

CHAPTER 22

KENYA REGISTERED LAND ACT AND RULES

1 Prefatory

1.1 We propose to set out the Kenya Registered Land Act in full, followed by the Registered Land Rules which have been made under it and the land registry forms that have been prescribed. Under the title of each Part we shall make general comments on its subject matter. Thus anyone wanting a broad description of the whole Act with an explanation of its general arrangement can obtain it merely by reading the comments on the Parts. For those wanting more detail each section will be followed by a brief commentary indicating its origin and, if not already clear, its meaning and purpose. Where necessary, possible alternatives will be discussed, and in particular any alterations made in the Act for the later versions described in Chapter 21.5. We give the history and genealogy of a number of sections, as pedigree is sometimes more convincing (particularly to a doubting legal draftsman) than just plain 'objects and reasons'.

1.2 The commentary has derived a great deal from the unpublished commentary prepared by the Kenya Committee in 1961, which itself was largely derived from the Lagos commentary printed and published in 1960. We also owe much to Baalman's commentary on the Singapore Torrens system, though we venture to suggest that such a wealth of reference to previous cases, particularly from Australia and New Zealand, should be unnecessary in the context of a brand new statute - and may even be embarrassing in a country where Australian and New Zealand law reports are not readily available. In any case we hope that the new statute will stand on its own merits, and be subject to fresh interpretation should any provisions be questioned in court.

1.3 The arrangement of the Kenya Registered Land Act 1963 was based on the Lagos Registered Land Bill 1960, and indeed followed it with only two alterations:

- (1) The Lagos Bill made provision for the adjudication of title, but in Kenya it was decided to provide for adjudication in a separate Act (which we describe in the next chapter), and so Lagos 'Part II - Adjudication' was omitted from the Kenya Act.
- (2) Lagos Bill 'Part IX - Judgments and Writs' and 'Part X - Cautions and Restrictions' were combined in one Part in the Kenya Act under the title 'Restraints on Disposition'.

Thus there are twelve Parts in the Kenya Act as against fourteen in the Lagos Bill. Some of the Parts are divided into numbered and named Divisions, which is a practice found in Australia (but not in New Zealand) and makes reference easier than the unnumbered headings which subdivide the Parts of some English Acts.

1.4 There is some difficulty in citing the legislation of former colonial territories, since many of them have enacted legislation changing their Ordinances to Acts and have sometimes renamed them altogether. For example, in Kenya, the important Native Land Registration Ordinance enacted in 1959, which is the foundation of much of the legislation in which we are particularly interested, had been renamed the Land Registration (Special Areas) Ordinance, when, in 1963, the Registered Land Ordinance (later Act) repealed and replaced nine of its eleven Parts, leaving only Parts I and II which were named the Land Adjudication Ordinance (though the long title appropriate to the original 1959 Ordinance was still retained). In 1964 the Land Adjudication Ordinance became the Land Adjudication Act, but in 1968 this name was changed to the Land Consolidation Act by the Land Adjudication Act 1968. Thus, in ten years, some thirty sections of statute law went under five different names and, for full measure, the name 'Land Adjudication Act' which had been longest used was immediately reused to designate a new Act. Care must therefore be taken not to confuse sections 1-30 of what from 1964 to 1968 was known as the Land Adjudication Act (which sections are still in force but are now known as sections 1-30 of the Land Consolidation Act) with sections 1-30 of the Land Adjudication Act 1968, which are quite different.

1.5 We have printed the sections of the Kenya Registered Land Act 1963 in large type and have flagged each section number so that anyone wishing merely to read the text of that Act can easily pick it out. We have used the following abbreviations with a number, where necessary, to indicate the section (or rule). (*Note.* We have included the date of enactment even when it is not part of the short title.)

BG	Land Registry Ordinance 1959 (British Guiana, now Guyana)
BSIP	Land and Titles Ordinance 1959 (British Solomon Islands Protectorate)
Cyp	Immovable Property (Tenure, Registration and Valuation) Law 1946 (Cyprus)
E	Land Registration Act 1925 (England and Wales)
ER	Land Registration Rules 1925 (England and Wales)
ITPA	Indian Transfer of Property Act 1882 (as applied to Kenya)
KLR(SA)O	Land Registration (Special Areas) Ordinance 1959 (Kenya)
KRLA	Registered Land Act 1963 (Kenya)
KRTA	Registration of Titles Act 1919 (Kenya)
Lag	Bill for the Registered Land Act 1960 (Lagos)
LPA	Law of Property Act 1925 (England and Wales)
Mal	Registered Land Act 1967 (Malawi)
Sar	Land Code 1957 (Sarawak)
Sey	Land Registration Ordinance 1965 (Seychelles)

Sing	Land Titles Ordinance 1956 (Singapore) ¹
Sud	Land Settlement and Registration Ordinance 1925 (Sudan)
Tan	Land Registration Ordinance 1953 (Tanganyika, now part of Tanzania)
T&C	Registered Land Law 1967 (Turks and Caicos Islands)
Vic	Transfer of Land Act 1954 (Victoria, Australia)

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ARRANGEMENT OF SECTIONS

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¹ We have kept the section numbering of Baalman's Ordinance since that will be convenient when using his commentary, but eight new sections have been added to the Land Titles Act and from section 8 onwards the numbers have been changed.

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TITLE

“Every Act begins with a long title the function of which is to indicate the general purposes of the Act. The long title is part of the Act, being considered, enacted, and subject to amendment, by the legislature. It is important because it is legitimate to use it for the purpose of interpreting the Act as a whole² ... a comprehensive long title may serve a valuable purpose in assisting to communicate the intended spirit and scope of the Act.”³ Nevertheless there are countries where Acts do not begin with a long title and the expressions 'long title' and 'short title' are not used; e.g. the Registry Act in Ontario just bears that simple name.

The Kenya Registered Land Act 1963 begins with this long title:

An Act of Parliament to make further and better provision for the registration of title to land, and for the regulation of dealings in land so registered, and for purposes connected therewith

There was, in fact, some discussion as to the long title of the Kenya Act. The Committee wished to call it 'An Ordinance to provide for the consolidation of the law relating to the registration of title to and dealings with land, the removal of anomalies and uncertainties related thereto and to make further and better provision therefore, and for matters connected therewith'. But it was decided that the word 'consolidate' must be avoided. The object of a consolidating statute is merely to collect and systematize all the existing statute law relating to its particular subject. Thus the English Land Registration Act 1925 is 'An Act to consolidate the Land Transfer Acts and the statute law relating to registered land'. New law is not to be expected in such a statute, but only a better presentation. There is, of course, no reason why an Act should not both amend and consolidate. For example, the Victoria Transfer of Land Act 1954 is entitled 'An Act to amend and consolidate the Law relating to the Simplification of the Title to and the Dealing with Estates and Interests in Land, and for other purposes'. A title might be framed on these lines which would be suitable for a version of the Registered Land Act intended to supersede an existing Act and system. But in Kenya, though the intention was to replace the existing Registration of Titles Ordinance 1919 and the system operated under it as soon as possible, both the Ordinance and the system were being retained for the time being, and therefore it was not possible to use the word 'consolidation' in the title of the new Act. This is important because it highlights the un-wisdom of retaining a competing system without expressly providing for its termination. The full implementation of the Registered Land Act was thereby indefinitely delayed, and ten years later two different systems of registration of title were still being operated in Kenya as well as the deeds system we described in the last chapter.

² See 6.3.4 for an example

³ Thornton Legislative Drafting 134

PART I - PRELIMINARY

Here is to be found a minor difference between English and Torrens registration statutes. English statutes begin, as might be expected, with Part I, but in Australia and New Zealand the preliminary sections precede Part I and so, rather oddly, are not contained in any Part of the Act. Moreover, in Australia and New Zealand, the framework of the Act as divided into the Parts is set out in a section of the Act immediately following the short title, and there is no 'Arrangement of Sections' of the sort which precedes English Acts and in effect conveniently sets out a synopsis of them (for which an alphabetical index, even if provided, is no substitute). Mindful of the usefulness of such a synopsis we have already set out the Arrangement of Sections of the Kenya Registered Land Act which follows the English pattern.

*Short title*⁴

►1. This Act may be cited as the Registered Land Act.

A long title need not be long, but a short title must necessarily be short. It should also be as informative and descriptive as is compatible with the essential requirement of brevity.”⁵ Since its purpose is to identify the Act it must be distinctive, and the choice of a short title for the new statute in Kenya caused some difficulty. It was making provision for land registration and an obvious name for it was the Land Registration Ordinance (the name adopted for the new Tanganyika Ordinance in 1953), but in Kenya this would have been confused with the Land Registration (Special Areas) Ordinance 1959; in any case, the new ordinance contained so many new features that it was desirable to distinguish it from other Land Registration statutes elsewhere. Indeed it went so far beyond the scope of the English Land Registration Act 1925 that it would have been almost misleading to have given it the same name. It included provisions appropriate to a Real Property (i.e. Land) Act and, as we have explained,⁶ it was expressly intended to make provision for what is contained in the English Law of Property Act 1925 (so far as relevant to conditions in Kenya) in addition to the Land Registration Act 1925. The Registered Land Ordinance was therefore chosen as a name that would indicate its dual coverage, i.e. that it was a Land Ordinance as well as a Registration Ordinance. This was also the name chosen for the same ordinance in Lagos where, as in Kenya, there already existed a Land Registration Ordinance though, curiously enough, the Nigerian Ordinance made provision not for the registration of land but merely for the registration of documents affecting land, and was therefore misnamed.

When Malawi introduced an Act based on the Kenya Act it was called the Registered Land Act almost without question, and the model Act that has been prepared for the Caribbean was automatically called the Registered Land Law. It has therefore established itself as a suitable name. It is at least distinctive.

Those who are interested in names may like to know that the 1875 and 1897 predecessors of the English Land Registration Act 1925 were both called the Land

⁴ For reasons of economy the 'marginal notes' have been printed as section headings.

⁵ Thornton *Legislative Drafting* 142

⁶ See 21.3

Transfer Act, and this is also the name used in New Zealand. The first English Act (Lord Westbury's Act 1862, sometimes called the Land Transfer Act) was officially named the Land Registry Act 1862, by the Short Titles Act 1896, and in British Guiana the new Ordinance in 1959 was called the Land Registry Ordinance. The original Torrens Act in South Australia in 1858 was called the Real Property Act, significant indication of Torrens' intention that it should reform the whole law of real property. The other Australian States all adopted the same name (as did Fiji) but Victoria and Western Australia later changed it to the Transfer of Land Act. Baalman chose the Land Titles Ordinance as the name for his new ordinance in Singapore in 1956. This is the name used by Ontario, Saskatchewan, Alberta, the North West Territories and Nova Scotia in Canada, but Manitoba uses the Real Property Act, and British Columbia the Land Registry Act. Jamaica has the Registration of Titles Law 1888, the name also used in the Federated Malay States, but Malaysia now has its National Land Code (which includes provision for registration of title).

Commencement

The *commencement* of an Act must be distinguished from its *passing*. It is *passed* when all the legislative steps have been completed, the final step usually being the assent of the head of state; but it does not *commence* until it comes into operation. There are four possibilities.⁷ The legislation may:

- (a) make no specific provision (as in the Kenya Registered Land Act) in which case interpretation legislation generally makes covering provision (usually that it commences on the day of assent or, alternatively, on publication in the Gazette);
- (b) specify a date for the commencement;
- (c) empower some person to specify a commencement date (as in the model statute for the Caribbean);
- (d) provide for the Act to commence upon the occurrence of a stipulated event.

Application.

►2. This Act shall apply to—

- (a) every area to which, immediately before the commencement of this Act, the Land Registration (Special Areas) Act applied;
- (b) any area to which the Land Consolidation Act is, on or after the commencement of this Act, applied;
- (ba) any area to which the Land Adjudication Act 1968 applies;
- (c) any area to which the Minister may, by order, apply this Act; and
- (d) all land which from time to time is set apart under section 208 or section 209 of the Constitution.

Where the only way onto the register is through a process of systematic adjudication and specific provision is made for that process, there is no need to

⁷ Thomson Legislative Drafting 146

provide expressly for application of the Act; it will automatically apply to those areas declared for systematic adjudication. In Kenya, however, the Ordinance could not be applied everywhere at once, and the purpose of this section is to provide for application to specific areas. Taking the five paragraphs in turn -

(a) The new Act repealed and replaced the registry provisions of the KLR(SA)O and so first of all it had to apply automatically and immediately to the areas which had been registered under the KLR(SA)O. The existing registers remained unchanged but were governed by the new law.

(b) It had to apply to any area declared for systematic adjudication under the Land Adjudication Act (i.e. the Adjudication Part of the KLR(SA)O, which Part was retained and called the Land Adjudication Act until 1968 when it was renamed the Land Consolidation Act.)

(ba) When the Land Adjudication Act was renamed the Land Consolidation Act in 1968 a new Land Adjudication Act was enacted. This paragraph was therefore inserted to apply the Registered Land Act to areas declared for adjudication under the new Act.

(c) Provision also had to be made to enable the new Act to be applied to areas where the land was already registered under the Registration of Titles Act 1919 and the Crown Lands Act 1915.

(d) Lastly it applied to land set apart under s198 or s199 (now s208 or s209) of the Constitution.

Interpretation.

► 3. *In this Act, except where the context otherwise requires—*

"adjudication officer" and "adjudication register" have the meanings assigned to "Adjudication Officer" and "Adjudication Register" in the Land Adjudication Act;

"certificate of lease" means a certificate of lease issued under section 32 of this Act;

"charge" means an interest in land securing the payment of money or money's worth or the fulfilment of any condition, and includes a subcharge and the instrument creating a charge;

"chargee" means the proprietor of a charge;

"chargor " means the proprietor of charged land or of a charged lease or charge;

"county council" means—

(a) in relation to trust land, the local authority in which the trust land in question is vested; and

(b) in relation to other land, the county council in whose area of jurisdiction the land is situated;

"the court", save as is otherwise expressly provided means the court having jurisdiction in the matter in question by virtue of section 159 of this Act;

"dealing" includes disposition and transmission;

"disposition" means any act by a proprietor whereby his rights in or over his land, lease or charge are affected, but does not include an agreement to transfer, lease or charge;

"easement means a right attached to a parcel of land which allows the proprietor of the parcel either to use the land of another in a particular manner or to restrict its use to a particular extent, but does not include a profit;

"file" means place in the relative parcel file;

"guardian" means any person responsible (whether under African customary law or otherwise) for protecting the interests of any person who is under a disability, whether by reason of age, unsoundness of mind or any other cause;

"instrument" includes any deed, judgment, decree, order or other document requiring or capable of registration under this Act;

"interest in land" includes absolute ownership of land;

"land" includes land covered with water, all things growing on land and buildings and other things permanently affixed to land;

"land certificate" means a land certificate issued under section 32 of this Act;

"land register" means the land register compiled under Division 2 of Part II of this Act;

"lease" means the grant, with or without consideration, by the proprietor of land of the right to the exclusive possession of his land, and includes the right so granted and the instrument granting it, and also includes a sublease, but does not include an agreement for lease;

"lessee" means the holder of a lease;

"lessor" means the person who has granted a lease or his successor in title;

"licence" means a permission given by the proprietor of land or a lease which allows the licensee to do some act in relation to the land or the land comprised in the lease which would otherwise be a trespass, but does not include an easement or a profit;

“parcel” means an area of land separately delineated on the registry map;

“periodic tenancy” means a tenancy from year to year, half year to half year, quarter to quarter, month to month, week to week or the like; 01

“personal representative” means executor of the will or administrator of the estate;

“presentation book” means the presentation book kept under section 6(1)(d) of this Act;

“profit” means the right to go on the land of another and take a particular substance from that land, whether the soil or products of the soil;

“proprietor” means

(a) in relation to land or a lease, the person named in the register as the proprietor thereof; and

(b) in relation to a charge of land or a lease, the person named in the register of the land or lease as the person in whose favour the charge is made;

“the register” means the leaf of the land register kept in respect of a parcel of land or a registered lease;

“to register” means to make an entry, note or record in the register under this Act, and “registered”, “unregistered” and “registration” bear a corresponding meaning;

“the Registrar ” means

(a) the Chief Land Registrar or the Deputy Chief Land Registrar, appointed under section 7 of this Act; or

(b) where a Land Registrar or an Assistant Land Registrar has been authorized under section 7(4) of this Act to exercise or perform any particular power or duty, that Land Registrar or Assistant Land Registrar so far as concerns that power or duty;

“registration district” means a land registration district constituted under section 5 of this Act;

“registration section” means a division 'of a registration district established under section 18(3) of this Act;

“registry” means a land registry established under section 6(1) of this Act;

“registry map” means the map or series of maps referred to in section 18 of this Act;

“transfer” means the passing of land, a lease or a charge by act of the parties and not by operation of law and also the instrument by which such passing is effected;

“transmission” means the passing of land, a lease or a charge from one person to another by operation of law on death or insolvency or otherwise howsoever, and includes the compulsory acquisition of land under any written law;

“trustee” includes personal representative;

“valuable consideration” includes marriage, but does not include a nominal consideration.

Definitions in an interpretation section perform two functions: first, they are used to clarify meaning and avoid ambiguity, and secondly, they are used to enable a word or a brief phrase to signify a group of words and so avoid cumbrous and tedious repetition. The definition of 'the Registrar' is an example of this latter function.

Definitions to clarify meaning are of two kinds: the definition either gives a complete meaning of its own, or it extends (or narrows) the common meaning; thus a word is said either to *mean* something or to *include* (or *not to include*) something. Where it is said that it *means* something, its meaning is confined to what is actually stipulated in the definition and this replaces the ordinary dictionary meaning which may be merely clarified, or it may be substantially changed (though this is not desirable); in any case it is no longer relevant. But where the word or phrase is said to *include* or *not to include* something, the ordinary dictionary meaning is retained but is extended or restricted by what is expressed to be included or not included. Thus the expression 'means and includes' (which is found, for example, in some Australian Acts) is a contradiction in terms, for 'means' *confines* the meaning to what is expressed, whereas 'includes' *extends* the meaning by what is expressed, and the same words cannot both confine *and* extend. The words 'and includes' or 'but does not include' may of course be added to extend or restrict or clarify a specific meaning expressed in the interpretation section, just as they are used to extend or restrict or clarify the ordinary dictionary meaning where no special definition is given.

A relatively large number of definitions have been included in the interpretation section on the grounds that such definitions are generally useful and convenient. They have all been placed together in this section so that there would be a single comprehensive 'glossary' in one place instead of a series of little glossaries scattered throughout the ordinance, which was the plan followed in the Singapore Land Titles Ordinance. If a special definition is required for the purpose of a particular section or part and its use is confined to that section or part, it may be appropriate to place it in that section or part (preferably at the beginning of it). The expression 'for the purpose of this section a word means

something', however, clearly implies that elsewhere the word means something different, which is confusing if its meaning will be the same wherever it is used. Unless a word or phrase has in fact a special meaning confined to a particular part or section, it would appear preferable to include it in the general interpretation section.

In some English Acts the interpretation section is placed at the end, but practice is not uniform; for example, the interpretation section is at the end of the Law of Property Act 1925 but at the beginning of the Land Registration Act 1925. The beginning is more convenient, for it will be easier to find, particularly if there are a number of schedules which will follow a definition section even if it is placed at the end of the statute itself.

The following definitions should be noted:

charge is specifically defined as an 'interest in land,' (in the Sudan an 'interest in land' did not include a charge) and *chargor* and *chargee* were substituted for 'lender' and 'borrower', taken from Tan 2 and used in KLR(SA)O 4; a loan is not always involved (e.g. in the case of an annuity, or rentcharge, or a charge by a guarantor). The word 'mortgage' has been avoided because of its technical meaning in English law.

dealing is defined to include disposition and transmission, because a single comprehensive term is needed to cover both, though it may seem a little artificial to use 'dealing' for the involuntary transaction that takes place where transmission is concerned.

interest and *land* are key definitions. Following English practice most registration statutes define *land* as including all rights and interests in land. For example, in Sing 4 land is defined as meaning "the surface of any defined parcel of the earth, and all substances thereunder, and so much of the column of air above the surface as is reasonably necessary for the proprietor's use and enjoyment, and *includes any estate or interest in land* and all vegetation growing thereon and structures affixed thereto". One confusing result of the words that we have italicized is that a 'lease' is 'land' and so a lessee, the proprietor of the lease, is the proprietor of land, though obviously it is the lessor who owns the land. The KRLA, however, leaves 'land' to its ordinary meaning, but makes clear that it includes land covered with water, all things owing on land, and buildings and other things permanently affixed to land. This is very much easier for the layman to understand than the extremely technical terms that have been introduced into some legislation; e.g. in the Uganda Registration of Titles Ordinance 'land' includes messuages, tenements and hereditaments corporeal or incorporeal".

Similarly in the KRLA *interest in land* includes the absolute ownership of land but is not otherwise defined, and so is left to its ordinary meaning, though of course various specific interests are themselves defined (e.g. lease, charge, easement, and so on).

lease is defined to include the right granted and the instrument granting it, so as to conform with common and accepted terminology; it is expressly provided that a lease may be made with or without consideration as there appears to be

no logical reason for perpetuating the 'peppercorn' type of lease (i.e. a lease with a purely nominal rent).

to register is given the wide but natural meaning of 'to make an entry, note or record in the register', and no attempt has been made to distinguish by subtleties of nomenclature the different effect of various entries, as e.g. in Singapore where "there is a very important distinction between the 'notification of an incumbrance on the title' and the entry of a 'memorial of registration' of an instrument lodged in the Registry".⁸ Under the KRLA a caution is just as much registered as a transfer and its effect is made plain in the relevant part of the Act.

valuable consideration is defined to include marriage, but not to include a nominal consideration, and this definition was derived from Sud 3 via KLR(SA)O 3. Its origin was presumably LPA 205(xxi) but the words "*purchaser* means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property" have been omitted.

Conflict with other laws.

► 4. *Except as otherwise provided in this Act, no other written law and no practice or procedure relating to land shall apply to land registered under this Act so far as it is inconsistent with this Act:*

Provided that, except where a contrary intention appears, nothing contained in this Act shall be construed as permitting any dealing which is forbidden by the express provisions of any other written law or as overriding any provision of any other written law requiring the consent or approval of any authority to any dealing.

This section reinforces the general canon of construction that where a statute is inconsistent with earlier laws, the statute prevails. A provision on these lines (without the proviso and usually called 'Reconciliation with existing laws') is common to all Torrens statutes, but it does not appear in the English Act - or in the Sudan Ordinance or KLR(SA)O which was largely derived from the Sudan Ordinance. It came into Lag 4 from BG 3(1).

The proviso is important in that it saves those laws which require the consent of a particular authority to a transaction (e.g. under the Land Control Act or under a planning law) and which, without the proviso, would be overridden. This proviso was based on Sud 29 which expressly saved the Natives Disposition of Lands Restriction Ordinance (the equivalent of the Land Control Ordinance), and ended with the words "nor render valid any transaction made null and void by such ... Ordinance". These words were carried forward into KLR(SA)O 48, which read:

"Nothing contained in or done under this Ordinance shall affect the provisions of any written law rendering necessary the consent of any authority to any

⁸ Baalman Singapore 27

dealing with any land or charge, or render valid any dealing made invalid by any such law."

It was considered desirable to retain this provision in the Lagos Bill and it was therefore added as a proviso to the new section providing for 'reconciliation with other laws'. The words "or render valid any dealing made invalid by any such law" were, however, omitted as conflicting with the basic principle of registration that a bona fide purchaser for value is completely safe in relying on the register. The Registrar is, of course, responsible for seeing that the required consents are given before he registers, but if he should make a mistake or a consent be wrongly given, registration must have the effect of validating the transaction so far as a subsequent purchaser is concerned. A purchaser cannot be required to examine the validity of entries made by the registry and of the instruments which support the entries. A forgery may be validated in the same way. Thus a very high standard of competence and integrity is required in the registry, if expensive 'mistakes' (or worse) are to be avoided.

PART II -ORGANIZATION AND ADMINISTRATION

This Part makes provision for the organization and administration of the registry, which it seems more logical to deal with at the beginning of the Act (as in the Sudan, Tanganyika, and Singapore Ordinances) than to wait until near the end as in the English Act. Many details are covered which, some might argue, would be better dealt with in rules on the grounds that it is simpler to change a rule than the Act. But the processes that are set out have been well tried and there is no reason why they should need change. Also, the intention was to keep rules down to a minimum. The English Act, for example, has 148 long sections, followed by 325 Rules, and so is very confusing. It is necessary to keep on turning from Act to Rules and from Rules to Act. The Act would be much easier to understand if it alone gave the complete picture, as this Act aims at doing in 165 relatively brief and simple sections. It made no change from the procedure and organization already established under the KLR(SA)O, but it was also intended that the other registries should be brought into line under it, so that all the registries would then be operated on a uniform system under a single statute. (As we have already pointed out, this desirable result had, ten years later, still not been achieved.)

Part II is divided into three Divisions. *Division 1* sets up the land registry and provides for the appointment of its officers, *Division 2* makes provision for the land register and how it is to be kept, and *Division 3* deals with the survey side of registration under the heading 'Maps, Parcels and Boundaries'. This last Division is of particular interest in the Kenya setting, since the new Act had to reconcile the so-called guaranteed boundaries of the Torrens system with the general boundaries of the English system, which we described at length in Chapter 8.1

*Division 1 - Land Registries and Officers**Registration districts.*

► 5. For the purposes of this Act, the Minister may, by order, constitute an area or areas of land a land registration, district or land registration districts and may at any time vary the limits of any such district.

This formula enables a single registry to be set up or as many registries as are required. Decentralization was discussed in Chapter 16.2

Land registries.

► 6. (1) There shall be maintained in each registration district a land registry, in which there shall be kept—

- (a) a register, to be known as the land register, in accordance with Division 2 of this Part;
- (b) the registry map;
- (c) parcel files containing the instruments which support subsisting entries in the land register and any filed plans and documents;
- (d) a book, to be known as the presentation book, in which shall be kept a record of all applications numbered consecutively in the order in which they are presented to the registry;
- (e) at the discretion of the Chief Land Registrar an index, in alphabetical order, of the names of the proprietors (other than public bodies, banks, building societies and other corporations which lend money on the security of land) of land, leases and charges, showing the numbers of the parcels in which they are interested; and
- (f) a register and a file of powers of attorney.

(2) The registers of powers of attorney for the time being maintained for the purposes of the Crown Lands Act, the Land Titles Act and the Registration of Titles Act shall be deemed to be registers of powers of attorney under this section.

The items in subsection (1) are the working components of a land registry, and have been discussed at length in Chapter 17. There is a point of interest in paragraph 6(1)(e): large organizations were exempted from the alphabetical index in view of the considerable clerical effort required to keep their cards up to date as they are subject to such frequent fluctuation. This exception has not been repeated in later versions of the Act elsewhere, nor has the discretion to dispense with the index (which, perhaps unwisely, was given in Kenya).

Appointment of officers

► 7. (1) There shall be appointed a Chief Land Registrar, who shall be responsible for administering the land registries in accordance with this Act.

(2) There may be appointed a Deputy Chief Land Registrar and so many Land Registrars and Assistant Land Registrars as may be necessary for carrying out the provisions of this Act.

(3) The Deputy Chief Land Registrar shall have all the powers and may perform all or any of the duties conferred and imposed on the Chief Land Registrar by this Act or by any rules made thereunder, except the power of authorization conferred by subsection (4) of this section.

(4) The Chief Land Registrar may in writing authorize any Land Registrar or Assistant Land Registrar to exercise or to perform all or any of the powers or duties conferred on the Chief Land Registrar by this Act or by any rules made thereunder, and may at any time revoke or vary any such authorization:

Provided that no such authorization shall be deemed to divest the Chief Land Registrar of any of his powers or duties, and he may, if he thinks fit, exercise and perform all his powers or duties notwithstanding any such authorization.

It was originally provided that the Governor should appoint the Chief Land Registrar and other officers, but after Independence this was changed to the passive form above, since such officers are appointed by the Civil Service Commission. In Malawi it is provided that the Minister shall appoint the officers. In England they are appointed by the Lord Chancellor (E 126(1)). In Singapore the appointment is made by the President (Sing 5(1)).

The proviso to subsection (4) clears up a small point which otherwise can be a cause of uncertainty.

General powers of Registrar.

► 8. The Registrar may exercise the following powers in addition to any other powers conferred on him by this Act, that is to say—

(a) he may require any person to produce any instrument, certificate or other document or plan relating to the land, lease or charge in question, and that person shall produce the same;

(b) he may summon any person to appear and give any information or explanation respecting land, a lease or a charge, or any instrument, certificate or other document or plan relating to

the land, lease or charge in question, and such person shall appear and give such information or explanation;

(c) he may refuse to proceed with any registration if any instrument, certificate or other document, plan, information or explanation required to be produced or given is withheld or any act required to be performed under this Act is not performed;

(d) he may administer oaths or take a declaration in lieu thereof, and may require that any proceedings, information or explanation affecting registration shall be verified on oath or by statutory declaration;

(e) he may order that the costs, charges and expenses incurred by him or by any person in connexion with any investigation or hearing held by him for the purposes of this Act shall be borne and paid by such persons and in such proportions as he may think fit.

This section sets out all the general powers of the Registrar in the place where one would expect to find them, i.e. immediately following provision for his appointment instead of towards the end as in the Sudan Ordinance, and in KLR(SA)O which adopted the same form. Throughout the Act, however, the Registrar is given various special powers to perform specific acts incidental to its administration; e.g. in Part X he is given power to rectify the register in certain cases.

Indemnity of officers

The original draft of KRLA included the following section:

"The Chief Land Registrar shall not, nor shall any other officer of the Registry, be liable to any action or proceeding for or in respect of any act or matter done or omitted to be done in good faith in the exercise or supposed exercise of the powers of this Act, or any rules made thereunder."

This section was omitted from the final version as enacted, but a section on these lines is included in the English (E131), Sudan (Sud 86), and various other statutes. It has reappeared as Mal 8 and T & C 7. Obviously it can do no harm, and perhaps it may be wise to include it, though we can cite no instance where it has actually proved to be required.

Seal of registry

► 9. Each registry shall have a seal, and every instrument purporting to bear the imprint of such a seal shall be received in evidence and, unless the contrary is shown, shall be deemed without further proof to be issued by or under the direction of the Chief Land Registrar.

The Sudan Ordinance (and KLR(SA)O following it) did not provide for a registry seal, and did not appear to suffer as a result; but this provision was included in the KRLA to bring it into line with KRTA 4(3). The wording of Sing 6(2) was followed as being unequivocal and clearer than E 126(7).

*Division 2 - The Land Register**The land register*

► 10. (1) The land register shall comprise a register in respect of each parcel in each registration section, and a register in respect of each lease required by this Act to be registered.

(2) Each register shall be divided into three sections as follows—

A—the property section, containing a brief description of the land or lease, together with particulars of its appurtenances and a reference to the registry map and filed plan, if any;

B—the proprietorship section, containing the name and, where possible, the address of the proprietor and a note of any inhibition, caution or restriction affecting his right of disposition;

C—the encumbrances section, containing a note of every encumbrance and every right adversely affecting the land or lease.

This section makes clear the distinction between the 'registers' which are kept in respect of each parcel and of each registrable lease and the 'land register' which comprises all the 'registers'. The English form of the register (as prescribed in ER 2, 3, 6, and 7) has been followed. It should be particularly noted that any inhibition, caution, or restriction which affects the right of disposition is entered in the proprietorship section, and therefore literally stands in the way of any new entry.

In T & C 9 a useful addition is made to this section. It is provided that the register shall show whether the land is Crown land or private land, and that in respect of Crown land no entry in the proprietorship register will be needed. A similar addition to Mal 10 was made by the Adjudication of Title Act 1971 (s29 and Schedule).

Compilation of land register for special areas

► 11. (1) The registers kept under section 33 of the Land Registration (Special Areas) Act for the several registration districts established under that Act shall, on the commencement of this Act, be deemed to be the land registers for the corresponding registration districts established under this Act.

(2) Whenever an adjudication register has become final under section 27 of the Land Consolidation Act, the adjudication officer shall deliver the adjudication register to the Land Registrar or Assistant Land Registrar in charge of the registration district concerned, who shall prepare a register for each person shown in the

adjudication register as a landowner and every other person shown in the adjudication register as being entitled to the benefit of any interest, lease, right of occupation, charge or other encumbrance affecting the land shall be registered as being so entitled, subject in every case to any restriction of the power of the proprietor or of any such person as aforesaid to deal with the land, and to any interest, lease, right of occupation, charge or encumbrance affecting the land.

(2A) Upon receiving an adjudication register from the Director of Land Adjudication under section 27 of the Land Adjudication Act 1968, the Chief Land Registrar shall forward it to the Land Registrar or Assistant Land Registrar in charge of the district concerned, who shall prepare a register for each person shown in the adjudication record as an owner of land, and every person shown in the adjudication record as being entitled to an interest which does not amount to ownership of land shall be registered as being so entitled, subject in every case to any restriction of the power of the proprietor or of any person so entitled to deal with the land and to any interest, lease, right of occupation, charge or encumbrance affecting the land:

Provided that, in the case of group land, the group representatives shall be registered as the proprietors of the land (with the addition of the words "as group representatives of the ... group" and with a reference to the certificate of incorporation), and where there are no group representatives a note of the fact shall be made on the register and, pending the incorporation of group representatives, no person shall be registered as proprietor of the land.

(3) For the purposes of this Act, a right of occupation under African customary law recorded in the adjudication register shall be deemed to be a tenancy from year to year.

For general comment see next section. Subsection (3) makes 'customary occupation' an overriding interest under s30(d) (which includes 'periodic tenancies') and thus takes the place of KLR(SA)O 40(f), which had expressly named "right of occupation under native law and custom" as an overriding interest and which it was considered inadvisable to repeat. The subsection does not appear elsewhere.

Compilation of land register where land registered under other Acts, and of Government land and Trust land.

► 12. (1) On the application of this Act under section 2 of this Act to any area, then, in relation to every parcel of land situated in that area the title to which is already registered under the Registration of Titles

Act, the Government Lands Act or the Land Titles Act, the following provisions shall apply—

(a) if the title to the parcel is comprised in a grant or certificate of title registered under the Registration of Titles Act—

(i) the grant or certificate of title shall be deemed to be a land certificate or certificate of lease, as the case may be, issued under this Act, and the folio of the register of titles kept under section 25 of the Registration of Titles Act shall be deemed to be the register under this Act:

Provided that the Registrar may at any time prepare a register in the prescribed form showing all subsisting particulars contained in or endorsed on the folio of the register of titles kept as aforesaid and substitute such register for such folio and issue to the proprietor a land certificate or certificate of lease, as the case may be, in the prescribed form; and

(ii) that Act shall cease to apply to the parcel and this Act shall apply thereto;

(b) if the title to the parcel is comprised, in a register kept under the Government Lands Act or the Land Titles Act, the Registrar shall—

(i) as soon as conveniently possible, cause the title to be examined;

(ii) prepare a register in the prescribed form showing all subsisting particulars affecting the parcel which are capable of registration under this Act;

(iii) serve on the proprietor and on the proprietor of any lease or charge a notice of intention to register; and

(iv) issue to the proprietor if he so requires a land certificate or certificate of lease in the prescribed form;

and, on the expiration of the period limited by the notice or as soon as the Registrar has determined any objection made in pursuance thereof, Part X of the Government Lands Act or Part III of the Land Titles Act, the case may be, shall cease to apply to the parcel and this Act shall apply thereto.

(2) In compiling the land register, the Registrar shall register--

(a) the Government as the proprietor of all Government land in the area; and

(b) subject to the Land Adjudication Act 1968 and the Land Consolidation Act, the relative county council as the proprietor of all Trust land in the area, subject in each case to any grant or lease affecting the land, and on such registration the Registration of Titles Act shall cease to apply to the land.

Sections 11 and 12 should be considered together because normally 'compilation of the register' consists of only one, albeit very important, section which provides that the land register shall be compiled from the record which has become 'final' at the end of systematic adjudication (e.g. Sud 23(2), Mal 11, and T & C 10), though an existing land register may also have to be taken into account. In Kenya, however, a wide variety of circumstances had to be catered for:

First, the registers kept under the repealed section of the KLR(SA)O were to continue unchanged under the new Act (s 11 (1)).

Secondly, the usual provision had to be made for registers to be compiled from the final registers under the Land Adjudication Act (later the Land Consolidation Act) and the new Land Adjudication Act 1968, with its provision for group representatives (s1 1(2) and (2A)).

Thirdly, provision had to be made to conserve the titles registered under the KRTA, but to change them to the new form of register (s12(1)(a)).

Fourthly, provision had to be made to enable titles registered under the Government Lands Act or the Land Titles Act (advanced systems of deeds registration) to be examined with a view to their conversion forthwith to registration of title (s12(1)(b)). (This is a very brief provision for the conversion of deeds registration to registration of title, and we have already drawn attention to the slow progress that has been made under it. It can be contrasted with the process provided for in the Malaysia National Land Code (Penang and Malacca Titles) Act passed in 1963, which we described at some length in Chapter 11.10.9-11)

Lastly, provision had to be made for the registration of the Government or the relative county council as the proprietor of land which was not privately owned (s12(2)).

Transitional provisions.

► 13. (1) A parcel, the title to which, on the application of this Act to the area in which it is situated, is registered under the Government Lands Act or the Land Titles Act shall continue to be dealt with in accordance with the Government Lands Act or the Land Titles Act, as the case may be, until this Act applies to that parcel under section 12(1)(b) of this Act.

(2) Nothing in this Act shall affect the rights, liabilities and remedies of the parties under any mortgage, charge, memorandum of equitable mortgage, memorandum of charge by deposit of title or lease which, immediately before the registration under this Act of the land

affected thereby, was registered under the Government Lands Act, the Land Titles Act, the Registration of Titles Act or the Land Registration (Special Areas) Act, and

(a) such rights, liabilities and remedies shall be exercisable and enforceable in accordance with the law which was applicable thereto immediately before the registration of the land under this Act; and

(b) any such memorandum of equitable mortgage or memorandum of charge by deposit of title may be discharged by the execution of a discharge in the form prescribed under the Act under which such memorandum was first registered.

These provisions illustrate the sort of question that arises and the decisions that have to be made when a new Act is superimposed on an existing system.

The new Act made substantial differences in the rights of mortgagors and mortgagees, but it was decided not to change existing relationships involuntarily and subsection (2) therefore saved them. A similar provision was inserted into the Malawi Registered Land Act by the Adjudication of Title Act 1971.

First registration.

- ▶ 14. The date of first registration under this Act of any land shall—
 - (a) in the case of land the subject of a grant or lease under the Registration of Titles Act, be deemed to be the date on which this Act applied to the land concerned;
 - (b) in the case of land registered under the Land Registration (Special Areas) Act, be deemed to be the date on which it was first registered under that Act;
 - (c) in the case of land the subject of a grant, lease or certificate of ownership registered under the Government Lands Act or the Land Titles Act, be the date on which this Act applies thereto by virtue of section 12(1)(b) of this Act;
 - (d) in any other case be the date on which the land first came on to the land register.

This establishes the effective date of first registration in the varying circumstances of Kenya.

Manner of registration

- ▶ 15. Registration shall be effected by an entry in the land register in such form as the Chief Land Registrar may from time to time direct, and by the cancellation of the entry, if any, which it replaces.

In Malawi and the Turks and Caicos ss14 and 15 of the KRLA became subsections of a single section (Mal 11 and T & C 11) which reads:

"Manner of registration.

"[T & C] 11—(1) The first registration of any parcel shall be effected by the preparation of a register in accordance with the provisions of section 9 of this Law and the signing by the Registrar of the particulars of the ownership and the particulars of incumbrances, if any, appearing thereon.

"(2) Every subsequent registration shall be effected by an entry in the register in such form as the Registrar may from time to time direct, and by the cancellation of the entry, if any, which it replaces."

New editions of register

▶ 16. The Registrar at any time may open a new edition of a register showing only subsisting entries and omitting therefrom all entries that have ceased to have any effect.

See comment on section 17.

Cancellation of obsolete entries

▶ 17. The Registrar may cancel any entry in the register which he is satisfied has ceased to have any effect.

In Malawi and the Turks and Caicos these two sections have been transposed, on the grounds that it is more logical to provide for the cancellation of obsolete entries before providing for the opening of new editions, but this is a small point and the significant feature of the two sections is that they adopt the English procedure with its emphasis on conserving only subsisting entries in preference to the Torrens procedure which aims at keeping a record of the whole history of each parcel and never destroying anything.

*Division 3 - Maps, Parcels and Boundaries**Registry map*

▶ 18. (1) The Director of Surveys shall prepare and thereafter maintain a map or series of maps, to be called the registry map, for every registration district.

(2) Where for any registration district, or for a part thereof, no map has been so prepared, the Registrar may himself cause a map or series of maps to be prepared for that registration district, or for that part, and thereafter maintained, and such map or series of maps shall be deemed to be the registry map until the Director of Surveys prepares a map or maps under subsection (1) of this section and delivers it to the Registrar.

(3) On the registry map, every registration district shall be divided into registration sections, which shall be identified by distinctive names, and the registration sections may be further divided into

blocks, which shall be given distinctive numbers or letters or combinations of numbers and letters.

(4) The parcels in each registration section or block shall be numbered consecutively, and the name of the registration section and the number and letter of the block, if any, and the number of the parcel shall together be a sufficient reference to any parcel.

(5) The Registrar may, at any time, cause registration sections or blocks to be combined or divided, or cause their boundaries to be varied.

(6) A plan may be filed in respect of a particular parcel to augment the information available from the registry map, and the filing of the plan shall be noted in the register.

Subsection (1) is controversial, since it appears to make the Director of Surveys responsible for the preparation and maintenance of the map which, as an integral part of the register, should be the responsibility of the Registrar.

Moreover subsection (2), by implication, reduces the status of the maps which, perforce, had to be used to support many of the registers prepared under KLR(SA)O and which it was impracticable to replace. (The phrase 'Preliminary Index Diagram' was even coined to describe them.) Nevertheless this formula was followed in Mal 15(1) and (2) and BSIP 92(1). However, T & C 14 reads:

"Registry Map.

"[T & C] 14.—(1) The Registry Map shall be compiled from the demarcation maps made under the Land Adjudication Law, 1967, and shall be divided into registration sections which, so far as is possible, shall have the same boundaries and names as the adjudication sections; the registration sections, where the adjudication sections are so divided, shall be divided into blocks which shall be given the same letters or numbers or combination of letters and numbers as are given on the demarcation maps.

"(2) The parcels in each registration section or block shall be numbered consecutively following the numbering in the adjudication proceedings, and the name of the registration section and the number or letter of the block (if any) and the number of the parcel shall together be a sufficient reference to any parcel.

"(3) The Registrar may, at any time, cause registration sections or blocks to be combined or divided, or cause their boundaries to be varied.

"(4) A plan may be filed in respect of a particular parcel to augment the information available from the registry map, and the filing of the plan shall be noted in the register."

The linking of the registry number to the number in the adjudication proceedings goes back to Sud 23(4).

Power to alter registry map and to prepare new editions.

► 19. (1) Where the Registrar is maintaining the registry map he may, or in any case he may require the Director of Surveys to, correct the line or position of any boundary shown on the registry map with the agreement of every person shown by the register to be affected by the correction, but no such correction shall be effected except on the instructions of the Registrar in writing in the prescribed form, to be known as a mutation form, and the mutation form shall be filed.

(2) Whenever the boundary of a parcel is altered on the registry map, the parcel number shall be cancelled and the parcel shall be given a new number.

(3) Where the Registrar is maintaining the registry map he may, or in any case he may require the Director of Surveys to prepare a new edition of the registry map or any part thereof, and there may be omitted from the new map any matter which the Registrar considers obsolete.

See comment under section 20.

Further surveys.

► 20. The Registrar may cause a survey to be made for any purpose connected with this Act, but, where the registry map is maintained by the Director of Surveys such survey shall be used to amend the registry map only if it is approved by the Director of Surveys.

These two sections have been substantially improved by BSIP 93, 94, and 95, which are respectively labelled 'Correction of registry map' (for use where a mistake which ought to be put right is discovered), 'New editions of the registry map' (like the register, the map may become cluttered up with dead matter and a new edition may be needed), and 'Mutation' (where a positive change of boundary is required). In T & C 15 and 16, these became.

Correction of the Registry Map and new editions

"[T & C] 15—(1) The Registrar may cause to be made a survey of any land for the purposes of this Law and, after informing every person affected thereby, may cause the Registry Map to be corrected as a result of such survey.

"(2) The Registrar may, at any time, direct the preparation of a new Registry Map or any part thereof, and there may be omitted therefrom any matter which the Registrar considers obsolete."

"Mutation.

"[T & C] 16—(1) On the application of a proprietor of land, and subject to the agreement of all persons affected thereby, the Registrar may order the alteration of the Registry Map, but no such alteration shall be effected except on the instructions of the Registrar in writing in the prescribed form, to be known as a mutation form, and the mutation form shall be filed.

“(2) Whenever the boundary of a parcel is altered on the Registry Map, the parcel number shall be cancelled and the parcel shall be given a new number.”

The operation of the mutation form is described in Chapter 17.3.7. Subsection (2) makes provision for 'unique numbering' as does KRLA 19(2) above.

Boundaries.

► 21. (1) Except where, under section 22 of this Act, it is noted in the register that the boundaries of a parcel have been fixed, the registry map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.

(3) Where the Registrar exercises the power conferred by subsection (2) of this section, he shall make a note to that effect on the registry map and in the register and shall file such plan or description as may be necessary to record his decision.

(4) No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section.

(5) Except where, as aforesaid, it is noted in the register that the boundaries of a parcel have been fixed, the court or the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as it or he thinks fit.

Subsection (1) makes provision for the 'general boundaries' of the English system, but calls them 'approximate' as being more readily understandable. Mal 18(1) reverts to 'general boundaries' but does not define the expression. In T & C 17(1) we are back to 'approximate boundaries' labelled in the margin 'General boundaries'. But it is to Sud 90(1)2 that we must look for a clear explanation of what a general boundary is, and it is unfortunate that this admirable wording has not been repeated.

Subsection (2) is intended for the case where a proprietor comes to the registry to ask for his boundaries to be pointed out, and must be distinguished from an application to 'fix' a boundary in the English sense (for which provision is made in the next section). It caters for the sort of request which is not infrequently made in some registries, not because there is a dispute but merely because there is some doubt or uncertainty which the owners are quite content to let the registry settle. Survey evidence may well be the best in such cases, but the subsection makes it clear that the Registrar may, if he wishes, use other evidence, such as is provided

by a hedge or other physical feature, or even by a witness. This provision is reinforced by subsection (5).

Subsection (4) is intended to avoid suits in court before the resources of the registry have been exhausted. This is a useful provision which was derived from Cyp 58(1).

Fixed boundaries.

► 22. (1) If the Registrar in his discretion considers it desirable to indicate on a filed plan, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if any interested person makes application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

(2) The Registrar shall, after giving all persons appearing by the register to be affected an opportunity of being heard, cause to be defined by survey the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and thereupon the plan shall be deemed to define accurately the boundaries of the parcel.

(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the Director of Surveys, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.

This section provides for the full-dress 'fixing' of a boundary on English lines (though little recourse is had to it in England). When a boundary has been 'fixed' under this section the plan, which will be filed, will be deemed to be conclusive evidence of the position of the boundaries. (Physical boundaries that have stood for twelve years, however, become effective by prescription, and override the plan.) The Registrar was given powers himself to order a boundary to be fixed because, in Kenya, there were occasions (e.g. a boundary between a parcel in the Special Areas and a parcel of alienated Crown land) when in the public interest it was essential to 'fix' a boundary, though the parties themselves were not prepared to seek this action. This power has been carried forward into Mal 19(1) and T & C 18(1), though it is difficult to visualize circumstances in which it could be required.

Subsection (3) was intended to give the 'certificate plans' of the Torrens system under the existing Registration of Titles Act the status of 'fixed boundary plans' in order to avoid any allegation that such plans had been downgraded by the new Act. (In Tanzania, however, it was provided that similar plans should merely indicate 'general boundaries' unless they were formally fixed - see Tan 89(1) and (2).)

Maintenance of boundary features

► 23. (1) Every proprietor of land shall maintain in good order the fences, hedges, stones, pillars, walls and other features which demarcate his boundaries, whether established pursuant to the requirements of any other written law or pursuant to an order of the Registrar or of the proprietor's own accord.

(2) The Registrar may in writing order the demarcation within a specified time of any boundary in such permanent manner as he may direct, and any person who fails to comply with such an order shall be guilty of an offence and liable to a fine not exceeding two hundred shillings.

(3) The Registrar may in writing order which of adjoining proprietors shall be responsible for the care and maintenance of any feature demarcating a common boundary, and any proprietor so ordered to be responsible who allows the boundary feature or any part of it to fall into disrepair or to be destroyed or removed shall be guilty of an offence and liable to a fine not exceeding two hundred shillings.

The Kenya system placed great reliance on the physical marks on the ground to define parcels, and it seemed desirable to give the Registrar power to ensure that these marks were properly kept up, though such provisions are, perhaps, more appropriate to a Survey Ordinance and were in fact derived from the Sudan Demarcation and Survey Ordinance 1905 of which s5 enabled owners and occupiers to be ordered to demarcate their lands, s7 required the landmarks to be maintained, and s8 enabled the landmarks to be placed in the charge of one owner. The extent to which the registry should be engaged in executive work of this sort is debatable, but the same provisions have been repeated in Mal 20 and T & C 19.

Interference with boundary features

► 24. (1) Any person who defaces, removes, injures or otherwise impairs any boundary feature or any part of it unless authorized to do so by the Registrar shall be guilty of an offence and liable to imprisonment for a term not exceeding two months or to a fine not exceeding two thousand shillings, or to both such imprisonment and such fine.

(2) Any person convicted of such an offence, whether or not any penalty there for is imposed upon him, shall be liable to pay the cost of restoring the boundary feature, and such cost shall be recoverable as a civil debt by any person responsible under this section for the maintenance of the feature.

The Kenya Survey Ordinance merely safeguarded beacons, and this section was considered necessary to reinforce it. It has been repeated in Mal 21 and T & C 20.

Combinations and subdivisions

► 25. (1) Where contiguous parcels are owned by the same proprietor and are subject in all respects to the same rights and obligations, the Registrar, on application by the proprietor, may combine these parcels by closing the registers relating to them and opening a new register or registers in respect of the parcel or parcels resulting from the combination.

(2) Upon the application of the proprietor of a parcel for the division of his parcel into two or more parcels, the Registrar shall effect the division by closing the register relating to the parcel and opening new registers in respect of the new parcels resulting from the division, and recording in the new registers all subsisting entries appearing in the closed register:

Provided that—

- (i) nothing shall be done under this section which would be inconsistent with this Act or any other written law; and
- (ii) no parcel which is subject to a lease shall be subdivided.

Subsection (1) enables the Registrar to amalgamate contiguous parcels, but only if the proprietor so requests, and if the rights and obligations affecting the parcels are identical. Subsection (2) similarly allows subdivision but subject to the safeguard that it must not contravene any law, e.g. a planning regulation which requires a minimum frontage or area. The second proviso was prompted by the difficulty which had arisen in Uganda when a parcel of agricultural land was leased to one person, and the lessor sold off portions of the reversion with the result that the lessee found himself with a number of separate lessors but without the rent having been apportioned. This proviso has been carried forward into Mal 22(2)(ii) and T & C 21(2)(ii) and should be contrasted with Tan 84 which expressly provides that the Registrar may effect the combination of any parcels or the division of a parcel whether or not any such parcel is subject to a lease.

Reparcellation.

► 26. (1) The Registrar may, on the application of the proprietors of contiguous parcels who are desirous of changing the layout of their parcels, and with the consent in writing of all other persons in whose names any right or interest in such parcels is registered and of any cautioner, cancel the registers relating to such parcels and prepare new registers in accordance with the revised layout:

Provided that, where in the opinion of the Registrar a proposed reparation involves substantial changes of ownership which should be effected by transfers without invoking this section, he may in his discretion refuse to effect such reparation.

(2) Upon any such reparation, the new parcels shall, notwithstanding section 38 of this Act, vest in the persons in whose names they are registered.

This section was derived from Tan 85 and it was included in the Lagos draft because it "conceivably could be useful in a town like Lagos, as it would enable proprietors to replan the layout of their holdings by agreement. It can do no harm to include it though it is doubtful if advantage will be taken of it."⁹ It was included in Kenya because it might be useful in Nairobi or Mombasa. It went on to Malawi (Mal 23) but was called 'Change of boundaries' and to the Turks and Caicos (T & C 22) where it became 'Reparation' again. It is doubtful if it has ever been used. It was not included in the BSIP Land and Titles Ordinance 1968.

"Party walls.

"[BSIP] 97—(1) Where any wall or structure lies along the boundary of two parcels which are comprised in separate estates, that wall or structure shall be deemed to be severed vertically in two and the land comprised in each estate shall include the appropriate vertical part thereof.

"(2) Either of the two estate owners may apply to the Registrar for the registration of the wall or structure as a party wall or party structure; and the Registrar may, after giving notice of the application to the other estate owner and affording him an opportunity to be heard, register it as such.

"(3) Where a wall or structure is registered as a party wall or party structure, each estate owner shall have such rights to support and user over the part thereof which is not comprised in his estate as may be requisite."

The above section is included (between 'Boundaries' and 'Combinations and subdivisions') in the corresponding Division of BSIP Land and Titles Ordinance 1968. It is based on LPA 1925 First Schedule, Part V, but a provision on these lines had already been included in the ordinance that was being repealed and replaced. It is not found in any other version of the Registered Land Act, but might be useful. Provision for party walls is made in Sing 81.

PART III - EFFECT OF REGISTRATION

This is a very short Part, but it is of prime importance, for it is the foundation on which the whole system of registration of title stands. It contains those key provisions which make the register the final and only proof of title and give it that special quality - known in Torrens circles as 'indefeasibility' - which distinguishes registration of title from registration of deeds. Furthermore, it is in this Part that absolute ownership painlessly and almost imperceptibly, replaces the fee simple -

⁹ Lagos Working Party Report (1960) 17

the sacred cow of English land law which here expires without a moo to mark its passing, even though lawyers trained in English land law have often been as jealous to preserve it as anthropologists are to preserve customary tenure.

However, though the Part is of such fundamental importance, it should not worry the ordinary man - or even the expert. If it has been correctly drafted it can, like the foundation of a building designed and erected by competent engineers, remain out of sight and nobody need look at it again. It should not be difficult to get it right. It has been the subject of legislation for more than a hundred years; there is no excuse or mistake now, or even, it might be thought, for any new form of words which, not yet tested by time, could raise doubt and perhaps invite challenge in the courts.

Yet the Kenya Native Lands Registration Ordinance in 1959 to some extent broke new ground, and the version then prepared came into the Registered Land Act 1963 via the Lagos draft Bill (where the fee simple disappeared). The history of and reasons for this new version should therefore be of interest, though we hope only academic, since it would be untoward, to say the least of it, if the form and effect of these provisions were now to be questioned.

But first perhaps we should mention the essential difference between the English and the Torrens treatment of this vital matter. The English Land Registration Act 1925 s5, repeating the Land Transfer Act 1875 s7, provides that "the registration of any person as first proprietor of a freehold estate with absolute title vests in him an estate in fee simple ... together with all rights, privileges, and appurtenances belonging thereto", and s9 makes similar provision in respect of leasehold. (This, it should be noted, is a very solid piece of substantive law which cannot be dismissed as 'procedural' or 'adjectival' by those who claim that registration does not alter law but merely simplifies procedure.) In the Torrens Acts, however, no such vesting provision was necessary, since the Crown grant (the basis of the Torrens register) itself confers the fee simple, and to ensure the effectiveness of the register it was merely necessary to make the estate or interest of a registered proprietor paramount, subject, of course, to incumbrances noted in the register and certain exceptions, corresponding to the overriding interests of the English system. Thus, as we explained in Chapter 5, the registration of a Crown grant in the Torrens system merely keeps good what is already good, whereas first registration under the English system makes good a title which may perhaps have been defective.¹⁰

The Tanganyika Ordinance in 1953 followed the Torrens pattern (Tan 33) and did not include any specific vesting provision; nor did the Sudan Ordinance in 1925 which adopted a form of words that should be quoted in full since, except for paragraph (c), they have been carried forward more or less unchanged into the Kenya Registered Land Act as s28:

"Effect of registration.

"[Sud] 25. The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of the Court or of the

¹⁰ See 5.4.1

Mohammedan Law Court shall be rights not liable to be defeated except as provided in this ordinance and shall be held by the proprietor together with all privileges and appurtenances belonging thereto according to the interest defined in the register and in this ordinance free from all other interests and claims whatsoever but subject as follows, that is to say:

"(a) subject to the charges, incumbrances, leases and other liabilities, and to the conditions and restrictions, if any, entered on the register;

"(b) subject, unless the contrary is expressed in the register, to such of the liabilities, rights and interests as are declared by this ordinance not to require notification on the register and are subsisting;

"(c) subject, where the proprietor is not entitled for his own benefit to the land (as between himself and the person beneficially entitled), to any unregistered rights or interests to which such person may be entitled."

There is no doubt that the Sudan draftsman must have considered that this section effectively replaced E 5 (freehold) and E 9 (leasehold), and indeed its efficacy has never been questioned in the Sudan. Nevertheless the Kenya Working Party on African Land Tenure 1957-58, while preserving this section virtually unchanged, thought that it would be advisable to reinforce it by preceding it with a section based on the positive vesting formula of the English Act; registration was the last step in the transmutation of customary tenure into recorded title recognized and regulated by written law, and there should be no possible doubt as to its effect. Accordingly it was provided (KLR(SA)O 37) that registration should vest "an estate in fee simple" in the registered proprietor, since that was the highest form of tenure known to English law (and systems derived from it); it was the name used in the existing registers in Kenya, and any other name at that time might have caused the new titleholders to suspect that they were getting something inferior. Obviously there could be no question of adopting a different name for 'ownership of land' in an Act (KLR(SA)O) relating only to areas of customary tenure.

The Lagos Working Party in 1960, however, had no such qualms. In their commentary on this Part (which they called "The core of registration of title"), they said, "We have prepared this draft on lines which indicate how we can achieve the desired security of ownership with facility for transfer without, at the same time, importing (or even giving the appearance of importing) all the mumbo-jumbo of English land law. We considered, in particular, whether we should use the word 'Freehold' which has acquired a special significance in colloquial parlance, but, on balance, decided that as we really mean absolute ownership it is better to say so."¹¹ This then was the form that came back to Kenya and was finally adopted in the Registered Land Act which, since it too was intended to apply to all registered land, followed very closely the arrangement and wording of the Lagos Bill.

This Part was repeated almost verbatim in the Malawi Act, and it was also followed in the British Solomon Islands Protectorate (BSIP 99, 100, 101, and

¹¹ Lagos Working Party Report (1960) 17

104). In the T & C Act, however, there is an important variation to provide for provisional titles which we will consider at the end of our commentary on this Part of the Kenya Act.

Interest conferred by registration

► 27. Subject to the provisions of this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

As we have just explained, this section is based on the vesting words of E 5 (freehold) and E 9 (leasehold). Its intention is reasonably clear, but it contains a glaring example of just the kind of obscure terminology that the KRLA sought to avoid (and on the whole did avoid). We are unable to explain what distinguishes a 'privilege appurtenant or belonging to land' from a 'right belonging to land'. A law lexicon defines 'privilege' as 'an exceptional right or exemption'.¹² 'Appurtenant' means belonging to or attached to land by act of parties (as distinct from 'appendant' which means attached to land by operation of law).¹³ We cannot, however, find in Cheshire, or Megarry and Wade, or Ruoff and Roper an example of a 'privilege appurtenant to land' that we can offer to illustrate its meaning. Yet this obscure phrase, admittedly hallowed by time, has been carried forward into each subsequent version of the Registered Land Act, and even into BSIP 99. Some bold draftsman might well delete it from the next version - or let us have a note explaining the particular circumstances in which it is likely to be useful in the jurisdiction for which he is drafting.

The Kenya Committee, in commenting on this section as a clause in their draft bill, remarked, "It could be argued that, having said what the position of the proprietors of land and leases is to be, the clause should also go on to establish the position of the proprietor of a charge and even of an easement or a profit a prendre. However, the provisions dealing with these particular matters in themselves establish beyond doubt what is the effect of charges, easements and profits, and we see no necessity for the inclusion of anything more in this clause." Nevertheless, provision for the effect of registration of a person as the proprietor of 'a usufructuary interest' and of 'a charge' was made in Sey 20(d) and (e), in order to conserve separate laws already relating to usufructs and to mortgages.

¹² Motion *The Pocket Law Lexicon* 298

¹³ M & W Xcii

Rights of proprietor

► 28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall be rights not liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 of this Act not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

This section repeats Sud 25 (which we have set out above), except that paragraph (c), which read "subject, where the proprietor is not entitled for his own benefit to the land (as between himself and the person beneficially entitled), to any unregistered rights or interests to which such person may be entitled", has been changed into the proviso which makes the meaning and purpose very much clearer.

Voluntary transfer

► 29. Every proprietor who has acquired land, a lease or a charge by transfer without valuable consideration shall hold it subject to any unregistered rights or interests subject to which the transferor held it, and subject also to the provisions of the Bankruptcy Act and to the winding-up provisions of the Companies Act, but save as aforesaid such transfer when registered shall in all respects have the same effect as a transfer for valuable consideration.

This is derived from Sud 26 (via KLR(SA)O 39 and Lag 46). We discussed voluntary transfer in Chapter 10.1 Similar provision is made in Sing 28(3), which reads, "Nothing in this section shall confer on a proprietor claiming otherwise than as a purchaser any better title than was held by his immediate predecessor." Baalman commented:

"The Torrens System of land registration is predominantly a purchaser's system. Its aim is to facilitate the transfer of land as a commercial commodity by removing most of the risks of financial loss which beset purchasers under the general law. As a transferee who does not give value for his land is not exposed to that risk, there is no need to protect him. But the Torrens statutes have not always said so in plain words; in many of them it is simply being left

to necessary implication. While the Courts have consistently drawn that implication, this Ordinance ... relieves them of the necessity to do so by the express enactment of s. 28(3)."¹⁴

Overriding interests

► 30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- (a) rights of way, rights of water and profits subsisting at the time of first registration under this Act;
- (b) natural rights of light, air, water and support;
- (c) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
- (d) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies within the meaning of section 46 of this Act;
- (e) charges for unpaid rates and other moneys which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
- (f) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
- (g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;
- (h) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law:

Provided that the Registrar may direct registration of any of the liabilities, rights and interests hereinbefore defined in such manner as he thinks fit.

In Chapter 2 we described how there are certain rights and liabilities which it is not practicable to register but which, though not recorded, must nevertheless retain their validity.¹⁵ These exceptions to the general rule that only registered interests affect registered title are known as overriding interests in the English Act, but in the Torrens Acts they are included in a comprehensive list of

¹⁴ Ballman *Singapore* 86

¹⁵ See 2.5.1

exceptions to paramountcy (beginning of course, with interests and liabilities which are shown on the register).

This list is obviously of great importance to a prospective purchaser, for it indicates matters affecting his purchase which will not be revealed by inspecting the register, and it is given a section of its own, as in the English Act, the details being worked out for Kenya after considering E 70 (which Ruoff and Roper call a "somewhat inconsequential and jumbled" list),¹⁶ Sud 27, KLR(SA)O 40; also Tan 33 and Sing 28 where the overriding interests are listed as exceptions to paramountcy on Torrens lines. It should be noted, however, that English overriding interests differ from Torrens exceptions in that in the English system the register may expressly state that the parcel is free from some particular overriding interest, and also an overriding interest may be expressly recorded in the register. The Torrens system does not allow this. There are no exceptions to the Torrens 'exceptions'.

Ruoff and Roper discuss overriding interests at length in their Chapter 6 (which comprises twenty-five pages) and Baalman devotes twenty pages of his New South Wales commentary to exceptions from indefeasibility. It is a subject of considerable practical importance, but unfortunately it also lends itself to extensive academic argument. We confine our comments to three points:

(1) Paragraph (a). It was decided to exempt only those rights of way etc. *subsisting at the time of first registration*, thus following Sing 28(b) rather than E 70(1)(a). The KRLA provides that an easement shall be created by registration (see Part V Division 5) and there appeared no reason to 'override' this provision.

(2) Paragraph (d). The length of lease not requiring registration is always the subject of discussion but with little inclination to go to the "not exceeding 21 years" of E 70(1)(h). In Sud 27(g) it is "less than three years", and under KLR(SA)O 40(e) this was reduced to "not longer than one year" but was raised to "five years" in Lag 47(c). Registration of shorter leases is, however, permissible, but Tan 54(1) took a different line; it provides that "no lease shall be registered unless it is expressed to be for a term, exceeding five years". The point is only of importance as regards other than 'occupation leases', if paragraph (g) is amended as we suggest in (3) below.

(3) Paragraph (g). E 70(1)(g) reads, "The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed". Lag 47(f), however, attempted to improve on the English formula and read: "The rights of every person in possession or actual occupation of the land to which he may be entitled in right of such possession or occupation, save where enquiry is made of such person and the rights are not disclosed". This became paragraph (g) above, but it is not easy to understand and therefore Mal 27(f), followed by T & C 28(g), reverted to the English version (which Ruoff and Roper discuss in detail on pages 109-113 of Registered Conveyancing). We suggest that the omission of the words "Or in receipt of the rents and profits thereof" would confine it unmistakably to the rights of the occupation tenant, and that that is all it should be concerned with.

¹⁶ Rouff and Roper 98

Entries to constitute actual notice

► 31. Every proprietor acquiring any land lease or charge shall be deemed to have had notice of every entry in the register relating to the land, lease or charge and subsisting at the time of acquisition.

This section was derived from Tan 34 in which it was an original provision. It came into the KRLA via KLR(SA)O 41, and Lag 48. It may appear to be 'a blinding glimpse of the obvious', but it can leave no room for doubt on a matter which was the subject of much argument in deeds registration unless express provision to cover it was made.

Provisional titles

In Chapter 11.11 we debated the case for limited titles and explained why, in Kenya, no provision was made for them, since the purpose of registration was to achieve certainty and finality of title. We must therefore go elsewhere for the relevant legislation, and T & C 23, 24, 25, and 26 are a useful example (which has been carried forward unchanged into the Caribbean model). It should be noted that these sections revert to the English formula, with separate sections for freehold and leasehold, and the Kenya section 28 setting out 'rights of proprietor' has been omitted. T & C 26 is of particular interest to land administrators.

"Effect of registration with absolute title

"[T & C] 23. Subject to the provisions of section 27 of this Law, the registration of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute ownership of that parcel together with all rights and privileges belonging or appurtenant thereto, free from all other interests and claims whatsoever, but subject—

"(a) to the leases, charges and other incumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 28 of this Law not to require noting on the register:

"Provided that—

(i) nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee;

"(ii) the registration of any person under this Law shall not confer on him any right to any minerals or to any mineral oils unless the same are expressly referred to in the register.

"Effect of registration with provisional title.

"[T & C] 24. Subject to the provisions of section 27 of this Law, the registration of any person as the proprietor with a provisional title of a parcel shall not affect or prejudice the enforcement of any estate, right or interest adverse to or in derogation of the title of that proprietor arising before such date or under such instrument or in such other manner as is specified in the register of that parcel; but

save as aforesaid, such registration shall have the same effect as the registration of a person with absolute title.

“Effect of registration of a lease.

"[T & C] 25. Subject to the provisions of section 27 of this Law, the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease:

"Provided that if the title of the lessor is a provisional title the enforcement of any estate, right or interest affecting or in derogation of the right of the lessor to grant the lease shall not be prejudiced.

“Effect of registration as Crown Land.

"[T & C] 26. The registration of land as Crown land shall, subject to any registered incumbrances, enable the Administrator by a disposition registered under this Law to dispose of such land in accordance with the provisions of section 9 of the Crown Lands Ordinance 1896 or any law replacing or amending such section."

T & C 27 and 28 respectively relate to Voluntary transfer and Overriding interests, both in the Kenya form.

T & C 29 provides for the conversion of provisional into absolute title as follows:

“Conversion of Provisional into absolute title.

"[T & C] 29. (1) Any proprietor registered with a provisional title or any interested person may at any time apply to the Registrar to be registered or to have the proprietor registered, as the case may be, with an absolute title.

"(2) If the applicant satisfies the Registrar that the qualification to which the provisional title is subject has ceased to be of effect, the Registrar shall make an order for the registration of the proprietor with absolute title after such advertisement as the Registrar may think fit.

"(3) On the making of any such order or on the application of any interested party after the expiration of twenty years from the date of first registration with a provisional title, the Registrar shall substitute in the register the words 'absolute title' for the words 'provisional title' and the title of the proprietor shall thereupon become absolute."

PART IV - CERTIFICATES AND SEARCHES

Part IV brings us back to practical matters after our excursion into legal theory in Part III, where it was declared that the effect of entry in the register (set up in Part II) is to confer an unimpeachable title. The next logical step, therefore, is to make provision for certificates to evidence that title, though such certificates need not be 'land certificates' (or 'certificates of title' as they are called in the Torrens system); a certified copy of the register is all that is really needed.

In Chapter 9¹⁷ we discussed at length the arguments for and against land certificates, and here we need only repeat that the land certificate is not an essential adjunct to registration of title (as is demonstrated by its disappearance in the Sudan). If the certificate is used to establish identity - an advantage often claimed for it - there can be a real danger if too much reliance be placed upon it, for it may be stolen and so make personation or forgery easier. In fact the certificate is the greatest factor in facilitating fraud, and in Chapter 10 we cited various cases in England, Australia, and America where a proprietor has been defrauded because his land certificate has been misused to effect a transfer. Indeed a principal virtue of registration of title is that it dispenses with documents of title. It seems odd to bring them back in the guise of land certificates.

Nevertheless, in countries where English land law has been established, the idea of the title deed is so firmly planted in the minds of landowners that there is great reluctance to abandon it, not least by the banks which still wish to insist on the deposit of a 'deed' to secure a charge, even when the law (as in KRLA 33(3)) specifically requires the land certificate to be returned to the chargor. To satisfy the demand for land certificates provision was therefore made in Kenya to enable them to be issued, but only if requested.

Land certificates and certificates of lease.

► 32. (1) The Registrar shall, if requested by any proprietor of land or a lease where no land certificate or certificate of lease has been issued, issue to him a land certificate or a certificate of lease, as the case may be, in the prescribed form showing, if so required by the proprietor, all subsisting entries in the register affecting that land or lease:

Provided that

- (i) only one such certificate shall be issued in respect of each parcel of land or lease;
- (ii) no certificate of lease shall be issued unless the lease is for a certain period exceeding twenty-five years.

(2) A land certificate or certificate of lease shall be only prima facie evidence of the matters shown therein, and the land or lease shall be subject to all entries in the register whether they are shown on the certificate or not.

(3) When there is more than one proprietor, the proprietors shall agree among themselves as to who shall receive the certificate, and failing agreement the certificate shall be filed in the registry.

(4) The date of issue of a land certificate or certificate of lease shall be noted in the register.

¹⁷ See 9.3.6-15

E 63 provides that on the first registration of a freehold or leasehold interest in land, a land certificate shall be prepared which shall be either delivered to the proprietor or deposited in the land registry. Sud 70, however, provides that the Registrar may order that a land certificate shall be issued to the proprietor. The same provision was repeated in KLR(SA)O 42 with a proviso that only one such certificate should be issued (though Tan 35 had expressly provided that co-owners might, if they so desired, receive separate certificates of title in respect of their respective shares). KLRA 32 retained the principle that certificates should only be issued on demand, and, in the case of certificates of lease, only when the term exceeded twenty-five years. If so requested a certificate could be issued showing all subsisting entries instead of one showing nothing more than the name of the registered proprietor which was all that was provided in the form prescribed under KLR(SA)O.

In the Malawi and Solomon Islands statutes this section was omitted on the grounds that if certificates of title are undesirable in principle, then provision should not be made for them, but the section has come back as T & C 31, as the landowners of the Turks and Caicos Islands set great store by title deeds and are reluctant to do without them. Worse still, the Malawi Registered Land Act was amended in August 1970 to insert this section and sections 33 and 35 below.

Subsection (2) is intended to make clear the status of the certificate, and indicates that there are matters (e.g. inhibitions, cautions, etc.) which may appear on the register without being shown on the certificate.

Production of certificate

► 33. (1) If a land certificate or a certificate of lease has been issued, then, unless it is filed in the registry or the Registrar dispenses with its production, it shall be produced on the registration of any dealing with the land or lease to which it relates, and, if the certificate shows all subsisting entries in the register, a note of such registration shall be made on the certificate.

(2) If the disposition is a transfer, the certificate if produced shall be destroyed, and in such case a new certificate may be issued to the new proprietor.

(3) If the disposition is a charge, the certificate shall be delivered to the chargor.

Subsection (1) is derived from Sud 82 (based on E 74) via KLR SA)0 43(1) and Lag 50(1), but obviously this requirement gives the certificate a special importance which is inconsistent with the dictum of the Privy Council that "the cardinal principle of the statute is that the register is everything" (*Waimiha Sawmilling Co. v. Waione Timber Co.* [1926] A.C. 101, 106).

Subsection (2) repeats KLR(SA)O 43(2) (again repeated in T & C 32(2)) though Lag 50(2) suggested a preferable alternative form of words: "A note of such registration shall be made on the certificate or the certificate may be destroyed and a new certificate may be issued to the new proprietor." The practice

of issuing a new certificate under a new title number (e.g. as in Alberta in Canada) seems unnecessarily wasteful.

Subsection (3) was a deliberate attempt to stop the practice of handing the certificate to the chargee on the creation of a charge, but this provision has been largely ignored by the banks in Kenya. In T & C 32(3) (and in the 1970 Malawi amendment) this subsection was altered to read: "If the disposition is a charge, the certificate, if any, shall be filed in the registry."

Dispositions of leases and charges

► 34. On the registration of any disposition of a lease or charge the duplicate and the triplicate of the lease or charge shall be produced to the Registrar, who shall note particulars of the disposition on the filed lease or charge and on the duplicate and triplicate thereof unless the Registrar is satisfied that they cannot be produced.

This section did not appear in the KLR(SA)O or in the Lagos draft, but was inserted in the KRLA to clarify an important point of procedure. The only evidence that the lessee or chargee has of his lease or charge is his copy of the registered lease or charge together with a certified copy of the register of the parcel showing the entry in the incumbrances section, though of course the lessee or chargee may obtain, at any time, a copy of the lease or charge officially certified under section 36. Any disposition of the lease or charge must therefore be shown on the registry copy if that copy is to show the current situation, and a similar record should be made on the duplicate and triplicate (see section 108(2)), if available. It might perhaps have been more appropriate to have placed this section in Part VI - Instruments and Agents, but nevertheless it has been repeated in this position as T & C 33. It does not appear in the Solomon Islands or Malawi statutes.

Lost or destroyed certificates

► 35. (1) If a land certificate or certificate of lease is lost or destroyed, the proprietor may apply to the Registrar for the issue of a new certificate, and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous certificate.

(2) The Registrar may require a statutory declaration that the certificate has been lost or destroyed.

(3) The Registrar, if satisfied with the evidence as to the destruction or loss of the certificate, and after the publication of such notice as he may think fit, may issue a new certificate.

(4) When a lost certificate is found, it shall be delivered to the Registrar for cancellation.

Subsections (1), (2), and (3) were derived from Sud 83 via KLR(SA)O 44. Subsection (4) was added by the Kenya Committee.

Searches and copies

► 36. (1) Any person, on application in the prescribed form, may inspect during official hours of business any register and any sheet of the registry map or any filed instrument or plan.

(2) Any person may require an official search in respect of any parcel, and shall be entitled to receive particulars of the subsisting entries in the register relating thereto, and certified copies of any document or of the registry map or of any plan filed in the registry.

This section maintains the principle of the public register which was common to all the existing registration ordinances in Kenya. In the Sudan (Sud 91), however, the register could only be inspected, as in England, by or under the authority of the proprietor or by any other person authorized by the Registrar, but not otherwise. The register in Lagos was similarly secret under the Registration of Titles Ordinance 1935, but the Working Party adopted the above section from KLR(SA)O 45, remarking: "The Register will no longer be secret. This secrecy is an illogical survival peculiar to England, where it was originally developed (for nefarious purposes) in the teeth of the efforts of the legislature to keep dealing public. It is anomalous to retain it in respect of land when all sorts of information on apparently private matters can be obtained from public records. Obviously it is a futile provision when the Register has been publicly compiled as it has in the process of systematic adjudication. The English provision was discussed at length in Chapter 3.¹⁸

Evidence

► 37. (1) Every document purporting to be signed by a Registrar shall, in all proceedings, be presumed to have been so signed until the contrary is proved.

(2) Every copy of or extract from a document certified by the Registrar to be a true copy or extract shall, in all proceedings, be received as prima facie evidence of the contents of the document.

(3) Every entry or note in or on any register, registry map or filed plan shall, subject to sections 142 and 143 of this Act, be received in all proceedings as conclusive evidence of the matter or transaction which it records.

(4) No process for compelling the production of the register, or of the registry map, or of any filed instrument or plan, shall issue from any court except with the leave of that court, which leave shall not be granted if a certified copy or extract will suffice, and any such process, if issued, shall bear thereon a statement that it is issued with the leave of the court.

¹⁸ See 3.18

Subsections (1), (2), and (3) have been combined in Mal. 30(1) and T & C 36(1) and a potentially useful subsection has been added. T & C 36(1) and (2) (which are the same as Mal. 30(1) and (2)) read as follows:

"Evidence.

"[T & C] 36. (1) A certified copy of the register or part of the Registry Map or any plan or instrument filed in the registry shall be admissible in evidence in all actions and matters and between all persons or parties, to the same extent as the original, and a signature on any such certified copy purporting to be the signature of the Registrar shall be presumed to be the signature of the Registrar until the contrary is proved.

"(2) No legal practitioner, trustee, personal, representative or other person in a fiduciary position shall be answerable in respect of any loss occasioned by the inaccuracy of any such certified copy as is referred to in subsection (1)."

In commenting on subsection (4) (repeated as Mal 30(3) and T & C 36(3)) the Kenya Committee remarked, "This is a very necessary provision, as there is a tendency to regard it as better to summon a registrar to produce registers etc. to the Court, when a certified copy would have sufficed, thereby wasting the registrar's time and usually involving more expense; additionally, great difficulty has been occasioned in the past in recovering registers and documents so produced, which have tended to be classified as exhibits and filed in the Court records."

PART V - DISPOSITIONS

Since registration of title is essentially a conveyancing device, it is in the field of dealing that it confers its greatest benefit and has its greatest scope. This Part now makes provision for the various dispositions which can be effected by a proprietor. 'Disposition', it should be remembered, has been defined as 'any act by a proprietor whereby his rights in or over his land, lease or charge are affected' and must be distinguished from a 'transmission' which happens automatically and involuntarily on the occurrence of an event.

As, in due course, all conveyancing in Kenya will be registered conveyancing, this Act is intended to include all the substantive law necessary to regulate the position *inter se* of the parties to any instrument. It was in this light that the Kenya Committee particularly examined the Indian Transfer of Property Act 1882, which, as applied to Kenya, contained the statute law governing property transactions; but since that Act was designed to fit a system of unregistered conveyancing, or conveyancing supported merely by a deeds register in its simplest form, many of its provisions are unnecessary in the context of conveyancing by a system of registered title. However, the Kenya Committee went through it carefully and, as Appendix III to their report, gave a brief commentary to show, section by section, how the provisions of the applied Indian Transfer of Property Act were superseded by their bill, or otherwise dealt with. We need only make occasional reference to it.

Part V is very long, comprising seventy sections - nearly half the Act. Each sort of disposition might have been given a separate Part of its own, as was done, for instance, in the Singapore Land Titles Ordinance 1956, but, instead, all dispositions have been grouped together in this Part, which has been divided into seven divisions as follows:

Division 1 covers general matters common to all dispositions. Divisions 2, 3, and 4 deal with the three main dispositions, namely, leasing, whereby the proprietor parts with the possession of his property for a time, but with the intention that it shall return to him or his successors; charging, whereby the proprietor uses his property to secure a loan or the performance of some obligation; and transfer of the whole of the interest of the proprietor, whether by sale or gift or exchange. Since both leases and charges can be transferred, provision to enable the proprietor to create them precedes Division 4 'Transfers' (though in most other statutes transfer is dealt with first). Division 5 covers subordinate or derivative interests under the heading 'Easements, Restrictive Agreements, Profits and Licences'. Division 6 is entitled 'Co-proprietorship and Partition'; the important and difficult matter of co-proprietorship has been brought into this Part, perhaps rather artificially, on the grounds that it frequently leads to partition which, very definitely, is a disposition. Finally, Division 7 is entitled 'Succession on Death', but is included merely to point out that nothing in this Act affects the law of testate or intestate succession.

It should be noted that to effect a disposition an instrument is required which must be signed by the parties affected and that the disposition is completed by registration.

Additional general comments on the various dispositions will be found under the headings of their respective Divisions, and these could be usefully read even by those who only want a 'broad description'.

Division 1 - General

Subsequent dealings

► 38. (1) No land, lease or charge shall be capable of being disposed of except in accordance with this Act, and every attempt to dispose of such land, lease or charge otherwise than in accordance with this Act shall be ineffectual to create, extinguish, transfer, vary or affect any estate, right or interest in the land, lease or charge.

(2) Nothing in this section shall be construed as preventing any unregistered instrument from operating as a contract, [but no action may be brought upon any contract for the disposition of any interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and is signed by the party to be charged or by some other person thereunto by him lawfully authorized:

Provided that such an action shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract—

- (i) has in part performance of the contract taken possession of the property or any part thereof; or
- (ii) being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.]¹⁹

(3) The Minister, after consultation with the Council of the Law Society of Kenya, may prescribe terms and conditions of sale which shall apply to contracts by correspondence, subject to any modification or any stipulation or any intention to the contrary which is expressed in the correspondence, and which may be made to apply to any other cases for which the terms and conditions are made available, where express reference is made to those terms and conditions.

(4) Where any trust land registered under this Act in the name of a county council, being land in the special areas, has been granted or leased by the Minister before the commencement of this Act under the powers vested in him by any written law, the proprietor of the land granted or the lease shall not dispose of the land granted or the lease without the consent in writing of the County Council, and any condition contained in the grant or lease requiring the consent of any other person to disposal shall be absolutely void.

Subsection (1) is aimed at ensuring that registered land can only be dealt with in accordance with the Act and 'on the register'. The wording is derived from Sud 28 and Tan 41(2). In Lag 54(1) the words 'legal or equitable' were inserted after the words 'estate, right or interest', to make sure that no dealing off the register should be effectual. However, no court is likely to permit a person to avoid his responsibilities merely because of non-registration, provided of course that registration is still possible, and therefore the first part of subsection (2), taken from Sing 27(2), was added to enable the court to treat an unregistered instrument as a contract, instead of facing the court, as in Sud 28, with the uncompromising provision that any attempt to deal with the land except in accordance with the ordinance "shall be null and void" obviously unreasonable and unfair if effect could be given to an otherwise binding agreement without injury to an innocent third party.

Logically the next step was to specify what was required to make an agreement binding, and therefore it was provided, that, to be enforceable, an agreement must

¹⁹ The words in square brackets were repealed by and re-enacted in the Law of Contract (Amendment) Act 1968.

be in writing (following LPA 40(1) which replaced this provision in s4 of the Statute of Frauds 1677). This naturally led to a brief codification of the law relating to part performance (expressly saved in LPA 40(1)). These provisions were repealed in Kenya in 1968 and re-enacted in the Law of Contract (Amendment) Act, but they have been carried forward into Mal 31(2) and T & C 37(2).

Mal 31 also includes a subsection which reads:

"(3) The death of any person by or on behalf of whom any instrument of dealing has been executed shall not affect the validity thereof, and any such instrument may be presented for registration as if the death had not occurred."

Sing 22 makes a similar provision, which sensibly clears up a matter that otherwise can cause much argument, but it was not carried forward into T & C 37.

Protection of persons dealing in registered land

► 39. (1) No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned—

- (a) to inquire or ascertain the circumstances in or the consideration for which such proprietor or any previous proprietor was registered; or
- (b) to see to the application of any consideration or any part thereof; or
- (c) to search any register kept under the Land Registration (Special Areas) Act, the Government Lands Act, the Land Titles Act or the Registration of Titles Act.

(2) Where the proprietor of land, a lease or a charge is a trustee, he shall, in dealing therewith, be deemed to be absolute proprietor thereof, and no disposition by such trustee to a bona fide purchaser for valuable consideration shall be defeasible by reason of the fact that such disposition amounted to a breach of trust.

This section repeats Lag 55 which was intended to take the place of the section usually entitled 'Persons dealing with registered proprietor not affected by notice' that is common in all Torrens statutes. It did not appear in the original South Australia Act of 1858, but came in two years later with the first crop of amendments, presumably because it was considered to be a necessary reinforcement, and it has held its place more or less unchanged ever since. It is, however, not easy of interpretation, and it is significant that Baalman in his commentary on the New South Wales Act devoted seventeen pages to it "in the search for its meaning". Yet, labelled 'Exoneration from effect of notice', he repeated it verbatim as Sing 35(1) which reads:

"Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any land shall

be required or in any manner concerned to inquire or ascertain the circumstances under or the consideration for which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice actual or constructive of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

The British Guiana Committee, by breaking up the section into subsections and paragraphs, tried to clarify it in BG 69, but since no vestige of it had appeared in the Tanganyika Land Registration Ordinance 1953 (or in the KLR(SA)O), the Lagos Working Party were tempted to omit it altogether from their bill. However, they decided that it would be useful "to make it clear to any conveyancer that, when a dealing is proposed, he is in no way required to go behind the register". This, therefore was the prime purpose of subsection (1).

Subsection (2) protects the bona fide purchaser for value who deals with a trustee. This protection does not extend to the volunteer.

It was considered that mention of fraud in this section (as in the Torrens legislation) would be confusing. Provision is made in Part X for rectification and indemnity in case of fraud. What constitutes fraud must be determined by the court, and any attempt to define it, positively or negatively, seems unwise.

Additional fee for delayed registration

► 40. Where an instrument is presented for registration later than three months from the date of the instrument, then, as well as the registration fee, an additional fee equal to the registration fee shall be payable for each three months which have elapsed since such date:

Provided that—

- (i) in no such case shall the sum of the additional fees exceed five times the original registration fee payable;
- (ii) the Chief Land Registrar may, in his sole discretion, remit any additional fee payable by virtue of this section, either in whole or in part.

As an encouragement to prompt registration, this section provides for a progressively increasing penalty fee to be paid if registration is delayed. This is considered more realistic than a provision based on E 123 that unless application for registration is made within two months the conveyance shall be void. The object is to get all transactions registered, and better late than never, provided, of course, that no entry in the register has supervened.

The second proviso caused some discussion as to whether it was desirable to give the Registrar a discretion which could worry him if it did not embarrass him, and this proviso was not repeated in T & C 39, though it was in Mal 33.

Power to compel registration.

► 41. (1) If he is satisfied that any person, through his wilful default, has failed to register any instrument which is registrable under this Act, the Registrar may by notice in writing order such person to present such instrument for registration, and thereupon the registration fee and any additional fee payable under section 40 of this Act shall become due and shall be payable whether the instrument is presented for registration or not.

(2) Any person who fails to comply with an order of the Registrar under subsection (1) of this section within one month of the service of the notice shall be guilty of an offence and shall be liable to a fine not exceeding five hundred shillings.

The purpose of a land registry is defeated if transactions are not registered, and it is in the public interest that all reasonable steps be taken to secure the registration of any transaction which may come to the notice of the Registrar. The idea that failure to register should constitute a punishable offence was first proposed in Lag 57, and was adopted in Kenya with some hesitation, though it is not really different in principle from making punishable failure to register a birth, or the transfer of a motor car. The section has not, in fact, ever been used in Kenya though many cases of failing to register have come to light. However, the same provision has been carried forward into Mal. 34 and T & C 40.

Priority of registered interests

► 42. (1) Interests appearing in the register shall have priority according to the order in which the instruments which led to their registration were presented to the registry, irrespective of the dates of the instruments and notwithstanding that the actual entry in the register may be delayed:

Provided that where an instrument is prepared in the registry it shall be deemed to have been presented on the date on which application for its preparation was made to the Registrar.

(2) Instruments sent by post or under cover and received during the hours of business shall be deemed to be presented simultaneously immediately before the closing of the office on that day, and instruments so sent but received between the time of closing and the next opening of the office for business shall be deemed to be presented simultaneously immediately after such opening.

(3) Where more than one instrument or application are presented on the same day, or on different days but at so short an interval from each other that in the opinion of the Registrar there is doubt as to their order

of priority, the Registrar may refuse registration until he has heard and determined the rights of the parties interested thereunder.

Subsection (1) deals with the question of priority plainly and in a sensible and practical way. The order of presentation will be shown by the serial number of the instrument and there is no need for a time stamp. The proviso is important in those places where instruments are prepared in the registry.

Subsection (2) caters for instruments sent by post (the normal practice in England) and is a useful provision to have in reserve, even if current practice is personal dealing only.

Subsection (3) provides for determination of priority by the Registrar, should there be a doubt, instead of making it dependent merely on the speed with which possible contestants can get to the registry. Such determination is, of course, only possible if an application has not gone through to registration, for once registration is complete it cannot be changed without a formal process of rectification. In practice the question of priority seldom, if ever, causes any real difficulty, and elaborate arrangements for recording the time of presentation are largely a survival from deeds registration. (See Chapter 17.5.2 for a fuller explanation.)

Stay of registration

► 43. (1) Where any person proposing to deal with registered land has, with the consent in writing of the proprietor, applied for an official search and has stated in his application the particulars of the proposed dealing, the registration of any instrument affecting the land to be comprised in or affected by the proposed dealing shall be stayed for a period (hereinafter referred to as the suspension period) of fourteen days from the time at which application for the search was made, and a note shall be made in the register accordingly.

(2) If within the suspension period a properly executed instrument effecting the proposed dealing is presented for registration, such instrument shall have priority over any other instrument which may be presented for registration during the suspension period, and shall be registered notwithstanding any caution or any other entry for which application for registration may have been made during the suspension period.

(3) Subject to subsection (2) of this section, any instrument or document for which application for registration is made during the suspension period other than that effecting the proposed dealing shall be dealt with in the same manner, shall have the same priority and shall be as effectual as if no stay of registration had been obtained.

This section makes provision for the official search procedure introduced in England by the Land Registration Rules 1930, amended in 1936, and superseded

by the Land Registration (Official Searches) Rules 1969. Any person proposing to deal can, with the consent of the proprietor, obtain a stay of registration of any other dealing for fourteen days, and thus relate the priority of his interest back to the date of his official search. The actual wording was derived from BG 142. The need for the process is questionable, certainly in those registries where registration is completed at once, but it has been repeated in Mal 36 and T & C 42. Similar provision, with priority for seven days, is made by Sing 134 on which Baalman commented, "It is probable that the section will not be widely used in Singapore. But history has shown that in jurisdictions which have no statutory equivalent, the Legal Profession frequently exhorts the Legislature to insert one."²⁰ History certainly repeated itself in this regard in Kenya, where, before the KRLA was thought of, the legal profession had already asked for it to be inserted in the KRTA.

Merger of registered interests

- 44. Where upon the registration of a dealing, the interests of—
- (a) lessor and lessee; or
 - (b) chargor and chargee; or
 - (c) the proprietor of a parcel which is burdened with an easement, profit or restrictive agreement and the proprietor of a parcel which benefits therefrom,

vest in the same proprietor, such interests shall not merge unless a surrender or discharge is registered or the parcels are combined or there is a declaration of merger, which may be contained in the instrument evidencing the dealing.

Merger is a doctrine of the common law whereby the lesser of two interests in the same land is extinguished if they come together in the same owner without any intervening interest. For example, an easement is automatically extinguished under the common law if the dominant and servient tenements come into the ownership of the same person. The easement will, however, remain recorded on the register unless the Registrar is notified. If subsequently either the dominant or servient tenement is disposed of, will the easement which has remained on the register be revived? The question is resolved by this simple commonsense provision. It was derived from Sing 52.

Division 2 - Leases

A lease is defined in s3 as "the grant, with or without consideration, by the proprietor of land of the right to the exclusive possession of his land". The purpose of this Division is to enable a proprietor to make such a grant and to provide for various contingencies when he does so. The right created by the lease is capable of being subleased, or charged, or transferred (just like land itself) and

²⁰ Baalman *Singapore* 272

so it is only logical to make provision for that right before enabling it to be charged or transferred.

There is an important practical distinction between 'occupation leases' (i.e. where the lessee is in occupation of the leased premises) and leases where somebody other than the original lessee is in occupation. As regards occupation leases, whatever their length, it makes little difference whether the lease is registered or not, for the interest of the occupier is an overriding interest under s30(g) and the lease will operate as a contract by virtue of s38(2), although the Registrar could, under s41, insist on registration if the term exceeded three years.

Where, however, the lessee is not in occupation, it means that there must either have been a sublease of some sort or an 'assignment' (i.e. transfer of the lease). Thus there has been a dealing in the leasehold interest, and clearly a register for it is as necessary as it is for the original ownership. Indeed where the lease is a long lease (as it often is, for example, in respect of leasehold grants from the Government) the leasehold interest will probably be more valuable than the freehold reversion. The incumbrance section of the register of ownership will show the original lessee, but it will be the register of the leasehold in which most of the dealing will be entered.

It should be particularly noted that, although not all leases have to be registered, all leases and tenancies governed by this Act are in respect of registered land. Provision therefore has to be made to cover both registered and unregistered leases.

Leases

► 45. Subject to the provisions of this Act and of any other written law, the proprietor of land may lease the land or part of it to any person for a definite term or for the life of the lessor or of the lessee or for a period which though indefinite may be determined by the lessor or the lessee, and subject to such conditions as he may think fit:

Provided that, if only part is leased, the lease shall be accompanied by a plan or other description which the Registrar, in his absolute discretion, deems adequate to identify the part leased.

This is the section which enables a proprietor to lease his land. It can be compared with E 18(1)(c), though its actual wording was derived from KLR(SA)O 50(1), but with the inclusion of leases for the life of the lessor or lessee. The Lagos Working Party, with some hesitation, rejected leases for life, but there appears no real reason why a lease should not be made to terminate on the death of the lessor or lessee, an event which it is simple to prove and which may well be good reason for ending a lease.

The proviso was an addition made by the Kenya Committee. The KRTA requirement for a deed plan certified by the Director of Surveys had proved onerous in the case of leases of comparatively short duration and, to avoid the expense of survey, had led to the undesirable practice of protecting leases by caveat.

Periodic tenancies

► 46. (1) Subject to any written law governing agricultural tenancies—

(a) where in any lease the term is not specified and no provision is made for the giving of notice to determine the tenancy, the lease shall be deemed to have created a periodic tenancy;

(b) where the proprietor of land permits the exclusive occupation of the land or any part thereof by any other person at a rent but without any agreement in writing, that occupation shall be deemed to constitute a periodic tenancy;

(c) the period of a periodic tenancy created by this subsection shall be the period by reference to which the rent is payable, and the tenancy may be determined by either party giving to the other notice, the length of which shall, subject to any other written law, be not less than the period of the tenancy and shall expire on one of the days on which rent is payable.

(2) No periodic tenancy of any kind shall be capable of registration, but it shall be deemed to be a right to obtain an interest for the purposes of section 131 of this Act.

Subsection (1) sets out plainly various points in regard to periodic tenancies (defined in s3) which are by no means always understood but which proprietors and their 'periodic tenants' should know.

Subsection (2) (repeated in BSIP 134(2)), in forbidding registration of periodic tenancies, is in conflict with the proviso to s30 which allows the Registrar to direct their registration (since they appear in the list of overriding interests), as this subsection has been omitted from Mal. 39 and T & C 45.

Registration of leases

► 47. A lease for a specified period exceeding two years, or for the life of the lessor or of the lessee, or a lease which contains an option whereby the lessee may require the lessor to grant him a further term or terms which, together with the original term, exceed two years, shall be in the prescribed form, and shall be completed by—

(a) opening a register in respect of the lease in the name of the lessee; and

(b) filing the lease; and

(c) noting the lease in the encumbrances section of the register of the lessor's land or lease.

This section requires that a lease for a period exceeding two years shall be registered, but as we have already pointed out (in discussing s30) various periods

can be chosen ranging from one year under KLR(SA)O to twenty-one years under the English Act. The Kenya Committee endeavoured to follow the principle that once a term is created in respect of which dealings are likely to occur registration should be compulsory. The Committee recommended three years, since normally leases up to three years are occupation leases, but this was changed to two years in the final version of the Act. Mal 40 adopted a period "exceeding three years" and T & C 46 "exceeding two years". Perhaps a more realistic way of approaching the question would be to make the validity of a charge or transfer of a lease pendent on registration, irrespective of the length of the lease, but this do not appear to have been tried.

Lessor's consent to dealing with lease

► 48. Upon the registration of a lease containing an agreement, express or implied, by the lessee that he will not transfer, sub-let, charge or part with possession of the land leased or any part thereof without the written consent of the lessor, the agreement shall be noted in the register of the lease, and no dealing with the lease shall be registered until the consent of the lessor, verified in accordance with section 110 of this Act, has been produced to the Registrar.

This section is derived from KLR(SA)O 51, which was based on Sud 51. It was included in the Lagos Bill, as clause 100(1) in Division 4 - Transfers. It seems a reasonable provision so long as the law allows a lessor to have the right to forbid an assignment and, without throwing onto the Registrar anything more onerous than to require another signature to the transfer, it provides a service to the lessor which he is entitled to expect from the fact of registration. Lagos 100(2) went on to provide that, notwithstanding any express provision in the lease to the contrary, the consent should not be unreasonably withheld. This was derived from s19 of the English Landlord and Tenant Act 1927. It can even be argued that a prohibition against dealings contained in a lease should not be enforceable at all. Obviously this is a matter for political decision, like so much of the law of landlord and tenant, but at least the Registered Land Act should enable the register to make clear what the position is. The English Act provides that leases and subleases which contain an absolute prohibition against all dealing shall not be registered (E 8(2)), which is not surprising since the chief purpose of registration in England is to simplify dealing, and therefore there is little purpose in registering an estate which is inalienable.

Lease of charged land

► 49. Where any land is subject to a charge, no lease of such land shall be registered without the previous consent in writing of the proprietor of the charge, verified in accordance with section 110 of this Act, unless the charge expressly dispenses with the necessity for such consent.

This section provides a necessary protection for the chargee. It was derived from KLR(SA)O 50(3), which became a separate clause in the Lagos Bill (Lag 69).

Duration of leases

► 50. (1) Where the period of a lease is expressed as commencing on a particular day, that day is excluded in computing that period.

(2) Where no day of commencement is named, the period commences on the date of first execution of the lease, and that day is excluded in computing that period.

(3) Where the period is a year or a number of years, in the absence of an express agreement to the contrary, the lease shall last during the whole anniversary of the day on which such period commences.

This section clears up small points which otherwise can cause uncertainty and is derived from ITPA 110. It was not included either in the KLR(SA)O or in the Lagos Bill, and is an example of how the ITPA brought such matters to the notice of the Kenya Committee.

Future leases

► 51. (1) A lease may be made for a period to commence on a future date, not being later than twenty-one years from the date on which the lease is executed, but shall be of no effect unless it is registered.

(2) Any instrument purporting to create a lease to commence on a date more than twenty-one years after the date of the instrument, or to take effect on the fulfilment of any condition, is void.

In English law a lease to begin at a future date is known as a 'reversionary lease', and subsection (1) is derived from Tan 55, which is labelled 'Reversionary leases'.

Subsection (2) is derived from LPA 149(3).

This section has been carried forward unchanged into the BSIP, Malawi, and Turks and Caicos legislation and is clearly a necessary provision, though it is doubtful if much use will be made of it.

Holding over

► 52. (1) Where a person, having lawfully entered into occupation of any land as lessee, continues to occupy that land with the consent of the lessor after the determination of the lease, he shall, subject to any written law governing agricultural tenancies and in the absence of any evidence to the contrary, be deemed to, be a tenant holding the land on a periodic tenancy on the same conditions as those of the lease, so far as those conditions are appropriate to a periodic tenancy.

(2) For the purposes of this section, the acceptance of rent in respect of any period after the determination of the lease shall, if the former tenant is still in occupation and subject to any agreement to the contrary, be taken as evidence of consent to the continued occupation of the land.

This section is derived from Lag 68, which was noted as being 'new'. 'Holding over' is of particular concern to registrars when considering the question of cancellation of leases, and this section was devised for Lagos to clear up points which can cause difficulty. The 'Effect of holding over' is provided for (on similar lines) in ITPA 116, though this was not in fact the source of s52.

Agreements implied in leases on part of lessor

► 53. Save as otherwise expressly provided in the lease and subject to any written law governing agricultural tenancies, there shall be implied in every lease agreements by the lessor with the lessee binding the lessor—

(a) that, so long as the lessee pays the rent and observes and performs the agreements and conditions contained or implied in the lease and on his part; to be observed and performed, the lessee shall and may peaceably and quietly possess and enjoy the leased premises during the period of the lease without any lawful interruption from or by the lessor or any person rightfully claiming through him;

(b) not to use or permit to be used any adjoining or neighbouring land of which he is the proprietor or lessee in any way which would render the leased premises unfit or materially less fit for the purpose for which they were leased;

(c) where part only of a building is leased, to keep the roof, main walls and main drains, and the common passages and common installations, in repair;

(d) where any dwelling-house, flat or room is leased furnished, that such house, flat or room is fit for habitation at the commencement of the tenancy; and

(e) that if at any time the leased premises or any part thereof are destroyed or damaged by fire, civil commotion or accident not attributable to the negligence of the lessee, his servants or his licensees, so as to render the leased premises or any part thereof wholly or partially unfit for occupation or use, the rent or a just proportion thereof according to the nature and extent of the damage sustained shall be suspended and cease to be payable until

the leased premises have again been rendered fit for occupation and use; but that if the leased premises have not been so rendered fit for occupation and use within six months of their destruction or damage as aforesaid, the lessee may at his option, and on giving one month's written notice of his intention so to do, determine the lease.

For comments see under s54.

Agreements implied in leases on part of lessee

► 54. Save as otherwise expressly provided in the lease and subject to any written law governing agricultural tenancies, there shall be implied in every lease agreements by the lessee with the lessor binding the lessee—

- (a) to pay the rent reserved by the lease at the times and in the manner therein specified;
- (b) to pay all rates, taxes and other outgoings which are at any time payable in respect of the leased premises during the continuance of the lease unless the same are payable exclusively by the lessor by virtue of any written law;
- (c) except where part only of a building is leased, or where a dwelling-house is leased furnished, to keep all buildings comprised in the lease and all boundary marks in repair;
- (d) where part only of a building is leased, or where a dwelling-house is leased furnished, to keep the leased premises, except the roof, main walls and main drains, and the common passage and common installations in repair;
- (e) where the lease is of furnished premises, to keep the furniture in as good condition as it was at the commencement of the period, fair wear and tear only excepted, and to replace such articles as are lost, destroyed or so damaged as to be beyond repair with articles of equal value to those so lost, destroyed or damaged;
- (f) to permit the lessor or his agent with or without workmen or others at all convenient times and after reasonable notice to enter on the leased premises and examine their condition;
- (g) to repair or otherwise make good any defect or breach of agreement for which the lessee is responsible and of which notice has been given by the lessor to the lessee, within such reasonable period as may be specified in the notice; and

(h) not to transfer, charge, sublease or Otherwise part with the possession of the leased premises or any part thereof without the previous written consent of the lessor, but such consent shall not be unreasonably withheld.

Sections 53 and 54 set out the agreements between the lessor and lessee which will be implied in every lease unless expressly excluded from it. The object is to make it possible to lease land by a simple form (containing no more than the number of the parcel, the period of the lease, the amount of the rent and the names and signatures of the parties) and these two sections will then imply all the agreements that are normally found in a lease. Section 53 was inspired by Tan 56(1) (which became KLR(SA)O 52(1)) and s54 by Tan 56(2) (which became KLR(SA)O 52(2)). The Kenya Committee, after a perusal of a number of precedents and actual leases, endeavoured to provide what appeared to them to be common form agreements, and pointed out that, of course, there was nothing to prevent contracting out. This pattern has been carried forward into T & C 52 and 53 and, with additions to cover the 'estates' which exist in the BSIP legislation, into BSIP 136 and 137, but in Mal 46 the agreements implied on the part of the lessor are confined to s53(a) and (b) above "and such other agreements as the Minister may have prescribed prior to the execution of the lease", and a singular formula is followed in Mal 47. In KLRA 54 it will be noted that any written law governing agricultural tenancies was expressly saved. This was because detailed recommendations had been made in another report as to what should be implied in all agricultural tenancies, and it was possible that independent action might be taken on those recommendations. Agricultural tenancies are covered in the Turks and Caicos Islands by the inclusion of an implied agreement on the part of the lessee, which reads:

"[T & C] 53 ... (c) in the case of agricultural land, to farm the same in accordance with the practice and any rules of good husbandry, and to yield up the land at the end of the term in good heart."

Meaning of "in repair"

► 55. Where an agreement is contained or implied in any lease to keep a building or a particular part of a building "in repair", it shall, in the absence of an express provision to the contrary, mean in such state of repair as that in which a prudent owner might reasonably be expected to keep his property, due allowance being made for the age, character and locality of the building at the commencement of the lease:

Provided that there shall not be read into such an agreement an undertaking to put any building into a better state of repair than that in which it was at the commencement of the lease.

'In repair' is an expression in ss53 and 54 which requires definition, and s55 endeavours to condense the mass of English judicial opinion on its interpretation.

(This section is an exception to the general principle that all definitions should appear in the interpretation section, but here is the obvious place for it.)

Lessor's right of forfeiture

► 56. (1) Subject to the provisions of section 59 of this Act and to any provision to the contrary in the lease, the lessor shall have the right to forfeit the lease if the lessee—

- (a) commits any breach of, or omits to perform any agreement or condition on his part expressed or implied in the lease; or
- (b) is adjudicated bankrupt; or
- (c) being a company, goes into liquidation.

(2) The right of forfeiture may be—

- (a) exercised, where neither the lessee nor any person claiming through or under him is in, occupation of the land, by entering upon and remaining in possession of the land; or
- (b) enforced by action in the court.

(3) The right of forfeiture shall be taken to have been waived—

- (a) the lessor accepts rent which has become due since the breach of agreement or condition which entitled the lessor to forfeit the lease or has by any other positive act shown an intention to treat the lease as subsisting; and
- (b) the lessor is, or should by reasonable diligence have become, aware of the commission of the breach:

Provided that the acceptance of rent after the lessor has commenced an action in the court under subsection (2) of this section shall not operate as a waiver.

This section provides for the lessor's right of forfeiture which is normally expressly included in leases but will now be implied unless expressly excluded. It was developed from Tan 56(3), which had been repeated in KLR(SA)O 52(3).

Subsection (2) makes clear that the lessor can only take direct action to exercise this right if the lessee (or some person claiming through him) is not in occupation of the leased premises; otherwise an action in court is required.

Subsection (3) is a codification of the common law of waiver, produced by the Kenya Committee after studying Megarry and Wade's Law of Real Property.

Effect of forfeiture on subleases

► 57. The forfeiture of a lease determines every sublease and every other interest appearing in the register relating to that lease, but—

- (a) where the forfeiture is set aside by the court on the grounds that it was procured by the lessor in fraud of the sublessee; or

(b) where the court grants relief against the forfeiture under section 59 of this Act,

every such sublease and other interest shall ~be deemed not to have determined.

This was an innovation (prompted by ITPA 115) which was introduced by the Kenya Committee to provide for subleases to determine on the forfeiture of a lease, unless there is fraud against the sublessee, or the court relieves against forfeiture. It has been included as BSIP 145 and Mal 50, but in the Turks and Caicos it has been added to the previous section as T & C 55(4).

Notice before forfeiture

► 58. Notwithstanding anything, to the contrary contained in the lease, no lessor shall be entitled to exercise the right of forfeiture for the breach of any agreement or condition in the lease, whether expressed or implied, until the lessor has served on the lessee a notice—

(a) specifying the particular breach complained of; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach within such reasonable period as is specified in the notice; and

(c) in any case other than non-payment of rent, requiring the lessee to make compensation in money for the breach,

and the lessee has failed to remedy the breach within a reasonable time thereafter, if it is capable of remedy, and to make reasonable compensation in money.

See comment on s59.

Relief against forfeiture

► 59. (1) A lessee upon whom a notice has been served under section 58 of this Act, or against whom the lessor is proceeding, by action or re-entry, to enforce his right of forfeiture, may apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and the conduct of the parties and the circumstances of the case, thinks fit, and, if it grants relief, may grant it on such terms as it thinks fit.

(2) The court, on application by any person claiming as sublessee or chargee any interest in the property or part of the property comprised in the lease forfeited or sought to be forfeited, may make an order vesting the property or such part in such sublessee or chargee for the whole period of the lease or any less period, upon such conditions as the court in the circumstances of the case thinks fit:

Provided that nothing in this subsection shall apply in the case of a forfeiture arising from a breach to which the sublessee is a party, or from the breach of an express agreement or condition against subleasing, parting with the possession of or disposing of the property leased.

(3) This section shall have effect notwithstanding any stipulation or agreement to the contrary and whether the lease is registered or not.

As provision had been made for forfeiture, the Kenya Working Party considered that "even in these early days of formal leasing" it was desirable to make provision for relief against forfeiture on the lines of LPA 146 (which repeated similar provisions made in the Conveyancing Act 1881).²¹ This provision (KLR(SA)O 53) was divided in Lagos into Lag 73 - 'Notice before forfeiture' and Lag 74 - 'Relief against forfeiture', but was otherwise unchanged. KLRA 59, however, omits (for no apparent reason) LPA 146(7) (reproducing Conveyancing Act 1881 s14(5)), which was included in KLR(SA)O 53, as well as in the draft prepared by the Kenya Committee, and in Lag 54 and Mal 52. It appears in the Turks and Caicos as follows:

"[T & C] 57 ... (3) For the purpose of this section a lease limited to continue as long only as the lessee abstains from committing a breach of agreement or condition shall be and take effect as a lease to continue for any longer term for which it could subsist, but terminable by a proviso for reentry on such breach."

Variation and extension of leases

► 60. Subject to the provisions of section 58 of this Act, the agreements and conditions contained or implied in any registered lease may be varied, negatived or added to, and the period of any registered lease may from time to time be extended, by an instrument executed by the lessor and the lessee for the time being and registered before the expiration of the then current term of the lease.

This section was derived from BG 91 via Lag 75, and makes clear a simple point which otherwise might puzzle some registrars.

Substitution of leases

► 61. Where upon the presentation of a lease for registration the Registrar is satisfied that the lessee is the person registered as the proprietor of a prior lease in respect of the same land, he shall cancel the registration of the prior lease and register the new lease subject to the encumbrances registered against the prior lease.

This section does no more than state the obvious but it does no harm to state it, and it establishes the procedure to be followed in the registry. It follows Lag 76 (which abbreviated BG 92(1)) but, adds the provision saving existing

²¹ Kenya Working Party Report on African Land Tenure (1958) 26

incumbrances, as in IIG 92(2). This section does not appear in the BSIP legislation, but is repeated as Mal 54 and T C 59.

Subleases

► 62. (1) Subject to any provision in his lease affecting his right to do so, the proprietor of a registered lease may sublease for any period which is less than the remainder of the period of his lease by an instrument in the prescribed form.

(2) Save as otherwise expressly provided in this Act, the provisions of this Act affecting leases, lessors and lessees shall apply to subleases, sublessors and sublessees, with such adaptations as are necessary.

(3) If a lease is determined by operation of law or by surrender under any law relating to bankruptcy or winding up, such determination shall determine the sublease.

(4) In addition to the agreements specified by this Act to be implied in leases, there shall be implied in every sublease under this Act an agreement by the sublessor that he will, during the continuance of the sublease, pay the rent reserved by the lease under which the sublessor holds, and observe and perform the agreements and conditions thereof.

(5) Where a sublessee has paid to the sublessor's lessor the rent or any part of the rent payable by the sublessor under the lease under which the sublessor holds, the sublessee shall be entitled to set off any sum so paid against the rent payable by him to the sublessor in respect of the sublease.

This section is derived from BG 94 via Lag 77. It seemed better to include a section on these lines rather than to rely merely on the definition of 'lease' in s3, as including 'sublease', and, of course, subsection (5) puts beyond doubt a situation which could otherwise give rise to difficulties in practice.

Surrender of leases

► 63. (1) Where the lessor and the lessee agree that the lease shall be surrendered, it shall be surrendered in the following manner, that is to say—

- (a) an instrument shall be prepared in the prescribed form, or else the word "surrendered" shall be endorsed on the lease or on the duplicate or triplicate thereof;
 - (b) the instrument or endorsement shall then be executed by the lessee;
 - (c) the Registrar shall then cancel the registration of the lease;
- and

(d) the instrument or endorsed lease shall then be filed, and thereupon, or upon such earlier date as is expressed in the instrument or endorsement, the interest of the lessee shall cease.

(2) No lease which is subject to a charge or a sublease shall be surrendered without the consent in writing of the proprietor of the charge or sublease.

See commentary on s64.

Determination of leases

► 64. (1) Where—

- (a) the period of a lease has expired; or
- (b) an event upon which a lease is expressed to determine has happened; or
- (c) a lessor has lawfully re-entered and recovered possession of the land leased; or
- (d) a notice duly given to determine the lease has expired,

the lease and every other interest appearing on the register relating to the lease shall thereupon determine, and if the lease is registered the lessor may apply in writing to the Registrar to cancel its registration.

(2) An application under this section shall be supported by such evidence of the matters giving rise to the determination and the recovery of possession by the lessor as the Registrar may require, and the Registrar on being satisfied of the matters set forth in the application shall cancel the registration of the lease.

Section 63 sets out a simple procedure for surrendering a lease. It originated in Sud 53, which was labelled 'Termination and surrender of lease', and was repeated as KLR(SA)O 54. That section, however, did not deal satisfactorily with termination, for it merely provided that "the Registrar shall on proof to his satisfaction of the termination of a registered lease enter in the register a note of the fact of termination". The Lagos Working Party, when explaining Lag79, which dealt with the question of termination, said, "Clause 79 sets out the procedure to be followed when a lease is determined ... In our experience the circumstances in which the Registrar shall cancel a lease have caused considerable difficulty and we therefore think it desirable to follow the more detailed provisions of the British Guiana Ordinance which, in their turn, come from Singapore and the Australian Acts." Lag 79 followed the lines of BG 76, which was based on Sing 71, and KLRA, 64 is also based on Sing 71. It does not, however, provide (like Sing 71(3)) that the Registrar may of his own motion enter a notification of the determination of a lease which has expired by effluxion of time. It not infrequently happens that the lessee 'holds over' on the terms and

conditions of the registered lease, and therefore the lease should not be cancelled unless, application is made for its cancellation.

Division 3 - Charges

One of the principal claims made for registration of title is that it enables money to be raised on the security of land, and this Division now makes provision for the transaction which is generally known as a 'mortgage'. The word 'mortgage', however, does not appear in the Division, or indeed anywhere in the Act. 'Charge', in this connection, is a much less familiar word, and 'chargor' (like 'mortgagor' not even pronounced as spelt) and 'chargee' are contrived words which do not appear in the ordinary dictionary, though their meaning is obvious enough as soon as the meaning of 'charge' is understood. The more familiar word 'mortgage' has been avoided because of its import in English land law, where it has a long and involved history dating back into the twelfth and thirteenth centuries when "the forms of mortgage were influenced by the law against usury, which was both a crime and a sin".²² Before 1926 a mortgage in England was usually a conveyance in fee simple (i.e. an outright transfer) subject to a 'proviso for redemption' which was a covenant by the mortgagee (the lender) to re-convey if the money was paid back on a fixed date. As might be expected, Equity early intervened to compel the mortgagee to re-convey the property to the mortgagor even after the fixed date; at first, only in cases of accident, mistake, or special hardship, but later in all cases, to such an extent that, if the security was to mean anything at all, some limit had to be set to the equitable right to redeem. Equity therefore devised the decree of 'foreclosure' whereby the right to redeem the property was 'foreclosed', i.e. declared to be at an end, and the mortgagee was then left with an unchallengeable fee simple.

Thus the English mortgage deed was an outright conveyance (though there was no intention to transfer the property) and it fixed for the repayment of the purchase price (really a loan) a date (usually six months ahead) which neither party expected to be observed. "It does not in the least explain the rights of the parties; it suggests that they are other than really they are", said Maitland, who called the mortgage deed "one long *suppressio veri* [suppression of truth] and *suggestio falsi* [suggestion of the false]".²³

In England the Law of Property Act 1925 abolished mortgage by conveyance of the fee simple and provided two methods for effecting legal mortgages of freehold:

- (i) A demise for a term of years absolute subject to a provision for cesser on redemption (i.e. a lease, usually for 3,000 years, containing a provision that it shall cease on repayment of the loan); or
- (ii) A charge expressed to be by way of legal mortgage.

But it is unnecessary to consider these methods, since the Law of Property Act 1925 does not apply to those many jurisdictions still using the old form of English

²² M & W 881

²³ Maitland *Equity* 269

mortgage or procedure derived from it. In any case, the preparation of the Registered Land Act presented a golden opportunity to put this important matter on a straightforward and intelligible basis, and this opportunity has been fully taken. The process provided in this Division is complete in itself, and is relatively easy to understand. There should be no need to study the ramifications of mortgages, as they previously existed, though some reference to them will help to explain the need for and purpose of the provisions now made. The Division is an outstanding example of the "much-needed simplification and clarification of land law" which, it was claimed in the Preface, a system of registration of title can offer. It proves that claim to be no idle boast.

Form and effect of charges

► 65. (1) A proprietor may, by an instrument in the prescribed form, charge his land, lease or charge to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfilment of a condition, and the instrument shall, except where section 74 of this Act has by the instrument been expressly excluded, contain a special acknowledgement that the chargor understands the effect of that section, and the acknowledgement shall be signed by the chargor or, where the chargor is a corporation, by one of the persons attesting the affixation of the common seal.

(2) A date for the repayment of the money secured by a charge may be specified in the charge instrument, and where no such date is specified or repayment is not demanded by the chargee on the date specified the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee.

(3) The charge shall be completed by its registration as an encumbrance and the registration of the person in whose favour it is created as its proprietor and by filing the instrument.

(4) A charge shall not operate as a transfer but shall have effect as a security only.

(5) There shall be included, in an instrument of charge securing the fulfilment of a condition or the payment of an annuity or other periodical payment not of the nature of interest on a capital sum, such provisions as the parties think fit for disposing, subject to the provisions of section 78 of this Act, of the money which may arise on the exercise by the chargee of his power of sale, either by setting aside the proceeds of sale or part thereof and investing it to make the future periodical payments, or by payment to the chargee of such proceeds or part thereof to the extent of the estimated capital value of the chargee's interest, or otherwise.

Subsection (1) creates the power to charge and requires the execution of an instrument. (Compare E 25(1) and Sing 53(1).) Land or a lease or a charge may be charged, and special provision is included to ensure that the chargor understands the liabilities to which he is subject. This was inspired by ITPA 69 (which is labelled 'Power of sale where valid') and is an important safeguard, particularly in view of the prevalence in some developing countries of the idea that registration of title automatically enables a loan to be raised with no risk to the borrower. It is essential that any intending chargor should understand that charging land subjects him to the risk of losing the land, should he default on the repayment of the capital when it is due, or fail to pay the interest. Land Control Boards (see Chapter 24) should also understand that when considering an application to charge land they should apply to it the criteria that they would apply to an application to sell it, for charging land may lead to its outright transfer just like selling it.

Subsection (2) enables the date to be fixed for the repayment of the loan, but provides for what is more usual, namely the fact that the parties do not wish to fix a day, or even if they do fix it are quite likely not to want to stick to it when it comes. In such case the money shall be deemed repayable three months after the demand in writing by the chargee. This subsection was devised by the Kenya Committee to make really clear what hitherto had been one of the most puzzling points in the whole business.

Subsection (3) establishes the registration procedure.

Subsection (4) would appear to be quite unnecessary to anybody unfamiliar with the English mortgage, for it would never have occurred to him that the charge did transfer the property, nor is there anything within the Act to suggest that it does. However it can do no harm to put the matter beyond even unreasonable doubt. The subsection is derived from Sing 53(3), though, rather oddly, in his commentary (at page 129) Baalman points out that there is nothing in that Ordinance which prevents a mortgage being made by way of absolute transfer.

Subsection (5) requires the parties to a charge which is to secure something other than a capital sum (e.g. an annuity or the fulfilment of some condition) to specify whether the money derived from the exercise of the power of sale is to be invested to provide further periodical payments, or is to be paid (wholly or in part) to the chargee as representing the estimated capital value of his interest. This subsection thus manages to dispense with the technical distinction which Torrens, in his South Australia Act in 1858, made between 'mortgages' to secure a debt and 'incumbrances' (called 'charges' in later legislation elsewhere) for securing the periodical payments of money which was not interest on a loan. This unnecessary distinction between mortgages and charges has, however, been introduced into Singapore and Guyana.

Second or subsequent charges

► 66. A proprietor whose land, lease or charge is subject to a charge may create a second or subsequent charge in the same manner as the first charge and the same provisions shall apply thereto, but any sale

under the power expressed or implied in any such charge shall be expressed to be subject to all prior charges unless all those charges have been discharged.

This section empowers the creation of second and subsequent charges, and saves prior charges. The virtue of this simple provision will be appreciated by those who still use the pre-1926 English form of mortgage, and particularly by an owner who has mortgaged property worth, say, £2,000 to secure a loan of £500 and wants to raise a further loan; if the first mortgagee already holds the fee simple, any further mortgage will have to be equitable. The section repeats Lag 81 which was derived from Sar 149. There is no such provision in the Singapore Ordinance, Baalman remarking (Singapore 130) that there is no limit to the number of successive mortgages which can be registered in respect of one piece of land. Though this can be inferred from the provisions relating to the application of the proceeds of sale, (see s78), it was thought preferable to make express provision.

Statutory charges.

► 67. Nothing in this Part affects the provisions of any Act which provides for the registration of a notification or note in respect of any sum of money owing to a public body.

This section was introduced after the Kenya Committee had completed its draft. It has not been repeated in subsequent Acts elsewhere.

Presumption that money paid is interest.

► 68. If any question arises whether any payment made by the chargor is in respect of principal or interest, such payment shall be presumed to be in respect of interest to the extent of all interest which is due and payable at the date of payment.

This is a simple commonsense provision which avoids the possibility of any confusion. It did not appear in the Lagos Bill: but was prompted by the ITPA.

Agreements implied in charges.

► 69. There shall be implied in every charge, unless the contrary is expressed therein, agreements by the chargor with the chargee binding the chargor—

(a) to pay the principal money on the day therein appointed and, so long as the principal money or, any part thereof remains unpaid, to pay interest there on, or on so much thereof as for the time being remains unpaid, at the rate, at the times and in manner therein specified;

(b) to pay all rates, taxes and other outgoings which are at any time payable in respect of the charged property;

- (c) to repair and keep in repair all buildings and other improvements upon the charged land or comprised in the charged lease and to permit the chargee or his agent, at all reasonable times until the charge is discharged and after reasonable notice to the chargor, to enter the land and examine the state and condition of such buildings and improvements;
- (d) to insure and keep insured all buildings upon the charged land or comprised in the charged lease against loss or damage by fire in the joint names of the chargor and chargee with insurers approved by the chargee to the full value thereof;
- (e) in the case of a charge of agricultural land, to farm the land in accordance with the rules of good husbandry within the meaning of any law for the time being in force governing agricultural tenancies;
- (f) in the case of a charge of land or of a lease, not to lease the charged land or any part thereof, or sublease the whole or any part of the land comprised in the charged lease, for any period longer than one year without the previous consent in writing of the chargee, but such consent shall not be unreasonably withheld;
- (g) not to transfer the land, lease or charge charged or any part thereof without the previous written consent of the chargee but such consent shall not be unreasonably withheld;
- (h) in the case of a charge of a lease, during the continuance of the charge to pay the rent reserved by the lease and observe and perform the agreements and conditions thereof, and to keep the chargee indemnified against all proceedings, expenses and claims on account of the non-payment of the said rent or any part thereof, or the breach or non-observance of the said agreements and conditions or any of them, and, if the lessee has an enforceable right to renew the lease, to renew it;
- (i) where the charge is a second or subsequent charge, that the chargor will pay the interest from time to time accruing due on each prior charge when it becomes due, and will at the proper time repay the principal money due on each prior charge; and
- (j) where the chargor fails to comply with any of the agreements implied by paragraphs (b), (c), (d), (e), (g) and (h) of this section that the chargee may spend such money as is necessary to remedy the breach, and may add the amount so spent to the principal

money, and that thereupon the amount shall be deemed for all purposes to be part of the principal money secured by the charge.

This section sets out the agreements on the part of the chargor which will be implied in every charge unless they are expressly negatived. These follow KLR(SA)O 57, which had repeated Sud 61 (presumably inspired by E 28), but include an agreement to insure which had been added in Lag 69. The Kenya Committee also added, what is common form in private mortgages, namely an obligation to observe the obligations imposed by prior charges, and a power for the chargee to spend money in certain circumstances to preserve the security, adding the amount so spent to the principal money due under the charge.

In Mal 63 this section (we suggest unwisely and unnecessarily) was reduced to "such agreements by the chargor with the chargee as may be prescribed by the Minister", but the Kenya version was restored complete in T & C 67.

Chargee's consent to transfer

► 70. Where a charge contains an agreement, express or implied, by the chargor with the chargee that he will not transfer the land, lease or charge charged or any part thereof without the written consent of the chargee, the agreement shall be noted in the register, and no transfer by the chargor shall be registered until the written consent of the chargor is in respect of principal or interest, such payment shall be presumed to be in respect of interest to the extent of all interest which is due and payable at the date of payment.

This is a simple commonsense provision which avoids the possibility of any confusion. It did not appear in the Lagos Bill but was prompted by the ITPA.

Agreements implied in charges.

► 69. There shall be implied in every charge, unless the contrary is expressed therein, agreements by the chargor with the chargee binding the chargor—

(a) to pay the principal money on the day therein appointed and, so long as the principal money or any part thereof remains unpaid, to pay interest there on, or on so much thereof as for the time being remains unpaid, at the rate, at the times and in manner therein specified;

(b) to pay all rates, taxes and other outgoings which are at any time payable in respect of the charged property;

(c) to repair and keep in repair all buildings and other improvements upon the charged land or 'comprised in the charged lease and to permit the chargee or his agent, at all reasonable times until the charge is discharged and after reasonable notice to the

chargor, to enter the land and examine the state and condition of such buildings and improvements;

(d) to insure and keep insured all buildings upon the charged land or comprised in the charged lease against loss or damage by fire in the joint names of the chargor and chargee with insurers approved by the chargee to the full value thereof;

(e) in the case of a charge of agricultural land, to farm the land in accordance with the rules of good husbandry within the meaning of any law for the time being in force governing agricultural tenancies;

(f) in the case of a charge of land or of a lease, not to lease the charged land or any part thereof, or sublease the whole or any part of the land comprised in the charged lease, for any period longer than one year without the previous consent in writing of the chargee, but such 'consent shall not be unreasonably withheld;

(g) not to transfer the land, lease or charge charged or any part thereof without the previous written consent of the chargee but such consent shall not be unreasonably withheld;

(h) in the case of a charge of a lease, during the continuance of the charge to pay the rent reserved by the lease and observe and perform the agreements and conditions thereof, and to keep the chargee indemnified against all proceedings, expenses and claims on account of the non-payment of the said rent or any part thereof, or the breach or non-observance of the said agreements and conditions or any of them, and, if the lessee has an enforceable right to renew the lease, to renew it;

(i) where the charge is a second or subsequent charge, that the chargor will pay the interest from time to time accruing due on each prior charge when it becomes due, and will at the proper time repay the principal money due on each prior charge; and

(j) where the chargor fails to comply with any of the agreements implied by paragraphs (b), (c), (d), (e), (g) and (h) of this section that the chargee may spend such money as is necessary to remedy the breach, and may add the amount so spent to the principal money, and that thereupon the amount shall be deemed for all purposes to be part of the principal money secured by the charge.

This section sets out the agreements on the part of the chargor which will be implied in every charge unless they are expressly negatived. These follow KLR(SA)O 57, which had repeated Sud 61 (presumably inspired by E 28), but

include an agreement to insure which had been added in Lag 69. The Kenya Committee also added, what is common form in private mortgages, namely an obligation to observe the obligations imposed by prior charges, and a power for the chargee to spend money in certain circumstances to preserve the security, adding the amount so spent to the principal money due under the charge.

In Mal 63 this section (we suggest unwisely and unnecessarily) was reduced to "such agreements by the chargor with the chargee as may be prescribed by the Minister", but the Kenya version was restored complete in T & C 67.

Chargee's consent to transfer

► 70. Where a charge contains an agreement, express or implied, by the chargor with the chargee that he will not transfer the land, lease or charge charged or any part thereof without the written consent of the chargee, the agreement shall be noted in the register, and no transfer by the chargor shall be registered until the written consent of the chargee, verified in accordance with section 10 of this Act, has been produced to the Registrar.

This is a similar safeguard to that provided in respect of leases by s48 it must be read in conjunction with s69(g) above (which implies this agreement in a charge) and s74(3)(c)(i)(a) below (whereby a transferee from the chargor is given protection).

Variation of charges

► 71. The amount secured, the method of repayment, the rate of interest or the term of the charge may be varied by the registration of an instrument of variation executed, by the parties to the charge, but no such variation shall affect the rights of the proprietor of any subsequent charge, unless he has consented to the variation in writing on the instrument of variation.

This section makes the same provision as E 3 1. It repeats Lag 84, which was derived from BG 82.

Right of redemption

► 72. (1) Subject to the provisions of s section, a chargor, on payment of all money due and owing under the charge at the time of payment or on fulfilment of any condition secured thereby and on payment of any costs or expenses properly incurred by the chargee in exercising any power conferred on him by section 74 of this Act, may redeem the charged land, lease or charge at any time before it has been sold under section 77 of this Act, and any agreement or provision which purports to deprive the chargor of this right of redemption shall be void; and, for the purposes of this subsection, land, a lease or a

charge shall be deemed to have been sold when a bid has been accepted at the auction sale.

(2) If the chargor wishes to redeem the charged land, lease or charge before the date specified in the charge for repayment, he shall be entitled to do so on payment to the chargee, in addition to any other money then due or owing under the charge, interest on the principal sum secured thereby up to that date.

(3) If the chargor seeks to redeem the charged land, lease or charge after the date specified in the charge, or where no such date is specified, he shall give the chargee three months' notice of his intention to redeem the charge or shall pay him three months' interest in lieu thereof.

(4) If at any time the chargor is entitled and desires to repay the money secured by the charge, and the chargee is absent or cannot be found, or the Registrar is satisfied that the charge cannot be discharged otherwise, the chargor may deposit the amount due with the Registrar in trust for the person entitled thereto, and thereupon the obligations of the chargor under the charge shall cease, and the Registrar shall cancel the registration of the charge and shall pay the amount deposited to the chargee if the chargee applies for it within six years of the date of deposit, and if the amount is not so paid it shall be paid into the consolidated fund.

This section clarifies the chargor's right of redemption, and it should be specially noted that he cannot be deprived of this right. If, however, he wishes to exercise it before the date fixed for repayment he must pay the interest which would be due up to that date. If the date has passed, or no date is specified, he must give three months' notice of his intention to redeem.

Subsection (4) (derived from Sud 67 via KLR(SA)O 58(4) and Lag 85(4)) makes provision for the case where the chargee is absent or cannot be found, and enables the chargor to pay the money to the Registrar in trust for the person entitled, who must apply for it within six years; otherwise it is credited to general revenue.

Right of third party to transfer of charge

► 73. On his tendering to the chargee such sums as would have been payable to the chargee if the chargor had sought to redeem the charge under section 72 of this Act, any of the following persons, that is to say—

- (a) any person, other than the chargor, who has an interest in the land, lease or charge charged; or

(b) any surety for the payment of the amount secured by the charge; or

(c) any creditor of the chargor who has obtained a decree for sale of the charged land, lease or charge,

may require the chargee to transfer the charge to him.

This section is inspired by ITPA 92, which provides for subrogation. It enables certain specified persons to redeem the charge in the same way as the chargor can redeem it and to require the chargee to transfer the charge to the redeemer. For example, this is a useful provision when a surety for a debt secured by a charge is called upon to honour his guarantee.

Chargee's remedies

► 74. (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.

(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under subsection (1) of this section, the chargee may—

(a) appoint a receiver of the income of the charged property; or

(b) sell the charged property:

Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection.

(3) The chargee shall be entitled to sue for the money secured by the charge in the following cases only—

(a) where the chargor is bound to repay the same;

(b) where, by any cause other than the wrongful act of the chargor or chargee, the charged property is wholly or partially destroyed or the security is rendered insufficient and the chargee has given the chargor a reasonable opportunity of providing further security which will render the whole security sufficient, and the chargor has failed to provide such security;

(c) where the chargee is deprived of the whole or part of his security by, or in consequence of, the wrongful act or default of the chargor:

Provided that—

- (i) in the case specified in paragraph (a) of this subsection—
 - (a) a transferee from the chargor shall not be liable to be sued for the money unless he has agreed with the chargee to pay the same; and
 - (b) no action shall be commenced until a notice served in accordance with subsection (1) of this section has expired;
- (ii) the court may, at its discretion, stay a suit brought under paragraph (a) or paragraph (b) of this subsection, notwithstanding any agreement to the contrary, until the chargee has exhausted all his other remedies against the charged property, unless the chargee agrees to discharge the charge.

This is one of the most important sections of the whole Act, and is one which should be understood by every prospective chargor, for it makes quite clear what remedies the chargee has if the chargor defaults.

Subsection (1) provides for the chargee to serve three months' notice of default, when such default has continued for one month. (This is derived from Vic 76(1); see also LPA 103(i).)

Subsection (2) confers two main powers on the chargee: the power to appoint a receiver and the power to sell the charged property. These powers (which are explained in detail below) are alternatives and cannot be exercised together; a chargee who has appointed a receiver cannot sell without serving another notice.

Subsection (3) confers the power to sue for the charge-money in certain cases. In the case of (a), however, it should be remembered that s69(a) implies an agreement by the chargor to pay, and so, unless that agreement has been expressly excepted, the chargee will have the right to sue in every case. Reasonable safeguards, designed to protect the chargor, have been included in the provisos.

These 'remedies' must now be explained. In English law, and under the ITPA, the mortgagee has four main powers in addition to his right to sue for the money. The first two of these - foreclosure and sale - are primarily for recovery of capital, while the other two - taking possession and appointing a receiver - are for recovery of interest. Foreclosure and sale are necessarily final remedies, since they put an end to the whole transaction; the other two remedies are useful if the mortgagee wishes to keep the mortgage alive and merely to enforce punctual payment of the interest. The rights to foreclose and to take possession arise from the very nature of the security. The power to sell and to appoint a receiver are improvements designed by conveyancers and now incorporated by statute in the great majority of mortgages.

The matter was naturally carefully considered by the Kenya Working Party in 1957, and they decided that it was undesirable to give the chargee a power of sale; instead it was provided (in KLR(SA)O 59) that, in default of repayment, he must apply to the court and the land would then be put up for sale (twice if necessary)

with a reserve price. If no sale was effected the chargee could be granted a decree for foreclosure and that would extinguish the debt secured by the charge. The procedure was derived from the Sudan Civil Justice Ordinance and had much to commend it as serving the needs of a community containing a wide variation in sophistication and business acumen. In Lagos, however, as a power of sale was already allowed, the Working Party there decided to retain it and not to make it dependent on a court order (Lag 87). They also provided for the appointment of a receiver (Lag 89). Foreclosure was possible as a last recourse (Lag 90), but the power to enter into possession was abolished (Lag 91).

It was these provisions that the Kenya Committee considered in 1961, and they reached the conclusion that, as the chargee was given the right to buy in at any auction held in exercise of the power of sale and could acquire the property by the simple expedient of bidding for it, there could be no need to perpetuate the lengthy and costly court action required for foreclosure. As regards the remedies designed to keep the charge alive, the chargee's power of taking possession puts him in such a difficult position that it is seldom exercised; he becomes liable to account very strictly not only for all that he receives but also for all that he ought to have received had he managed the property with due diligence.²⁴ The normal means of intercepting the income of the charged property is now to appoint a receiver, and therefore it was decided that, in this Act, no power should be given to the chargee to take possession.

Chargee's powers of leasing

► 75. (1) The proprietor of a charge of land or a lease who has appointed a receiver under the powers conferred on him by section 74 of this Act shall, in the absence of any express provision to the contrary, contained in the charge, have power, subject to the provisions of this Act and of any other written law—

- (a) to grant leases in respect of the charged land or the land comprised in the charged lease or any part or parts thereof; and
- (b) to accept a surrender of any lease so granted and of any lease created by the chargor,

and may, for such purposes, execute in the place of the chargor any instrument required to effect such lease or surrender.

(2) Every lease granted by a chargee shall—

- (a) be made to take effect in possession not later than twelve months after its date;
- (b) reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without a fine or premium being obtained;

²⁴ See M & W 909

- (c) be for a term not exceeding twenty-one years; and
- (d) contain a declaration by the chargee that he has appointed a receiver, with the date of the appointment.

This section was not included in the draft prepared by the Kenya Committee but was inserted in the Bill before it was enacted in 1963. It confers on a chargee who has appointed a receiver a power to grant a lease of the charged land; perhaps, therefore, it would more appropriately have followed the next section which provides how the receiver is to be appointed and what his powers and duties are, and this in fact is where it appears as Mal 70 and T & C 74. It is based on LPA 99, which empowers a mortgagor or a mortgagee in possession to make agricultural leases or occupational leases for any term not exceeding twenty-one years "to take effect in possession not later than twelve months after its date". LPA 99(6) reads: "Every 5 such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken." A 'fine' in this context is a 'premium' paid for the grant or renewal of a lease, and the inclusion of both words (as if they had different meanings) in KLRA 75(2)(b) makes it unnecessarily confusing. Yet this wording has been carried forward unchanged into Mal 70(2)(b) and T & C 74(2)(b).

Appointments, powers, remuneration and duties of receiver

- ▶ 76. (1) The appointment of a receiver under the powers conferred by section 74 of this Act shall be in writing signed by the chargee.
- (2) A receiver may be removed at any time and a new receiver appointed by writing signed by the chargee.
- (3) A receiver appointed under this section shall be deemed to be the agent of the chargor for the purposes for which he is appointed; and the chargor shall be solely responsible for the receiver's acts and defaults unless the charge otherwise provides.
- (4) The receiver shall have power to demand and recover all the income of which he is appointed receiver, by action or otherwise, in the name of the chargor, and to give effectual receipts accordingly for the same.
- (5) A person paying money to the receiver shall not be concerned to inquire into the validity of the receiver's appointment.
- (6) The receiver shall be entitled to retain out of any money received by him all costs, charges and expenses incurred by him as receiver, and, for his remuneration, a commission at such rate, not exceeding five per cent of the gross amount of all moneys received, as is specified in his appointment, or if no rate is so specified at the rate of five per cent of that gross amount, or such other rate as the chargor

and the chargee and other chargees, if any, agree or the court thinks fit to allow on application made by the receiver for that purpose.

(7) The receiver shall apply insurance money in making good the loss or damage in respect of which the money is received.

(8) Subject to the provisions of subsection (7) of this section, the receiver shall apply all money received by him in the following order of priority

(a) in discharge of all rents, rates, taxes and outgoings whatever affecting the charged property; and

(b) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the charge in right whereof he is receiver; and

(c) in payment of his commission, costs, charges and expenses and of the premiums on fire, life and other insurance, if any, properly payable under the charge instrument or under this Act, and the cost of executing necessary or proper repairs directed in writing by the chargee; and

(d) in payment of the interest accruing due in respect of any principal money due under the charge; and

(e) in or towards the discharge of the money secured by the charge, if so directed in writing by the chargee,

and shall pay the residue, if any, of the money received by him to the person who, but for the appointment of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the charged property.

This section is derived from LPA 109 (which reproduced with amendments the statutory power conferred by the Conveyancing Act 1881), and it was introduced into India as s69A of the Transfer of Property Act 1882 by the Transfer of Property (Amendment) Act 1929, an amendment adopted in Kenya by the Indian Transfer of Property (Amendment) Ordinance 1959 s69C. It should be noted that, as the receiver only has power to deal with income and is not able to sell or lease the property, there is no necessity for his appointment to be registered.

Power of sale

► 77. (1) A chargee exercising his power of sale shall act in good faith and have regard to the interests of the chargor, and may sell or concur with any person in selling the charged land, lease or charge, or any part thereof, together or in lots, by public auction for a sum payable in one amount or by instalments, subject to such reserve price and conditions of sale as the chargee thinks fit, with power to buy in at

the auction and to resell by public auction without being answerable for any loss occasioned thereby, and may himself bid at any auction.

(2) Where the chargor is in possession of the charged land or the land comprised in the charged lease, the charge shall become entitled to recover possession of the land upon a bid being accepted at the auction sale.

(3) A transfer by a chargee in exercise of his power of sale shall be made in the prescribed form, and the Registrar may accept it as sufficient evidence that the power has been duly exercised, and any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power.

(4) Upon registration of such transfer, the interest of the chargor as described therein shall pass to and vest in the transferee freed and discharged from all liability on account of the charge, or on account of any other encumbrance to which the charge has priority (other than a lease, easement or profit to which the chargee has consented in writing).

(5) A chargee, in exercising his power of sale, shall have the same powers and rights in regard to easements and restrictive agreements as are conferred upon a proprietor by sections 94 and 95 of this Act.

This section makes various stipulations with regard to the exercise of the power of sale, and was mainly derived from Vic 77.

Subsection (1) differs from LPA 101(1)(i) in two particulars: first, the chargee is required to act in good faith and to have regard to the interests of the chargor (a provision derived from Vic 77(1) to give statutory force to a decision to that effect in *Pendlebury v. Colonial Mutual Life Assurance Society Ltd.* (1912) 13 C.L.R. 676), and secondly, the power to sell by private contract has been omitted and this power is restricted to sale only by public auction. The chargee may buy in at the auction.

Subsection (2) was new but seemed clearly necessary.

Subsections (3) and (4) are derived from Vic 77(2) and (4) and tie up loose ends.

Subsection (5) makes it clear that, in exercising his power of sale, the chargee may grant easements or make a restrictive agreement (see ss94 and 95).

Application of purchase money

► 78. The purchase money received by a chargee who has exercised his power of sale, after discharge of any prior encumbrances to which the sale is not made subject or after payment into court of a sum sufficient to meet any such prior encumbrances, shall be applied—

- (a) first, in payment of all costs and expenses properly incurred and incidental to the sale or any attempted sale;
- (b) secondly, in accordance with any express provision in the charge (as required by section 65 (5) of this Act) for disposing of such money and, in the absence of any such express provision, in discharge of the money due to the chargee at the date of the sale; and
- (c) thirdly, in payment of any subsequent charges in the order of their priority,

and the residue of the money so received shall be paid to the person who immediately before the sale was entitled to redeem the charged land, lease or charge.

This section sets out the order in which the proceeds of the sale are to be applied. This follows LPA 105 (also followed by Vic 77) and ITPA 69C, except that it also covers the position that would arise if, for instance, an annuitant whose annuity is secured by a charge exercises his power of sale.

Variation of powers

► 79. The provisions of sections 72(2) and (3), 74, 75, 76 and 77 of this Act may in their application to a charge be varied or added to in the charge:

Provided that any such variation or addition shall not be acted upon, except where the chargee is the Land and Agricultural Bank of Kenya or the Settlement Fund Trustees, unless the court, having regard to the proceedings and conduct of the parties and to the circumstances of the case, so orders.

The Kenya Committee included this section in their draft with some hesitation, since they recognized that there were strong arguments for not allowing any variation of the practice which had been so carefully worked out. The powers which have been conferred in this Division are all that a chargee needs to enforce his security speedily and effectively, but the Committee thought it would be wrong to prohibit other arrangements if the parties wanted them. If, however, variation were to be allowed, additional safeguards were clearly necessary to protect unsuspecting chargors from harsh and unconscionable agreements which might be foisted on them by unscrupulous chargees, and it was therefore provided that no variation of powers conferred in the Act should be acted upon without an Order of the Court. (The Land and Agricultural Bank of Kenya and the Settlement Fund

Trustees are excepted from this provision, since they have express powers conferred by other legislation.) This protection has been carried forward into Mal 73 and even into T & C 77.

No right of entry into possession or foreclosure

► 80. For the avoidance of doubt, it is hereby declared that the chargee shall not be entitled to foreclose, nor to enter into possession of the charged land or the land comprised in a charged lease or to receive the rents and profits thereof by reason only that default has been made in the payment of the principal sum or of any interest or other periodical payment or of any part thereof or in the performance or observance of any agreement expressed or implied in the charge.

This section leaves no doubt that foreclosure and taking possession are remedies to which the chargee is no longer entitled.

Discharge of charge

► 81. (1) A discharge, whether of the whole or of a part of a charge, shall be made by an instrument in the prescribed form, or (if of the whole) the word "Discharged" may be endorsed on the charge or the duplicate or triplicate and the endorsement executed by the chargee and dated.

(2) A discharge shall be completed by cancellation in the register of the charge, or part thereof as the case may require, and filing the instrument of discharge or the endorsed charge.

This section sets out the procedure for discharging a charge (cf. E 35 and ER 151), and includes a provision similar to that for surrendering a lease.

Satisfaction of charges

► 82. Upon proof to the satisfaction of the Registrar—

(a) that all money due under a charge has been paid to the chargee or by his direction; or

(b) that the event or circumstance has occurred upon which, in accordance with the provisions of any charge, the money thereby secured ceases to be payable, and that no money is owing under the charge,

the Registrar shall order the charge to be cancelled in the register, and thereupon the land, lease or charge shall cease to be subject to the charge.

This section, which is derived from Sing 63(1), enables the Registrar to cancel a charge when he is satisfied that it has determined, even though no formal discharge has been presented or can be obtained (as required by s81); for example, when an annuitant has died and formal receipts have not been kept of each periodical payment.

Tacking and further advances

► 83. (1) Provision may be made in the charge for a chargee to make further advances or give credit to the chargor on a current or

continuing account, but, unless that provision is noted in the register, further advances shall not rank in priority to any subsequent charge except with the consent in writing of the proprietor of the subsequent charge.

(2) Except as provided in this section, there is no right to tack.

In England before 1926 there were two forms of tacking. A prior mortgagee who made a subsequent advance to the mortgagor without notice of an intermediate advance, might 'tack' his second to his first mortgage and recover both before the intermediate mortgagee could recover anything. The other form of tacking was where a mortgagee lent more money on the strength of the same security, the commonest example being a mortgage to secure a bank overdraft which might be increased as further cheques were cashed. Save in regard to the making of further advances, the right to tack was abolished in England by LPA 94(3). This Kenya section similarly conserves the right to make further advances (also subject to safeguards) and abolishes all other forms of tacking.

Consolidation

► 84. A chargee has no right to consolidate his charge with any other charge unless the right is expressly reserved in the charges or in one of them and is noted in the register against all the charges so consolidated.

Consolidation, in this context, is the right of a person in whom two or more mortgages are vested to refuse to allow one mortgage to be redeemed unless the other or others are also redeemed. This section follows LPA 93 (repeating a similar provision in the Conveyancing Act 1881 which put an end to consolidation unless express provision was made for it in one of the mortgage deeds or in certain specified circumstances).

Similar provisions to ss83 and 84 were made by Tan 60 and 61. Tacking and consolidation are, in fact, typical of complexities which case law and practice can produce but which can be very easily rationalized by statutory provision.

Division 4 - Transfers

This Division makes provision for transfers, and comes naturally after the Divisions providing for leases and charges, which are both capable of transfer.

Transfer

► 85. (1) A proprietor may transfer his land, lease or charge to any person (including himself), with or without consideration, by an instrument in the prescribed form.

(2) The transfer shall be completed by registration of the transferee as proprietor of the land, lease or charge and by filing the instrument.

(3) The transferee of a charge may require the chargor to execute the transfer for the purpose of acknowledging the amount due under the charge at the date of execution of the transfer.

Subsections (1) and (2) enable a proprietor to transfer his land, lease, or charge with or without consideration and, as in all dispositions, an instrument is required and the transaction is completed by registration. The words "including himself" - presumably intended to make it clear that a person could transfer to himself as trustee - have been omitted from subsequent versions of the Act.

Subsection (3), enabling the transferee of the charge to require the chargor to acknowledge the amount due under the charge, is derived from Sud 64 via KLR(SA)O 60(3) (where it was part of a section entitled 'Transfer of charge') and Lag 97(3).

Certificates as to payment of rates

► 86. The Registrar shall not register any instrument purporting to transfer or to vest any land, or a lease of land situated within the area of a rating authority unless there is produced to the Registrar a written statement by the authority that all rates and other charges payable to the authority in respect of the land for the last twelve years have been paid, expressed to be available until the day upon which, or until a day not earlier than that upon which, the instrument was registered:

Provided that no such statement shall be required where the instrument relates to—

- (i) land which is subject to a lease, and the leasehold interest is, by virtue of any written law, the rateable property; or
- (ii) a lease, and the land or another leasehold interest is, by virtue of any written law, the rateable property.

This section, originally drafted as subsection (4) of the previous section, was put forward by the Kenya Committee with some diffidence. Though there was a similar provision in KRTA 33(2), there is no equivalent in KLR(SA)O (nor in England). The Committee pointed out, however, that "the circumstances in Kenya are such that this type of prohibition probably represents the last line of defence by a local authority of its income from rates, and as such should be included". They added the proviso which exempts an instrument relating to an interest which is not rateable. The section has become common form, for it was carried forward unchanged into Mal 80 and T & C 84.

In Kenya in 1968 the following section was inserted to require a similar certificate in respect of Government rent and, to be logical, a similar provision should be included in any subsequent version of the Act which includes the above section.

Certificate as to rent

► 86A. The Registrar shall not register any instrument purporting to transfer or create any interest in land, unless a certificate is produced to him certifying that no rent is owing to the Government in respect of the land, or that the land is freehold.

See comment on s86 above. This section has not been included in the Malawi or Caribbean versions of the KRLA.

Transfer to take effect immediately

► 87. A transfer shall not be expressed to take effect on the happening of any event or on the fulfilment of any condition or at any future time.

This section is designed to prevent a transfer from being made subject to a condition precedent (i.e. a condition which delays vesting until a specified event has happened), or to take effect at some future time. Since the purpose of the register is to show existing ownership it is obvious that such a transfer should not be registered and, indeed, in Mal 81 and T & C 85 this section reads:

"[Mal 81; T & C 85] A transfer to take effect on the happening of any event or on the fulfilment of any condition or at any future time shall not be capable of registration."

Conditions repugnant to interest transferred

► 88. (1) Any condition or limitation purporting to restrain absolutely a transferee or any person claiming under him from disposing of the interest transferred is void.

(2) Subject to section 12 of the Trusts of Land Act, any condition or limitation made in relation to a transfer which purports to determine the interest of the transferee on the happening of any future event or on the failure of any future event to happen is void.

(3) Except as provided in Division 5 of this Part, no transfer of land shall contain a direction that the land shall be used or enjoyed by the transferee in a particular manner.

(4) This section does not apply to Wakfs.

This section avoids certain conditions which are repugnant to the interest transferred, and was prompted by the ITPA.

Subsection (1) is aimed at stopping any private attempt to restrict the alienability of land, and is derived from ITPA 10, which makes such a condition void when property is transferred.

Subsection (2) prevents the imposition of a condition subsequent (i.e. a condition which, if fulfilled, would terminate the ownership - e.g. "to my daughter X until she marries"). Such a condition would offend against 'absolute ownership' but the situation could easily be covered by a lease.

Subsection (3) repeats a similar provision in ITFA 11.

Subsection (4) avoids the thorny question of Wakfis - religious or charitable trusts under Islamic law - which must be tackled under separate legislation.

Transfer of part

► 89. No part of the land comprised in a register shall be transferred unless the proprietor has first subdivided the land and new registers have been opened in respect of each subdivision.

This section requires that land must be officially subdivided before part of it can be transferred. This is much simpler in practice than the English transfer of part, as was explained in Chapter 19.

Transfers of leases

► 90. On the transfer of a lease, unless the contrary is expressed in the transfer, there shall be implied—

(a) a warranty on the part of the transferor that the rent, agreements and conditions on the part of the lessee to be paid, performed and observed have been so paid, performed and observed up to the date specified in the transfer or, if no such date is specified, the date of the transfer; and

(b) an agreement on the part of the transferee to pay the said rent as from the day following the date specified in the transfer or the date of the transfer, as the case may be, and to perform and observe the said agreements and conditions.

This section sets out what is to be implied in a transfer of a lease and is common form (e.g. E 24 and Sud 56).

Effect of transfer on agreements in leases

► 91. A transferee from a lessor or from a lessee shall possess all the rights, and be subject to all the liabilities, of the lessor or lessee, as the case may be, expressed or implied in the lease, or arising or which have arisen thereunder, and the transferor shall cease to be under any obligation or possessed of any rights in respect of the lease:

Provided that nothing in this section shall affect the rights or liabilities of the lessor or lessee, as the case may be, in respect of a breach of any of the agreements expressed or implied in the lease which occurred before the transfer.

This section provides that the transferee of a lease or of the reversion shall stand in the place of the transferor for all purposes, while the transferor disappears from the scene completely. A lessor will no longer be able to sue the original lessee in contract on his personal covenant, which is an unsatisfactory feature of the common law since there would appear to be no reason why, after the original lessee has parted with all his interests, he should still be under a legal obligation.

The proviso saves the position of the parties in respect of any breach of agreement occurring prior to the transfer.

Transfer subject to charge

► 92. In every transfer of land or a lease subject to a charge, there shall be implied an agreement by the transferee with the transferor to pay the interest secured by the charge at the rate and at the times and in the manner specified in the charge and to keep the transferor indemnified against the principal sum secured by the charge and against all liability in respect of any of the agreements on the part of the transferor therein contained or implied.

This sets out the agreement to be implied in a transfer of land or a lease subject to a charge, and is common form (e.g. Sud 55).

Transfer subject to lease

► 93. A transfer of land which is subject to a lease shall be valid without the lessee acknowledging the transferee as lessor, but nothing in this section—

(a) affects the validity of any payment of rent made by the lessee to the transferor; or

(b) renders the lessee liable, on account of his failure to pay rent to the transferee, for any breach of agreement to pay rent, before notice of the transfer is given to the lessee by the transferee.

This section was prompted by the ITPA and is a commonsense provision designed to protect a lessee whose lessor transfers the reversion.

Division 5 - Easements, Restrictive Agreements, Profits and Licences

Provision having been made for the three main dealings - lease, charge, and transfer - this Division groups together four lesser interests which are frequently encountered in practice and for which special provision must therefore be made in this Act.

Easement, profit, and licence have been defined in s3, but it may be helpful to recapitulate - with some examples. An *easement* is a right attached to a parcel of land which allows its owner to use the land of another person in a particular manner (e.g. by walking over it, or depositing rubbish on it) or to restrict its use to a particular extent (e.g. by preventing the erection of any structure that would restrict the flow of light); but this right, by definition, does not include a *profit*, which is a right to go on the land of another person and to take something from it (e.g. the right to dig gravel, or cut turf, or take game or fish). A *licence* is a permission given by a landowner to do some act on his land which otherwise would be a trespass (e.g. to play a game, or to occupy a seat at a theatre, or to have a bookstall on a railway-station). A licence can be distinguished from a lease in that it does not give the right to exclusive possession, whereas a lease does. A

restrictive agreement as explained in s95 below is an agreement (usually in an instrument of transfer) whereby one proprietor for the benefit of another restricts building on his land to a certain extent, or restricts its use in a particular way. (The expression 'restrictive covenant', which, in this context, would be more familiar to students of English law, has been avoided, because a 'covenant' is an 'agreement under seal' and sealing by individual persons is a practice which has been abandoned in this Act.)

In the main, however, this Division has endeavoured not to depart from English rules and principles, and its provisions have been adopted unchanged in Malawi and in the Caribbean model.

Easements

► 94. (1) The proprietor of land or a lease may, by an instrument in the prescribed form, grant an easement over his land or the land comprised in his lease, to the proprietor or lessee of other land for the benefit of that other land.

(2) Any proprietor transferring or leasing land or a lease may in the transfer or lease grant an easement, for the benefit of the land transferred or leased, over land retained by him or reserve an easement for the benefit of land retained by him.

(3) The instrument creating the easement shall specify clearly—

(a) the nature of the easement, the period for which it is granted and any conditions, limitations or restrictions intended to affect its enjoyment; and

(b) the land burdened by the easement and, if required by the Registrar, the particular part thereof so burdened; and

(c) the land which enjoys the benefit of the easement, and shall, if so required by the Registrar, include a plan sufficient in the Registrar's estimation to define the easement.

(4) The grant or reservation of the easement shall be completed by its registration as an encumbrance in the register of the land burdened and in the property section of the land which benefits, and by filing the instrument.

(5) An easement granted by the proprietor of a lease shall be capable of existing only during the subsistence of the lease.

This section enables the proprietor of land or a lease to grant an easement by an instrument in the prescribed form or, as is more common, to reserve an easement when transferring land or a lease. The grant or reservation is completed, as usual, by registration. It is a very necessary provision since, in this Act, only easements subsisting at the time of first registration are overriding interests and

easements created thereafter must be registered in order to be binding (see comment on s30(a)).

It should be noted that an easement cannot exist 'in gross' (i.e. otherwise than as a right attached to land, known in English law as the 'dominant tenement' as distinct from the 'servient tenement' which bears the burden). Thus a public right of way is not an easement (and, indeed, has not been provided for in this Act, an omission which should perhaps be repaired). In New Zealand, however, it is expressly provided that "an easement over land may be created without being attached or made appurtenant to other land" (Property Law Act 1952 s122), and several Australian States have similar enactments resulting, according to Baalman (Singapore 162), "in a considerable amount of technical confusion" which has been avoided in Singapore, and which is similarly avoided here.

Restrictive agreements

► 95. (1) Where an instrument, other than a lease or charge, contains an agreement (hereinafter referred to as a restrictive agreement) by one proprietor restricting the building on or the user or other enjoyment of his land for the benefit of the proprietor of other land, and is presented to the Registrar, the Registrar shall note the restrictive agreement in the encumbrances section of the register of the land or lease burdened by the restrictive agreement, either by entering particulars of the agreement or by referring to the instrument containing the agreement, and shall file the instrument.

(2) Unless it is noted in the register, a restrictive agreement is not binding on the proprietor of the land or lease burdened by it or on anybody acquiring the land or lease.

(3) The note of a restrictive agreement in the register does not give the restrictive agreement any greater force or validity than it would have had if it had not been registrable under this Act and had not been noted.

(4) In so far as the restrictive agreement is capable of taking effect, not only the proprietors themselves but also their respective successors in title shall be entitled to the benefit and subject to the burden of it respectively, unless the instrument otherwise provides.

(5) Notwithstanding the provisions of this section or of any other written law, any agreement, condition or restriction contained in any instrument (whether executed before or after the commencement of this Act) whereby persons who are members of a particular race or who are not members of a particular race are prohibited or prevented from owning or from occupying any land or from acquiring an interest therein shall be void.

This section enables a restrictive agreement to be noted in the register. Unless it is so noted it will not be binding on the proprietor of the land burdened or anybody who acquires it from him, but the noting of it in the register does not confer on it greater force or validity than it had before. Thus it is not incumbent on a registrar to decide whether an agreement is registrable, let alone enforceable, or not. The section is based on Sud 57 and E 50 (cf. Sing 111).

Subsection (5) was aimed at a particular situation in Kenya, and has not been repeated in subsequent versions of the Act elsewhere. It is only of interest as being an example of very positive substantive law.

Profits

► 96. (1) The proprietor of land or a lease may, by an instrument in the prescribed form, grant a profit.

(2) The instrument shall indicate clearly the nature of the profit, the period for which it is to be enjoyed and—

(a) whether it is to be enjoyed in gross, or as appurtenant to other land or a lease; and

(b) whether it is to be enjoyed by the grantee exclusively, or by him in common with the grantor.

(2) The grant of a profit shall be completed—

(a) by its registration as an encumbrance in the register of the land or lease which it affects; and

(b) where it is appurtenant to other land or a lease, by its registration in the property section of the register of the land or lease to which it is appurtenant; and

(c) by filing the instrument.

(4) A profit which is not appurtenant to land may be dealt with as though it were land.

(5) A profit granted by the proprietor of a lease shall be capable of subsisting only during the subsistence of the lease.

This section provides for the grant of a profit which, like an easement, will not be an overriding interest unless it subsisted at the time of first registration.

Subsection (2) is based on Sing 84(3).

Subsection (4) is necessary to enable a profit to be transferred or otherwise dealt with since, unlike an easement, it may be held in gross (i.e. unconnected with the ownership of other land).

Release and extinguishment of easements, profits and restrictive agreements

► 97. (1) Upon presentation of a duly executed release in the prescribed form, the registration of the easement, profit or restrictive

agreement shall be cancelled, and thereupon the easement, profit or restrictive agreement becomes extinguished.

(2) On the application of any person affected thereby, the Registrar may cancel the registration of an easement, profit or restrictive agreement upon proof to his satisfaction that—

- (a) the period of time for which it was intended to subsist has expired; or
- (b) the event upon which it was intended to determine has occurred.

This section provides for the cancellation of easements, profits, and restrictive agreements either by agreement or by determination. (Cf. Sing 82(1) and 83(1) with regard to easements, but there seems no reason why profits and restrictive agreements should not also be dealt with together in one section as here.) In the Malawi and Caribbean versions the last two words of subsection (1) have been corrected to read "shall be extinguished".

Discharge and modification of easements, profits and restrictive agreements

► 98. (1) The court has power, on the application of any person interested in land affected by an easement, restrictive agreement or profit (whether created before or after the commencement of this Act) by order wholly or partially to extinguish or modify the easement, profit or restrictive agreement (with or without payment by the applicant of compensation to any person suffering loss in consequence of the order), on being satisfied—

- (a) that, by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the court deems material, the easement, profit or restrictive agreement ought to be held to be obsolete; or
- (b) that the continued existence of the easement, profit or restrictive agreement impedes the reasonable user of the land for public or private purposes without securing practical benefits to other persons or, as the 'case may be, will unless modified so impede such user; or
- (c) that the proposed discharge or modification will not injure the person entitled to the benefit of the easement, profit or restrictive agreement.

(2) Subsection (1) of this section applies also to a restrictive agreement contained in a lease (whether created before or after the commencement of this Act) for a certain period exceeding seventy years where more than fifty years of that period have expired, but

otherwise that subsection shall not apply to a restrictive agreement contained in a lease or charge.

This section provides a very necessary means of obtaining the discharge or modification of easements, profits, and restrictive agreements, and is modelled on LPA 84 (which enables an Official Arbitrator to discharge or modify restrictive covenants).

Saving of certain rights

► 99. Nothing in this Act shall be construed as altering any rule or principle of law which implies in the grant of an easement such ancillary rights as are necessary for effective enjoyment of the easement.

This section was intended by the Kenya Committee to repeat Sing 73(2), but was modified when the Act was passed. The section was omitted in Malawi, but came back as T & C 98, which repeats Sing 73(2) as follows:

"[T & C 981 Nothing in this Law shall be construed as derogating from the natural right to support, light, air or access to at highway appertaining to any land nor from such ancillary rights as are necessary for effective enjoyment of an easement."

Baalman comments at some length on this section, and says that "this restatement of the common law by s. 73(2) was probably necessary to resolve doubts which may have been engendered by the need for certainty in the description of parcels as required by s.39". (Sing 39 is the equivalent of s 18(4) in this Act.)

Licences

► 100. (1) Without prejudice to section 131 of this Act, a licence is not capable of registration.

(2) A licence relating to the use or enjoyment of land is ineffective against a bona fide purchaser for valuable consideration unless the licensee has protected his interest by lodging a caution under that section.

This section endeavours to deal with the difficult question of licences. Megarry and Wade (775) say that "the law relating to licences is full of difficulty, but until quite recently it could be said that it was not part of the law of real property; for a licence was merely a personal arrangement between two parties and did not create any proprietary interest which could bind a third party i.e. a successor in title to the licensor's land ... But even this fundamental distinction has been shaken by a number of recent decisions; ... a new chapter in the subject of real property may possibly be opening."

Section 100, following Sing 74(2), does not allow a licence to be registered as an interest in land, but enables a licensee to lodge a caution thus ensuring that any prospective purchaser has notice of the licence. Even if a caution is lodged the

licence will not necessarily be enforceable against a bona fide purchaser for value, but a licence will certainly be unenforceable if a caution is not lodged.

Division 6 – Co-proprietorship and Partition

Multiple ownership was discussed at length in Chapter 13. Rules of inheritance which provide a share for each dependant can produce, in the course of two or three generations, so many owners of shares shown with such huge denominators that registration becomes farcical and, so far from facilitating transfer, actually inhibits it by making it virtually impossible to get the agreement, let alone the signatures, of all the persons who have an interest. This Division now provides the legal machinery for preventing the registration of an excessive number of co-owners, and also for preventing subdivision into parcels too small for economic development (i.e. 'fragmentation'). The members of the Kenya Working Party in 1957 were very alive to the dangers both of multiple ownership and of excessive subdivision. They worked out the procedure in this Division when they drafted KLR(SA)O 66-71, and this procedure has been carried forward unchanged into subsequent legislation in Kenya and elsewhere, but has proved very difficult to operate. Nobody likes being eliminated from his 'inheritance', however small it may be, and particularly in countries where to have no land is to have nothing. In any case, multiple ownership and fragmentation are basically economic problems and demand economic rather than legal solutions.

Registration of more than one proprietor

► 101. (1) An instrument made in favour of two or more persons, and the registration giving effect to it, shall show—

- (a) whether such persons are joint proprietors or proprietors in common; and
- (b) where they are proprietors in common, the share of each proprietor.

(2) Not more than one person may be registered as the proprietor of any parcel of which the Central Land Board has at any earlier time been registered as the proprietor.

(3) Subject to subsection (2) of this section the Minister may for any registration [with the consent of the county council (if any) concerned and of the Regional Assembly of the region in which the registration section is situated,] prescribe either—

- (a) the maximum number (whether one or a greater number) of persons who are allowed to be registered in the same register as proprietors; or
- (b) the maximum denominator of the vulgar fraction which expresses the share of any proprietor,

or both of them, and no dealing shall be registered if its effect would be that the number or that denominator, as the case may be, would be exceeded.

(4) Until the Minister otherwise prescribes under section (3) of this section, no dealing in respect of land in the special areas shall be registered which, if registered, would have the effect of vesting any parcel of land or a lease or charge in more than five proprietors.

Subsection (1) requires a disposition in favour two or more persons to specify whether they are 'joint owners' or 'owners in common'. (The characteristics of these two interests are set out in ss 102 and 101) The 1922-25 legislation in England abolished tenancy in common as a legal estate but it can exist in equity, and joint tenants on the register can in fact, be holding in trust for themselves as tenants in common (which is no very easy for a layman to understand). The Kenya Working Party had no doubt, however, that it was essential to provide for proprietorship in common, but in subsection (3) sought to limit the number of persons who could be registered as co-owners and also the size of the denominator of their shares.

Subsection (4) fixed the maximum number of proprietors at five, until the Minister should decide otherwise.

Subsections (1) and (3), with the omission of the words in square brackets, have been repeated as Mal 95(1) and (2) and T & C 100(1) and (2).

Characteristics of joint proprietorship and severance thereof

► 102. (1) Where the land, lease or charge is owned jointly, no proprietor is entitled to any separate share the land, and consequently—

- (a) dispositions may be made only by the joint proprietors; and
- (b) on the death of a joint proprietor, his interest shall vest in the surviving proprietor or the surviving proprietors jointly.

(2) For avoidance of doubt, it is hereby declared that—

- (a) the sole proprietor of any land, lease or charge may transfer the same to himself and another person jointly; and
- (b) a joint proprietor of any land, lease or charge may transfer his interest therein to all the other proprietors.

(3) Joint proprietors, not being trustees, may execute an instrument in the prescribed form signifying that they agree to sever the joint proprietorship, and the severance shall be completed by registration of the joint proprietors as proprietors in common and by filing the instrument.

This section sets out the characteristics of joint proprietorship and provides for its severance except, of course, where the joint proprietors are trustees. Although

as between themselves joint proprietors have separate rights, as against everyone else they are in the position of a single owner; together they form one person. The most distinctive feature of joint ownership is 'the, right of survival' (*jus accrescendi* or right of accrual). This is the right whereby on the death of one joint owner his interest in the land passes to the other joint owners, and this process continues until there is only one survivor who then holds as the sole owner. This right of survivorship is really only appropriate in the case of trustees, and persons used only to customary law naturally regard it as a very strange provision.

Characteristics of proprietorship in common

► 103. (1) Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate.

(2) No proprietor in common shall deal with his undivided share in favour of any person other than another proprietor in common of the same land, except with the consent in writing of the remaining proprietor or proprietors of the land, but such consent shall not be unreasonably withheld.

Subsection (1) sets out the characteristics of proprietorship in common and was derived from KLR(SA)O where, like the previous section, it was an original provision.

Subsection (2) emphasizes the partnership nature of this co-ownership since it enables other co-owners to prevent the intrusion into the 'partnership' of anybody they do not like.

Partition.

► 104. (1) An application in the prescribed form to the Registrar for the partition of the land owned in common may be made by—

(a) any one or more of the proprietors; or

(b) any person in whose favour an order has been made for the sale of an undivided share in the land in execution of a decree,

and, subject to the provisions of this Act and of any written law by which minimum areas or frontages are prescribed or the consent of any authority to a partition is required, the Registrar shall effect the partition of the land in accordance with any agreement of the proprietors in common or, in the absence of agreement, in such manner as the Registrar may determine.

(2) Partition shall be completed by closing the register of the parcel partitioned and opening registers in respect of the new parcels created by the partition and filing the agreement or determination.

This section and the next two sections, which relate to procedure on partition, repeat provisions of the KLR(SA)O which were based largely on ss 125-9 of the Sudan Civil Justice Ordinance 1929. KLR(SA)O 69(1) included a provision enabling a District Commissioner also to apply for partition as it was feared that there might be cases in which proprietorship in common was holding up development and none of the co-proprietors would apply for partition. This provision was dropped in Lag 109(2) and has not been reinserted, the Kenya Committee remarking that "laws to ensure development should be dealt with outside the context of registration, and there are other enactments in Kenya which are probably sufficient for this purpose".

When Registrar may order sale

► 105. (1) Where for any reason the land sought to be partitioned is incapable of partition or the partition would adversely affect the proper use of the land, and a demand is made by the applicant or one or more of the other proprietors in common that the land or any share or shares in the land be sold, the Registrar shall, in default of any agreement between the proprietors in common, value the land and the shares of the proprietors in common and order the sale of the land or the separation and sale of such shares by public auction or make such other order for the disposal of the application as he thinks fit.

(2) A proprietor in common shall be entitled to purchase the land or any share so offered for sale, either at the auction or at any time by private treaty.

This section enables the Registrar to order a sale Where the land is incapable of partition (e.g. because partition would result in parcels below the economic level).

Subsection (2) enables a co-proprietor to bid at the sale, or he may buy in by Private treaty before the auction. This provides a convenient process for one member of a family to buy out the others.

Procedure where share small

► 106. (1) Where the land sought to be partitioned is capable of partition generally, but the resultant share of any particular proprietor in common would be less in area than any minimum prescribed by or under any written law, the Registrar shall add such share to the share of any other proprietor or distribute such share amongst two or more other proprietors in such manner and in such proportions as, in default of agreement, he thinks fit.

(2) Where the Registrar proceeds in accordance with subsection (1) of this section, he shall assess the value of the share added or distributed and shall order that there be paid to the proprietor of the share by each proprietor who has received an addition to his share the value of such addition.

(3) Where any sum is payable under subsection (2) of this section by any proprietor in common to any other proprietor in common, the Registrar may order that such sum be secured by way of charge on the share of the person liable to pay it.

This section provides a convenient and practicable procedure for dealing with a parcel of land large enough to be partitioned but not into such small parcels as would satisfy all the co-proprietors. It amounts virtually to a repooling scheme with those who receive more than their entitlement paying compensation to those who receive less or perhaps nothing at all. The sums so payable may be secured by a charge and, of course, may then be recovered in the same way as money secured by an ordinary charge.

Division 6A - Groups

Groups

► 106A. Where the proprietor of land or the person entitled to an interest in land not amounting to ownership is group representatives—

(a) the Registrar shall add to or delete the names of group representatives in accordance with the directions of the Registrar of Group Representatives; and

(b) the persons whose names are for the time being registered as the group representatives shall, for the purpose of any registered dealings, be deemed to be the absolute proprietors of the land, but without prejudice to their duties under section 8 of the Land (Group Representatives) Act 1968.

Division 6A (comprising s106A only) was inserted in 1968, but is clearly out of place in that it is in no way a 'Disposition'. Group (or family) representation will be considered in Part VII below.

Division 7 - Succession on Death

Succession on death

► 107. Subject to Part VII of this Act, nothing in this Act affects the law of testate or intestate succession.

Disposition is, by definition (e.g. in T & C 2), confined to acts *inter vivos*, and in any case it would be inappropriate to make express provisions for succession in this Act which relates to land only, since such provisions should also cover movables. Nevertheless, since it is claimed that the Act makes provision for all the requirements of a landowner in connection with his land dealings, it is advisable to make it clear that the point has not been overlooked but that this Act does not affect the existing law either as to the right to make a will or in the event of intestacy.

[PART VA - STRATA TITLES]

No provision was made for 'strata titles' in the Kenya Registered Land Act 1963, nor in the Turks and Caicos Registered Land Law 1967, but in Chapter 14 we suggested "that it can be accepted without further discussion that it is imperative to enact legislation wherever there 'multiple-storey building", and we promised to include a version that had been prepared for the Registered Land Acts of the Eastern Caribbean. We briefly described its salient features.²⁵ It fits into the legislation at this point, and we therefore now include it without further comment.

[Division 1 - Interpretation]

► [107A. In this Part of this Act unless the context otherwise requires—

["building" means the building or buildings shown in a strata plan;

["common property" means in relation to any strata plan so much of the land to which such plan relates as is for the time being not included in any strata lot contained in such plan;

["strata lot" means a horizontal subdivision of a parcel which is shown on a filed strata plan as a strata lot;

["strata lot corporation" means the body incorporated in respect of a parcel under section 107D;

["strata plan" means the plan referred to in section 107B;

["unanimous resolution" means a resolution unanimously passed at a duly convened meeting of a strata lot corporation at which all persons entitled to exercise the power of voting conferred by or under this Act are present either in person or by proxy at the time of the motion;

["unit entitlement" means the number allocated to a strata lot in accordance with section 107B(2)(d).

*[Division 2 - Strata Lots]**[Creation of strata lots]*

► [107B. (1) Subject to the provisions of this Act and of any other written law, the proprietor of a parcel upon which a building comprising more than one storey has been or is to be constructed may apply to the Registrar on the prescribed form for the registration of horizontal subdivisions, to be known as strata lots, in accordance with a plan, to be known as a strata plan, which shall accompany the application.

[(2) Every strata plan shall—

[(a) state the full reference of the parcel and be described as a strata plan;

[(b) delineate the boundaries of the parcel and the location of the building in relation thereto;

²⁵ See 14.5

[(c) include such elevations, sections, plans, diagrams and other information as shall be sufficient to—

[(i) illustrate the strata lots and distinguish each lot by a number;

[(ii) define the boundaries of each strata lot in the building by reference to floors, walls and ceilings; provided, however, that it shall not be necessary to show any bearings or dimensions of strata lots; and

[(iii) specify the approximate floor area of each strata lot;

[(d) have endorsed upon it a schedule setting out the unit entitlement of each strata lot indicating as a whole number the proportion of the common property allocated to that strata lot;

[(e) have endorsed upon it the address at which documents may be served upon the strata lot corporation;

[(f) contain such other particulars and be accompanied by such certificates and other documents as may be prescribed.

[(3) The reference of the parcel and the number of the strata lot shall together be a sufficient reference to a strata lot.

[(4) The common boundary between any two strata lots or between a strata lot and common property shall, unless otherwise specified in the relevant strata plan, be the centre line of the floor, wall or ceiling between such strata lots or between such strata lot and the common property, as the case may be.

[(5) The unit entitlement of each strata lot shall, as respects the proprietor of such strata lot, determine—

[(a) the quantum of his share in the relevant strata lot corporation; and

[(b) the proportion payable by him of contributions levied pursuant to section 107E(2).

[Registration.

► [107C. If the Registrar is satisfied that the application is in order he shall—

[(a) file the strata plan;

[(b) open a new register in respect of each strata lot shown on the strata plan in accordance with section 1071;

[(c) in respect of the register relating to the parcel—

[(i) record in the property section that the land comprised therein consists only of the common property;

[(ii) in the proprietorship section delete the name of the proprietor, substitute the name of the strata lot corporation established under section 107D, and enter a restriction prohibiting any dealing with the land otherwise than by order of the court or of the Registrar;

[(iii) note in the incumbrances section that registers in respect of strata lots have been opened.

[Division 3 - Strata Lot Corporations

[Establishment of strata lot corporations.

► [107D. (1) Upon the opening of registers in respect of the strata lots shown on a filed strata plan, there shall be established in respect of the parcel in question, by virtue of this Act and without further formality, a body corporate, to be known as a strata lot corporation, in which the common property of such parcel shall vest.

[(2) Each strata lot corporation shall be known by the name of “The Proprietors” followed by the reference of the parcel in question, and the Registrar shall issue a certificate in the prescribed form that the strata lot corporation has been established, which certificate shall be kept prominently displayed in the building.

[(3) Every strata lot corporation shall have perpetual succession and a common seal and be capable of suing and being sued in its corporate name.

[(4) The provisions of any enactment providing for the incorporation, regulation and winding-up of companies shall not apply to a strata lot corporation.

[(5) The proprietors for the time being of all the strata lots in a parcel shall be the members of the strata lot corporation relative to that parcel.

[Duties and powers of strata lot corporations.

► [107E. (1) The duties of every strata lot corporation shall include the following—

[(a) to insure and keep insured the building to the replacement value thereof against fire, earthquake, hurricane and such other risks as may be prescribed unless the members by unanimous resolution otherwise determine;

[(b) to effect such other insurance as it may be required by law to effect;

[(c) to insure against such risks other than those referred to elsewhere in this subsection as the members may from time to time by unanimous resolution determine;

[(d) subject to section 107M and to such conditions as may be prescribed, to apply insurance moneys received by it in respect of damage to the building in re-building and reinstating the building so far as it may be lawful to do so;

[(e) to pay premiums on any policies, of insurance effected by it;

[(f) to keep in a state of good and serviceable repair and properly maintain the common property;

[(g) to comply with notices or orders by any competent public or local authority requiring repairs to, or work to be done in respect of the parcel;

[(h) to comply with any reasonable request for the names and addresses of the members of any committee of such strata lot corporation;

[(i) to pay all rates, taxes and assessments imposed by statute or regulation upon the parcel or the building and not otherwise payable by the proprietor or occupier of any individual strata lot.

[(2) The powers of every strata lot corporation shall include the following—

[(a) to establish a fund for the administrative expenses involved in the control, management and administration of the common property, for the

payment of any premiums of insurance and for the discharge of any of the obligations of the strata lot corporation in question;

[(b) to determine from time to time the amounts to be raised for the fund referred to in paragraph (a) of this subsection and to raise amounts so determined by levying contributions on the members in proportion to the unit entitlements of their respective strata lots;

[(c) to recover from any member, by action for debt in any court of competent jurisdiction, any sum of money expended by the strata lot corporation in question or repairs or work done by it or at its direction in complying with any notice or order by a competent public or local authority in respect of the strata lot of which such member is for the time being the proprietor;

[(d) to enter any strata lot and effect repairs or carry out work pursuant to its duty under paragraph (g) of subsection (1) of this section.

[(3) Subject to the provisions of subsection (4) any contribution levied pursuant to subsection (2) shall be due and payable on the passing of a resolution to that effect and in, accordance with the terms of such resolution, and may be recovered by the strata lot corporation in question as a debt in an action in any court of competent jurisdiction from any member who is in arrears with his contribution and, for the purpose of this subsection, "member" includes both the person who was the member in question at the time of the passing of the resolution and the person (if any) who, has succeeded him as a member at the time of the institution of the action and such persons (if more than one) may be sued jointly and severally.

[(4) A strata lot corporation shall, on the application of a member or of any person authorised in writing by him, certify—

[(a) the amount of any contributions determined as the contribution of that member;

[(b) the manner in which such contribution is payable;

[(c) the extent to which such contribution has been paid by that member,

and, in favour of any person dealing with that member, such certificate shall be conclusive evidence of the matters certified therein.

[(5) A policy of insurance authorised by or under this section and in respect of the building shall not be liable to be brought into contribution with any other policy of insurance save another policy authorised by or under this section in respect of the same building.

[Service of documents on strata lot corporations.]

► [107F. (1) Every strata lot corporation shall cause to be kept at a conspicuous place at or near the front of the parcel of which it is the proprietor a receptacle suitable for purposes of postal delivery, with the name of the corporation clearly shown thereon.

[(2) Any summons, notice, order or other document may be served on a strata lot corporation by post in a prepaid letter addressed to such corporation at the

address shown on the strata plan, or by placing it in the receptacle of that corporation.

[Voting

► [107G. (1) Every member of a strata lot corporation shall have [one vote] [the number of votes represented by the number of his unit entitlement].

[(2) Any powers of voting conferred by or under this Act may be exercised—

[(a) by the member in person or, subject to such conditions and in such form as may be prescribed, by proxy;

[(b) in the case of a member who is an infant, by his guardian;

[(c) in the case of a member who is for any other reason unable to manage his affairs, by the person for the time being authorised by law to manage his affairs.

[(3) Where the court upon the application of the relevant strata lot corporation or of any member of that corporation is satisfied that there is no person able to vote in respect of a strata lot, the court, in any case where a unanimous resolution is required by this Act, shall and in any other case in its discretion may appoint some fit and proper person for the purpose of exercising such powers of voting under this Act as the court shall determine, and the court may in making such appointment make such order as it thinks necessary or expedient to give effect to such appointment including an order as to the payment of costs of the application, and may vary any order so made.

[(4) The court may order service of notice of the application referred to in subsection (3) on such person as it thinks fit or may dispense with service of such notice.

[(5) No member shall be entitled to vote at any meeting of a strata lot corporation unless all moneys presently payable by him to that corporation have been paid.

[Administration.

► [107H. (1) A strata lot corporation, any member thereof or any person having an interest in a strata lot in the parcel of which the corporation is proprietor may apply to the court for the appointment of an administrator.

[(2) The court may in its discretion on cause shown appoint an administrator for an indefinite period or for a fixed period on such terms and conditions as to remuneration and otherwise as it thinks fit, and the remuneration and expenses of any administrator so appointed shall be an administrative expense within the meaning of this Act.

[(3) The administrator shall, to the exclusion of the strata lot corporation in question, have the duties and powers of that corporation or such of those duties and powers as the court shall order, and may delegate any of such duties and powers.

[(4) The court may in its discretion on the application of the administrator or of any person referred to in subsection (1) remove or replace the administrator.

[(5) On any application under this section, the court may make such order as to costs as it thinks fit.

[Division 4 - Registration and Dealings

[Strata lot registers.

► [1071. (1) The registers opened by the Registrar in accordance with section 107C in respect of each strata lot in a parcel shall record—

[(a) all the particulars recorded in the property section of the register relating to the parcel in question and including the unit entitlement of the strata lot in question;

[(b) the proprietor of the parcel as first proprietor of the strata lot; and

[(c) the incumbrances noted in the incumbrances section of the register relating to the parcel;

[Provided that if the Registrar is satisfied that any of such particulars or incumbrances do not apply to the strata lot he shall omit them from the register relating to the strata lot and record the reason for his decision.

[(2) A strata lot shall be deemed—

[(a) for the purposes of sections 23 and 24 to be a parcel; and

[(b) for all purposes of this Act to be land.

[Easements

► [1071 (1) In respect of every strata lot there shall be implied—

[(a) in favour of the proprietor thereof, and as appurtenant thereto—

[(i) an easement for the subjacent and lateral support thereof, by the common property and by every strata lot capable of affording support thereto;

[(ii) easements for the passage or provision of water, sewerage, drainage, gas, electricity, garbage, artificially heated or cooled air, and other services (including telephone, radio and television services) through or by means of any pipes, wires, cables or ducts for the time being existing in the parcel of which the strata lot forms part, to the extent to which such pipes, wires, cables or ducts are capable of being used in connection with the enjoyment of such strata lots;

[(b) as against the proprietor thereof and to which it shall be subject

[(i) an easement for the subjacent and lateral support of the common property and of every other strata lot capable of enjoying support from such strata lot;

[(ii) easements for the passage or provision of water, sewerage, drainage, gas, electricity, garbage, artificially heated or cooled air, and other services (including telephone, radio and television services) through or by means of any pipes, wires, cables or ducts for the time being existing within such strata lot, as appurtenant to the common property and to every other strata lot capable of enjoying such easements.

[(2) The proprietor of a strata lot shall be entitled to have his strata lot sheltered by all such parts of the building as are capable of affording shelter thereto.

[(3) The right created by subsection (2) shall be an easement to which the parts of the building therein referred to shall be subject and such easement shall entitle the proprietor of the strata lot in question to enter upon any of such parts to replace, renew or restore any shelter.

[(4) All ancillary rights and obligations necessary to make easements effective shall apply to the easements implied or created by this section.

[Dispositions affecting common Property]

► [107K. (1) Notwithstanding the provisions of this Act a strata lot corporation shall not transfer, lease or charge the common property or any part thereof nor grant or accept any easement or restrictive agreement affecting the common property or any part thereof otherwise than in pursuance of a unanimous resolution in that behalf and with the written consent of all persons (other than members of such corporation) appearing from the register to have an interest in any of the strata lots in the parcel of which such corporation is proprietor.

[(2) Every instrument relating to any of the matters referred to in subsection (1) shall have endorsed thereon or be accompanied by a certificate under the seal of the corporation in question that the resolution referred to in subsection (1) was duly passed and that all necessary consents were given, and such certificate shall, in favour of persons dealing with that corporation pursuant to this section, and in favour of the Registrar, be conclusive evidence of the facts stated therein.

[Division 5 - Management and Administration]

[By-laws.]

► [107L. (1) Subject to the provisions of this Act, in relation to any parcel comprising strata lots and common property, the control, management and administration of the strata lot corporation in question and the common property, and the use and enjoyment of the strata lots and the common property shall be regulated by by-laws.

[(2) Until by-laws are made by the strata lot corporation in question, the by-laws set forth in the First and Second Schedules shall, on registration of strata lots in the parcel in question, come into force for all purposes in relation to such parcel and the strata lots and common property therein.

[(3) The by-laws set forth in the First Schedule shall not be amended or varied otherwise than by unanimous resolution, but the by-laws set forth in the Second Schedule may be amended or varied by the strata lot corporation in question.

[(4) No by-law shall operate to prohibit or restrict any dealing with any strata lot or to destroy or modify any easement implied or created by this Act.

[(5) No amendment or variation of any by-law shall have effect until the strata lot corporation in question has lodged with the Registrar a notification thereof in the prescribed form and the Registrar has notified such corporation that he has filed a note in respect thereof.

[(6) A strata lot corporation shall, on the application of any member thereof or of any person authorized in writing by him, make available for inspection the by-laws for the time being in force.

[(7) Every strata lot corporation and its members for the time being shall be bound by the by-laws for the time being in force in relation to such corporation to the same extent as if such by-laws were the subject of separate agreements between each such member and all the other members and the corporation.

[Destruction of the building.

► [107M. (1) Where a building is destroyed—

[(a) the strata lot corporation in question shall forthwith lodge with the Registrar, in the prescribed form, a notification of such destruction;

[(b) upon receipt of any such notification the Registrar shall, in the prescribed form, record the fact in the registers relating to the parcel and to the strata lots;

[(c) the corporation shall hold the parcel in trust for all its members in shares proportional to their respective unit entitlements.

[(2) for the purposes of this Part of this Act a building is destroyed—

[(a) when the members by unanimous resolution so resolve; or

[(b) when the court is satisfied that having regard to the rights and interests of the members as a whole it is just and equitable that such building shall be deemed to have been destroyed and makes a declaration to that effect.

[(3) In any case where a declaration has been made pursuant to paragraph (b) of subsection (2) the court may by order impose such conditions and give such directions for the payment of money as it thinks fit for the purpose of adjusting, as between the corporation and the members and amongst the members themselves, the effect of the declaration.

[(4) An application for a declaration under paragraph (b) of subsection (2) may be made to the court by a strata lot corporation or by any member thereof or by a chargee of a strata lot in the parcel in question.

[(5) On any application to the court for a declaration under paragraph (b) of subsection (2) any insurer who has effected insurance on the building in question or on any part thereof (being insurance against destruction of strata lots or damage to the building) shall have the right to appear in person or by attorney.

[(6) The court may, on the application of a strata lot corporation or of any member thereof or of its administrator, by order make provision for the winding-up of the affairs of such corporation and may, by the same or a subsequent order, declare the corporation dissolved as on and from a date specified in the order.

[(7) On any application under this section the court may make such order for the payment of costs as it thinks fit.

[(8) The court may from time to time vary any order made by it under subsections (3) or (7).

[Regulations.

► [107N. The Minister may make regulations generally for the proper carrying out of the purposes and provisions of this Part of this Act and, in particular, but without prejudice to the generality of the foregoing, may make regulations—

[(a) as to the manner and form of strata plans;

[(b) providing for the amendment of filed strata plans;

[(c) providing for cases where a building is damaged but is not destroyed;

[(d) providing for the insurance of strata lots by the proprietors thereof;

[(e) providing for the voting rights of chargees of strata lots.

[Rules of court.

► [107O. Provision may be made by rules of court as to the practice and procedure to be followed in relation to any application which may be made to the court under this part of this Act.

PART VI - INSTRUMENTS AND AGENTS

Provisions with regard to these two matters were given separate Parts in e.g. the Singapore Act, but they are grouped together in this Act on the grounds that provisions concerning instruments and how they should be executed go quite logically with provisions concerning who can execute them. Part VI is of great practical importance in the operation of a land registry. Its provisions have been carried forward unchanged into the Caribbean model.

Form of instruments

► 108. (1) Every disposition of land, a lease or a charge shall be effected by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve, and every person shall use a printed form issued by the Registrar unless the Registrar otherwise permits.

(2) Leases and charges shall be presented for registration in triplicate.

(3) Instruments shall contain a true statement of the amount or value of the purchase price or loan or other consideration (if any), and an acknowledgement of the receipt of the consideration.

Subsection (1) is derived from Sud 34 which, as here, makes the use of printed forms compulsory unless the Registrar permits the use of a different form. It is intended that printed forms should almost invariably be used; there is no need for the elaboration usual in private conveyancing and privately drawn forms should be discouraged; they tend to perpetuate the 'deed mystique'.

Subsection (2) was derived from KLR(SA)O 72(2). It requires leases and charges to be submitted in triplicate, the idea being that the chargor and lessor, and the chargee and lessee will each find a copy convenient, though, of course, the entry in the register (plus the filed instrument as being the authority for the

entry) is what really matters. A certified copy can be obtained at any time. This provision (along with the rest of the section) has been carried forward unchanged into subsequent legislation elsewhere.

Subsection (3) was derived from Sud 3 5 which was labelled 'Instruments to contain true statement of price'. The Kenya Working Party decided to omit from KLR(SA)O the requirement to state the value, but it was inserted in Lag 113(3) and has gone forward into subsequent legislation.

Execution of Instruments

► 109. (1) Every instrument evidencing a disposition shall be executed by all persons shown by the register to be proprietors of the interest affected and by all other parties to the instrument:

Provided that the Registrar may dispense with execution by any particular party (other than the donee under a disposition by way of gift) where he considers that such execution is unnecessary.

(2) Subject to section 124 (2) of this Act, an instrument shall be deemed to have been executed only—

(a) by a natural person, if signed by him;

(b) by a corporation—

(i) if sealed with the common seal of the corporation, affixed thereto in the presence of and attested by its clerk, secretary or other permanent officer and by a member of the board of directors, council or other governing body of the corporation; or
(ii) in the case of a corporation not required by law to have a common seal, if signed by such persons as are authorized in that behalf by any law or by the statute or charter of the corporation or in the absence of any express provision, by the persons duly appointed in writing for that purpose by the corporation, evidence of which appointment has, been produced to the satisfaction of the Registrar.

(iii) in the case of group representatives incorporated under the Land (Group Representatives) Act 1968, if signed by all the group representatives, or if signed by a majority of the group representatives who produce a certificate of the Registrar of Group Representatives that the execution of the instrument has been authorized by resolution of the group.

Subsection (1) makes it clear that all the parties are required to sign - not merely the transferor - unless the Registrar dispenses with a signature, but any idea that the signature of the transferee (who is to be registered as proprietor) is necessary to assist in the prevention of forgery should be resisted. Registry staff

are not, and should not be expected to be, handwriting experts. Positive identification (under the next section) is the only real safeguard.

Subsection (2) makes crystal clear matters which otherwise tend to puzzle registry staff.

Verification of execution

► 110. (1) Subject to subsection (3) of this section, a person executing an instrument shall appear before the Registrar or such public officer or other person as is prescribed and, less he is known to the Registrar or such public officer or other person, shall be accompanied by a credible witness for the purpose of establishing his identity.

(2) The Registrar or public officer or other person shall satisfy himself as to the identity of the person appearing before him and ascertain whether he freely and voluntarily executed the instrument, and shall complete thereon a certificate to that effect.

(3) The Registrar may dispense with verification under this section—

(a) if he considers that it cannot be obtained or can be obtained only with difficulty and he is otherwise satisfied that the document has been properly executed; or

(b) in cases in which to his knowledge the document has been properly executed,

and shall record on the document his reasons for dispensing with the appearance of the parties.

(4) No instrument executed out of Kenya shall be registered unless it has endorsed thereon or attached thereto a certificate in the prescribed form completed—

(a) if the instrument was executed in the Commonwealth, by a judge, magistrate, justice of the peace, notary public, commissioner for oaths or administrative officer;

(b) if the instrument was executed in a foreign country, by a British consular officer or pro-consul or such other person or class of persons as the Minister may determine.

(See Rule 7(2) on page 608 for the form of certificate prescribed for the purpose of subsections (2) and (4).)

This section is designed to ensure so far as is humanly possible that the person executing the instrument is the proprietor. In Chapter 19.6.8 we called 'Verification of execution' the key to the whole system and it is on the faithfulness

with which this section is observed that the main safeguard against forgery and personation depends.

Stamps.

► 111. No instrument required by law to be stamped shall be accepted for registration unless it is duly stamped.

This is a sensible 'reminder' that the Stamp Duty Act imposes this obligation. It was derived via Lag 116 from the Nigeria Registration of Titles Ordinance 1935 s93.

Disposal of instruments

► 112. (1) Subject to subsection (2) of this section and to section 114 (2) of this Act, all instruments accepted by the Registrar shall be retained in the registry for as long as they support a current entry in the register and for six years thereafter.

(2) When a lease or charge is registered, particulars of registration shall be noted on the duplicate and the triplicate thereof, and the duplicate and the triplicate shall be returned to the person who presented them.

(3) After six years after an entry in the register has been superseded or has ceased to have any effect, the Registrar may destroy any instrument which supported the entry.

In theory an instrument could be destroyed as soon as the entry giving effect to it has been made in the register, for it is the register, and the register alone, that proves title. In practice there is a general reluctance to destroy any instruments. ER 310(2) provides that "the Registrar may destroy any documents in his possession or custody where they have become altogether superseded by entries in the register, or have ceased to have any effect, but in Lagos the Working Party "thought it inadvisable to authorize immediate destruction"²⁶ hence the provision that instruments must be kept for six (five in Lagos) years after they have ceased to support the current entry.

Subsection (3) originated in Lagos as Lag 117(3)

Minors

► 113. (1) For the avoidance of doubt, it is hereby declared that the name of a person under the age of twenty-one years may be entered in the register either on first registration or as a transferee or on transmission.

(2) Nothing in this section enables any such person to deal with land or any interest in land by virtue of such registration, and, where to his knowledge a minor is registered, the Registrar shall enter a restriction accordingly.

²⁶ Lagos Working Party Report (19~0) 31

(3) Where a disposition by a minor whose minority has not been disclosed to the Registrar has been registered, such disposition may not be set aside only on the grounds of minority.

Subsections (1) and (2) were derived from Lag 11; 8 (which was 'new') and make it clear that the names of minors may be registered but this will not empower them to deal (which can only be done through properly appointed guardians) and the Registrar should enter a restriction if he knows that a proprietor is a minor. Twenty-one years is, of course, an arbitrary figure, and should be adjusted to whatever the local figure is (now eighteen years in Great Britain).

Subsection (3) was added in Kenya to protect the registry, since it frequently happens that dispositions to minors are registered without any indication of their disability.

Agents and persons under disability

► 114. (1) Except as provided in subsection (3) of this section, no instrument executed by any person as agent for any other person shall be accepted by the Registrar unless the person executing it was authorized in that behalf by a power of attorney executed and verified in accordance with sections 109 and 110 of this Act.

(2) The original of such power of attorney or, with the consent of the Registrar, a copy thereof certified by the Registrar shall be filed.

(3) Where any person who, if not under a disability, might have made any application, done any act or been a party to any proceeding under this Act or under any rules made thereunder is a minor, a person of unsound mind or a person under any other disability, the guardian of such person, or if there is no such guardian a person appointed under some written law to represent that person, may make any application, do any act and be party to any proceeding on behalf of that person, and shall generally represent that person for the purposes of this Act.

(4) Before accepting any document executed by a guardian or a person so appointed to represent a person under a disability, the Registrar shall satisfy himself that the person claiming to be the guardian is entitled to execute the document or require the production of the appointment of the person so appointed, and shall file a note of the explanation which satisfied him or a copy of the appointment, as the case may be.

This section repeats KLR(SA)O 75 (repeated as Lag 119). Subsection (2) was derived from Sud 40, Subsection (3) from Sud 76, and subsection (4) from Sud

77. It leaves no doubt as to how the Registrar should treat agents and persons under a disability (including minors).

Gift to person under disability

► 115. A person under a disability who has been registered as proprietor of land, a lease or a charge acquired by him by way of gift may, within six months after he ceases to be under a disability, repudiate the gift if he has not already disposed of the subject matter thereof, but no such repudiation shall be effective until—

- (a) he has transferred the land, lease or charge to the donor, who is bound to accept it; and
- (b) the transfer has been registered.

This section was devised by the Kenya Committee in 1961 with the intention of providing a satisfactory method of treating gifts to persons under a disability (which had been a source of uncertainty in the registry). The standard example is a gift to a minor, and the law has always allowed him to repudiate it after he has attained his majority. This section now gives him (and other donees under disability) six months in which to repudiate after he ceases to be under disability, but requires him to reconvey the gift to the donor, who is bound to accept it. The right to repudiate is, of course, lost if a person who suffers from an undisclosed disability has dealt with the interest.

Powers of attorney

► 116. (1) Upon the application of the donor or the donee of a power of attorney which contains any power to dispose of any interest in land, such power of attorney shall be entered in the register of powers of attorney and the original, or with the consent of the Registrar a copy thereof certified by the Registrar, shall be filed in the file of powers of attorney.

(2) Every such power of attorney shall be in the prescribed form or such other form as the Registrar may in any particular case approve, and shall be executed and verified in accordance with sections 109 and 110 of this Act.

(3) The donor of a power of attorney registered under this section may at any time give notice to the Registrar in the prescribed form that the power has been revoked, and thereupon the revocation shall be entered in the register of powers of attorney and noted upon the power, and the notice shall be filed in the file of powers of attorney.

(4) Any interested person may give notice in writing to the Registrar that a power of attorney which has been registered under subsection (1) of this section has been revoked by the death, bankruptcy or disability of the donor or the death or disability of the

donee, accompanied by such evidence as the Registrar requires, and thereupon the revocation shall be entered in the register of powers of attorney and noted upon the power, and the notice shall be filed in the file of powers of attorney.

(5) Subsections (3) and (4) of this section do not apply to a power of attorney given for valuable consideration during any time during which it is, by virtue of the terms thereof, irrevocable.

(6) If owing to the length of time since the execution of a power of attorney or for any other reason the Registrar considers it desirable, he may require evidence that the power has not been revoked, and may refuse to register any disposition by the donee of the power of attorney until satisfactory evidence is produced.

The provisions of this section and the next section were put together by the Kenya Working Party in 1958 as a single section (ELR(SA)0 76) comprising eight subsections, and this formula was followed in Lag 120. It was adopted (with only slight change of wording) by the Kenya Committee in 1961, but in the KLRA was divided into two sections, and has gone forward unchanged into subsequent versions elsewhere.

Subsection (1) makes provision for the filing of a power of attorney which contains a power to deal with land, and is common form (cf. LPA 125, Sud 40, Tan 96(1)).

Subsections (3), (4) and (5) were derived from Tan 96(2), (3) and (4). Subsection (6) was derived from Sud 42.

Effect of registered power of attorney

► 117. (1) A power of attorney which has been registered under section 116 of this Act and of which no notice of revocation has been registered under that section shall be deemed to be subsisting as regards any person acquiring any interest in land affected by the exercise of the power, for valuable consideration and without notice of revocation and in good faith, or any person deriving title under such a person.

(2) Any person making any payment or doing any act in good faith in pursuance of a power of attorney registered under section 116 of this Act shall not be liable in respect of the payment or act by reason only that before the payment or act the donor of the power had died or become subject to a disability or become bankrupt, or had revoked the power, if the fact of death, disability, bankruptcy or revocation was not at the time of the payment or act known to the person making or doing the payment or act.

See comments on preceding section.

Subsection (1) is derived from Tan 96(1).

Subsection (2), which protects the donee of a power of attorney acting in good faith, was originally KLR(SA)O 76(8).

PART VII - TRANSMISSIONS AND TRUSTS

As has been made clear in Part V a disposition requires an instrument executed by the registered proprietor (or his duly appointed agent) to evidence it, and is not effective until it is registered. It is the entry in the register which completes the transaction, and the fact of registration is all-important. A transmission, however, takes place automatically on the occurrence of an event, whether the register is altered or not. The event itself divests the registered proprietor of his interest and thus the register becomes out of line with fact until a transmission is recorded. For example, since death terminates ownership it is obvious that when a registered proprietor dies his land (unless it is to be ownerless) must be vested in somebody who is not shown in the register. The same thing happens on bankruptcy which itself vests the bankrupt's property in the trustee in bankruptcy or the official receiver. It seems logical also to include expropriation within this category for, when land is declared for compulsory acquisition, its registered proprietor can no longer deal with it and, as in the case of transmission on death or bankruptcy, all that is required is effective machinery for recording the change of proprietorship.

Trusts have been included in this Part because the personal representatives of deceased proprietors are by far the commonest trustees.

Transmission on death of joint proprietor

► 118. If one of two or more joint proprietors of any land, lease or charge dies, the Registrar, on proof to his satisfaction of the death, shall delete the name of the deceased from the register.

When a joint proprietor dies there is nothing to pass on to his successor and no more need be done, therefore, than delete his name from the register when his death is proved.

Transmission on death of sole proprietor or proprietor in common

► 119. (1) If a sole proprietor or a proprietor in common dies, his personal representative, on application to the Registrar in the prescribed form and on production to him of the grant, shall be entitled to be registered by transmission as proprietor in the place of the deceased with the addition after his name of the words "as executor of the will of deceased" or "as administrator of the estate of deceased", as the case may be.

(2) Upon production of a grant, the Registrar may, without requiring the personal representative to be registered, register by transmission—

- (a) any transfer by the personal representative;
- (b) any surrender of a lease or discharge of a charge by the personal representative.

(3) In this section, "grant" means the grant of probate of the will, the grant of letters of administration of the estate or the grant of summary administration of the estate in favour of or issued by the Public Trustee, as the case may be, of the deceased proprietor.

Subsection (1) was derived from Tan 67 & 80(1).

Subsection (2) should be particularly noted. It makes it clear that the personal representative of a deceased sole proprietor (including, of course, the last survivor of joint proprietors) or of a proprietor in common can effect certain transactions without the formality of himself being registered, as proprietor. Baalman's comment on its equivalent in Sing 86 shows its importance: "This section buries the Australian fetish that only a registered proprietor can execute a registrable dealing. Instead of insisting on registration of a transmission application in all cases it follows the pattern of the English Land Registration Act 1925 s.41(3)."

This section has been carried forward unchanged into the Malawi and Turks and Caicos legislation.

Transmission on death intestate of proprietor subject to African customary law

► 120. (1) Where a proprietor dies intestate and is subject to African customary law relating to succession on death, this section shall apply, and a certificate signed by an administrative officer to the effect that a proprietor was so subject at the date of his death shall, when delivered to the Registrar and filed, be conclusive evidence that the deceased proprietor was so subject.

(2) Upon being informed of the death of a proprietor intestate, the Registrar, after satisfying himself of the death of the proprietor, shall apply to the court for the determination of the heirs, and the court shall determine who are the persons entitled, according to the customary law applicable to the deceased proprietor, to any land, lease or charge of the deceased proprietor, and the nature and extent of their respective shares, and shall thereafter issue a certificate in the prescribed form (hereinafter referred to as a certificate of succession) certifying the names of the persons so entitled and the nature and extent of their respective shares.

(3) The court shall send the certificate of succession to the Registrar, who shall, subject to the provisions of this Act, give effect to its terms by registering as proprietor of the land, lease or charge any

person who appears from the certificate to be entitled thereto; and the certificate shall be filed.

(4) The Registrar shall not give effect to a certificate of succession under this section unless—

(a) the certificate is accompanied by the certificate of the Estate Duty Commissioner that the requirements of the Estate Duty Act in regard to the payment of estate duty have been or will be complied with or that no estate duty is payable; and

(b) thirty days have elapsed since the date shown on the certificate of succession.

(5) If a certificate of succession shows a person or persons to be entitled to a divided share or shares in the land of a deceased proprietor, the Registrar shall, before giving effect to the certificate, and subject to the provisions of any written law which requires the consent of any authority to the partition or subdivision of land, effect the division of the land.

(6) If a certificate of succession does not comply with the law governing the parcel in question because—

(a) its registration would contravene subsection (2), subsection (3) or subsection (4) of section 101 of this Act; or

(b) the division of the parcel under subsection (5) of this section cannot be effected by reason of any written law or for any other reason,

the Registrar shall return the certificate to the court, and that court shall issue a fresh certificate which does so comply.

(7) (a) When a court proceeds under subsection (6) of this section, it may add the share of any entitled person to the share of any other entitled person or distribute such share amongst two or more entitled persons in accordance with any agreement which may be made between such persons or, in the absence of agreement, in such manner and in such proportions as that court thinks fit, with such compensation, if any, as it may determine to be proper to be paid by the person who benefits by the addition to any person adversely affected thereby, and the court may order that such compensation be secured by way of charge on the share of the person who benefits by the addition.

(b) In paragraph (a) of this subsection, “entitled persons” means a person who is entitled to a share, under the original certificate of succession.

(8) Where a proprietor dies and the court is satisfied that there is no person lawfully entitled to any land, lease or charge of the deceased proprietor, the court shall issue a certificate to that effect and shall send it to the Registrar, and the Registrar shall register the county council as proprietor of such land, lease or charge and the certificate shall be filed.

This section, while conserving the customary laws of succession, was intended to enable the Registrar to get a certificate of succession from a court which would enable the register to be brought up to date, and the procedure set out in subsections (1), (2), and (3) is simple and straightforward.

Subsection (4) requires a certificate that estate duty has been paid (cf. E 73(9)) and there would appear to be no reason for not including a subsection on these lines, since estate duty is payable; but obviously it did nothing to add to the popularity of the process.

Subsections (5), (6), (7), and (8) were enacted with former 'customary land' in mind, but are necessary wherever multiple ownership or excessive subdivision is likely; e.g. subsection (7) is based on Sud 3.2 with 'court' substituted for 'Registrar'. Admittedly these provisions are very difficult to operate effectively, and they also contribute to making the process unpopular.

Transmission where successors not determined

► 121. (1) Where the Registrar has applied to a court under section 120 (2) of this Act for the determination of heirs, and at the end of one year from the date of application that court for any reason has not issued a certificate of succession, that court shall send to him a notification that it has not issued a certificate of succession, giving the reasons therefor.

(2) Where the Registrar receives a notification under subsection (1) of this section, he shall advertise its receipt in the prescribed manner.

(3) After the expiration of thirty days from the date of the advertisement, the Registrar shall register the county council as proprietor of the land, lease or charge, subject to any registered encumbrances and to any overriding interests or other liabilities to which it is subject, as trustee for sale, in trust for the heirs, and shall file the notification.

(4) For so long as the county council is registered under subsection (3) of this section, it shall not be liable for any waste committed or permitted in relation to the land, lease or charge.

(5) Nothing in this section shall prevent the subsequent issue of a certificate of succession, and, where the county council is registered as proprietor of the land, lease or charge of the deceased proprietor, the certificate shall be given effect to in accordance with section 120 of this Act, and upon the registration, as proprietor, of the person certified to be entitled to the land, lease or charge, or to a part thereof, the interest of the county council shall determine and cease absolutely, or shall determine and cease absolutely as respects that part.

This section was intended to break the impasse resulting from the failure of the court to comply with the previous section. Like the previous section it has been confined to Kenya and has not been successful, perhaps owing to lack of enthusiasm for it in the registry.

Effect of transmission on death

► 122. (1) Subject to any restriction on his power of disposing of the land, lease or charge contained in his appointment, the personal representative or the person beneficially entitled on the death of the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests which are unregistered but are nevertheless enforceable and subject to which the deceased proprietor held the same, but for the purpose of any dealing he shall be deemed to have been registered as proprietor thereof with all the rights conferred by this Act on a proprietor who has acquired land, a lease or a charge, as the case may be, for valuable consideration.

(2) The registration of any person as aforesaid shall relate back to and take effect from the date of the death of the proprietor.

This section (which really should be labelled 'Transmission on death, effect of') is derived from Sud 70 and has been carried forward unchanged into subsequent legislation. As would be expected, it puts the personal representative or beneficiary exactly in the place of the deceased.

Transmission on bankruptcy

► 123. (1) A trustee in bankruptcy shall, upon production to the Registrar of a certified copy of the order of court adjudging a proprietor bankrupt, or directing that the estate of a deceased proprietor shall be administered according to the law of bankruptcy, be registered as proprietor of any land, lease or charge of which the bankrupt or deceased proprietor is proprietor, in his place, and a copy of the order shall be filed.

(2) A trustee in bankruptcy shall be described in the register as "trustee of the property ofa bankrupt".

(3) The trustee in bankruptcy shall hold any land, lease or charge of which he is registered as proprietor subject to any restrictions contained in the Bankruptcy Act or in any order of court and subject to any liabilities, rights or interests which are unregistered but are nevertheless enforceable and subject to which the bankrupt or the deceased proprietor held the same, but for the purpose of any dealing with such land, lease or charge the trustee in bankruptcy shall have all the rights and be subject to all the limitations conferred or imposed by this or any other written law on a proprietor who has acquired land, a lease or a charge for valuable consideration.

This section, initially derived from Sud 72 and 73 was KLR(SA)O 81 and came into KRLA via Lag 125. It was carried forward unchanged into Mal 116 and T & C 119.

Liquidation

► 124. (1) Where a company is being wound up, the liquidator shall—

(a) produce to the Registrar any resolution or order appointing him liquidator; and

(b) satisfy the Registrar that he has complied with section 237 of the Companies Act,

and the Registrar shall enter the appointment in respect of any land, lease or charge of which the company is registered as proprietor, and shall file the copy of the resolution or order.

(2) An instrument executed by or on behalf of a company in liquidation delivered for registration after the appointment of the liquidator has been entered under subsection (1) of this section shall be sealed with the common seal of the company and attested by the liquidator or, in the case of a company not required by law to have a common seal, shall be signed by the liquidator whose signature shall be verified in accordance with section 110 of this Act.

(3) Where a vesting order has been made under section 240 of the Companies Act, the liquidator shall present the order and the Registrar shall register the liquidator as proprietor of any land, lease or charge to which the order relates.

This section deals with the liquidation of a company, and is possibly out of context in this Part, as a resolution or order winding up a company does not vest the company's property in the liquidator - it merely transfers the executive power from the director and shareholders to the liquidator. An analogy can, however, be drawn with bankruptcy, and so it is included here.

Subsection (3) - or its equivalent - has not been carried forward into Malawi or the Caribbean model.

Transmission in other cases

► 125. Where any person has become entitled to any land, lease or charge under any law or by virtue of any order or certificate of sale made or issued under any law, the Registrar shall, on the application of any interested person supported by such evidence as he may require, register the person entitled, as the proprietor.

This section deals with compulsory acquisition under legal powers, and sales by the court, i.e. transmission by operation of law. It is derived from BG 103, and has become common form.

Trusts not to be entered

► 126. (1) A person acquiring land, a lease or a charge in a fiduciary capacity may be described by that capacity in the instrument of acquisition and, if so described, shall be registered with the addition of the words “as trustee” but the Registrar shall not enter particulars of any trust in the register.

(2) An instrument which declares or is deemed to declare any trust, or a certified copy thereof, may be deposited with the Registrar for safe custody; but such instrument or copy shall not form part of the register or be deemed to be registered.

(3) Where the proprietor of land, a lease or a charge is a trustee, he shall hold the same subject to any unregistered liabilities, rights or interests to which it is subject by virtue of the instrument creating the trust, but for the purpose of any registered dealings he shall be deemed to be the absolute proprietor thereof, and no person dealing with the land, a lease or a charge so registered shall be deemed to have notice of the trust, nor shall any breach of the trust create any right to indemnity under this Act.

This section first appeared as Lag 128.

Subsection (1) was based on BG 116(2) (modified by substituting the words ‘as trustee’ for the words ‘as legal owner’) and was included in order to be consistent with the entries made in respect of personal representatives and on bankruptcy in ss119(1) and 123(2). (Similar provision for the entry of ‘as trustee’ was also made in s 160 of the Federated Malay States Land Code and this has been carried forward into s344 of the Malaysia National Land Code.) This provision, however, is difficult to reconcile with subsection (3) which reproduced Sud 74. That section stood on its own in the Sudan Ordinance, but reads oddly in conjunction with subsection (1) of this section, since if a proprietor is specifically registered ‘as a trustee’ a purchaser from him cannot sensibly be said to have no ‘notice’ of it, in any ordinary meaning of the word. (In any case, the provision appears to be

unnecessary, since the bona fide purchaser for value is fully protected by the specific provisions of s39(2).)

Subsection (2) is similarly open to question. The Lagos Working Party in 1960 derived it from s186 of the Sarawak Land Code 1957 and the Kenya Committee adopted it, remarking: "The Australian legislation permits the depositing of a trust instrument with the registrar, but for safe custody purposes only - it is not registered. We feel that it is a desirable service which prejudices nobody, and we have included it as sub-clause (2)." Baalman, however, held quite a contrary view. He made no such provision in his Singapore Ordinance and commented (Singapore 200):

"The broad principle of the Torrens System is to keep notice of trusts off the land register; trusts are kept behind the curtain. As a concession to the rigours of that broad principle, most Torrens statutes enable trustees or their beneficiaries to put notice of trust on the title by depositing a copy of the trust instrument in the Titles Office. The Registrar is thereupon directed by the statute to enter an official caveat which forbids the registration of dealings not in accordance with the provisions of the trust instrument. The Registrar's own officers are thus made policemen for the interests of the beneficiaries.

"This Ordinance does not make that concession. It contains no provisions for the depositing of trust instruments, nor for the official supervision of trusts. Instead, it provides facilities for the trustees or the beneficiaries to make their own arrangements for any police-work which may be thought desirable. The machinery for doing so will be found in s.93(2)(c)." (Section 93 provides for the lodging of caveats.)

The crux of the matter is in fact the extent to which the Registrar should be required to police trusts. Obviously circumstances vary widely not only between countries but even between different areas in the same country. A sophisticated community well served by professional advisers will doubtless avail itself adequately of the procedures provided in the Act, but this is to place a premium on professional advice, which may not be available. It would be quite wrong if registrars, merely on the principle, as it were, that trusts are no concern of the registry, were to stand by not caring whether a trustee defrauds his beneficiaries or not.

KLRA 126 has been carried forward unchanged into Mal 119 and T & C 122. It is s 122 of the Caribbean model, but it clearly requires some rethinking and perhaps BSIP 193 might be a better precedent. It reads:

"[BSIP] 193 (1) The owner of an interest may own it for his own use and benefit or as a trustee.

"(2) The Registrar shall not enter any trust on the land register.

"(3) An instrument which declares, or is deemed to declare, any trust, or a certified copy thereof, may be deposited with the Registrar for safe custody and reference; but such instrument or copy shall not form part of the land register or be deemed to be registered.

“(4) Whenever the Registrar becomes aware that any registered interest is affected by a trust, he may, but shall not be bound to, protect in such manner as he thinks fit the rights of any person beneficially interested under the trust or thereby required to give any consent.”

Survivor of trustees

► 127. Whenever two or more proprietors are registered jointly as trustees, and the survivor of such proprietors would not be entitled to exercise alone the powers which were vested in them, the Registrar shall enter a restriction to that effect.

This section is derived from Lag 129 and is in line with the English practice, where it is standard procedure, on the registration of trustees, for a restriction to be entered in the proprietorship register that no disposition by the last survivor shall be effected without an order of the court or of the Registrar.

Statutory trusts

In Chapter 13.4(2) we discussed the appointment of trustees as one of the 'cures' for multiple ownership. There is no provision for 'statutory trustees' in this Act or in the Malawi or Caribbean versions of it, but readers of Chapter 13.4.5 may wish to see the provision made for their appointment in the Sudan Land Settlement and Registration Ordinance 1925, Part IV - Appointment of Statutory Trustees of Registered Plots:

“Definitions.

“[Sud] 98. In this part of this ordinance, unless the context otherwise requires—

'beneficial owners' means the persons who were, prior to the appointment of statutory trustees, the registered owners of a plot, and includes their respective successors in title.

'The Court' means the District Court, or, if all the registered owners of a plot are Moslems, the Sharia Court.

'Governor' does not include any person other than an Acting Governor.

'registered owner' includes the lawfully appointed guardian of a registered owner who is a minor.

'registered plot' does not include a divided share in a registered plot.

'statutory trustees' means the persons appointed as trustees of a plot hereunder.

“Appointment of statutory trustees.

"[Sud] 99. (1) Whenever any development of or dealing with a registered plot of land cannot be carried out, or cannot be carried but without unreasonable delay and expense because the number of registered owners of such plot exceeds five, or one or more of such owners are dead, or absent, or minors not represented by a lawfully-appointed guardian, or under some other legal disability, in any such case the Governor or any registered owner of that plot may apply for the appointment of statutory trustees of such plot.

"(2) The application by a Governor shall be made in writing to the Chief Justice.

“(3) The application by a registered owner shall be made in writing to the Court within whose jurisdiction the said plot lies.

“(4) If the Chief Justice or the Court as the case may be is satisfied that the appointment of statutory trustees of the said plot is expedient, the Court shall appoint not less than three and not more than five persons to be statutory trustees of the said plot.

“(5) No person shall be eligible for appointment as such trustee unless he—

“(a) is over 25 years of age, and

“(b) is resident in the locality of the plot, and

“(c) is not under any legal disability, and

“(d) has consented in writing to act as such.

“(6) An applicant for the appointment of statutory trustees may submit to the Court the names of persons who are eligible for appointment and willing to serve as statutory trustees; and the Court in appointing statutory trustees shall have regard to such submission, and to the wishes of such of the registered owners of the plot as are resident in the locality of the plot.

“(7) The names of the statutory trustees appointed under this section shall be placed upon the register of the said plot together with a statement that they are the statutory trustees thereof.

“(8) If any statutory trustee dies, or ceases to be qualified under subsection (5), the Court may, and if by reason of such death or disqualification the number of the statutory trustees has become less than three, the Court shall appoint a new statutory trustee or trustees in his place. Every such appointment shall be in accordance with the preceding provisions of this section.

“Effect of registration of statutory trustee

“[Sud] 100. (1) From and after registration of the statutory trustees, the statutory trustees shall have the sole and exclusive right of dealing with the said plot or any part thereof, and for that purpose there shall be vested in them all the powers in respect thereof that were prior to their appointment vested severally or collectively in its beneficial owners. Provided that the statutory trustees shall not be entitled to exercise a power of sale or mortgage over the plot or any part thereof save with the consent of the Court, or to sub-divide the plot save with the consent of the Governor. The statutory trustees shall exercise the powers so vested in them on behalf of the beneficial owners of the plot, and for the benefit of the collective interest of such owners therein.

“(2) Thereafter any disposition or purported disposition of the plot, or any part thereof, by a beneficial owner shall take effect as a disposition of his beneficial interest therein, and shall not confer upon the person in whose favour such disposition is made any right of dealing with such plot or part thereof.

“(3) Notice in writing of any such disposition of a beneficial interest in such plot or part thereof shall be given to the statutory trustees but such disposition shall not be registered unless the transferee of such beneficial interest submits for registration an instrument of transfer duly executed, and countersigned by the statutory trustees.

“Saving.

“[Sud] 101. Save as provided in the preceding section nothing in this part contained shall prejudice or affect the beneficial rights and interests of the beneficial owners of any plot of which statutory trustees have been appointed hereunder, or any existing rights to dispose of or deal with such beneficial rights and interests, or to have such dispositions or dealings placed upon the register.”

Family representation

There are two further sections in the corresponding Part of the Malawi Act where, as in Lagos, special provision is made for a 'family' to be registered as proprietor and for the appointment of 'family representatives'. These sections are set out below, as they are likely to be of use to any jurisdiction faced with the problem of converting customary tenure to tenure under registered title. In Kenya, family ownership was not at first admitted,²⁷ but provision was later made for it in a special ordinance of its own, the Land (Group Representatives) Act 1968.

"Family representation.

"[Mall 121. (1) Where land is family land the head of the family shall be registered as the proprietor with the addition of the words 'as family representative'.

"(2) Where the proprietor of land, or a lease or a charge is a family representative he shall have the sole and exclusive right of dealing with the land, lease or charge:

"Provided that nothing contained in this section shall preclude the family representative and family members from regulating the occupation of the land among themselves according to custom.

"(3) Nothing in this Act shall relieve any person registered as the family representative from any duty, customary or otherwise, to consult other members of the family. A person so registered shall be bound to exercise the powers vested in him by this Act on behalf of and for the collective benefit of the family, but any failure by such person to comply with such duty or obligation shall in no way concern or affect any person dealing with him in good faith for valuable consideration nor shall any such failure create any right to indemnity under this Act.

"Replacement of family representative.

"[Mall 122. (1) The Registrar on being notified by any member of a family of which the head is registered as family representative—

“(a) of the death of the family representative;

“(b) that the family representative is unable to act by reason of mental or physical incapacity, absence from Malawi, imprisonment or detention; or

“(c) that the family representative is no longer acceptable to the majority of the members of the family,

shall refer the matter to the appropriate Local Land Board established under the provisions of the Local Land Boards Act, 1967.

²⁷ See 11.8.9

“(2) Upon receipt from the Local Land Board of the nomination of a new family representative, the Registrar shall delete the name of the registered family representative and substitute the name of the new family representative, and shall file the nomination.”

PART VIII - RESTRAINTS ON DISPOSITION

The Kenya Committee in 1961 commented as follows on this Part of their draft bill:

"We have indulged in a considerable amount of rethinking on this particular subject. Other legislation has dealt with judgments, writs, caveats, cautions, inhibitions, restrictions and prohibition orders in a variety of ways, and often widely separated in the particular statute. The essence is to provide effective means whereby, for a variety of reasons, the power of a proprietor to dispose of his interest can be stopped or delayed. Singapore, British Guiana and Lagos have included provisions for sale by the Court but we have cleared this to clause 122 [s125 in Act], in the Part dealing with transmissions, which seems to us to be more appropriate.

"What we have therefore endeavoured to do in this Part, is to confine ourselves to the matters to which we have referred above, and have divided it into first, a Division dealing with the hostile act by the Court, secondly the hostile act by some individual, and last the act (which may well be friendly) of the Chief Land Registrar, and have followed the English nomenclature of 'inhibitions' (by the Court), 'cautions' (by an individual) and 'restrictions' (by the Registrar)."

Cautions and restrictions are called caveats in the Torrens system, the place of the restriction being taken by a caveat lodged by the Registrar (known in New South Wales as a 'Registrar-General's caveat' and in Victoria as a 'Queen's caveat'). Tanzania and Guyana have both adopted the word 'caveat' for 'caution', but have made special provision for 'restrictions' under the name of 'injunctions' and 'prohibitions' respectively. Only in the English Act (and in the Irish and Ontario Acts based on the English Act) is the term 'inhibition' used, and it is questionable if it was really necessary to adopt it in the KRLA or to do anything more than provide that the court, as well as the Registrar, could impose a restriction (see comment on s128 below).

Baalman, commenting on 'caveats' in his Singapore Ordinance, stated that "the Torrens System replaces the equitable doctrine of notice' with the statutory doctrine of notification. A purchaser takes his land subject only to interests which are ascertainable from the land register, regardless of any notice which he might otherwise have had. In the doctrine of notification, caveats play an important part. The owner of an equity who would be protected under the general law by the doctrine of notice must, under the Torrens System, protect himself by having his interest notified on the land register. If his interest is one which is not immediately registrable, he can still obtain immediate protection for it by lodging a caveat." Baalman then went on to say: "The general function of a caveat is to suspend the process of registration until conflicting claims have been settled"

(Singapore 193). But as we shall presently see, caveats have not been confined only to cases where there are conflicting claims but have also been used merely to delay registration, an abuse which this Act seeks to avoid (see comment on s131 below).

Restrictions, in the KRLA, take the place of the caveat which, in Kenya, the Registrar was empowered to enter under KRTA 65(1)(f). They differ from the caution in that they are imposed by the Registrar instead of being prepared and 'lodged' by the cautioner; indeed in certain circumstances the Registrar is required to enter a restriction, e.g. in the case of trusts.

In general, the provisions of this Part are easy to understand and require but little comment. They have been repeated verbatim in subsequent versions of the KRLA enacted elsewhere, with the exception of s131(1) where an important change has been made and the comment on it should be particularly noted.

Division 1 - Inhibitions

Power of court to inhibit registered dealings

► 128. (1) The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until further order, the registration of any dealing with any land, lease or charge.

(2) A copy of the inhibition under the seal of the court, with particulars of the land, lease or charge affected thereby, shall be sent to the Registrar, who shall register it in the appropriate register, and no inhibition shall bind or affect the land, lease or charge until it has been registered.

Subsection (1) is based on E 57(1), but it is doubtful if it was necessary to make special provisions for 'inhibitions' instead of merely enabling the court to enter a restriction (see comment on s136(1) below). In any case, according to Ruoff and Roper (at 794) applications for an inhibition are "extremely rare" in the English system.

Subsection (2) is derived from Sud 71 which provides that a court issuing a judgment shall send an authenticated copy to the Registrar for registration and that until registered it shall not affect the land to which it relates.

Effect of inhibition

► 129. So long as an inhibition remains registered, no instrument which is inconsistent with it shall be registered.

This section is derived from Lag 134, which was shown as 'new' in the comparative table on page 104 of the Lagos Working Party Report on Registration (1960).

Cancellation of inhibition

► 130. The registration of an inhibition shall be cancelled in the following cases and in no others—

- (a) on the expiration of the time limited by the inhibition; or
- (b) on proof to the satisfaction of the Registrar of the occurrence of the event named in the inhibition; or
- (c) on the land, lease or charge being sold by a chargee, unless such sale is itself inhibited; or
- (d) by order of the court.

This section is based on BG 122.

Division 2 - Cautions

Lodging of cautions

► 131. (1) Any person who—

- (a) claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, that is to say, some defined interest capable of creation by an instrument registrable under this Act; or
- (b) is entitled to a licence; or
- (c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge,

may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the same.

(2) A caution may either—

- (a) forbid the registration of dispositions and the making of entries altogether; or
- (b) forbid the registration of dispositions, and the making of entries to the extent therein expressed.

(3) A caution shall be in the prescribed form, and the Registrar may require the cautioner to support it by a statutory declaration.

(4) The Registrar may reject a caution which he considers unnecessary or whose purpose he considers can be effected by the registration of an instrument under this Act.

(5) Subject to the provisions of this section, the caution shall be registered in the appropriate register.

Subsection (1)(a) repeats KRTA 57(1), which had been specially amended in 1959 to adopt this wording, and it was thought injudicious to alter it when, only

two years later, the RLA was being drafted. It is, however, not easy of interpretation, and the comparable provision elsewhere does not attempt to be so specific. For example, Sud 78(1) begins, "*Any person claiming an interest in land or a charge* under an unregistered instrument or otherwise howsoever" and the italicized words were adopted in KLR(SA)O 86(1). The formula in E 54(1) is "Any person interested under any unregistered instrument, or interested as a judgment creditor or otherwise howsoever, in any land or charge registered in the name of any other person". Subsection (1) has been changed in later versions of the Act and in the Turks and Caicos reads:

“[T & C] 127 (1) Any person who—

“(a) claims any unregistrable interest whatsoever, in land or a lease or a charge; or

"(b) is entitled to a licence; or

"(c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge; or

(d) being a Bank, has advanced money on a current account to the proprietor of land or a lease or a charge,

may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the same."

Paragraph (d) is derived from Sud 78(2) and conveniently takes the place of 'deposit of title deeds' to secure an overdraft.

Subsection (2) enables the cautioner to stop dealings completely. There is a clear-cut distinction between two rival schools of thought on this point: the Australian provisions relating to caveats allow them to operate as complete 'stoppers' (e.g. Vic 89(1)), while the English (E 54(1)) rely on cautions which merely entitle the cautioner to notice of any dealing, giving him time to take action if necessary. Lag 137(1) adopted the English provision, but KLR(SA)O 86(1) enabled the cautioner to 'stop' dealing, as does this section in the KRLA. *Subsection (3)* is derived from Sud 76(3).

Subsection (4) is derived from Sud 78(2) (via KLR(SA)O 86(2)), but that subsection is mandatory and provides that "the Registrar shall not allow a caution to be registered in any case where he considers the purposes of the caution can be effected by the registration of an instrument", whereas this subsection is merely permissive. An important question is whether the Registrar should be allowed, let alone required, to reject a caution. In some jurisdictions the Registrar *must* accept a caveat if it is in the correct form, and it evident that its use can be abused, as Baalmaan reveals in his Commentary (Singapore 193):

“In actual practice, caveats against dealings have come to be regarded not so much as statutory injunctions but as provisional registrations. In the vast majority of cases the claim of the caveator is not in dispute, and neither he nor the caveatee contemplates litigation. The caveat simply preserves the status quo until the caveator is able to lodge the formal instrument executed

by the proprietor, which will transform his equitable interest into a registered estate.”

Used in this way the caveat enables dealing to be safely conducted ‘off the register’. In such cases it is clear that the Registrar should insist on the presentation of the appropriate instrument, and subsection (4) enables him to do so.

Notice, and effect of caution

► 132. (1) The Registrar shall give notice in writing of a caution to the proprietor whose land, lease or charge is effected by it.

(2) So long as a caution remains registered no disposition which is inconsistent with it shall be registered except with the consent of the cautioner or by order of the court.

Subsection (1) derives from KRTA 57(3).

Subsection (2) derives from Sud 78(5).

Withdrawal and removal of caution

► 133. (1) A caution may be withdrawn by the cautioner or removed by order of the court or, subject to the provisions of subsection (2) of this section, by order of the Registrar.

(2) (a) The Registrar may, on the application of any person interested, serve notice on the cautioner warning him that his caution will be removed at the expiration of the time stated in the notice.

(b) If at the expiration of the time state the cautioner has not objected, the Registrar may remove the caution.

(c) If the cautioner objects to the removal of the caution, he shall notify the Registrar in writing of his objection within the time specified in the notice, and the Registrar, after giving the parties an opportunity of being heard, shall make such orders he thinks fit, and may in the order make provision for the payment of costs.

(3) On registration of a transfer by a chargee in exercise of his Power of sale under section 77 of this Act, the Registrar shall remove any caution which purports to prohibit any dealing by the chargor and which was registered after the charge by virtue of which the transfer has been effected.

(4) On the withdrawal or removal of a caution, its registration shall be cancelled, but any liability of the cautioner previously incurred under section 135 of this Act shall not be affected by the cancellation.

Subsection (1) derives from Sud 78(6).

Subsection (2) derives from Sud 78(7) and enables anyone affected by the caution to get the matter determined by the Registrar. This 'warning-off' process corresponds with the English procedure (ER 218-21).

Second caution In respect of same matter

▶ 134. The Registrar may refuse to accept a further caution by the same person or anyone on his behalf in relation to the same matter as a previous caution.

This section is derived from KRTA 57(11) and avoids any argument should a cautioner, whose caution has been removed, attempt to repeat his caution.

Wrongful cautions

▶ 135. Any person who lodges or maintains a caution wrongfully and without reasonable cause shall be liable, in an action for damages at the suit of any person who has thereby sustained damage, to pay compensation to such person.

This section gives a proprietor protection against frivolous or irresponsible cautions. It is derived from Sud 78(8) but similar provision is made in E 56(3).

Division 3 - Restrictions

Restrictions.

▶ 136. (1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, after directing such inquiries to be made and notices to be served and hearing such persons as he thinks fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.

(2) A restriction may be expressed to endure—

(a) for a particular period; or

(b) until the occurrence of a particular event; or

(c) until the making of a further order, and may prohibit or restrict all dealings or only such dealings as do not comply with specified conditions, and the restriction shall be registered in the appropriate register.

(3) The registrar shall make a restriction in any case where it appears to him that the power of the proprietor to deal with the land, lease or charge is restricted.

Subsection (1) is derived from Sud 79(1), but this began, "The Court may in its discretion upon the application of any person interested in land or a charge and

the Registrar may, either with or without such application..." and therefore no separate provision was needed for inhibitions.

Subsection (3) (which in T & C 132(3) has been corrected to read, "The Registrar shall order a restriction to be entered...") imposes an important duty on the Registrar, but it was omitted from Mal 131. It was derived from Sud 79(2).

Notice and effect of restriction

► 137. (1) The Registrar shall give notice in writing of a restriction to the proprietor affected thereby.

(2) So long as any restriction remains registered, no instrument which is inconsistent with it shall be registered except by order of the court or of the Registrar.

Subsection (1) makes the same provision in respect of restrictions as s 132(1) makes for cautions.

Subsection (2) makes the same provision in respect of restrictions as ss129 and 132(2) make for inhibitions and cautions respectively.

Removal and variation of restrictions

► 138. (1) The Registrar may at any time, upon application by any person interested or of his own motion, and after giving the parties affected thereby an opportunity of being heard, order the removal or variation of a restriction.

(2) Upon the application of any proprietor affected by a restriction, and upon notice thereof to the Registrar, the court may order a restriction to be removed or varied, or make such other order as it thinks fit, and may make an order as to costs.

This section is derived from Lag 138(5) and (6).

[T & C PART IX – PRESCRIPTION]

KLR(SA)O Part VIII was entitled 'Prescription' and when preparing it in 1958 the Kenya Working Party on African Land Tenure (Report 27) wrote:

"A process providing for the de jure recognition of the de facto ownership resulting from long possession has been found necessary in most systems of land law since Roman times. In essence, occupation is the basis of title under most systems of native customary law and, indeed, where there are no written records, occupation is very often the only sound evidence. The Indian Limitation Act, 1877, the provisions of which in relation to prescription still apply in the Colony, seemed to us to be difficult to ascertain and we have therefore set out the principles briefly in the Registration Bill."

Only the provisions relating to the acquisition of easements and profits were included in the KLRA (as Part IX) because provision for the acquisition of title by adverse possession was to be made in the Limitation Act which was expected to be ready at the same time. That Act, however, was delayed - an example of the

risk a Registration Act runs when it relies on independent legislation to provide essential supporting law - but in 1968 Part IX was repealed and the whole subject was dealt with separately in the Limitation of Actions Act 1968 (based on English limitation of actions, i.e. negative instead of positive prescription).²⁸ Part IX - Prescription comprising ss139-41 has therefore disappeared from the Act we are considering.

However, the provisions of KLR(SA)O Part VIII have been carried forward into versions of the Registered Land Act in other countries (including BSIP Land and Titles Ordinance 1968, where it is Part XX). We consider it a valuable Part of the Act which is very helpful to registrars, and we use T & C (i.e. the Caribbean model) Part IX ss135-8 for the purpose of our commentary.

Acquisition of land by prescription

► [T & C 135—(1) The ownership of land may be acquired by peaceable, open and uninterrupted possession without the permission of any person lawfully entitled to such possession for a period, of twenty years:

[Provided that no person shall so acquire the ownership of Crown Land.

[(2) Any person who claims to have acquired the ownership of land by virtue of the provisions of subsection (1) of this section may apply to the Registrar for registration as proprietor thereof.]

In English law "by limitation one person may acquire the land of another by adverse possession for a period which is now generally twelve years; by prescription one may acquire rights such as easements and profits over the land of another. One important difference is that limitation is extinctive but prescription is acquisitive.²⁹ This section eliminates the distinction and provides for the positive acquisition of ownership by peaceable, open and uninterrupted possession without permission which corresponds with the *nec vi* (not by force), *nec clam* (not secretly), *nec precario* (not with permission) of Roman Law. Time begins to run as soon as the possession is established and, with one exception, the period required is unaffected by the nature of the ownership of the land being prescribed. The intention is to quiet possession and logically it is immaterial whether the land being acquired is subject to a lease or not or whether its owner is under a disability, though under English law the reversion of a landlord would not be barred merely by possession against his lessee, and in the case of disability the date from which time begins to run would be postponed.

Crown (or Government) land is the exception. The proviso to subsection (1) was inserted because it is difficult for the State to look after its land as closely as a private proprietor unless it employs a horde of officials, but this outright prohibition is anomalous and could cause hardship. It would be preferable to replace it by a long period for limitation. (In England the limitation period against Crown land used to be sixty years but this was reduced to thirty years by the Limitation Act 1939; the period in respect of privately owned land is twelve years.)

²⁸ See 8.12.2 (the whole question of prescription was discussed at length in 8.12)

²⁹ M & W 842

Principles of possession

► [T & C 136—(1) Where it is shown that a person has been in possession of land, or in receipt of the rents or profits thereof, at a certain date and is still in possession or receipt thereof, it shall be presumed that he has, from that date, been in uninterrupted possession of the land or in uninterrupted receipt of the rents or profits until the contrary be shown.

[(2) Possession of land or receipt of the rents or profits thereof by any person through whom a claimant derives his possession shall be deemed to have been the possession or receipt of the rent or profits by the claimant.

[(3) Where from the relationship of the parties or from other special cause it appears that the person in possession of land is or was in possession on behalf of another his possession shall be deemed to be or to have been the possession of that other.

[(4) If a person whose possession of land is subject to conditions imposed by or on behalf of the proprietor continues in such possession after the expiry of the term during which such conditions subsist, without fulfilment or compliance with them by such person and without any exercise by the proprietor of his right to the land, such subsequent possession shall be deemed to be peaceable, open and uninterrupted possession within the meaning of section 135 of this Law.

[(5) For the purposes of subsection (4) of this section—

[(a) a tenancy at will shall be deemed to have terminated at the expiration of a period of one year from the commencement thereof unless it has previously been determined;

[(b) a periodic tenancy shall be deemed to have terminated at the expiration of the period:

Provided that where any rent has subsequently been paid in respect of the tenancy it shall be deemed to have terminated the expiration of the period for which the rent has been paid.

[(6) Possession shall be interrupted—

[(a) by physical entry upon the land by any person claiming it in opposition to the person in possession with the intention of causing interruption if the possessor thereby loses possession; or

[(b) by the institution of legal proceedings by the proprietor of the land to assert his right thereto; or

[(c) by any acknowledgement made by the person in possession of the land to any person claiming to be the proprietor thereof that such claim is admitted.

[(7) No person possessing land in a fiduciary capacity on behalf of another shall acquire by prescription the ownership of the land as against such other.]

Since the Registrar is empowered to decide applications for the acquisition of ownership by prescription, it is obviously useful to set out the principles to which he must have regard in making his decisions. These principles are derived mainly from the Sudan Prescription and Limitation Ordinance 1928, which has proved

very effective in practice. On the whole they are self explanatory and require but little comment.

Subsection (2) enables a squatter to transfer whatever right he has acquired and it will be taken into account when the transferee makes his claim (e.g. A who has been in possession for, say, seven years can transfer to B who will then only have to be in possession for five years to complete a prescriptive period of twelve years).

Subsection (3) is specially important, for it effectively protects an owner who has allowed a relative or dependant to occupy his land, a situation frequently arising where 'custom' is still strong.

Subsections (4) and (5) cover the awkward question of prescription when occupation is continued after a lease has expired.

Subsection (6) makes clear what 'interrupts' possession, a very necessary provision in view of the requirement that possession must be uninterrupted. *Subsection (7)* makes sure that a trustee cannot acquire against a beneficiary.

Procedure on application

► [T & C 137—(1) On application by any person for registration as proprietor under section 135 of this Law the application shall be advertised by the Registrar at the expense of the applicant in such manner as the Registrar may direct.

[(2) The Registrar shall give notice of any such application to the proprietor of the land affected and to any other persons who may, in his opinion, be affected thereby.

[(3) After one month has elapsed from the date of giving notice under subsection (2) of this section the Registrar, on being satisfied that the applicant has acquired the ownership of the land claimed, may allow the application and register him as proprietor of the land claimed, subject to any interests on the register which have not been extinguished by the possession.]

A section on these lines was inserted in Malawi (as Mal 136) where it was decided to allow the Registrar to hear and decide prescriptive claims instead of their having to be referred to the court (as in the original Sudan procedure). The Transfer of Land Act 1954 in Victoria in Australia makes a similar provision (Vic 60) but provides no 'principles' for the guidance of the Registrar.

Acquisition of easements and profits by prescription

► [T & C 138—(1) Except in respect of Crown land, easements and profits may be acquired without registration by peaceable, open and uninterrupted enjoyment thereof for a period of twenty years:

[Provided that no easement or profit shall be so acquired unless the proprietor of the land burdened by such easement or profit is, or by reasonable diligence might have been, aware of such enjoyment and might by his own efforts have prevented it.

[(2) Where any person claims to have acquired an easement or profit by virtue of the provisions of subsection (1) of this section he may apply to the Registrar for the registration thereof, and the Registrar, on being satisfied as to the claim and

subject to such notices, advertisements and conditions as the Registrar may direct, shall register the easement or profit as an incumbrance on the register of the land affected and, in the case of an easement, in the property register of the land which benefits.]

Subsection (1) is derived from s5 of the Sudan Prescription and Limitation Ordinance 1928.

PART X - RECTIFICATION AND INDEMNITY

The operation of the registry is necessarily subject to human fallibility, and it must be anticipated that mistakes will be made; also fraud may be committed without being detected at the time of registration. This Part therefore now provides the machinery for rectifying the register when there is an error or omission and rectification is possible. Provision is also made for the payment of compensation if an innocent person suffers loss either from that rectification or because no such rectification is possible since it would adversely affect a 'bona fide purchaser for value'.³⁰

Rectification by Registrar

► 142. (1) The Registrar may rectify the register or any instrument presented for registration in the following cases—

- (a) in formal matters and in the case of errors or omissions not materially affecting the interests a any proprietor;
- (b) in any case and at any time with the consent of all persons interested;
- (c) where, upon resurvey, a dimension or area shown in the register is found to be incorrect, but in such case the Registrar shall first give notice to all persons appearing by the register to be interested or affected of his intention so to rectify.

(2) Upon proof of the change of the name or address of any proprietor, the Registrar shall, on the written application of the proprietor, make an entry in the register to record the change.

Subsection (1)(a) and (b) come from Sud 84 via KLR(SA)O 88. Paragraph (c) is a useful addition made in this Act. It sometimes happens that on resurvey a different area is found from that shown on the register. The Registrar must be empowered to correct the entry but at the same time he must notify the proprietor in order to avoid the possibility of misunderstanding, particularly where the alteration in the figures may make the proprietor think that he is losing land (though, of course, the actual area on the ground remains unchanged by the correction).

In T & C 139(1) a paragraph has rightly been added to allow the Registrar to rectify the register where any person has acquired a title by prescription under

³⁰ See 10

Part IX. This is a lacuna in the Act we are considering since rights can be acquired by prescription against a registered title and the register must be rectified when such acquisition has been proved.

Rectification by court

► 143. (1) Subject to subsection (2) of this section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

Subsection (1) permits rectification by the court where there has been fraud or mistake, but subject to *subsection (2)* which contains the vital provision that the possession of the bona fide purchaser for value shall not be disturbed unless he had knowledge of the fraud or mistake, or was negligent. This is in line with the provisions of E 82, but the wording has been simplified (e.g. such mystifying clichés as 'party or privy to' have been eliminated).

It will be noted that 'first registrations' are excepted from rectification. This is clearly undesirable. If a first registration is wrong and can be put right without harming any third party, it ought to be put right. In fact in Mal 139(1) and T & C 140(1) the words "including a first registration" have been substituted for the words "other than a first registration".

Right to indemnity

► 144. (1) Subject to the provisions of this Act and of any written law relating to the limitation of actions, any person suffering damage by reason of—

- (a) any rectification of the register under this Act; or
- (b) any mistake or omission in the register which cannot be rectified under this Act, other than a mistake or omission in a first registration; or
- (c) any error in a copy of or extract from the register or in a copy of or extract from any document or plan certified under this Act,

shall be entitled to be indemnified by the Government out of moneys provided by the Legislature.

(2) No indemnity shall be payable under this Act to any person who has himself caused or substantially contributed to the damage by his

fraud or negligence, or who derives title (otherwise than under a registered disposition made bona fide for valuable consideration) from a person who so caused or substantially contributed to the damage.

This section entitles any person who has suffered damage because of rectification or because of an omission or mistake that cannot be rectified to be indemnified out of public funds unless he has himself been fraudulent or negligent. E 83(1), KLR(SA)O 90(1), and Lag 44 all refer to 'loss' rather than 'damage'. The Kenya Committee substituted 'damage' for 'loss', since a person might be registered, in error, as the proprietor of land he was not entitled to own, and he might then be able to claim, on rectification, that he had suffered 'loss' whereas he could not maintain that he had suffered 'damage'. It should be noted that in subsection (1)(b) mistakes or omissions on first registration are expressly excepted from the right to indemnity, and this exception has been carried through to T & C 141(1)(b), though the point is debatable.

Amount of indemnity

► 145. Where an indemnity is awarded in respect of the loss of any interest in land, it shall not exceed—

(a) where the register is not rectified, the value of the interest at the time when the mistake or omission which caused the damage was made; or

(b) where the register is rectified, the value of the interest immediately before the time of rectification.

This section repeated Tan 100(5) which itself had repeated E 83(6) and had been repeated as KLR(SA)O 90(3) and Lag 147; it has become T & C 142. It may be said to be common sense (as well as common form), but it is a very necessary provision and conclusively settles a point which otherwise might be disputable.

Procedure for claiming indemnity

► 146. The Registrar may, on the application of any interested party, determine whether a right of indemnity has arisen under this Part and, if so, award indemnity, and may add thereto any costs and expenses properly incurred in relation to the matter.

This section, which is based on Tan 100(6), provides a practicable procedure for claiming indemnity, even though, at first sight, it may appear that the Registrar is judge in his own cause. The procedure envisaged is that on the receipt of a claim for indemnity the Registrar will immediately notify the Law Officers but will try to effect a settlement. Claims which are admitted, or can be compromised, can be settled easily, but if either the Minister or the claimant does not agree the amount awarded he can exercise the right of appeal which he has under Part XI. This follows English procedure. In Lagos (where this section was Lag 145), when the Registered Land Act was drafted it was noted that there had been no claims in the twenty-five years the registry had been operating. When the Registered Land Act was drafted in Kenya the Committee remarked that in forty-one years under

KRTA there had been only one claim and that in regard to an alleged error in survey (which under this Act, in any case, would be expressly excluded under s148).

Recovery of indemnity paid

► 147. Where any moneys are paid by way of indemnity under this Part, the Minister is entitled to recover by suit or otherwise the amount so paid from any person who has caused or substantially contributed to the loss by his fraud or negligence, and to enforce any express or implied agreement or other right which the person who is indemnified would have been entitled to enforce in relation to the matter in respect of which the indemnity has been paid.

This repeats Tan 100(8) which was derived from E 100(9) and was repeated as KLR(SA)O 90(6) and Lag 148. It has become T & C 144. It is obviously only sensible.

Errors in survey

► 148. (1) As between the Government and a proprietor, no claim to indemnity shall arise and no suit shall be maintained on account of any surplus or deficiency in the area or measurement of any land disclosed by a survey showing an area or measurement differing from the area or measurement disclosed on any subsequent survey or from the area or measurement shown in the register or on the registry map.

(2) As between a proprietor and any person from or through whom he acquired the land, no claim to indemnity shall be maintainable on account of any surplus or deficiency in the area or measurement above or below that shown in any other survey or above or below the area or measurement shown in the register or on the registry map, after a period of six months from the date of registration of the instrument under which the proprietor acquired the land.

This section comes from Sud 87 and 88 via KLR(SA)O 91 and Lag 146; it has become T & C 145. It was omitted from the Seychelles Land Registration Ordinance 1965 but was considered sufficiently important to be added by the Land Registration (Amendment) Ordinance 1967 (which contained no other provisions).

Subsection (1) is valuable since it saves the possibility of any argument on a point that otherwise can be the cause of much misunderstanding.

Subsection (2) is necessary where the price paid in a transaction is calculated on the area shown on the register and an error in survey may affect price. It is fair that time should be allowed for this to be settled, but a limit should be set to it and six months seems reasonable.

PART XI - DECISIONS OF REGISTRAR AND APPEALS

Perhaps it would have been better to have called this Part 'Appeals from Decision of the Registrar' (as in Tan Part XVI) and not to have included in it s149, which applies essentially to cases where the Registrar finds himself unable to give a decision and so presents the facts to the Supreme Court for a ruling.

Power of Registrar to state case

► 149. Whenever any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on him by this Act, the Registrar may state a case for the opinion of the Supreme Court; and thereupon the Supreme Court shall give its opinion thereon, which shall be binding upon the Registrar.

This section was derived from Tan 104 (in Part XVII - Miscellaneous), but is common form (see e.g. E 140).

Appeals

► 150. (1) If any person is dissatisfied by the refusal of the Deputy Chief Land Registrar, a Land Registrar or an Assistant Land Registrar to effect or cancel any registration, he may, within thirty days of the refusal, appeal in the prescribed form to the Chief Land Registrar, and the Chief Land Registrar may direct that such registration be effected or cancelled, as the case may require, or may uphold the refusal.

(2) (a) The Minister or any person aggrieved by a decision, direction, order, determination or award of the Chief Land Registrar may, within thirty days of the decision, direction, order, determination or award, give notice to the Chief Land Registrar in the prescribed form of his intention to appeal to the Supreme Court against the decision, direction, order, determination or award.

(b) On receipt of a notice of appeal, the Chief Land Registrar shall prepare and send to the Court and to the appellant, and to any other person appearing to him from the register to be affected by the appeal, a brief statement of the question in issue.

(c) On the hearing of the appeal, the appellant and the Chief Land Registrar and any other person who, in the opinion of the Court, is affected by the appeal may, subject to any rules of court, appear and be heard in person or by an advocate.

(d) The Court may make such order on the appeal as the circumstances may require, and every such order shall be given effect to by the Chief Land Registrar.

(e) The costs of the appeal shall be in the discretion of Court.

Subsection (1) makes it clear that all 'appeals' against decisions of subordinate officers go to the Chief Registrar and is particularly important in jurisdictions where there are more registries than one. (It does not appear in T & C 147 which envisages only one registry.)

Subsection (2) spells out the procedure for appeal from the decision of the Chief Registrar and is repeated as subsections (1)-(5) of T & C 147. It was derived from Lag 151, which repeated s97 of the Nigeria Registration of Titles Ordinance 1935.

Effect of appeal on disposition

► 151. (1) Any party to an appeal from the decision of any court (including an African court) or to any subsequent appeal may give notice of the appeal to the Registrar, who shall make a note thereof in the register.

(2) Where—

(a) a note has been so made in the register, all dispositions affecting the land, lease or charge concerned and registered after the note shall take effect subject to any order made on the appeal; and

(b) no note has been so made in the register, all dispositions other than dispositions made in good faith and for valuable consideration shall take effect subject to any order made on the appeal.

This section (which did not appear in this form in the Bill prepared in 1961) has been clarified in T & C 148 (following Mal 147) to read as follows:

"Effect of appeal on disposition.

" [T & C] 148—(1) An appeal to the Court shall not affect a disposition for valuable consideration made in good faith and registered before delivery of notice of the appeal to the Registrar.

"(2) A note that an appeal is pending shall be made in the register affected by the appeal and any disposition shall be subject to such notice."

There is an additional section in the Caribbean legislation:

Appeal Rules.

"[T & C] 149—The Supreme Court may make rules of Court for regulating applications and appeals to the Court under the provisions of this Law, and for the fees to be paid in respect thereof."

This provision derives from Lag 152 and Mal 148.

PART XII - MISCELLANEOUS

A Part with this heading appears in most statutes and provides a resting-place for matters which have not been fitted in elsewhere. What these matters should be

differs surprisingly from statute to statute, but Mal Part XII and T & C Part XII have closely followed this Part which itself was based on Lag Part XIV.

Addresses

► 152. Any person who under this Act submits a caution or any instrument for registration, or is the proprietor of any land, lease or charge, shall furnish to the Registrar in writing a postal address within Kenya for service, and shall notify him in writing of any change in that address:

Provided that the Registrar may in his discretion dispense with this requirement in regard to any particular registration.

This is an important provision which, except for the proviso, was derived from BG 148 via Lag 153, where it also appeared under Miscellaneous though the Part which deals with instruments (Part VI) should perhaps be a better place for it.

The proviso was very necessary for Kenya, where in some areas proprietors could give no postal address at all, but rather surprisingly it has been carried forward into T & C 150.

Service of notices

► 153. A notice under this Act shall be deemed to have been served on or given to any person—

- (a) if served on him personally;
- (b) if left for him at his last known place of residence or business in Kenya;
- (c) if sent by registered post to him at his last known postal address or at his last known postal address in Kenya;
- (d) if served in any of the above-mentioned ways on an attorney holding a power of attorney whereunder such attorney is authorized to accept such service;
- (e) if service cannot be effected in one of the above-mentioned ways, by displaying it in a prominent place on the land.

This section is derived from Tan 110 via Lag 154 and is a very necessary provision. In T & C 151 it has been modified as follows:

"Service of notices.

"[T & C] 151. A notice under this Law shall be deemed to have been served on or given to any person—

- "(a) if served on him personally; or
- "(b) if served on an attorney holding a power of attorney whereunder such attorney is authorised to accept such service; or

"(c) if sent by registered post to him at his last known postal address in this territory or elsewhere and a receipt purporting to have been signed by him has been received in return; or

"(d) if service cannot be effected in one of the above-mentioned ways, by displaying it in a prominent place on the land affected and by publishing it in three consecutive issues of the Gazette."

Meaning of "opportunity of being heard"

► 154. (1) Where by this Act a thing is to be or may be done after giving a person an opportunity of being heard, that person shall be deemed to have been given such an opportunity—

(a) if he attends before the Registrar personally or by an advocate or other agent, and is given such an opportunity; or

(b) if he intimates, personally or by an advocate or other agent, that he does not wish to be heard; or

(c) if he has been served with a notice in writing specifying the nature of the thing to be done and appointing a day and time not less than seven days after service of the notice at which he will, if he attends before the Registrar, be heard.

(2) Where a person or an advocate or other agent on his behalf attends before the Registrar concerning a matter on which he is entitled to an opportunity of being heard, or fails to attend pursuant to such a notice as aforesaid, the Registrar may, if he thinks fit, adjourn the hearing from time to time, and, notwithstanding failure to attend, may, if he thinks fit, hear such person at any time.

(3) Where by this Act all persons interested or affected are to be given an opportunity of being heard, it shall be sufficient if all persons who, according to any subsisting entry in the register, appear to be so interested or affected are given such opportunity.

Like the preceding section, this is a very practical provision which gives valuable guidance to the Registrar. It was derived from s87 of the Nigeria Registration of Titles Ordinance 1935 via Lag 155, and has been repeated as T & C 152, except that in (1) (c) seven days has been extended to ninety.

Offences

► 155. (1) Any person who knowingly misleads or deceives any person authorized by or under this Act to require information in respect of any land or interest in land shall be guilty of an offence and liable to imprisonment for a term not exceeding one year or to a fine not exceeding ten thousand shillings, or to both such imprisonment and such fine.

(2) Any person who—

- (a) fraudulently issues or makes or fraudulently procures the issue or making of, any certificate or other document, or any registration, or any erasure or alteration in any certificate or other document or in any register; or
- (b) fraudulently removes from a register any register or any part of any register or any instrument in the registry; or
- (c) fraudulently causes any defacement, obliteration, mutilation or unauthorized entry or alteration to be made on or in any register or filed instrument,

shall be guilty of an offence and liable to imprisonment for a term not exceeding three years or to a fine not exceeding thirty thousand shillings, or to both such imprisonment and such fine.

(3) If any person after the delivery to him of a summons to attend before the Registrar or to produce any document neglects or refuses without reasonable cause to attend in accordance with the summons, or to produce any document which he is required by the summons to produce, or to answer upon oath or otherwise any question which is lawfully put to him by the Registrar under the powers conferred by this Act, he shall be guilty of an offence and liable to a fine not exceeding five hundred shillings.

All the offences under the Act are set out in this lone section. There is no corresponding section in the Sudan Ordinance or in the Tanganyika Ordinance of 1953, or in KLR(SA)O. A provision on these lines, however, has been a feature of the English Act since 1875 and has also been included in the Torrens Acts since the first Act in 1858. Forgery and fraud are punishable under the general law, but it seems advisable to reinforce that law by making specific provision for them here and for other offences in the special context of registration.

Subsection (1) is derived from Sing 141(1)(c) but is treated as being a less serious offence than the offences in the next section.

Subsection (2)(a) is derived from Sing 141(1)(a), but see also E 116(1), which makes similar provision.

Subsection (2)(b) is derived from Sing 141(1)(d).

Subsection (2)(c) is also derived from Sing 141 (1)(d) but the word 'fraudulently' has been introduced, though surely it should be an offence to damage the register deliberately and maliciously, irrespective of whether the intent is fraudulent or not.

Subsection (3) repeats E 128 and is clearly a potentially useful section if only to show that the orders of the Registrar cannot be lightly disregarded.

This section has been repeated in T & C 153 with three alterations:

(1) No distinction is made between the offence in subsection (1) and the offences in subsection (2) above; the former appears to be regarded as just as serious as the other three and the same penalty is provided for it.

(2) The following paragraph has been substituted for paragraph (2)(b) above:

“(c) Fraudulently uses, assists in fraudulently using or is privy to the fraudulent use of any instrument or form purporting to be issued or authorised by the Registrar; or”

(This repeats Sing 141(1)(b).)

(3) The word 'fraudulently' has been omitted from subsection (1)(d), which corresponds with subsection (2)(c) above.

Fees

► 156. (1) The prescribed fees shall be payable in respect of land certificates, certificates of lease, searches, survey plans, printed forms and all other matters connected with registration, and the Registrar may refuse registration until the fees are paid.

(2) The Registrar may act notwithstanding that the prescribed fee or any part thereof has not been paid, but the unpaid fee or part of a fee shall be recorded in the register.

(3) The Registrar may refuse to register a disposition of any land, lease or charge against which unpaid fees are recorded until such fees are paid, [and shall refuse to register a disposition or to issue a land certificate or a certificate of lease if the fees payable to the Chief Land Registrar under the Land Adjudication Act 1968 or the Land Consolidation Act are not recorded in the register as having been paid in full.]³¹

(The fees prescribed are set out in the Fifth Schedule to the Registered Land Rules on page 634)

Subsection (1) makes it clear that fees are payable for almost everything that is done in the registry, and avoids the constant reiteration of the phrase 'on payment of the prescribed fee'. It was derived from Sud 95 via Lag 158(1).

Subsection (2), giving the Registrar discretion to register even if the prescribed fee is not paid is derived from Tan 108(1) via Lag 157(2) and is important. Documents should not remain unregistered merely because, perhaps inadvertently, some small fee has not been paid.

Subsection (3), however, ensures that uncollected fees are not forgotten when next there is a transaction. It was derived from Tan 108(2) via Lag.157(3).

This section has been repeated unchanged as T1 & C 154(1), (2), and (3) (except for the amendment made in 1968 to subsection (3) that the Registrar shall refuse to register a disposition or to issue a certificate if the initial fees have not been paid in full).

³¹ The words in square brackets are an amendment added in 1968.

Recovery of fees and expenses

► 157. Unpaid fees or expenses incurred by the Registrar shall constitute a debt due to him and shall be a civil debt recoverable summarily.

This section provides a quick and easy method for the Registrar to recover any fees due, and should be compared with, e.g., Tan 108(3), which requires him to sue for any unpaid fees. The formula in T & C is:

"[T & C] 155. Unpaid fees or expenses incurred by the Registrar shall constitute a civil debt recoverable by the Registrar in a Magistrate's court."

Enforcement of Registrar's orders for payment

► 158. An order for the payment of a sum of money made by the Registrar under any power conferred by this Act shall be deemed to be a decree of the High Court and shall be enforceable as such.

This section, repeated as T & C 156, enables cost and other sums awarded by the Registrar to be dealt with as if they had been awarded by the court, and it should be noted that there is no provision for the court to enquire into or review the Registrar's order. Such a provision would, in effect, merely introduce a further process of appeal. The time to contest such an order is when it is made, not when it comes to be enforced.

Jurisdiction of courts

► 159. (1) Except as provided by section 120 of this Act, civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in any such land, lease or charge, being an interest which is registered or registrable under this Act, or being an interest which is expressed by this Act not to require registration, shall, notwithstanding the provisions of the Courts Act, be tried by the High Court, or, where the value of the subject matter in dispute does not exceed ten thousand shillings, by the High Court or a subordinate court held by a Senior Resident Magistrate or a Resident magistrate:

Provided that where the land in question is within the special areas the limit of jurisdiction of a subordinate court held by a Resident Magistrate shall not apply.

(2) References to the court in section 120 of this Act are references to a subordinate court having jurisdiction in the area in which the land is situated.

In Kenya, and in jurisdictions where land cases under customary law are tried by customary or local courts, it is particularly important to make it quite clear that, once land is brought onto the register, cases in respect of it can only be tried by professional judges.

Rules

► 160. The Minister may make rules generally to give effect to the purposes and provisions of this Act, and in particular, and without prejudice to the generality of the foregoing, for prescribing the forms to be used under this Act and the fees payable for anything to be done thereunder, and for prescribing anything which under this Act may be prescribed.

This section (repeated as T & C 158) gives the Minister wide powers to make rules, although, as the wording indicates, it was intended that he should use these powers mainly for prescribing fees and forms - which are matters best left to the flexibility of rules. (E 144(1) takes quite a different line and particularizes no fewer than thirty-one purposes for which rules may be made.) The Rules made in Kenya and the forms and fees prescribed under this section are set out at the end of this Act on page 606.

There is no provision in this Act (or in the T & C Law) for the publication of the rules or for the procedure which is to be followed when they are made, since this is laid down in separate legislation. In Singapore, however, specific provision is made in the following terms:

"[Sing] 140(2) All rules made under this Ordinance shall be published in the Gazette and shall unless it is otherwise provided by such rules, come into force on the date of such publication.

"(3) Such rules shall be presented to the Legislative Assembly as soon as may be after such publication and, if a resolution is passed within the next subsequent three months after any such rules are so presented disapproving the rules or any part thereof, such rules or such part thereof, as the case may be, shall thereupon be void but without prejudice to the validity of anything previously done thereunder or to the making of new rules."

Saving of rights of Government and County Councils

► 161. Nothing in this Act prejudices any of the interests, rights, powers and privileges conferred on the Government or the County Council by any other written law.

Repeated as T & C 159.

Act to bind Government.

► 162. Subject to sections 139 (3) and 161 of this Act, this Act binds the Government.

Repeated as T & C 160.

Application of common law

► 163. Subject to the provisions of this Act and save as may be provided by any written law for the time being in force, the common law of England, as modified by the doctrines of equity, shall extend and apply to Kenya in relation to land, leases and charges registered

under this Act and interests therein, but without prejudice to the rights, liabilities and remedies of the parties under any instrument subsisting immediately before such application.

This section, which specifically refers to the common law of England and the doctrines of equity, should be compared with T & C 161:

“Other Law

“[T & C] 161. Any matter not provided for in this Law or in any other written law in relation to land, leases and charges registered under this Law and interests therein shall be decided in accordance with the principles of justice, equity and good conscience.”

Indian Transfer of Property Act not to apply to registered land

► 164. Upon the first registration of any land under this Act, the Transfer of Property Act, 1882, of India shall cease to apply to that land, except in relation to any dealing entered into before the date of first registration.

This section shows that, so far as registered land is concerned, this Act replaces the substantive law hitherto provided by the Indian Transfer of Property Act 1882. Thus it is a section of very particular significance.

3 Kenya Registered Land Rules

ARRANGEMENT OF RULES AND FORMS

- 1 Citation.
- 2 Form of register.
- 3 Forms of certificates.
- 4 Other forms.
- 5 Saving of forms under [previous Acts].
- 6 Forms to be in English.
- 7 Verification of instruments.
- 8 Fees.
- 9 Assessment of fees.
- 10 Payment of fees.
- 11 Registrar not to prepare instruments in certain cases.
- 12 Deposit on account of fees.
- 13 Refund of fees.

(Note. In the following list the reference in brackets is to the relevant section of the Act.)

First Schedule - Forms of Register (s10)

Second Schedule - Forms of Land Certificate and Certificate of Lease (s32(1))

Third Schedule - Other Prescribed Forms

- R.L. 1 Transfer of Land (s85(1))
- R.L. 2 Transfer of Lease (s85(1))
- R.L. 3 Transfer of Charge (s85(1))
- R.L. 4 Transfer by Chargee in Exercise of Power of Sale (s77(3))
- R.L. 5 Transfer of Profit (s96(4))
- R.L. 6 Transfer of Undivided Share (s103(2))
- R.L. 7 Transfer by Personal Representative to Person Entitled Under a Will or on an Intestacy (s119(2))
- R.L. 8 Lease (s47)
- R.L. 9 Charge (s65(1))
- R.L. 10 Discharge of Charge (s81(1))
- R.L. 11 Surrender of Lease (s63(1)(a))
- R.L. 12 Grant of Easement (s94(1))
- R.L. 13 Grant of Profit (s96(1))
- R.L. 14 Release of Easement, Profit or Restrictive Agreement (s97(1))
- R.L. 15 Severance of Joint Proprietorship (s102(3))
- R.L. 16 Application for Partition (s104(1))
- R.L. 17 Power of Attorney (s16(2))
- R.L. 18 Notice of Revocation of a Power of Attorney (s16(3))
- R.L. 19 Application to be Registered as Proprietor by Transmission (s119(1))
- R.L. 20 Certificate of Succession (s120(2))
- R.L. 21 Advertisement Under Section 121(2)
- R.L. 22 Caution (s131(3))
- R.L. 23 Appeal to the Chief Land Registrar Under Section 150(1)
- R.L. 24 Notice of Intention to Appeal to the Supreme Court (s150(2) (a))
- R.L. 25 Application to Inspect the Register (s36(1))
- R.L. 26 Application for Official Search (s36(2))
- R.L. 27 Certificate of Official Search (s36(2))
- R.L. 28 Application for Registration (s32(1))
- R.L. 29 Mutation Form, (s19(1))

Fourth Schedule - Verification of Instruments: Prescribed Officers and Other Persons (s110)

Fifth Schedule - Fees (s156(1))

Rules under section 160 of the Registered Land Act

THE REGISTERED LAND RULES

1. These Rules may be cited as the Registered Land Rules.

2. A register shall be in one of the forms in the First Schedule to these Rules, whichever is appropriate; the registration section and the parcel number shall together form the title number, and the parcel number entered in a register in respect of a lease shall contain—

(a) where the lease is of a whole parcel, the parcel number;

(b) where the lease is a sublease, a letter suffix unique to that sublease;

(c) where the lease or sublease is of a portion of a parcel, a subdivisional number unique to that portion,

and letters and subdivisional numbers shall appear in the order in which the respective interests were created.

3. A land certificate and a certificate of lease shall be in the appropriate form in the Second Schedule to these Rules.

4. The forms in the Third Schedule to these Rules shall, subject to section 108 of the Act, be used in all matters to which they refer.

5. Notwithstanding rules 2, 3 and 4 of these Rules, any register, certificate of freehold title or instrument which complies with the form prescribed under the Land Adjudication Act shall be deemed to comply with these Rules, and a grant for a term of years which was registered under the Registration of Titles Act shall, for the purposes of registration under this Act, be deemed to be a lease.

6. All forms shall be clearly and legibly completed in the English language.

7. (1) In addition to the Registrar and the persons specified in section 110 of the Act, the public officers and other persons specified in the Fourth Schedule to these Rules may verify any instrument for the purposes of that section.

(2) A certificate for the purpose of subsections (2) and (4) of section 110 of the Act shall be in the following form, which may be printed on, or otherwise incorporated in, any instrument present for registration—

I certify that the above-named appeared before me on the day of.....and, being identified by [or being known to me], acknowledged the above signatures or makes to be his [theirs] and that he [they] had freely and voluntarily executed this instrument and understood its contents.

.....

Signature and designation of person certifying

and the Registrar or the public officer or other person certifying (if he has a seal or stamp of office) shall affix his seal or stamp of office to the certificate.

8. The fees specified in the second column of the Fifth Schedule to these Rules shall be paid in respect of the matters specified in the first column of that Schedule:

Provided that—

(i) No fee shall be payable for the preparation or registration of any instrument in respect of any dealing in favour of the Governor, the Government, the Permanent Secretary to the Treasury (Incorporated), the Central Land Board, the Settlement Fund Trustees or a Region, or in respect

of any application, notice or caution made, given or presented by or on behalf of any of those persons or, where they are required for official purposes, for a search by or for the issue of any copy to any public officer;

(ii) where a parcel is identified by reference to more than one sheet of the registry map, the sheets required to identify that parcel shall, for the purposes of any fee, be deemed to be one sheet only.

9. Where any fee is calculated ad valorem and no consideration is expressed in the instrument, the value for the purposes of assessment of stamp duty shall be the value on which the fee is calculated.

10. (1) Except where an instrument has been prepared by the Registrar, every instrument presented for registration shall be accompanied by the prescribed form of application for registration, and the fee payable therefor shall be paid by means of adhesive revenue stamps affixed to that form in the place provided.

(2) The Registrar shall cause to be impressed on all such forms and on all copies thereof a stamp recording the date of presentation in such manner (in the case of the original) as to cancel the stamps affixed in payment of fees, and such impression shall, in the absence of fraud, be conclusive evidence of the date of presentation and that the fees stated in the application to have been paid have been paid.

(3) Unless the Registrar otherwise agrees, fees in all other cases shall be paid in cash.

11. (1) Except where one of the parties to a disposition is the Governor, the Government, the Permanent Secretary to the Treasury (Incorporated), the Central Land Board, the Settlement Fund Trustees or a Region, no instrument shall be prepared by the Registrar where the amount or value of the consideration exceeds twenty thousand shillings or where the amount or value of the annual rent or other annual payment reserved exceeds two thousand shillings, and the Registrar may refuse to prepare an instrument in any other case where he is of the opinion that the parties to the transaction should obtain the advice of an advocate.

(2) Where an instrument is prepared by the Registrar, his responsibility is limited to the preparation of that instrument, and he shall not be concerned with, nor be in any way liable for, any other issue which may arise between the parties to any transaction.

12. Where any fee payable for the services of the Registrar or of the Survey of Kenya cannot be assessed until the service required by an application has been completed the Registrar may require the applicant to deposit with the Registrar such sum not exceeding the maximum amount of the prescribed fee as the Registrar may determine, and he may refuse to proceed with the application until such deposit has been made.

13. No fee shall be refunded except by order of the Chief Land Registrar.

FIRST SCHEDULE – Form of Register

Front

KENYA REGISTERED LAND ACT AND RULES

FIRST SCHEDULE
THE REGISTER
[Front]

(r. 2)
[To be printed on green paper]

Edition _____
Opened _____

PART A—PROPERTY SECTION

Registration Section	Easements, etc.	Nature of Title
Parcel No. _____ Approx. area _____ acres Registry map sheet No. _____		ABSOLUTE

PART B—PROPRIETORSHIP SECTION

Entry No.	Date	Name of Registered Proprietor	Address and Description of Registered Proprietor	Consideration and Remarks	Signature of Registrar

FIRST SCHEDULE—(Contd.)
[Back]

PART C—ENCUMBRANCES SECTION

Entry No.	Date	Nature of Encumbrance	Further Particulars	Signature of Registrar

SECOND SCHEDULE (r. 3)

FIRST SCHEDULE—(Contd.)
THE REGISTER
[Front]

(r. 2)
[To be printed on white paper]

Edition.....

Opened.....

PART A—PROPERTY SECTION

Registration Section	Particulars of Lease	Nature of Title
Parcel No. _____ Approx. area _____ acres Registry map sheet No. _____	Lessor _____ Lessee _____ Rent _____ Term _____ From _____ For appurtenances see the registered lease N.B. Where the lease is of a part of a parcel, the parcel number refers to the number shown on the filed plan	LEASEHOLD

PART B—PROPRIETORSHIP SECTION

Entry No.	Date	Name of Registered Proprietor	Address and Description of Registered Proprietor	Consideration and Remarks	Signature of Registrar
1.		<i>Restriction: no disposition by the proprietor shall be registered without the written consent of the lessor (s. 48)</i>			

614

FIRST SCHEDULE—(Contd.)
[Back]

PART C—ENCUMBRANCES SECTION

Entry No.	Date	Nature of Encumbrance	Further Particulars	Signature of Registrar
1.			The agreements, etc., contained or implied in the registered lease	

THE REGISTERED LAND ACT
[Front]
LAND CERTIFICATE

Title Number

This is to certify that

is [are] now registered as the absolute proprietor[s] of the land comprised in the above-mentioned title, subject to the entries in the register relating to the land and to such of the overriding interests set out in section 30 of the Registered Land Act as may for the time being subsist and affect the land.

Given under my hand and the seal of the

District Registry this day of 19

.....
Land Registrar

[Back]

[To be completed only when the applicant has paid the fee of Sh. 251

At the date stated on the front hereof, the following entries appeared in the register relating to the land:

PART A - Property Section [easements, etc.]

PART B- Proprietorship Section [inhibitions, cautions and restrictions]

Part C - Encumbrances Section [leases, charges, etc.]

.....
Land Registrar.

SECOND SCHEDULE (Contd.)
THE REGISTRATION OF LAND ACT (r. 3)
(Front)
CERTIFICATE OF LEASE

Title Number

Rent Term

This is to certify that

is [are] now registered as the proprietor[s] of the leasehold interest above referred to, subject to the agreements and other matters contained in the registered lease, to the entries in the register relating to the lease and to such of the overriding interests set out in section 30 of the Registered Land Act as may for the time being subsist and affect the land comprised in the lease.

Given under my hand and the seal of the

District Registry this day of 19

.....
Land Registrar.

[To be completed only when the application has paid the fee of Sh. 25]

At the date stated on the front thereof, the following entries appeared in the register relating to the

PART A - Property Section [easements. etc.]

PART B - Proprietorship Section [inhibitions, cautions and restrictions]

Part C - Encumbrance: Section [sub-leases, charges etc.]

.....
Land Registrar.

THIRD SCHEDULE (r. 4)

THE REGISTERED LAND ACT

Form R.L. 1

TRANSFER OF LAND

Title No.:

I/We

in consideration of (the receipt whereof is hereby acknowledged) HEREBY TRANSFER

to

of

the land comprised in the above-mentioned title.

The Transferees declare that they hold the land as proprietors in common in the following undivided shares:

[or as joint proprietors].

Dated this day of 19

Signed by the Transferor:

in the presence of:

Signed by the Transferee:

in the presence of:

THE REGISTERED LAND ACT

Form R.L. 2

TRANSFER OF LEASE

Title No.:

I/we in consideration of

(the receipt whereof is hereby acknowledged) HEREBY TRANSFER

to

of

the leasehold interest comprised in the above-mentioned title.

The Transferees declare that they hold the leasehold interest as proprietors in common in the following undivided shares:

[or as joint proprietors].

Dated this day of 19

Signed by the Transferor:

in the presence of:

Signed by the Tranferee:

in the presence of:

THE REGISTERED LAND ACT

Form R.L. 3

TRANSFER OF CHARGE

Title No.:

I/we

in consideration of (the receipt whereof is hereby acknowledged) HEREBY TRANSFER

to

of

the charge shown as entry number..... in the encumbrances section of the register of the above-mentioned title.

The Transferor hereby declares that the amount of principal and interest owing by the Chargor at the date hereof is.....

[And the Chargor hereby acknowledges that that is the amount now due and owing by him].*

Dated this day of 19

Signed by the Transferor:
in the presence of
Signed by the Transferee:
in the presence of:

Signed by the Chargor in the presence of:

*Delete these words if the Transferee does not require the Chargor to acknowledge.

THE REGISTERED LAND ACT
Form R.L. 4

TRANSFER BY CHARGE IN EXERCISE OF POWER OF SALE

Title No.:

I/we

having exercised the power of sale conferred upon me/us by the charge shown as entry number.....in the encumbrances section of the register of the above-mentioned title, in consideration of.....(the receipt whereof is hereby acknowledged) HEREBY TRANSFER

to

of

the interest comprised in the above-mentioned title.

The Transferees declare that they hold the said interest as proprietors in common in the following undivided shares:

[or as joint proprietors]

Dated this day of 19

Signed by the Transferor:
in the presence of:
Signed by the Transferee:
in the presence of:

THE REGISTERED LAND ACT
Form R.L. 5

TRANSFER OF PROFIT

Title No.:

I/we

in consideration of

(the receipt whereof is hereby acknowledged) HEREBY TRANSFER

to

of

the profit shown as entry number.....in the encumbrances section of the above-mentioned title.

The Transferees declare that they hold the profit as proprietors in common in the following undivided shares:

[or as joint * proprietors].

Dated this day of 19

Signed by the Transferor

in the presence of:

Signed by the Transferee

in the presence of:

THE REGISTERED LAND ACT

Form R.L. 6

TRANSFER OF UNDIVDED SHARE

Title No.:

I/we

in consideration of

(the receipt whereof is hereby acknowledged) HEREBY TRANSFER

to

of

my/our undivided share[s] [respectively] in the above-mentioned title.

The Transferees declare that they hold the [combined] undivided share[s] as proprietors in common in the following undivided shares:

[or as joint proprietors].

I/we the remaining proprietor[s] of the interest comprised in the abovementioned title hereby consent to this transfer.

Dated this day of 19

Signed by the Transferor:

in the presence of:

Signed by the Transferee:

in the presence of:

Signed by the remaining proprietor[s]:

in the presence of:

THE REGISTERED LAND ACT

Form R.L. 7

TRANSFER BY PERSONAL REPRESENTATIVE TO PERSON ENTITLED
UNDER A WILL OR ON INTESTACY

Title No.:

I/we as personal representative of deceased HEREBY TRANSFER

to

of

(being the person entitled thereto under the will [or on the intestacy] of the deceased) the interest of the deceased comprised in the abovementioned title.

The Transferees declare that they hold that interest as proprietors in common in the following undivided shares:

(or as joint proprietors).

Dated this day of 19

Signed by the Transferor

in the presence of:

Signed by the Transferee

in the presence of:

THE REGISTERED LAND ACT

Form R.L. 8

LEASE

Title No.:

I/We

HEREBY LEASE

to

of

the land comprised in the above-mentioned title [or that portion of the land comprised in the above-mentioned title which is shown [on the registry map as parcel number.....] or [on the filed plan as number.....] for the term of

from the day of at the

rent of payable

The Lessees declare that they hold the lease as proprietors in common in the following undivided shares:

[or as joint proprietors].

Dated this day of 19

Signed by the Lessor:

in the presence of:

Signed by the Lessee:

in the presence of:

THE REGISTERED LAND ACT

FORM R.L. 9

CHARGE

Title No.:

I/we

HEREBY CHARGE my/our interest in the above-mentioned title [or the charge shown as entry number in the encumbrances section of the register of the above-mentioned title] to secure the payment

to

of

of the principal sum of

with interest at the rate of per centum per annum payable

The principal sum shall be repaid on the.....day of.....together with any interest then due.

And I/we the above-named Chargor[s] hereby acknowledge that we understand the effect of section 74 of the Registered Land Act.

Dated this day of 19

Signed by the Chargor:

in the presence of:

Signed by the Chargee:

in the presence of:

THE REGISTERED LAND ACT

Form R.L. 10

DISCHARGE OF CHARGE

Title No.:

I/We

HEREBY DISCHARGE the Charge shown as entry number.....in the encumbrances section of the register of the above-mentioned title wholly [or in relation to.....].

Dated this day of 19

Signed by the Chargee:

in the presence of:

THE REGISTERED LAND ACT

Form R.L. 11

SURRENDER OF LEASE

Title No.:

I/We

in consideration of*

(the receipt whereof is hereby acknowledged)* HEREBY SURRENDER the lease comprised in the above-mentioned title and the Lessor HEREBY ACCEPTS the said surrender.

Dated this day of 19

Signed by the Lessee:

in the presence of:

Signed by the Lessor:

in the presence of:

*Delete if no monetary consideration.

THE REGISTERED LAND ACT

Form R.L. 12

GRANT OF EASEMENT

Title No.:

I/We

in consideration of
(the receipt whereof is hereby acknowledged) HEREBY GRANT
to
of
the proprietor of the interest comprised in title number..... the following
easement:

Dated this day of 19

Signed by the Grantor:

in the presence of:

Signed by the Grantee:

in the presence of:

THE REGISTERED LAND ACT

Form R.L. 13

GRANT OF PROFIT

Title No.:

I/We:

in consideration of (the receipt whereof is hereby acknowledged) HEREBY
GRANT

to

of

the following profit to arise from the interest comprised in the above, mentioned
title:

The profit is to be enjoyed in gross [or as appurtenant to the interest of the
Grantee comprised in title number.....].

Dated this day of 19

Signed by the Grantor:

in the presence of:

THE REGISTERED LAND ACT

Form R.L. 14

RELEASE OF EASEMENT PROFIT OR RESTRICTIVE AGREEMENT

Title No.:

I/we

being the person(s) now entitled to the benefit of the [Easement] [profit] [restrictive agreement] shown as entry number.....in the encumbrances section of the register of the above-mentioned title HEREBY RELEASE the [easement] [profit] [restrictive agreement].

Dated this day of 19

Signed:

in the presence of:

THE REGISTERED LAND ACT

Form R.L. 15

SEVERANCE OF JOINT PROPRIETORSHIP

Title No.:

I/we

HEREBY SEVER our joint proprietorship of our interest in the above-mentioned title and apply to be registered as proprietors in common in the following shares:

Dated this day of 19

Signed by the Proprietors:

in the presence of:

THE REGISTERED LAND ACT

Form R.L 16

APPLICATION FOR PARTITION

Title No.:

I/we

HEREBY APPLY for the land comprised in the above-mentioned title to be partitioned in the following manner:

Dated this day of 19

Signed by the Applicant:

in the presence of:

THE REGISTERED LAND ACT

Form R.L. 17

POWER OF ATTORNEY

Title No.:

I HEREBY APPOINT:

Of:

to be my attorney and generally in relation to my interest in the abovementioned title to do anything and everything that I myself could do, and for me and in my name to execute all such instruments and to do all such acts, matters and things as may be necessary or expedient for carrying out the powers hereby given.

[If the power is to be limited to particular acts only, delete everything after the word "attorney" and set out below what powers are to be conferred.]

Dated this day of 19

Signed by the Donor:

in the presence of:

THE REGISTERED LAND ACT

Form R.L. 18

NOTICE OF REVOCATION OF A POWER OF ATTORNEY

Title No.:

I HEREBY GIVE NOTICE that the Power of Attorney filed in the register of powers of attorney as number.....has been revoked—

(a) by me,

or

(b) by the [death] [bankruptcy] [disability] of the donor,

or,

(c) by the [death] [disability] of the attorney,

[And I attach the following documents in support thereof:

Dated this day of 19

Signed:

in the presence of:

THE REGISTERED LAND ACT

FORM R.L. 19

APPLICATION TO BE REGISTERED AS PROPRIETOR BY
TRANSMISSION

Title No.:

I/We as personal representative(s) of:

deceased HEREBY APPLY to be registered by transmission as proprietor in place of the deceased of his interest in the above-mentioned title, and in support thereof attach the Grant as required by section 119 (1) of the Act.

Dated this day of 19

Signed by the Representative(s):

in the presence of:

THE REGISTERED LAND ACT

FORM R.L. 20

CERTIFICATE OF SUCCESSION

Title No.,

THE.....AFRICAN COURT HEREBY CERTIFIES that the persons entitled to the interest of.....deceased in the above-mentioned title and the nature and extent of their respective shares are:

Name	Address	Share
------	---------	-------

The persons who are to be registered as proprietors and their shares are:

Name	Address	Share
------	---------	-------

Dated this day of 19

Signature of President and Seal of the Court:

THE REGISTERED LAND ACT

Form R.L. 21

ADVERTISEMENT UNDER SECTION 121 (2)

[To be inserted in the Kenya Gazette and in the Gazette of the Region within which the land is situated and in a newspaper circulating in that Region]

THE ASSISTANT LAND REGISTRAR,District, has been notified by the.....African Court that it has not issued a certificate of succession in respect of the interest of :

Of:

in the title number:

IN ACCORDANCE with section 121 (2) of the Registered Land Act, therefore, NOTICE ISHEREBY GIVEN that after the expiration of thirty days from the.....date hereof the interest of the deceased will be registered in the name of the Council as trustee in terms of section 121 (3) of the Act.

Dated this day of 19

Signature of Assistant Land Registrar:

THE REGISTERED LAND ACT

Form R,L. 22

CAUTION

Title No.:

I:

Of:

claim an interest as:

in the above-mentioned title and forbid the registration of dealings and the making of entries in the register relating to the title [altogether] [to the following extent.....] without my consent, until this caution has been withdrawn by me or removed by order of the court or of the Registrar.

Dated this day of 19

Signed:

in the presence of:

THE REGISTERED LAND ACT

Form R.L. 23

APPEAL TO THE CHIEF LAND REGISTRAR UNDER SECTIONN 150 (1)

Title No.:

I:

HEREBY APPEAL against the refusal of the Registrar to effect or cancel the following registration:

My grounds for appeal are as follows:

Dated this day of 19

Signature of Appellant

THE REGISTERED LAND ACT

Form R.L. 24

NOTICE OF INTENTION TO APPEAL TO THE SUPREME COURT

Title No.:

To: The Chief Land Registrar,

[Address]

TAKE NOTICE that I intend to appeal to the Supreme Court against the decision taken by you in my appeal to you dated the

Dated this day of 19

Signature of Appellant

THE REGISTERED LAND ACII

Form R.L. 25

APPLICATION TO INSPECT THE REGISTER

Title No.:

I HEREBY APPLY to inspect the register of the above-mentioned title. Adhesive revenue stamps to the value of Sh. in payment of the fee are affixed hereto.

Date: 19

Signature:

Postal address:

Parcel file checked on completion of search by:.....[Counter clerk's initials]

To be submitted in duplicate.

CONDITIONS

1. Persons making searches may take brief notes in pencil, but no document shall be copied.

2. In no circumstances may any note or mark be made on any register, document or file produced for inspection.

3. Persons making searches shall check the contents of any parcel file produced to them and have it checked by the counter clerk, both before and on completion of the search, and obtain the counter clerk's initials on the duplicate search form, otherwise the person searching will be held responsible for any document lost or damaged.

4. The counter clerks duty does not extend to answering questions on matters of title and no responsibility is accepted for any opinion which may be expressed by him.

THE REGISTERED LAND ACT

Form RL. 26

APPLICATION FOR OFFICIAL SURCH

Title No.:

To: The Assistant Land Registrar,
District Registry.

Please supply—

*(a) particulars of the subsisting entries in the register of the abovementioned title;

(b) a certified copy of each of the following:

*I propose [or proposes]

to:

and application is hereby made for a stay of registration in accordance with section 43 (1) of the Act. The written consent of the proprietor accompanies this application. Adhesive revenue stamps to the value of Sh. are affixed hereto.

I understand that any additional fee which is payable must be paid by me forthwith on demand.

Date:

Signature of applicant or his advocate:

Postal address:

*Delete if not applicable.

The minimum fee is Sh. 5.

To be submitted in duplicate.

THE REGISTERED LAND ACT

Form RL. 27

CERTIFICATE OF OFFICIAL SEARCH

[To be printed on the back of form R.L. 26]

Title No.:

Search No.:

On the day of 19 the following were the subsisting entries on the register of the above-mentioned title:

Part A - Property Section [easements, etc.]

Part B - Proprietorship Section

 Name and address of proprietor:

 Inhibitions, cautions and restrictions:

Part C - Encumbrances Section [charges, etc]

The following applications are pendng:

The certified copies requested are attached.

The fees now payable are Sh. ; please detach the form below, and affix to it adhesive /revenue stamps for that amount and return it to me within seven days of today's date.

A stay of registration has been noted in the register.

Date:

Assistant Land Registrar

TO: The Assistant Land Registrar,

Search No.:

District Registry.

Adhesive revenue stamps for Sh. affixed hereto.

Signature of Applicant:

THE REGISTERED LAND ACT

Form R.L. 28

APPLICATION FOR REGISTRATION

I hereby apply for the registration of the undermentioned instruments in the following order of priority:

Date of instrument: Description: Title No.: Fee:

Please issue a land certificate/ certificate of lease.

Additional fee, at Sh. 5 1 Sh. 25 each

Adhesive revenue stamps affixed hereto the value of:

The following documents are enclosed:

Land Certificate; Clearance Certificate; Certificate of Lease; Estate Duty Certificate; Lease (duplicate and triplicate); Divisional Land Control Board consent; Charge (duplicate and triplicate); Lessor's consent in terms of the lease; Chargee's consent in terms of the charge;.....

Special instructions, including in appropriate cases the name and address of the person to whom the documents are to be sent if other than the presentor:

Signature:

Postal address:

Name in block capitals:

Date:

[The conditions on the back of this form must be complied with]

CONDITIONS

1. Every instrument presented for registration unless it has been prepared by the Registrar, must be accompanied by this form.

2. The form must be completed, in triplicate, accurately in accordance with these conditions. Failure to do so may result in the rejection of the application. The information supplied the presentor must appear legibly in English. If registration is sought at different registries, separate applications accompanied by the instrument must be addressed to each.

3. Delete from the list of enclosed documents those which are not appropriate, and add any additional enclosures.

4. Fees may only be paid by affixing adhesive revenue stamps to the required value in the space provided on the original application form. These stamps may be obtained from post offices; spoilt or damaged adhesive revenue stamps will not be accepted, but stamps upon which the presentor has placed his name stamp shall not be deemed spoilt or damaged for this purpose.

5. Applications may be submitted as follows—

(a) by post, addressed to the appropriate registrar;

(b) by hand, delivered at the appropriate registry;

(c) by requesting the Collector of Stamp Duties to forward the application form to the appropriate registrar after stamping the document;

[Back]

SKETCH

[To be completed by District Surveyor]

Not to scale.

Date:

Signature of District Surveyor

Signatures of parties present on the land at the time of survey:

To: Director of Surveys.

Please amend registry map to conform with above. The following additional information is supplied:

Date:

District Surveyor.

To: Assistant Land Registrar,

.....District

Registry map amended; application now fit for new registers.

Date:

Signature: *for* Director of Surveys.

[This form to be completed in triplicate]

FOURTH SCHEDULE (r. 7)

VERIFICATION OF INSTRUMENTS: INSCRIBED OFFICERS AND OTHER PERSONS

1. Instruments executed in Kenya:

A judge, magistrate or justice of the peace

The Registrar and the Deputy Registrar of the Supreme Court.

The Registrar-General, the Deputy Registrar-General and any Assistant Registrar-General

An administrative officer

A Superintendent of Prisons

An advocate

A bank official

2. Instruments executed in a foreign country:

A notary public

FIFTH SCHEDULE (r. 8)

Fees

	(1)	(2)
1.	On application for a land certificate or a certificate of lease:	
	(a) where the applicant requests the inclusion of all subsisting entries	25 00
	(b) where no such request is made	5 00
2.	On application for the preparation of a surrender of lease, discharge of charge, release of easement, release of profit or release of restrictive agreement, application to sever a joint proprietorship, application for partition, notice of revocation of power of attorney or a caution, except where item 4 applies.	5 00
3.	On application for the preparation of any instrument nothereinbefore described, except where item 4 applies	10 00
4.	On application for the preparation of any instrument in the opinion of the, Registrar, requires substantial additions to or variations from the prescribed form	Such fee, not exceeding 200 as the Chief Land Registrar may assess
5.	On application for the registration or filing of any instrument, for each title affected	
	(a) where the amount or value of the consideration, or the value of the interests affected by the registration, does not exceed Sh. 2,000 or where the annual rent or other annual payment reserved does not exceed Sh. 200	5 00
	(b) where the amount of value of the consideration, or value of the interests affected by the registration, exceeds Sh 2,000 but does not exceed Sh. 20,000, or where the annual rent or other annual payment reserved exceeds Sh. 200 but does not exceed Sh. 2,000	10 00
	(c) in any other case	25 00
	Provided that, where the instrument has been previously rejected as unfit for registration and relates to more than one title, the fee shall be calculated as if only one title were affected.	

6.	For opening new registers consequent upon a partition or subdivision, for each parcel resulting	
	(a) where the value of the interest before partition or subdivision did not exceed Sh. 20,000	10 00
	(b) in any other case	25 00
7.	On application for the combination of two or more parcels	
	(a) where the value of the interest after combination does not exceed Sh. 20,000	10 00
	(b) in any other case	25 00
8.	On application to inspect under section 36 (1), for each title inspected	5 00
9.	On application for an official search under section 36 (2)	
	(a) for supplying particulars of the subsisting entries in the register searched	5 00
	(b) for supplying a certified copy of any instrument, the registry map or a filed plan, for every page or sheet copied	5 00
10.	On application for a copy of any register or instrument, for every page copied	
	(a) if certified	5 00
	(b) if uncertified	2 50
11.	On application for a copy of the registry map, or for a copy of any filed plan, for every sheet copied	
	(a) if certified	10 00
	(b) if uncertified	5 00
12.	For fixing a boundary on the application of any person under section 22(1).	Sh.20 for every hour, or part of an hour, of the time involved together with any expenses incurred by the Registrar
13.	For any act, matter or thing not otherwise specifically hereinbefore provided	25 00