

LAND REGISTRATION UNDER A DUAL
LAND TENURE SYSTEM IN ZAMBIA

By

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DECLARATION

I, FATIMA MANDHU, do solemnly declare that this dissertation, except in cases where quotations are made and in such cases acknowledgement of sources of the materials has been indicated, represents my own work which has not been previously submitted for a degree at this or any other University.

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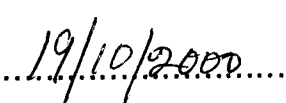
APPROVAL

This dissertation of **FATIMA MANDHU** is approved as fulfilling the requirements for the award of the Degree of Master of Laws by the University of Zambia.

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ABSTRACT

Land, which includes the surface of the earth, the airspace above it and everything beneath the surface down to the centre of the earth, is the source material wealth. As human beings we live on the earth and obtain from it food, clothing, fuel, shelter, metal and precious stones. Even when we die our bodies or ashes are buried into earth. Therefore, the availability of land and its uses are a vital part of human existence. The formulating of land policy and the keeping of land records relating to title and ownership of land are of great concern to all governments. A sound national land tenure policy with an effective land registration system will provide the answers to economic growth of each country.

In Zambia the current system of land legislation is based on antiquated English Law and traditional or religious concepts attached to land. Historical, political, and economic factors have contributed to the development of a highly urbanised Zambian population in favour of peri-urban settlements. Zambia is unique among African countries in that it has highly urbanised population, yet arguably an abundant supply of arable land that, for complex historical reasons, remains uncultivated and part of the traditional land system.

There are good legal, economic, social and political reasons for the establishment of a modern, coherent, simplified and relevant land legislation and administration system. The current government in Zambia is calling for these land policy reforms. The enactment of the new Lands Act is one such move in the right direction.

Before the enactment of the new legislation, land policies were based on the imported colonial laws. Most of the research carried out by academicians on the land laws and policy emphasised the dual land tenure system. Analysis of case law with regard to the complex English concepts and their impact on the customary land tenure system formed the main theme of these studies. This work now combines policy and procedure, therefore diverting from the traditional approach of policy analysis to the actual process of land Registration and the drafting of documents relating to transfer of land.

Conveyancing is a difficult process little understood even by lawyers themselves. The need to simplify and streamline conveyancing procedures through legislation as well as administrative changes, should be emphasised as the basis of future land reform policies.

The dissertation is divided into six chapters. Chapter one outlines the general background to Zambian land policy and the application of complex English land concepts. The development and basis of the Land Registration system cannot be discussed without referring to the Torrens Systems, its introduction and spread to various countries. This chapter also includes the legislative history of the land tenure system and its dual nature.

The second Chapter discusses the actual system of land registration, its legal history, its rationale and the need to have the right surveying policies with reference to accuracy of boundaries and acreage. It also gives an overview of pieces of legislation regulating the registration of rights and interests in land.

Chapter three discusses the practical process of transferring and registering rights affecting land.

Most of the case law points towards drafting problems faced by the Advocates. The need to simplify the age long art of conveying is clearly brought out.

Chapter four surveys the Lands and Deeds Registry, the institution responsible for officially delivering titles and managing state land, its constraints, including lack of manpower, limited surveying capacity, inefficiency and the delay of proceeding thousands of applications, many of which have been pending for years. Decentralisation and the restructuring of the institution are suggested as a form of reforming the entire land allocation and titling systems.

Chapter five focuses on title to and interests in land under the domain of customary law. A unified, simple system of land registration would provide solutions to most of the problems faced by the policy makers, the legislators and the institutions implementing the system of registration of land.

The final chapter outlines the findings and makes recommendations.

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DEDICATION

This piece of work is dedicated to the memory of my late father,
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TABLE OF CONTENTS

	PAGE
Title	i
Declaration :.....	ii
Approval :.....	iii
Abstract:	iv
Acknowledgements:	viii
Dedication:	x
Contents :.....	xi
List of Tables and Illustrations:	xiv
Table of Cases:	xvi
List of Statutes :	xx

CHAPTER ONE

INTRODUCTION

	PAGE
A. Background to Land Policy in Zambia.	1
B. Land Registration : Torrens System.	5
C. Registration of Deeds and Registration of Titles.	6
D. Evolution of the Dual Land Tenure System.	11
E. Law Governing Land Registration in the pre-independence era to- date.	20

CHAPTER TWO

SYSTEM OF REGISTRATION

A. Rationale for a system of registration of documents pertaining to land transactions.	26
B. Legal history of registration of interest in land.	36
C. Registration of Deeds and Registration of Titles: The two concepts.	51
D. Property Register.	67
E. Sectional Title.	70
F. Other statutes regulating registration of rights and interests in land.	78

CHAPTER THREE

CONVEYANCING IN ZAMBIA

A. Historically, background to conveyancing in England.	102
B. Conveyancing regulated under statute.	105
C. The transaction itself, the sale and purchase of real property.	118
D. What constitutes registration?	150

CHAPTER FOUR

PRACTICAL ADMINISTRATION.

A.	Lands and Deeds Registry: practice and procedure of registration.	160
B.	Problems faced by the Lands and Deeds Registry and the Council Registry.	177
C.	The legal practitioner's task of registering land transactions.	184

CHAPTER FIVE

CUSTOMARY TENURE

A.	Introduction.	194
B.	Customary tenure of the various tribes.	197
C.	Suitable land registration scheme for interests held under customary tenure.	207

CHAPTER SIX

Summary	213
Recommendations	215

LIST OF TABLES AND ILLUSTRATIONS

1. Land holding structure in England (Appendix 'A').
2. Phased development and separate certificate of Title.
3. Sketch plan (Appendix 'A').
4. *Theodilote and the tripod instruments used in surveying.*
5. Distance measurement when surveying a plot of land.
6. Field book and an example of a sketch plan.
7. Field book for reading the angles to arrive at the measurements.
8. Filed book continued calculations, pp 80-85, necessary to show the amount of work needed to arrive at an accurate reading for a survey conducted on one single plot, being stand No. 9212 Lusaka. Also the requirement of adequate trained personnel.
9. Report on survey, codification of all the data collected (Appendix 'E').
10. Sample of an application form introduced under common leasehold declaration (phased development) (Appendix 'G').
11. Application for registration of common leasehold scheme (Appendix 'H').
12. Outline of procedure for the sale and purchase of property in Zambia (Appendix 'A').
13. Sample of the Law Association of Zambia contract and conditions of sale (Appendix 'B').
14. Form 1, application for consent (Appendix 'C').

15. Form DR 61a, application for a caveat (Appendix 'D').
16. Sample of an assignment (statutory leasehold) for the transfer of property from the vendor to the purchaser (Appendix 'E').
17. Sample of an assignment (Presidential lease) for the transfer of property from the vendor to the purchaser (Appendix 'E').
18. Example of a completion statement prepared when the transaction ends (Appendix 'G').
19. Example of a lodgement schedule to be presented at the Lands and Deeds Registry for registering the documents indicated therein (Appendix 'H').

TABLE OF CASES

A

1. Abigal v. Lapin (1934) AC 500.
2. Alexander Mountain & Co. v. Rumere (1948) 2 KB 436.
3. Ailian v. Spiekerman and others (1976) 1 ch 158.
4. Amodu Tijani v. secretary of State of Nigeria (1912) 2AC 399.

B

5. Barrent v. Brumfitt (1867) LR 3.
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C

8. Re Chadwoods Registered land (1933) ch 574.
9. Concrete Construction (Holdings) Ltd v. Mubanga (1970) HC (unreported).
10. Corder v. Morgan (1811) ves 344.
11. Cox v. The African Lakes Corporation Ltd (1901) (unreported).
12. Crayen v. Consolidated Trust Limited (1949) 12 WACA 443.
13. Cumberland Court (Brighton) Ltd v. Taylor (1964) Ch 29.

D

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E

15. Eastwood v. Ashton (1915) AC 900.
16. Re Ecclesiastical Commissioners Conveyance (1936) ch 139.

17. Epps v. Esso Petroleum Ltd (1973) All E R 465.
18. In the matter of the Estate of Osman Tayub (1949) 5 NRLR 9.

F

19. Francis Jackson developments Ltd v. stemp (1943) 2 All ER 601.
20. Fung Ping Shan v. Tong Shun (1918) AC 403.

G

21. Gardiner v. Sevenoaks Rural District Council (1950) 2 All ER 84.
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24. Gibbs v. Messer (1891) AC 248.
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H

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29. Harvey v. Pratt (1965) 2 All ER 786.
30. Hope v. Harman (1847) 16 QB 571.
31. Hopgood v. Brown (1955) 1 WLR 213.

I

- 32. I.R.C v. Raphael (1935) AC 96.
- 33. J.R. Naik & Naik Motors Ltd v. Agness Chama (1985) ZR 227.

L

- 34. Le Roux and others v. Lowenthal (1905) T 5 7

M

- 35. Mackenzie v. Duke of Devonshire (1896) AC 400
- 36. Massey Harris co. (SA) Ltd v. Ohio Stores (1967) ZNRLR 37.
- 37. Morgan v. Clark NRLR 157.
- 38. Morrell v. Studd and Millington (1913) 2 ch 648.
- 39. Mweshi v. Mutale (1971) Subordinates Court (unreported).
- 40. Mwiinda v. Gwaba (1974) ZR 186.

O

- 41. Oakden v. Pike (1865) 34 LJ 620

S

- 42. Re Samson and Narbeth's contract (1910) 1 ch 741.
- 43. Seal v. Claridge (1881) 7 QD 516.
- 44. Simons v. Woodward (1892) 1 ch 741.
- 45. Re Southern Rhodesia (1919) AC 211
- 46. Re Strand Music Hall Co Ltd Ex part European and American Finance Co Ltd 35 Beav 153.
- 47. Re Stirrup (1961) 1 W L R 449.
- 48. Sundiv. Ravalia (1949) 5 N R L R 345.

W

- 49. Wallington v. Townsend (1939) ch 588.
- 50. Waring v. London & Manchester Assurance Co. (1935) ch 310.
- 51. White v. Bijou Mansions Ltd (1937) ch 610.
- 52. Williams and Glyn's Bank v. Boland (1981) AC 487.
- 53. William Jacks & Co. (Zambia) Ltd v. Registrar of Lands and Deeds
and Construction & Investment Holdings Ltd (1967) SJZ 54.

LIST OF STATUTES

(i) ENGLISH LEGISLATION

1. Law of Property Act 1925.
2. Land Registration Act 1925.
3. Land Registration Act 1936.
4. Land Registration Rules 1925.
5. Land Registration Rules 1930.
6. Land Registration Rules 1936.
7. Land Registration Rules 1956.
8. Land registration Rules 1964.
9. Land Registration fee order 1930.
10. Land Registration fee order 1956.
11. Land Registration fee order 1965.
12. Public office's fee (Land Registration) Order 1965.
13. Solicitors' Remuneration (Registered Land) Order 1925.
14. Solicitors' remuneration (Registration Land) Order 1953.
15. Solicitors' Remuneration (Registered Land) Order 1959.
16. Land Registration (Conduct of Public Inquiries) rules 1951.
17. Land Registration (District Registries) Order 1966.
18. Land Registry Act 1862.
19. The Lands Transfer Acts of 1875 and 1897.

(ii) INDIAN LEGISLATION

Bombay Land Revenue (Amendment) Act 1913.

(iii) NORTHERN RHODESIA LEGISLATION

1. Proclamation No. 18 of 1901.
2. Northern Rhodesia (Crown Land and Native Reserves) Order-in-Council 1928.
3. Native Trust Land Order-in-Council, 1947.
4. North Eastern Rhodesia Order-in-Council, 1899.
5. Land and Deeds Registry Proclamation, 1916.
6. Land Registration Ordinance No. 8 of 1916.
7. Land Registration Ordinance No. 12 of 1910.
8. Zambia (State Land Reserves) Orders-in-council 1928-1964.
9. Zambia (Trust Land orders-in-council) 1947-1964.

(iv) ZAMBIAN LEGISLATION

1. Agriculture Credits Act, cap 224, Laws of Zambia (1995).
2. Agricultural Lands Act, cap. 187, Laws of Zambia (1995)
3. Chiefs act, Cap. 287, Laws of Zambia (1995).
4. Common Leasehold Schemes Act, Cap 208, Laws of Zambia (1995).
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7. Housing (Statutory and Improvement Areas) Act, Cap. 194, Laws of Zambia (1995).
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9. Lands Acquisition Act, Cap. 189, Laws of Zambia (1995).
10. Lands and Deeds Registry Act, Cap. 185, Laws of Zambia (1995).
11. Landlord and Tenant (Business Premises) Act, Cap. 193, Laws of Zambia 1995.
12. Land (Perpetual Succession) Act, Cap. 186, Laws of Zambia (1995).
13. Land Survey Act, Cap. 188, Laws of Zambia (1995).
14. Property Transfer Tax Act, Cap. 340, Laws of Zambia (1995).

15. Quantity Surveyors Act, Cap. 438, Laws of Zambia (1995).
16. Rent Act, Cap. 206, Laws of Zambia (1995).
17. Water Act, Cap. 198, Laws of Zambia (1995).
18. Land (Conversion of Titles) Act, (Repealed).
19. Western Province Land Miscellaneous Provisions Act,
(Repealed).

CHAPTER ONE

INTRODUCTION

A. BACKGROUND TO LAND POLICY IN ZAMBIA

It was Sir Frederick Pollock, an Englishman, who correctly pointed out the problems of countries where English Land Law was the main source of law governing the land tenure system. He stated that it was often said that in no country were land owners so ignorant of their legal position and so dependant on legal advice as in England. In *Miller v. Tipling* Riddel J. stated that:-

It has been said that the Law of Land in countries under the Common Law of England is a `rubbish-heap which has been accumulating for hundreds of years and.... is... based upon feudal doctrines which no one (except Professors in Law Schools) understand and rather with the implication that even the Professors do not thoroughly understand them or all understand them the same way.¹

This is probably still true today despite the vast simplification in Land Law which was effected in England in 1925² and which could, with advantage, have been taken even further. Countries which are handicapped by complex land laws, whether derived from English law or not, should appreciate not only that this sort of simplification is imperative, but also (more encouraging) that it is feasible.

The Zambian legal system was and continues to be based on the English Legal System, and the current system of land legislation is based on antiquated English law, badly in need of modernization. Like other former British Colonies and Protectorates, Zambia is a common law jurisdiction.³ Common law was first imported into Zambia by the British in 1889. Specifically, the legal conditions were achieved through a Royal Charter.⁴ Moreover specific provisions under various pieces of legislation make reference to English Law. The most prominent one is the English Law (Extent of Application) Act.⁵ According to this piece of legislation, the common law, the doctrines of equity, and statutes which were in force in England on 17th August 1911, shall be in force in Zambia as provided for under section 2.

The English approach to land law evolved down the centuries from feudal origins in conditions totally different from those found in territories into which it was introduced. The concept of land transactions, on the other hand, can be traced back to the Biblical days as is explained in Jeremiah 32⁶.

I bought the field from Hanamel and weighed out the money to him; the price came to seventeen pieces of silver. I signed and sealed the deed, had it witnessed and weighed out the money on scale. Then I took both copies of the deed of purchase - the sealed copy containing the contract and its conditions and the open copy and gave them to Baruch I gave them to him in the presence of Hanamel and of the witnesses who had signed the deed of purchase The Lord Almighty, the God of Israel, has ordered

you to take these deeds, both the sealed deed of purchase and the open copy, and to place them in a clay jar. So that they may be preserved for years to come.⁷

The Bible clearly shows that land was being sold from the early days and that records were kept of the transactions entered into by the parties in the presence of witnesses, in countries where the Christian religion was accepted and practised.

The feudal system began after the Norman conquest in 1066, when William the First conquered England and became the owner of all the land in the country. To reward his followers and those who supported him and submitted to his rule, he granted and conferred certain rights to land, to be held of him as overlord. This land so demised was held from the Crown upon certain conditions. The people to whom the grants were made became tenants in-chief, who in turn were able to grant land to others for services, this process being repeated. Through this process of 'subinfeudation'⁸ the country became parceled out among tenants who owed personal services of various kinds to their mesne lords. The persons who did not have possession but stood between the King and the person holding the land were termed mesne lords. "And so the process (known as 'subinfeudation') was repeated down the scale. The system of land holding after the conquest thus came to resemble a vast pyramid, at the apex of which stood the Crown."⁹

This system had its origin in the rights of kings and feudal lords to the mineral products of the ground and to the disposal of them. In feudal times the rights of the Crown were split up, passing to feudal lords, but kings gradually repossessed for themselves their legal rights in respect of mines. The ownership of the minerals in the earth was a subject of continuous contention between the king and owners of the soil but usually the king, being the stronger party, prevailed. This was subsequently abandoned as to all minerals except gold and silver, which were called the royal metals, and held to belong absolutely to the Crown wherever they might be found. With such a system grew the landowning aristocrats who tried to keep their large estates tied up in their families forever.

In this account of how land was held in England, it can be seen that a tenant might hold land for a variety of services. But whatever the nature of their services, all tenants had one thing in common: they all held land from a superior lord. Each one was in possession of land by virtue of tenure, a word derived from the Latin '*tenere*' meaning 'to hold'. Tenure thus connotes not merely the holding of land but also the holding of land from a superior lord, and furthermore, that the land is held in return for certain services by the tenant to his lord. It was through this complex background that land law evolved in England. It was this law which was subsequently brought to the colonies.

B. LAND REGISTRATION: TORRENS SYSTEM

The development of land law in England was independent of the procedure for registration of the title to land. The concept of registration was first introduced into South Australia in 1858 by Robert Torrens. When he introduced this registration system, he did not regard the problem as being merely one of procedure, nor did he entertain any illusions about English Land Law. He intended that his Act ¹⁰ would be self-sufficient, and would generally reform the whole of the law of real property.

The objective of the Act of introducing the registration system clearly provided that the procedure outlined under various other laws relating to transfer of freehold and other interest in land was complex, cumbersome and unsuited to the requirements of the said inhabitants and as such began by repealing all these provisions and replacing them. The main problem faced by Torren, which is still prevailing in many countries over the world, was that not all the land was brought under the provisions of the Act and, resulting in the creation of two systems of land law and procedure existing side by side. Some land was governed by custom or the 'old system or the general law,' which remained applicable. Usually the existing law would be the indigenous law of the tribes and is generally referred to as customary law. In this regard, it should be appreciated that the use of the term 'Customary Law' does not indicate that there is a single uniform set of customs prevailing throughout the country. In fact, it consists of various different systems, which may share some basic concepts. General law, on the other hand, can be referred to as common law

similar to the one introduced in Zambia or other identical or similar system prevailing in diverse jurisdictions, such as America or Australia. This being the case, parallel systems still exist not only in South Australia where the Torrens System was first introduced, but all other countries which have adopted the system, Zambia being one of them. The Torrens system spread to various countries which use English Land Law and English methods of conveyancing, including the United States.

C. REGISTRATION OF DEEDS AND REGISTRATION OF TITLE

Registration of deeds developed before the registration of title under the old systems of conveyancing. A deed is defined in the Dictionary of English Law as ¹¹ a writing on paper, vellum or parchment, signed, sealed and delivered, whereby an interest, right, or property, passes, or an obligation binding on some person is created. A deed is a written instrument, such as one referred to in the Bible, recording a transaction affecting or purporting to affect a right attached to a piece of property. Registration of deeds is the registering of these transactions and recording them. On the other hand, registration of title is the recording of the right itself, called primary tenure. The basic doctrine of land law at common law had established a system in which title to land was proved by the production of the deed recording the history of transactions affecting the land; and that the system was

steadily being overtaken by a system which is based upon the registration of title to land. In areas in which the latter system is in operation, all transfers of title are required to be by way of a change of entry in the register in favour of the transferee; and gradually title to land in the area is entered on the register. The old cumbersome method of investigating and deducing title under private conveyancing is dispensed with; and a registered title is, thenceforth, guaranteed by the State.

In England, a system of registration of title was introduced as far back as 1862, but only on an optional basis. The Land Registry Act ¹² was passed to give certainty to the title to real estates, and to facilitate the proof thereof and also to render the dealings with land simpler and economical. The benefit provided under the said legislation meant that in England, under the land registration system, Her Majesty's Land Registry is invited to examine the title to a particular piece of land, and prepare an authoritative record of that title, describing it with the rights it enjoys, identifying the present owner and disclosing the rights of third parties and the encumbrances to which the land is subject. Thereafter, the State guarantees that the title will not be disturbed so long as the owner, in this case the registered proprietor, remains in possession or is in receipt of the rents and profits of the land in question.

Under the 'old system' in England, title was not registered and much of the complexity of land law was concerned with conveyancing and it was to the

simplification of the actual processes of proving title for the purpose of dealing in land that the efforts of reformers were particularly directed. The reformers addressed themselves to two distinct methods of tackling the problem. One was the introduction of a completely new system, namely registration of title, which was brought into effect in 1862.¹³ The 1862 Act failed and so did the 1875 Land Transfer Act which superseded it, mainly because registration was on an optional basis. It was not until a compulsory registration scheme was introduced that the new system began to make headway in 1897. The scheme was, "Compulsory in the sense that dealings in land after the given date must be carried out under the new and not the old system of conveyancing."¹⁴

To comply with the above legislative provisions, a land register was originally set up by the Land Registry Act, ¹⁵ and it has been in existence for over a hundred years, although even now it is a long way from covering every plot of land in the country. The system under the Land Registry Act proved unworkable and an entirely different system was established by the Land Transfer Act 1875, which was later followed by the present statutory law operating today based on the Land Registration Acts 1925 to 1971.

The other method called for the revision of the existing process of private conveyancing. No doubt, both methods overlapped but such revision was

desirable in any case because registration of title, even if successful, could not wholly replace private conveyancing for many years. The Conveyancing Act of 1881 began a series of reforms which culminated in the comprehensive legislation of 1925. Thus emerged in England an elaborate system for creating or transferring interests in land, called conveyancing. Highly trained lawyers examined title to land by scrutinizing the documents recording past transactions over a long period of time. They then prepared what was called an abstract of title. This was a careful history of these transactions and other events, such as births, marriages and deaths, which affect the title.¹⁶ In this way they satisfied themselves that the proposed deal may be safely completed. The parties to the transaction had to have this done every time there was a dealing. There was no finality about it at all. Nor was there any certainty that it was necessarily correct. Its accuracy and, therefore, the security of the title itself, depends entirely on the skill and care of lawyers concerned and they naturally required, and indeed deserved, a substantial fee, for they would be held responsible if anything went wrong.

It was always possible to make mistakes and overlook some important transactions which might affect title, particularly when land owners went out of their way to keep affairs secret. An obvious improvement was to institute interest in land and legislate that only transactions recorded in this register should be enforceable in the courts.

A search of this public register enabled the conveyancer to make sure that he did not overlook any material factor. The system became known as registration of deeds and was effective only if the deeds were indexed by the parcel they affected and not merely by the parties to the deeds.¹⁷ Its main weakness was that a deed was merely a record of an isolated transaction which, if it was properly drawn, showed that a particular transaction took place. It was not in itself proof of the legal right of the parties to carry out the transaction, and consequently, it was not proof of its validity. It follows, therefore, that investigation of the record and its validity and effect would become necessary before any further transaction could be conducted.

The system which remedied the defects of registration of deeds was known as registration of title. Under this system, by means of entries in a register maintained and warranted by the State, all material particulars affecting title to land were fully revealed to any interested persons merely by a perusal of the register.¹⁸ The register was at all times the final authority and the State accepted responsibility for the validity of the transactions effected by making that entry.

Both the methods, registration of titles and registration of deeds explained above have caused an unfortunate duality under English Land Law. Unhappily, this was imported into many countries under British colonial rule. Unhappily, this was imported into many countries under British Colonial rule.

The modern land registration system in England is a product of the Land Transfer Acts of 1875 and 1897.¹⁹ The Land Registration Acts of 1925 and 1936, together with various rules and orders of which the Land Registration Rules of 1925 are the most important, have made a significant change in land registration.²⁰ All this legislation was enacted to outline the main objects of registration, which is to provide certainty of title to Land and to simplify dealings and transactions in land. The central feature of the system is the preparation and maintenance of a register and a plan for each title. The registration of a person as proprietor of land operates to vest in him all the rights, privileges and appurtenances appertaining to the land or any part thereof, whether these are specifically entered on the register or not.

It is these English concepts and legislative provisions of land law which were imposed on Zambia during the colonial era.

D. EVOLUTION OF THE DUAL LAND TENURE SYSTEM.

One of the largest and most complex problems of colonial administrators was the provision and maintenance of systems of land records which would be adequate and appropriate to the needs of each territory. Prior to this, holders of rights in land in the traditional societies exchanged these rights without the use of any written documents or reference to a public authority. The only record available was the

'public memory'. This record arose due to the ceremony, the ritual and the publicity of each transaction in land. These varied according to the tribe concerned. In this way, the person in possession was registered in the memory of the general public and, in particular, in the memory of certain elders who were traditionally 'trained' to remember all the details of the transaction in land. This created what can be termed a 'memory register'.²¹

It was upon the traditional land tenure system that the colonizers imposed foreign concepts of land law and policy. During the forty years that the British Colonial Office directly ruled Northern Rhodesia, it developed a land tenure policy which primarily aimed at institutionalizing separate categories of land holding for the two racial groups, European settlers and Africans or natives.

The British South African Company claimed land in Northern Rhodesia on the basis of concessions obtained from Lewanika, the ruler of the Lozi people. This agreement was concluded on 28th June, 1889. The next concession the Lochner Concession, was concluded on 28th June, 1890 giving the British South Africa Company sole and absolute right over the territory of Barotse Nation. The North-Eastern concessions were obtained from a number of small chiefs and Kazembe, the Lunda chief in the Luapula Valley. In general these documents were fairly technical and, therefore, it was unlikely that any African chief could have understood them comprehensively. Further evidence shows that the chiefs were

not informed of the true nature of the documents they were signing as concessions.²² By 1912, the British South Africa Company tried to give statutory backing to its claim to mineral rights within Northern Rhodesia based on the above concessions. The law officers advised on 19th June 1920 that the company was indeed right in its contention with regard to mineral rights.²³ In the same year, settlers argued on economic grounds, that the land and minerals of Northern Rhodesia belonged to the Crown and should be used for the benefit of the country. The British South Africa Company, it would appear, was not anxious to have the matter adjudicated upon by the Privy Council due to the decision in the case of Re Southern Rhodesia,²⁴ where the company had claimed that it owned land on the basis of a land concession granted to Lippert by Chief Lobengula. The court ruled that the ownership of the unalienated land in Southern Rhodesia was not vested in, and was never acquired, by the British South Africa Company as its commercial or private property. Rather, the Judicial Committee decided that the land belonged to the Crown by reason of conquest. In Northern Rhodesia, as there was no conquest, there was a distinct possibility that the Privy Council could reach a conclusion that the land and minerals still belonged to the native population. It could also be argued that although there was no conquest, approval was given to the company's acquisition of the Rudd Concession, a concession from Lobengula of the exclusive right to minerals throughout his entire territory.

Apart from that, the concessions could not grant exclusive mineral rights in perpetuity. Customary law, which differs from English common law, would not recognise such a grant as such interests are unknown to it. This was stated in the case of Massey Harris Co (SA) Ltd v. Ohio Stores,²⁵ the only right which the concession would give as recognised by customary law would be a license to mine and remove the minerals.

Under customary land tenure, every member of a tribe could enter upon his tribal land and take and make use of anything that is a product of the land, including minerals and this is not dependent upon the pleasure of the chief. This right of a member can be enforced against the chief or any other members who are unlawfully depriving him thereof. This was upheld in the South African case of Le Roux and others v. Lowenthal.²⁶ The court held that no one could transfer minerals and mining rights not severed from the soil, unless he transferred the soil which contained them as well. Further, in the case of Cox v. The African Lakes Corporation Limited,²⁷ it was held that the chief was in no sense considered the landlord of the land in which he exercised jurisdiction over the natives of his tribe. Even under the native laws of the tribal system, he would not have been considered the sole proprietor. In 1905 the BSA company had sought to strengthen its land claims by procuring the transfer of a part of the North-Eastern territory to North Western Rhodesia.

Acting under article 1V of the North Western Rhodesia Order-in-Council 1899, the Secretary of State for the Colonies duly effected the proposal. In 1923 the BSA Company's administration came to an end. What followed was the 1923 Devonshire Agreement. Under the said agreement the company's land rights were transferred to the Crown and it was agreed that the Company should receive one half of the sum paid to the Crown under the sale or lease of lands in North Western Rhodesia. By the time the British Government took over the administration of the territory in 1924, the Company had made the following dispositions: ²⁸

- (A) 3,000,000 acres in freehold to individuals settlers.
- (B) 6,400,000 acres to the North Charterland Company.
- (C) 2,758,000 acres were claimed by the company itself.

As far as North Eastern Rhodesia was concerned, the BSA Company had never contended that the concessions secured from chiefs ever involved a grant of land rights. The colonial office regarded land in this part of the territory as 'native land', except for three freehold estates in the Tanganyika District, which the British South Africa Company possessed. ²⁹ The idea of land being a saleable commodity arose and the company alienated land to European settlers at the expense of the indigenous people. One form of security offered against increasing European encroachment was the idea of setting apart special reserved areas for the indigenous people. In spite of lack of legislative powers, various reserves were

planned for but few Interests and rights under this category were based on English land law came into existence. Under the terms of the Devonshire Agreement of 1923, which transferred the administration of the territory to the British Crown, land alienation became more prominent. The idea of 'setting apart' special reserved areas for social and general needs of the indigenous people had two objectives. Firstly, it was hoped this arrangement would offer some form of security to Africans against increasing European encroachment. Secondly, to legalise the principle of separateness between Europeans and natives. Under this system, Africans would be governed by their customs and the Europeans by English Law. In order to legalise these policies, the Northern Rhodesia (Crown Lands and Native Reserves) Order-in-Council was promulgated in 1928.³⁰ This Order created two categories of land namely:-

(a) Crown land

(b) Native Reserves.

Crown land comprised Land on either side of the railway line from Livingstone to the Copperbelt, including parts of Chipata, Mbala, Mkushi, Mumbwa and Mwinilunga.: in other words, land was alienated to settlers on freehold tenure.³¹ The first Governor of Northern Rhodesia, Sir Herbert Stanley, supported the idea of freehold tenure. However, his successor, Sir Crawford Maxwell opposed it. The overall decision was based on the fact that settlers' opposition to leasehold tenure required the retention of freehold tenure.

Government, at that time, was dissatisfied with this decision and to review these policies the Eccles Land Tenure Committee was set up in 1943. The Committee recommended that with respect to all future grants of agricultural land, a 999³² year leasehold tenure should be granted, whereas a 99 year leasehold tenure should be granted for urban land. The basis of this decision was the fact that land was a national asset and, as such, it was the duty of the Government to protect it and the best way of achieving this would be by exercising control over its use and transfer. The Legislative Council approved these recommendations and they were implemented in 1946. Changes were made to the arrangement at a later stage, but they dealt with agricultural land tenure.³³

In respect of urban land tenure, the system of 99 year leases was retained until 1957, when the Legislative Council established a committee to examine tenure in urban and peri-urban areas. This committee voted for freehold tenure in urban areas, excluding African townships and municipal areas, where land should be granted on freehold basis to the Municipal councils, who would then be responsible for further alienation. The Government accepted these proposals and enacted the Crown Grants Act in order to facilitate conversion of leasehold property holding to freehold.³⁴

With reference to native reserves, there was little doubt that interests in these lands were held under customary law. Though this concept was not given specific legislative backing, it could be implied, and as such, it conferred a legal title to whatever rights in land existed under customary law. The unsatisfactory conditions in the nature of the reserves as a result of over crowding, soil erosion and poor quality of reserves, led to changes in land policy. When implementing the changes, the colonial office, instead of declaring the whole of the unalienated land, as native trustland as it did in Nyasaland, decided that areas of unalienated land, which were shown by ecological survey to be suitable for non-native settlement, and by geological survey to contain workable mineral deposits, were to be retained as Crownland. The effect of vesting reserves, land set aside for the natives in the Crown for the use of 'natives' was the subject of judicial interpretation in the Kenyan case of Gathomo and Another v. Indangara and Another,³⁵ where it was held that such vesting had the effect of extinguishing 'all native rights in such reserved land', rendering those Africans in occupation thereof tenants at will of the Crown.³⁶

By the Native Trustland Order-in-Council of 1947, 57% of the country was declared Trust lands. Some of this land was carved out of Crownland and in the process reduced the latter to 6% only. Trust land was completely unsuitable for productive activity.

In introducing the concept, the Secretary of State said: "That area (Trust land) is, of course, unsuitable for non native settlement on existing lines. A lot of it is fly infested country and a great deal of it is waterless and has poor soil."³⁷

Land in the Native Trust Land as well as Reserves was equally vested in the Secretary of State for Colonies on behalf of the Crown. The term 'vest' implies the giving of the official and lawful right to possess and use the land.

The former Barotseland Protectorate enjoyed the only exceptional status with reference to land matters. This right was given legislative recognition by the Barotseland North Western Rhodesia Order-in-Council 1939, under which land in that area was set apart for the Litunga and his people. Even during the Federation of Rhodesia and Nyasaland, Barotseland still retained exceptional status as a protectorate within a federation.³⁸ At Independence, the Litunga's power over land in Barotseland as governed by Lozi Customary Law were recognised and guaranteed.³⁹ The land in Barotseland continued under the domain of the Litunga and Lozi Customary Law until 1970 when it was put on par with other reserves, by vesting it in the President.⁴⁰

After forty years of direct British Colonial Office administration, the result was the development of a land tenure system, which provided two separate categories of

land holdings, one for the Europeans, and the other for the natives. It was this dual land tenure system that Zambia inherited from the British at Independence.

E. LAWS GOVERNING LAND REGISTRATION IN THE PRE-INDEPENDENCE ERA TO DATE.

Before outlining the legislative history of the system of land registration in the Pre-Independence era to date, it should be noted that as a result of colonial rule Zambia inherited many of its land tenure policies from England, the registration system being one of these policies. Further, the dual land tenure system has provided for two distinct systems of registration: one being the English registration scheme applicable to land held under either freehold or leasehold tenure, and the other being registration of land rights under customary law.

The process of registration applies to all the different tenures, including traditional tenure held under customary law. It was a year after the 1899 North-Eastern Rhodesia Order-in-Council, that the BSA Company's administrator had exercised his powers under the said Order-in-Council of 1899 in enacting the regulations.⁴¹ Thus commenced the process of registration of rights and interests in land in

Northern Rhodesia. Regulation 2 of the Lands and Deeds Registry Regulations provided: "All unalienated land in the territory is vested in the Company"⁴²

All these regulations were repealed and replaced by legislative provisions provided under the proclamation of 1910.⁴³ The Lands and Deeds Registry Proclamation 1910, among other things, provided:

There shall be an office styled the registry of deeds (hereinafter termed 'the registry') in Livingstone for the registration of deeds of Transfer or conveyance of land and of deeds, mortgaging or charging land, for the payment of money or fulfilment of contractual obligations and of other deeds and instruments required or permitted by this or any other proclamations or by any law to be registered.⁴⁴

The proclamation further provided for division of land.

Separate registers shall be kept for:

- (i) Lands
- (ii) Township land.⁴⁵

It also answered the question of what constitutes registration.

Registration shall consist in the filing of a copy of the document for registration in the register document file'. Such copy to be duly certified by the Registrar as a true copy and an entry in a book to be called 'the land register' of the following items:-

The names of the parties
The date of the document
The date of Registration
And briefly the nature of the documents. ⁴⁶

These legislative provisions provided the basis of the current law regulating registration in Zambia. The main Acts establishing the institution for registration, and the administration of land are the Lands and Deeds Registry Act,⁴⁷ and the Land (Conversion of Titles) Act,⁴⁸ which has been repealed and replaced by the Lands Act,⁴⁹ The Lands Act, 1995 among other things, provides for the recognition of land held under customary tenure under Section 7 ⁵⁰ and the surrender of land held by a council, except for areas under the Housing (Statutory Improvements Areas) Act.⁵¹ The said Act also provides for the establishment of the land development fund, to encourage the opening up of new areas for development under Section 16.⁵² Also established under Section 22 of the Act, is a lands tribunal having powers to adjudicate on various matters of land dispute, compensation and land rights.⁵³ The legislative provisions of the Lands and Deeds Registry Act ⁵⁴ and the Lands Act ⁵⁶ are discussed in the second chapter.

CHAPTER ONE

END NOTES

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CHAPTER TWO

SYSTEM OF REGISTRATION

A. RATIONALE FOR A SYSTEM OF REGISTRATION OF DOCUMENTS PERTAINING TO LAND TRANSACTIONS.

The object of land registration as stated in the case of Gibbs v. Messer,¹

is to save persons dealing with a registered proprietor from the trouble and expense of going behind the register in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases bona fide and for value, from a registered proprietor and enters his deed of transfer or mortgage on the register shall thereby acquire an indefeasible right notwithstanding the infirmity of his author's title.²

In other words, the transfer of land legislation protects those who derive a registered title bona fide and for value, from a registered

owner. Accordingly, they need not investigate the title of such owner, for they are not affected by its infirmities. However, they must ascertain his existence and identity, the authority of any agent to act on his behalf and the validity of the deed under which they claim.

In the above mentioned case, the name of a registered owner was removed from the register in favour of a fictitious and non-existing transferee as a result of a forged transfer. Bona fide mortgagees subsequently put a mortgage purporting to have been executed by such transferee upon the register. In a suit by the true owners against the registrar, the mortgagees and the perpetrator of the fraud, it was held that the plaintiff's name must be restored to the register. Further, that the mortgage was invalid, and did not constitute an incumbrance of the plaintiff's title.

This decision is in accordance with the Torrens system of registration of title as explained in the case of Abigail v. Lapin,³ where the judge stated that the Real Property Act 1900 of New

South Wales embodies the Torrens system of the registration of title to land. It is a system that is in force in most parts of the world. Upon the registration of a transfer, the estate or interest of the transferor as indicated in the instruments with all rights, powers and privileges, passes to the transferee. Lord Wilberforce explained it more simply in the case of Williams and Glyn's Bank v. Boland.⁴ Subject to overriding interests, it is an essential feature of registration of title that a purchaser is entitled to rely and act upon the information shown on the register and nothing else. In other words, the register itself recording all the transactions is proof enough, and registration of title provides conclusive evidence behind which an intending purchaser need not go in notifying himself as to the proprietorship of any given land. In this system, registration is a guarantee as to the accuracy of the registered title.

The above cases⁵ clearly show that registration of title to land achieves three basic advantages. Firstly, that the title of every landowner is thoroughly investigated once and for all and placed on

the public register. A perusal of the register will give an intending purchaser all the necessary information about any previous dealings with reference to the piece of land in question. Secondly, that the registration of a land owner's title is an insurance against any adverse claims by others and is indispensable to the validity of all transactions relating to that land. Thirdly, that instruments are registered, not merely as documents executed between the parties to the contract but by reference to the land in question. The crucial point to note is that when the purchaser is registered as proprietor of the legal estate, the fact of registration vests the legal estate in him as compared with unregistered conveyancing which cannot guarantee that the vendor owns the estate. The vendor in this case proves his ownership of the legal estate by giving the purchaser details of the documents and events that have passed the estate from owner to owner and eventually to the vendor himself. In the case of Epps v. Esso Petroleum limited,⁶ Templeman J. held that registration vests not only the legal estate but also the equitable interest in the proprietor.

In order to obtain these desired results, the registration system should aim at combining the features of security, simplicity, accuracy, cost saving and expedition suitable to its circumstances as to methods of land transfer. Security not only refers to the purchaser, but also to a person who lends money on mortgage of land, as well as a person who has interests in the land, but who is not in possession of it. In other words, security is thus bound up with proof of title so that the safe custody of the documentary proofs of title is of paramount importance. The purchaser's position was outlined in the case of Waring v. London & Manchester Assurance,⁷ where it was held that he must satisfy himself that the power has arisen, i.e., he must look at the mortgage deed or charge to ensure that the money is due. He can then complete. He is under no duty to enquire as to whether or not the power is exercisable. However, if he learns that the power is not exercisable, he should not complete, as it appears he would not then get a good title. Simplicity and accuracy are crucial elements of any system. To prove validity of title to either the vendor or purchaser their importance has to be emphasised. A system that is

cost saving and expeditious no doubt produces efficiency as long as the whole system is suitable to circumstances into which it is introduced. To these six features a seventh one of equal importance can be added, completeness of the record, as without it, important benefits that should accrue from the record are not realizable.

Registration of title, when competently established and efficiently operated, confers many benefits:

- (i) An inspection of the register shows, at all times, the legal situation of the land. Consequently, any person dealing on the evidence of the register need have no fear of ejectment. The registered proprietor and he alone, can dispose of his rights. In the case of Re Chowood's Registered Land,⁸ Chowood Limited purchased certain freehold land, which purported to include certain strips of woodland. In due course, registration was applied for and effected, thus giving Chowood an absolute freehold title. It was not known at the time, however, that a certain Mrs. Lyall who owned the

adjoining land, had acquired title to the strips of woodland by adverse possession. Subsequently, Mrs. Lyall obtained an order from the court for the rectification of the register, by the removal therefrom of the strips of woodland.

As a result of this decision, Chowood Limited applied to the Chief Land Registrar to be indemnified in respect of the loss they had alleged by suffering as a result of the rectification of the register in respect of the strips of woodland. The Chief Land Registrar referred the claim to the court.

The court stated that Mrs. Lyall had acquired the benefit of both these overriding interests prior to the purchase by Chowood Limited. The company had, therefore, made its purchase subject to both as overriding interests. It was held, therefore that Chowood Limited suffered no loss by reason of the rectification ordered by the court. They were, therefore, not entitled to any indemnity since their title was at all times subject to the overriding interests held by Mrs. Lyall. The rectification of the register merely recognised the

existing position and put Chowood Limited in no worse position than they were before. Since the overriding interests had existed all along and the land was taken subject to them, no loss was really occasioned by Chowood Limited failing to ascertain that, at the time of their purchase, Mrs. Lyall was in possession, under such circumstances that the vendor could not claim title to the strip. "In other words, the loss was occasioned by their paying the vendor for a strip to which he could not make title."⁹

- (ii) All dealings in land can be effected with security, expedition and cost saving methods.
- (iii) A registered proprietor can borrow money easily on the security of his land.
- (iv) Litigation over land is greatly reduced.
- (v) The acquisition and holding of land by small proprietors is greatly facilitated.
- (vi) Complete protection is given to persons who have restrictive rights over land, for example, a right of way or water.

- (vii) Absentee landlords and reversionary beneficiaries need have no fear that they will lose their rights.
- (viii) Absolute security is given to creditors who lend money on the security of the land.
- (ix) The administration of every public service and every branch of national activity connected with land is greatly assisted in the execution of its work by the existence of an up to-date and unimpeachable map and record of landed property throughout the country.

The above explanation outlines all the advantages provided to everyone concerned with the property in question, where title is provided. One supreme advantage of a complete land register and one utilised for all purposes is that inevitably it takes away disputes and reduces controversial opinion.

The registration scheme devised by the colonial authorities in Northern Rhodesia was primarily intended to assure Europeans settlers' interest in land. The practical effect of this has been carried forward into Zambia and is still evident to date by the fact

that land rights held under African occupation in Reserves and Trust Land have been totally ignored, even though legislative provisions in general do not distinguish between the different categories of land under section 7.¹⁰ In fact, the Lands Act¹¹ has recognised customary tenure. With the current shift in emphasis from European interests to African interests the administration of the registration scheme poses difficulties of a different nature associated with many other factors, such as underdevelopment in rural areas.

In total registration of title, the machinery of records transfers primary attention from movable evanescent, mistakable units, the documents and human beings to immovable, indestructible and precisely definable units, the parcels of land affected. The effects of every instrument modifying the legal situation of the land are analyzed and entered against the parcel or parcels of land affected so that the current situation is always ascertainable at a glance. As a London solicitor said, "I entertain little doubt that registry of the

property, a registry which should in itself be evidence, not of a deed but of a title, would be highly beneficial by accomplishing facility and cheapness of transfer as well as security of title."¹²

B. LEGAL HISTORY OF REGISTRATION OF INTERESTS IN LAND.

Outside Great Britain the system of registering title introduced in South Australia was, as already indicated above, the Torrens System. The basic idea behind this system was that records of the sort normally kept by any competent land office in respect of Crown Leaseholds should also be kept in respect of freehold grants. It presented no mechanical or procedural difficulty. A title good at the time of grant could easily be kept good by efficient records backed by law.

In England, almost all land is registered with what is known as general boundaries. The general boundary rules provide that the filed plan or general map is deemed to indicate only the general boundaries of the registered land in a title. In such cases, the exact line of the boundary will be left undetermined. For example,

whether it includes a hill, hedge, tree or a ditch, or runs along the centre of the hedge, or its inner or outer face, or how the registered land includes the whole or any portion of an adjoining road or stream.¹³ This rule applies even though part or the whole of a hill, hedge, ditch, stream or other boundary is expressly included in or excluded from the title. The main purpose of the general boundary rule is that of avoiding boundary disputes. Dale defines a general boundary, "as boundary the precise line of which has not been determined."¹⁴

In other words, the boundary of the land in question is drawn in accordance with a physical feature present within the land or adjoining it. The use of general boundaries does not mean that the registry's maps are inaccurate. That is far from being the case. Since it is an acceptable rule that if the registry makes a mistake in drawing its maps so that a registered proprietor suffers actual monetary loss through being deprived of property, he will have a claim for compensation even though his land is registered with

general boundaries. Simpson's definition of general boundary appears more illuminating, "a boundary of which the precise line is undetermined in relation to the physical features which demarcates it."¹⁵

On the other hand, a fixed boundary is where the precise position of the whole or any part of the boundaries of the land is shown on the title plan ¹⁶ or defined on the register. Dale defines fixed boundaries "as a boundary the precise line of which has been determined and recorded." ¹⁷ So a fixed boundary is where the precise position of the whole or any part of the boundaries of the land is shown on the title plan or defined on the register. The point to note is that the fixing of a boundary is inevitably a prolonged and an expensive business as a whole. This can be explained with reference to the surveying process itself.

The British South Africa Company first introduced a registration system in the territory of Northern Rhodesia in 1911. The scheme

was supported by a cadastral survey system of South African origin based on a fixed boundary system.¹⁸ The primary purpose of a cadastral survey is to determine for each land parcel its location, the extent of its boundaries and surface area and to indicate its separate identity, both graphically on map and physically on the ground. Cadastral surveying falls into three stages: reconnaissance, which indicates the need to obtain an overall picture of what is required before any type of survey work is undertaken; observation and measurement, in which the relative position and sizes of natural and artificial features on the land are determined; lastly, presentation, in any survey the data collected must be prepared in a form which allows the information to be clearly interpreted and understood by others.¹⁹ In land surveying, this presentation takes the form of maps and plans showing the features on the ground in graphic miniature.

In Zambia, small scale maps, large scale plans (maps) and property index maps are used. A property index map is a large

scale plan comprising all numbered and surveyed land within the map. It usually covers the area of a township, hence commonly known as 'township map'. The size of each sheet of the property index map is 60cm x 80cm, covering an area of 3km x 4km on the scale 1:5000.²⁰

Triangulation surveys form the most economic and accurate method of surveying the whole country. The triangulation provides accurately positioned control points upon which subsequent surveys are based. The development of instruments for measurement of long distances ²¹ has resulted in measuring the lengths of the triangulation network instead of the angles. This method is called trilateration. All over Zambia trigonometrical stations have been established. The position of most of these stations has been determined by triangulation. This network is then connected to the national network. This is, however, in reality not always possible to achieve, unless a great deal of effort and money is spent. In many townships and densely populated areas

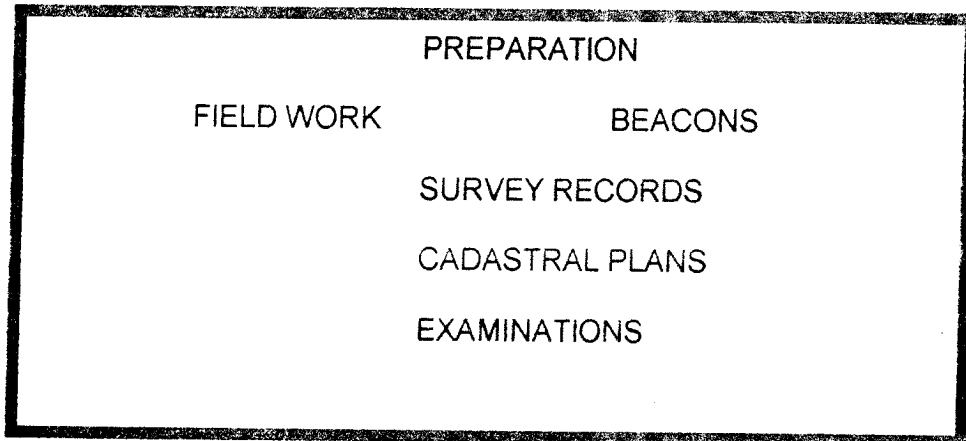
of Zambia, a great deal of triangulation and other measurements have been carried out in the past.²²

A Theodolite does measurement of distance using angle as well as linear distance between points on the surface of the earth.²³ Steel tapes in use are 100 metres long. In measuring a distance both ends of the tape must be held exactly in line. The vertical angle is observed in face left and face right and the slope distance is measured.²⁴ In case the distance is longer than the tape, it is divided by two or more intermediate points in the line between the station and the object. Each intermediate part of the distance is measured, reduced to horizontal and then added in order to get the whole distance.²⁵ Once all the distances are measured, they are recorded in field books specially designed for the present survey methods used in Zambia.²⁶ The land survey regulations provide that every land survey shall perform sufficient field work to enable

him apply a thorough check to every part of his survey work. This is done to promote accuracy. The other method of survey is called aerial photogrammetry. By photographing the ground from the air and letting the pictures overlap each other, it is possible to make accurate measurements. In this case, all beacons are marked by white wash before aerial photography is undertaken. One such survey was carried out in the Eastern Province of Zambia and had yielded results with an accuracy of 10.4 metres.²⁷

The standard beacon consists of an iron peg at least 12mm in diameter, or an iron pipe at least 12mm in internal diameter and at least 400mm in length set vertically in concrete not less than 200 millimetres cube. The top of the peg shall not extend more than 10 millimetres above the top surface of the concrete which shall be flush with the surface of the ground as per the requirements of Regulation 33.²⁸ The Land Survey Regulations 1971 govern the way in which a survey is to be carried out. These regulations have not been amended to adjust to modern survey equipment and

techniques. The cadastral survey procedure can be divided into the following main parts:



In order to carry out this survey effectively, careful planning and a number of other things have to be worked out.²⁹

Once all the field work has been carried out in accordance with regulation 43,³⁰ a report should be submitted.³¹ Finally, the survey is approved. It can be observed from the above procedure that a lot of expense is involved in carrying out a proper survey. The Assistant Surveyor-General outlined the other main problem being, lack of

qualified staff. Only three registered surveyors work for the Government in the Surveyor-General's Department.³²

To suggest that the solution in Zambia lies in the shift from the present fixed boundary system to the general boundary system may not be totally correct, since the problem is basically historical. The registration scheme that was initially devised for the then Northern Rhodesia was primarily intended to assure 'European settlers' interest in land. The shift, therefore, may not prove successful as the situation stands now. Generally, the details on available maps in Zambia are out-dated. Unless a provision is made to develop a good, accurate and up to date mapping system, the general boundary system may fail to provide a solution. The problem of lack of qualified staff faced by the survey department is a contributing factor as well. The alternative solution provided by the Surveyor-General's Department has been the production of diagrams just as accurate as those based on cadastral survey without the need to go to the field. One good example is the Project undertaken in the

Eastern Province of Zambia.³³ It is possible to locate with accuracy the positions of the respective parcels of land from the details and natural features disclosed by the maps.

It should be emphasised that there is merit in the proposal to move from the fixed boundary system, to the general boundary system where the markings of a parcel of land are related to its position vis-a-vis the natural features such as roads, mountains, streams and other erections on the ground. In this way the costly and time consuming field survey explained above is avoided. A comparison of the two systems shows that neither can claim advantage or superiority over the other. This can be adequately explained by reference to England, where the general boundary system supported by the ordnance map has worked with remarkable success as a facility in land registration.³⁴ The fixed boundary system has worked successfully in South Africa, where it has gained a reputation for accuracy in the description of the registered land.³⁵ So, the overall situation is not which system to apply, but to adopt the system which

will in the long term produce significantly greater benefits and lead to better overall land administration and an effective system of registration.³⁶ Dale, in 1971, suggested that Zambia will obtain greater benefits from the general boundary system based on detailed large scale maps. He had indicated that the South African modelled cadastral survey now used in Zambia has been successful with reference to 6% of the country's land at the expense of the overall mapping requirements of the country.³⁷ The problems of the Surveyor General's Department are of a general nature and applicable to either system.

In the period before colonialism, land was governed under only one form of tenure, being traditional tenure and this concept was not unique to Northern Rhodesia, but was evident in Africa as a whole. This system of traditional tenure was apt for the situation existing then and provided a suitable procedure of registration without reference to any written records. As Dowson correctly pointed out:

In Africa there were millions of holders of land rights which were continually changing hands, by inheritance or otherwise, without dispute, without the use of any written documents and often without reference to any public authority. The ceremony and publicity, which were attached to transactions in land in the primitive communities themselves, constituted a form of record.³⁸

No written record was available, for the parties met on the land usually accompanied by their witnesses and performed certain ritual acts, which were expressive of the intention to convey the piece of land in question. Due to this ceremony and the importance attached to traditional beliefs, ownership was registered in the memory of certain elders or traditional leaders trained to remember all the details of the transactions in land and record it within their memory. This memory register took the place of a written record, and provided adequately for then existing traditional tenure. With the advent of a new economic, social and political structure within the traditional set-up, the memory register did not prove adequate. It would not be true to support the idea that registration would be impracticable or unnecessary and even undesirable where private ownership is not an important feature of the tenure system. No doubt under the traditional

tenure the concept of communal ownership was evident. This was clearly explained by the late Judge T.O. Elias when he cited an example of a Nigerian chief who discussed the concept of communal ownership with the West African Lands Committee in 1912.³⁹

However, the growth of the belief that registration is unnecessary in these circumstances is completely erroneous. Time will inevitably come when growing pressures of population on the land and various other social developments will create a pressing need to define accurately the boundaries of family, village or tribal holdings and the rights enjoyed in these lands by members of the community concerned within the traditional tenure. In other words, a system of registration will have to be put into place, in spite of communal ownership.

In the village, the process of application for land for anyone moving from one area to another starts with the former chief vouching for a farmer before a new chief will grant him land to farm. The Headman

of the particular village (there may be a dozen or more in a chief's area), receives the application for land. The farmer usually goes to a particular headman because he has been informed that the village has good arable land available. After certain discussions in the village the headman takes the applicant to meet the chief, if he is inclined to recommend the applicant. The chief then discusses the matter with the rural council and may give consent to the application. This usually takes the form of a simple letter to the rural council. At this stage, the land is surveyed the title to land is converted from customary land tenure to state land and a lease is registered for that particular piece of land in accordance with land circular No.1 of 1985.⁴⁰

The above process provides for converting title from customary law to leasehold but it does not allow the applicant to hold the land and register it as customary tenure. The process itself is cumbersome, expensive and complicated. The alternative should be a simple and inexpensive system of registering title as well as rights held under customary tenure.

This concept of registration may not be accepted where traditional tenure has and will continue to provide a sense of security to its members. Its practical implementation may prove very difficult in the beginning since the change will no doubt interfere with many set-ups. However, once the advantages become evident in places where it is accepted the rest of the areas will follow the implementation. This will no doubt take a long time and a lot of understanding from the implementing agencies. The entire system will have to be explained, not only to the chiefs who head the villages, but each member of the community for them to realise the advantages and benefits, which will accrue to them. This understanding will then allow for the change to take place on a gradual basis.

Along side the traditional tenure exists the English Land tenure concepts with a system of registration provided under legislation. The principal statutes are the Lands and Deeds Registry Act⁴¹ and the Lands Act,⁴² which provide for land administration. Various other statutes, such as the Housing (Statutory and Improvement Areas)

Act,⁴³ and the Agricultural Credits Act,⁴⁴ provide for registration of rights and interests in land. However, the Reserves and Trust Land (Adjudication and Titles) Act,⁴⁵ which made provision for registration of interests held under customary domain by mode of converting a customary law interest, has since been repealed by the Lands Act. Provision to convert title from customary land tenure to a statutory title was provided for under Circular No. 1 of 1985,⁴⁶ which has received legislative backing under Statutory Instrument No. 89 of 1996.

**C REGISTRATION OF DEEDS AND REGISTRATION OF TITLE:
THE TWO CONCEPTS.**

Registration of deeds on the one hand is the maintenance of a public register in which documents affecting interest in land are copied or abstracted. The term register means the official record typed upon a card, or a series of cards joined together containing complete particulars of one estate owner's title to a particular piece of property

which is described by reference to an official plan kept at the registry.⁴⁷ A public registry is one which gives information to the public at large by conducting a search and upon payment of a required search fee. This is on similar lines as a Company's Registry, where any information regarding a company, which is registered, is made available to anyone upon payment of search fees. The concept of a public registry is used throughout the world with widely varying effectiveness, depending on how the register is kept. Its basic principle in its simplest form is that registered deeds take priority over unregistered deeds, or deeds registered subsequently. This form does not affect the legal force of any deed; it merely determines its priority by reference to the date of its registration, and not to the date of its execution. In other words, in the absence of any competing instruments registration confers no advantage so far as the actual vesting of the property is concerned.

The main problem related to a system of conveyancing by deeds stems from the very nature of the deed itself. A deed does not in itself prove title, it is merely a record of an isolated transaction

affecting the property in question. If properly drawn, it shows that a particular transaction took place, but it does not prove that the parties were legally entitled to carry out the transaction and consequently, it does not prove that the transaction was valid. This arises from the rule that the mere copying of a deed by the registry without any critical examination does nothing to remedy any deficiency in the deed. Therefore, investigation of its validity and effect will still be necessary before any further transaction can be safely conducted on the strength of it. In other words, a deed registry will not show matters, which affect a title and are not the subject of a deed. An example to illustrate this point would be the succession of property on death, which gives title by operation of law and not by act of the parties.

The main problem related to the system of registration of deeds is corrected by the provision of registration of title. A register of title is an authoritative record, kept in a public office, of the rights to clearly defined units of land as vested for the time being in some particular person or body, and of the limitation, if any, to which these rights are subject. All the material particulars affecting the title to land should

be fully revealed merely by perusal of the register, which should be maintained by the State. The register is, at all times, the final authority and the State in turn, should accept responsibility for the validity of all the transactions which are effected by making an entry in the register. This is accomplished by providing that anyone who purchases bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.⁴⁸ Registration of title, therefore, dispenses with the need for investigation of title. For as long as the registers remain in essence registers of deeds, not of title, the title will have to be deduced from scrutiny of the relevant deeds instead of vesting on the register. Title is by registration and not by deed. Instruments are still needed to provide evidence to the registrar of the intention of an owner to create, transfer or extinguish rights in his land; but, though the instrument may establish a contractual right, it cannot in itself affect or pass any interest in land, because the law which sets up registration of title expressly provides that only the appropriate entry in the register can affect or pass such interest.

To think of registration of deeds and registration of titles as two distinct and separate systems may be misleading.

Each is not a single system, but rather is composed of different alternatives and the combined alternatives form a continuum. The major variable in this continuum is the extent of the affirmation made by the (State) of the existence and ownership of interests. Other differences among different forms of the systems, such as the arrangements for indexing the records and control of descriptions, plan and surveys are not inherent and are often the result of chance.⁴⁹

The first requirement of a register of title is that it should be based on parcels of land, not on the person who owns them. But the use of land units as the basis of record is not necessarily confined to systems of registration of title, but extended to deeds as well because many registers of deeds have been substantially improved by being based on parcels, rather than proprietors. The only set back is that as long as the registers remain in essence registers of deeds, not of title, the title will have to be deduced from the deeds or documents registered instead of relying on the register. Compared with a registered title, this requires no such investigation; the register

records not merely evidence, but what in effect is a final, complete and up to date record of the land in question. It is in fact this 'continuous finality' which really differentiates registration of title from registration of deeds. In other words, "it can be said that the essential distinctive ingredient of registration of title is that title to interests in land depends on what the register shows and not on extraneous instruments."⁵⁰

To make this distinction very clear we can turn to the statute which introduced registration of title in England and Wales. Registration of title to land was introduced into England and Wales by the Lands Registry Act 1862, which was passed to give certainty to the title to real estates and to facilitate the proof thereof and also to render the dealing with land more simple and economical.⁵¹ This broad distinction was aptly described by John Baalman when he was drafting the proposed land Titles Bill in Singapore introducing registration of title there:

.....If you don't register your conveyance of land it will be bad..... If you do register your conveyance it will be good. The Bill will extract the impurities from titles registered under it..... So that at any given time a Purchaser without having to investigate the history of the title or to consider the possibility of defective conveyance but merely by inspecting the land registry can be satisfied that the proprietor named therein is the owner.⁵²

Even then any dividing line between the two concepts cannot be bold and, to some extent, each division will contain systems closely resembling each other on either side of the line.

The South African system for example, is in the form of a deeds system and is claimed to have all the advantages of registration of title. Land in the Republic of South Africa is owned and governed in accordance with Roman-Dutch Law.⁵³ Land registration there dates back from the first European settlement of 1652 and was derived from a system where 'from time immemorial' no alienation or pledge of land was good unless it had been effected in the presence of a judge. A similar formality was required in South Africa until an

ordinance⁵⁴ in 1828 provided that all deeds of transfer, mortgages and like instruments should be subscribed by the registrar of deeds instead of by two members of the Court of Justice in the presence of the Colonial Secretary, thus establishing the form of registration which is still in use today. This system has always been classified as registration of deeds but it is difficult to understand why. The point can be illustrated well if both the concepts are defined. Registration of deeds means a primary system under which instruments are recorded merely as such, and not with special reference to the land they purport to affect. Registration of title, on the other hand, is a system under which a record is made of the title to some particular land as vested in some particular person for the time being, or of instruments as affecting some particular land. A point to be noted in support of the fact that the South African system can be referred to as registration of deeds has its basis in the fact that there is no country in which land parcels are more closely defined than in South Africa. A system of land registration was introduced in South Africa in 1685, which required a register of all properties to be made; thereafter, the purchaser and seller had to appear before two

commissioners of the Court of Justice and the Secretary of the Government, who effected the transfer. In 1828 the office of Registrar of Deeds was created in the Cape colony, and the Registrar *continued the functions of the Commissioners as regards the* registration of sales and burdens on land; the same system was eventually adopted throughout South Africa.⁵⁵

Every piece of land in South Africa, whether it be a farm, *erf*, lot, plot or stand, is surveyed and a diagram thereafter is framed. A diagram consists of a plan of the piece of land, containing numerical data as to its size and situation, and a description of it.⁵⁶ It is the duty of the registrar to record the diagram of every piece of land situated within the areas of his jurisdiction. Once registered, the registrar then records against it any real right in or to such land but not any personal right. Further, no transaction in land can be effected without being registered under the parcel to which it relates and therefore technically in South Africa, it is not the fact of registration, which proves title, but the document of transfer, if duly registered. In

practice, this does not make a real difference and, therefore, it would be misleading to classify the system as registration of deeds. Support can be given to the view that the distinction between the two systems is not clear cut and there is an area, which overlaps and can be technically separated but in practice can prove misleading.

The distinction between registration of deeds and registration of title is of crucial importance even in the Zambian setting. The cadastral maps, which have been referred to for surveyed plots describing the parcels of land are themselves per se, not a record of any right held. These parcels of land should then be identified with a holder of that land in order to create a right. The formal record of rights is normally in the form of one or more 'registers'.

Registration of title provides conclusive evidence behind which an intending purchaser need not go in satisfying himself as to the proprietorship of any given land. This is clearly reinforced under Section 33 of the Lands and Deeds Registry Act.⁵⁷ "S33 A Certificate of Title shall be conclusive as from the date of its issue and upon and

after the issue thereof, notwithstanding the existence in any other person of any estate or interest....⁵⁸

On the other hand, a deed is only executed when there is some change in the possession of a right or interest and a register of deeds is a record of the transaction and not of the rights themselves. The statute outlines under Section 4 what documents are required to be registered.

4(1) Every document purporting to grant, convey or transfer land or any interest in land, or to be a lease or agreement for lease or permit of occupation of land for a longer term than one year.... Must be registered within the times hereinafter specified.⁵⁹

This section outlines the essence of a registration scheme and its reliability. The word 'purporting' plays an important role because as long as the document brought before the registrar intends to convey land, whether or not correctly drafted, must be registered. It has received judicial interpretation in the case of William Jacks & Co.

(Zambia) Ltd v. Registrar of Lands and Deeds and Construction & Investment Holdings Ltd.⁶⁰ The appeal was against an order made in relation to an application to extend the time for registration, under the provisions of section 6 of the Lands and Deeds Registry Ordinance of a document as an agreement for lease. The lease was made between William Jacks & Co. (Zambia) Limited and Construction and Investment Holdings Limited with reference to Stand 2397 Stockton Street for a period of 5 years. The lower court held that a requisite to determining the question of extension of time was the determination whether the document was in fact an agreement for lease. This, according to the Appeal court, was an error. By so doing the lower court gave no effect to the use of the word 'purporting' in Section 4 of the Ordinance. The judge should have determined the question whether the document purported to be an agreement for lease. The Appellate Court, therefore, considered the meaning of the word 'purport' and referred to the case of Re Broad,⁶¹ involving a will which, on its face, was validly executed. The will was not admitted to probate but the document was for other purposes held to be a

document purporting to be a will. Relying on this case, the Court of Appeal considered the full meaning of the word 'purporting' in section 4. Doyle Ag.C.J. (as he then was) said,

It seems to me that the intention of the legislature in using the word 'purporting' in S4 was to relieve the Registrar of the great burden of ascertaining what in fact was the true nature of any document presented to him. Provided on its face it appears to him more or less accurately to resemble a valid document, which required registration, he does not have to go further.⁶²

After probing into the intention of Parliament, his Lordship said that a document could be registered, even if invalid, so long as it is apparently valid. The facts of the case were that the appellant had entered into an agreement for a lease exceeding one year. He applied to the court to have the lease registered out of time. The said agreement, *although complete in some particulars, lacked a commencement date.* Applying the case of Harvey v. Pratt,⁶³ where Lord Denning outlined the five essential elements for a valid agreement of a lease. His Lordship concluded that commencement

date was one of the elements but lack of which did not invalidate the agreement of a lease. Ramsay J. described it more correctly,

The agreement... may have been thought by the parties to have been a concluded agreement, but it is to be registered, not by them, but the Registrar. He is a qualified barrister or solicitor and a perusal by him of the agreement would satisfy him that, on the face of it, it does not purport to be an agreement for a lease.⁶⁴

The effect of this decision on the provision requiring registration is that not each and every document, which is invalid, can be submitted for registration. It is only when the invalidity is not very obvious that the effect would make a document purport to convey an interest or a right. In other words, the registrar may rightly or wrongly admit any document for registration because it is clear that the system of registering documents is not intended to cure any defects in the document so registered. This is outlined by the Lands and Deeds Registry Act⁶⁵ under Section 21 "S21. Registration shall not cure any defect in any instrument registered or confer upon it any effect or validity other than that provided by this Part."⁶⁶

A useful contrast to the above view is provided in the Nyasaland case of In the matter of the Estate of Osman Tayub,⁶⁷ where the provisions of the 1916 Land Registration Ordinance⁶⁸ were in issue. The court had to address itself to the issue as to whether letters of administration were required to be registered under the said Registration Ordinance. The relevant legislation provided that all deeds, conveyances, wills and instruments in writing, whereby any land or interest in or affecting land may be affected, were subject to 'compulsory registration.' This Ordinance had replaced the 1910 Ordinance on registration of documents,⁶⁹ whose provisions matched the current Lands and Deeds Registry Act;⁷⁰ Section 4 of the Act requires registration of all documents purporting to grant any interest in land. Justice Thomas J. Hindind held that since letters of administration were not included in the definition clause of the 1916 Ordinance, but what was included instead was letters of administration with will annexed, that the former, therefore, was not subject to registration.

The current Zambian Act is quite explicit under Section 5(3) that:

“Probate of a Will affecting land or any interest in land shall be registered within twelve months of the grant thereof or the sealing thereof under the provisions of the Probates (Resealing) Act as the case maybe.”⁷¹

The definition clause clarifies the issue under Section 2(f) which states, “Probate of a Will includes letters of administration with or without Will annexed.”⁷²

Registration of Deeds and registration of title, it can be concluded, are two distinct concepts but the overall position is that they are interlinked and they should be considered as such to produce the desired results, which is the security they offer to the person holding the land.

D. PROPERTY REGISTER

In ordinary speech, the word 'register' is used to refer to either the record of the title to a single property or to the complete record of all registered properties. The property register contains a verbal description of the registered property and identifies it by reference to a plan. The register shows the property and who holds title to it, including any right or encumbrances against it.

Under the English system the register is not only used in the two senses discussed above but the individual record is itself divided into three parts, and each part is called a 'register'. First the property register identifies the land, and usually refers to the filed plan. The boundaries are general boundaries. The exact line is not defined in the plan, unless there is a note saying the boundaries have been fixed. The register may contain rights appurtenant to the property. Second, the proprietorship register states the nature of the title, e.g. leasehold, possessory, etc, and states the name and address of the registered proprietor. It contains cautions and restrictions. What does the restriction do to the title held, for example? Lastly, the charges register contains notices of incumbrances

on the title, e.g. restrictive covenants, easements, etc. It is here that any formal mortgage on the property is registered and becomes a registered charge.

A register is further defined in the English Act⁷³ which provides that the correction of the register may be effected merely by making an alteration to the plan without altering the typewritten record and so in this context the word 'register' describes not only the typewritten record but also the files plan referred to in the record. The Register Book can be bound or in loose leaf form and it can be kept on volume or folio basis. In the Torrens system the individual leaf of the register is usually referred to as a '*folium* or folio.' *Folium* is Latin for leaf. The size and texture of binders and paper including microfilming and imaging of land records provides for security of these records.

In Zambia, the Land Survey Act,⁷⁴ provides for the maintenance of a property register. Amongst other things the Surveyor-General, who is a public officer and a Land Surveyor, has statutory functions outlined under

Section 4(2) to: "Supervise and control the survey and charting of land for the purpose of registration."⁷⁵

Further, under Section 4(3),⁷⁶ only approved plans and diagrams become public documents whereas the rest of the records are the property of the Government. Liability for defective work on the part of the Government or the officers acting in accordance with the Act has been statutorily withdrawn by Section 10(3). "Neither the Government nor any officer thereof shall be liable for any defective survey work appertaining thereto performed by a land surveyor...."⁷⁷

No diagram can be accepted for registration at the Lands and Deeds Registry unless it is approved by the Surveyor-General under Section 32 of the said Act.⁷⁸

E. SECTIONAL TITLE

The sale of Flats or part of Multi-storey building requires special considerations on certain points, for example, entrances, stairways or lifts, to be used commonly. Under the English system of conveyancing the sale of flats is carried out by three principle methods. They may be sold freehold, leasehold or under a Co-operative Flat Scheme. A sale of freehold or leasehold can be effected by one instrument, the transfer or lease. When this takes place the developer or his successor or nominee remains on the scene as the responsible person seeing that the management of the block is carried out.⁷⁹

On the other hand, the developer often wishes to divest himself of all responsibility once he has sold his flats and the commonest way of effecting this is to transfer the developer's managing rights and obligations to a Management Company consisting of the flat owners.⁸⁰

A Co-operative Flat Scheme differs from those discussed above in that

the block is vested in trustees for the flat-owners and the trustees obtain a block mortgage. The flat-owners pay assessments to the trustees to cover outgoings. Their rights derive from a trust deed. Ownership is retained in the developer.⁸¹

In Zambia, The Common Leasehold Schemes Act No. 39 of 1994 provides for sectional title. However, discussions on the procedure and forms to be adopted to implement the Act are still in progress. No registration or issuance of title deeds for a unit under a Common Leasehold Scheme has been effected to date.

The background to this Act goes as far back as 1967, when the Johnson's Land Commission Report recommended that provision should be made by law under which the sales and purchases of one flat or a unit of flats amongst a block of flats can be simplified. In this regard the Commission recommended that legislation should be enacted making available a strata titles scheme similar to that operating under the New South Wales Strata

Title Act of 1961. The result was the enactment of the Common Leasehold Schemes Act.⁸²

Mainly because the common leasehold scheme is an innovation in Zambia, it was decided that there should be an appreciable interval between its enactment and implementation. This was to allow professional advisers, such as Lawyers, architects, surveyors and others to become familiar with the terms of the Act before they are called upon to operate it.

To create the common leasehold scheme, the Act ⁸³ under Section 3(1) states that any parcel of registered land, together with the buildings on it or proposed to be built on it, can be divided into units. Each of these prospective units will have to be given an identifying number by the Surveyor-General under Section 4(4).⁸⁴ The registered proprietor of that parcel of land then makes an application to the Registrar at the Lands and Deeds Registry using either the form "Common Leasehold Declaration"⁸⁵

or "Common Leasehold Declaration (phased development)",⁸⁶ as the case may be. The application should be accompanied by a certificate issued by an architect or quantity surveyor providing all the information requested under Section 4(2)(a) and (b).⁸⁷ The Common Leasehold Scheme can be given a name as approved by the Registrar under Section 5(3).⁸⁸

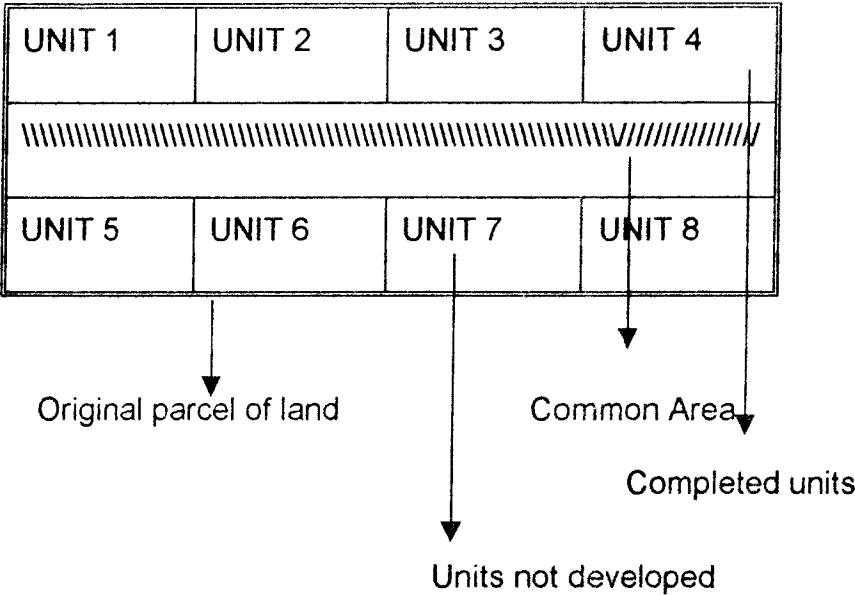
Once the scheme has been registered, the registrar will recall and cancel the original certificate of title and issue to the applicant a separate certificate of title for each unit. These powers are outlined under Section 5.⁸⁹

This common property will now be held by the unit-holders as tenants in common and the share of each holder will be certified by the Registrar in the certificate of title under Section 7(1) and (2).⁹⁰ The units holders also constitute a body corporate with all its attributes such as perpetual

succession under Section 8.⁹¹ This body corporate will control and manage the common property.

In case of phased development, the Registrar will issue a separate certificate of title for each of the completed units together with a certificate of title for the remainder of the parcel under Section 17(1).⁹² For example:-

PLOT 12



If 'A', the registered proprietor of plot 123, has registered a common Leasehold scheme under phased developments, the registrar will grant him certificates of title for each of the units 1, 2, 3 & 4. He will also be granted another certificate of title for the remainder of his original parcel, being units 5, 6, 7 & 8, together with the common area. The registered proprietor then becomes an agent of the body corporate, which is now registered as per Section 19(1).⁹³

The public will, no doubt, have to be informed and guided on this new concept. So as not to delay implementation of the Act,⁹⁴ the registry has devised a system under which the title deeds can now be issued for each separate unit. The procedure is that the application for the registration of the scheme together with the common leasehold declaration should be entered on the register.⁹⁵ Once put to practical test the form will be revised by the registry and perfected before being issued as a regulation under the Act made by the Minister of Lands.

Upon registration, "the owners of the common leasehold scheme" will become a corporate body.⁹⁶ It will have a legal personality separate from that of its members just like a company registered under the Companies Act. It will own property as provided under Section 7(1) and it will sue and it can be sued as per Section 8(4)(a) of the Act.⁹⁷

To distinguish it from other corporate bodies, the name of the body should have "Common Leasehold" or other such words as a prefix. The name, together with the information provided, will be used to make entries in the register.

For the purpose of the Act, there will be only two registers, namely, the Lands Register, and the Common Leasehold Register.⁹⁸ All dealings and transactions with land under the scheme will be entered in the Lands Register, like the one already discussed.

Once the scheme is registered on the current register, entries will be made showing it as "a promoters title" and that the land described is

subject to the Act. On the title being issued for separate units, notes will be made on the register that both the common parts and units have been removed from the original title, separate folios will be opened for the common parts and each unit and certificate of title issued.

On the other hand, the common leasehold register will record all the documents relating to the scheme itself, i.e. the body corporate and any change in the ownership, voting rights, or share in contribution, will be noted in this register. The members of the scheme will have the benefit of "restricted liability". In other words, the liability of each unit-holder will be to the extent of his unit entitlement, which is to be specified in the declaration. This register will be operated on the same basis as the companies' register but in accordance with the said Act. Fees payable have yet to be prescribed. The register will be a public register and, therefore, it can be searched by anyone upon payment of a fee.

Whether or not this will prove workable in practice requires the implementation of the Act and the test of time.

**F OTHER STATUTES REGULATING REGISTRATION OF RIGHTS
AND INTERESTS IN LAND.**

(i). The Housing (Statutory and Improvement Areas) Act.

The Housing (Statutory and Improvement Areas) Act,⁹⁹ provides for the control and improvement of housing in certain areas, thus creating land interests covered by the Act. In addition, the Act also provides for machinery to register these rights as an assurance of their existence under Section 11.¹⁰⁰

In every council where there is a Statutory Housing Area or Improvement Area, there shall be a Registrar who shall keep and maintain a register called the register of titles, and shall file therein all copies of all grants and of all certificates of title issued under this Act.....¹⁰¹

Providing for various title registries, the Act constitutes respective councils as registries of the Statutory Housing and Improvement Areas within their boundaries. The Act expressly exempts under Section 48 and the

schedule¹⁰² therein, certain statutory enactments to Statutory Housing Areas or Improvement Areas. The Schedule to section 48 provides:¹⁰³

- Non-application of certain enactments
1. Lands and Deeds Registry Act (Cap 287)
 2. The Land Survey Act (Cap 293)
 3. The Rent Act (Cap 438)
 4. The Town and Country Planning Act (Cap 475)
 5. The Stamp Duty Act (Cap 664).¹⁰⁴

It must be noted that the Act¹⁰⁵ draws a distinction when the Minister makes a statutory order declaring an area of land as part of a Statutory Housing Area under Section 4¹⁰⁶ and declaring an area as an Improvement Area, under Section 37.¹⁰⁷ The difference is based on the description of a building. In the case of a statutory housing area, the plan should indicate the dimensions of each piece or parcel of land with a serial number identifying the building, while in the case of an improvement area, it suffices to identify the location of each building by a serial number. This difference is evidently due to the background to the respective areas.

Improvement areas are basically the 'Shanty Compounds'. The initial inception of these areas was unplanned and unregulated. In such areas, it would be practically impossible to insist on dimensions which require precision. Statutory Housing areas, on the other hand, have always been estates of local authorities and, as such, have had the benefit of planned and organised growth. In these areas it becomes easier to determine the dimensions of any particular parcel of land with a serial number identification.

The general plan makes it possible to grant a registrable interest whenever a Council grants any interest in respect of a plot of land. In both areas it need not be accompanied by an exclusive diagram describing the particular parcel or plot of land as is evident under the Lands and Deeds Registry Act.¹⁰⁸ The said Act,¹⁰⁹ on the other hand, provides for a Statutory Housing area under section 13.

S13 (1) Any transfer or other document purporting to transfer or..... shall be deemed to be registered as soon as a memorial thereof..... has been entered in the register.

(2) Every document to which subsection (1) applies shall be accompanied by particulars identifying the house; building or plot in question by reference to its appropriate number on a Statutory Housing Area Plan.¹¹⁰

Therefore, the legislative requirement is that the particulars identifying the house, building or plot in a statutory housing area is by reference to its appropriate number on the plan. This procedure is not extended to land within an Improvement Area. Land under an Improvement Area falls within the ambit of section 39(4). "Every occupancy license and any other document relating to any dealing with land shall be registered in such manner as may be prescribed."¹¹¹

In this area, the provision laid down is that of issuing an occupancy license, which interest is registerable without any reference to the general plan. The reason why the general plan has been excluded from the registration procedure is mainly due to the practical difficulties of surveying plots in a 'shanty compound', where existing habitation follows no regular plan or pattern. The rest of the main problems of surveying

land in general, which have been discussed, are also applicable to these areas.

The Lands Act¹¹² under section 6 has reverted all land held by a Council to the President by surrender. In other words, all the sub-lessees holding from the council will now hold land directly by a lease granted by the President. There is an exception under section 6(3),¹¹³ where the council will keep on holding land for its own use and the land it used to hold under the Housing (Statutory and Improvement Areas) Act.¹¹⁴ This means that the Council will no longer issue a City Council lease or grant title to a sub-lessee. It will only continue to issue title and occupancy licenses for areas held under the Housing (Statutory and Improvement Areas) Act.¹¹⁵

A comparison between the registration scheme provided under the Lands and Deeds Registry Act¹¹⁶ and the Housing (Statutory and Improvement Areas) Act¹¹⁷ shows the useful differences and similarities under each

system. There is a requirement to register under section 39(4) of the Housing (Statutory and Improvement Areas) Act,¹¹⁸ any document relating to any dealing in land. The point to note is that there is no mention of length of time; in other words, every document has to be registered, unlike the provisions of the Lands and Deeds Registry Act,¹¹⁹ which provides that registration only applies to interests created for a longer term than one year. However, the consequences under both pieces of legislation are the same, that is, to render an unregistered document 'null and void'. The Housing (Statutory and Improvement Areas) Act¹²⁰ under section 16 outlines these consequences.

Any document, which is required to be registered under the provisions of this Act and is not so registered, shall be null and void:

Provided that nothing herein contained shall apply to the case of any person who has notice of any such document.¹²¹

In the case of Sundi v. Ravalia,¹²² the plaintiff relied on a tenancy agreement dated the 24th January, 1947, according to the terms of which

the appellant agreed to let and the respondent agreed to take on rent, all that Plot 48 situate in Fort Jameson Township for a period of four years, at the yearly rent of £120 payable yearly in advance. The tenancy agreement was not registered. The court held that the meaning of 'null and void' in section 6 of the Lands and Deeds Registry Ordinance is 'of no effect whatever.' Accordingly, a tenancy agreement which should have been, but has not been, registered cannot be relied upon as an agreement for a lease and cannot be used to fix the date of the commencement of a tenancy from year to year which has been created by actual entry and payment of rent.

The other difference between the Lands and Deeds Registry Act and the Housing (Statutory and Improvement Areas) Act is a qualifying proviso under section 16 of the Housing (Statutory and Improvement Areas) Act.¹²³ under this proviso, notice has a vitiating effect. That, one who has notice of an unregistered document cannot say that the document is null and void. No similar provision exists as to the extension of time within which to register a document. This, no doubt, creates hardships where

failure to register is inadvertent. As under the Lands and Deeds Registry Act,¹²⁴ the Housing (Statutory and Improvement Areas) Act,¹²⁵ also provides for priority of documents at the time of registration and not execution of the document. The provision itself is not however, absolutely clear on this point.

S14 (1) Except as hereinafter otherwise provided, any document required or permitted to be registered under this Act shall be in the prescribed form and shall be registered in the order of time in which it is presented for the purpose.¹²⁶

The marginal notes clarify this by providing, "priority determined by registration and not by execution."¹²⁷

Since marginal notes can be used as an aid in construing the provision of the enactment, they shed some light on its meaning. The Act¹²⁸ is equally silent on the effect notice and fraud may have on priority of documents. However, the effect of a certificate of title is the same under both Acts.

(ii) The Agricultural Credits Act.

The Agricultural Credits Act enables any farmer, by instrument in writing, to create in favour of a bank a floating charge, or in favour of any person, a fixed charge on all or any of his farming stock and other agricultural assets, as a security for advances by the bank or the lender under section 3. The proviso to section 3(2), clarifies the point when a floating charge becomes null and void even if it is registered under the Act.

Provided that a floating charge shall be created only in favour of a Bank and any floating charge created otherwise than in favour of a Bank shall be null and void, notwithstanding that it may have been registered under the provisions of this Act.¹³²

The Registrar of Lands and Deeds is also the registrar for agricultural charges. He is required by the Agricultural Credits Act¹³³, to keep a register of agricultural charges.

The registration of an agricultural charge may be proved by the production of a certified copy of the entry in the register relating to the charge, and a copy of any such entry purporting to be certified by the Registrar as a true copy, shall be received in evidence as proof of the matters stated therein

in all legal proceedings, without proof of the signature or authority of the person signing it. ¹³⁴

(iii) The Water Act

Another form of registration applies to rights and easements. Under the Water Act,¹³⁵ water rights, including easements, should be registered within three months from the date of grant.

S45. All rights granted under this Part shall be registered by the applicant with the Water Registrar within three months of the date of granting thereof and in the manner and on paying the fees prescribed, and, in addition, all such rights which affect land shall be registered by the applicant with the Registrar of Lands and Deeds within the time and in the manner and on paying the fees provided by the Lands and Deeds Registry Act. ¹³⁶

The Registrar of Lands and Deeds is also the Water Registrar. Failure to register these rights within the time so specified renders them null and void. ¹³⁷ “S50. Any water right or appurtenant right required to be registered by any of the provisions of this Act and not registered within the

proper time shall be null and void.”¹³⁸

The use of water other than for primary use in contravention of the Act is an offence for which penal sanction can be imposed.¹³⁹

The Act does not provide a remedy for interference with a right granted to the user of water. Redress would in this case be available through the ordinary courts. The case of Mweshi v. Mutale,¹⁴⁰ illustrates this point. In this case the water right in issue related to farm land abutting a public stream situate within trustland. The plaintiff brought an action against the defendant, a member of a farming group committee, for interfering in the use of stream water with his (plaintiff's) water furrows, which supplied water on the farm growing bananas and pineapples. The plaintiff said that he had bought from the previous owner, and in this the seller supported him. On this evidence, the local court ruled in favour of the plaintiff upholding his claim for compensation. On review, however, this judgment was set aside and re-trial ordered on account of the local court's omission to hear the defendant's version. During the review and the proceedings in the local court it was never revealed that the defendant (amongst other members of the committee) had a water right grant. This, in fact, was the

main issue of the case to be determined by the court. The water right granted to the farming group committee was for both primary and secondary uses so that an irrigation scheme could be carried out. The records available showed no indication to suggest that the plaintiff in this case was ever a holder of a water right grant. Apart from showing that an ordinary judicial process was available to provide redress in the event of an alleged infringement, the case threw light on the suitability of the Act in governing rights held under customary law. The fact that it was an offence under the Act remains clear since the plaintiff was using stream water for irrigation on a small scale without permit and it was a secondary use of water which could not be done without permission. The problems lie in whether or not the application of the Act ¹⁴¹ could be extended to an area within the trustland under the domain of customary law. The Act itself provided the answer, for under section 6: "No rights for the use of water occurring in an African area shall be conferred without the agreement of the Minister." ¹⁴²

The rationale behind this legislative provision is obvious, that interests under customary law should not be disturbed except by the Minister's consent.

In this regard, the case in question points to the fact that the order granting the said farming group committee water rights appeared defective and hence invalid. Since the recital to the grant is also silent it suggests that ministerial consent may have been obtained.

The administration of the Water Act ¹⁴³ has revealed a number of difficulties. The official view of the Water Board is unanimous that the lack of administrative personnel has made it impracticable to supervise adherence to the Act. ¹⁴⁴

The Water Board has no officers to go around Zambia and see to it that those who need to obtain water rights have done so and that conditions attached to those rights are observed. The processing of applications for water rights has been officially the responsibility of the water officer. It is his duty to make an on the spot investigation before passing recommendations to the Water Board for the grant of water rights. In practice, this becomes very difficult since only one water officer has to provide for the whole country. To overcome this problem the water officer delegates his duties to the provincial water engineers, who in turn,

process the applications and give their recommendations to the water officer. The anomaly is that such delegation of power is not provided for by legislation and, therefore, becomes illegal.

Another problem facing the Water Board is the restriction of the Water Act¹⁴⁵ to surface water only. Rights to the proper use of ground water are not subject to control. In other words, it cannot be extended to the use of water in wells, suggesting that the Act does not apply to land held under customary domain.

In conclusion, various rights held in the land itself and any other interests can be registered under different legislative provisions and through different administrative bodies. The Ministry of Lands handles the allocation, survey and registration of titles for land in both urban and rural areas. Under the legal breakdown of responsibilities, allocation is handled by the Lands Department (headed by the Commissioner of Lands), survey by the Survey Department (headed by the Surveyor General), and registration by the Lands and Deeds Registry (headed by the Chief Registrar), under the Commissioner of Lands.

The Ministry has always carried out its functions in a highly centralized

fashion, and despite a several-year-old policy of decentralization, it continues to do so. Some Ministry staff have been posted to each province, but decision-making and record-keeping have not yet been decentralized.

The Lands and Deeds Registry is responsible for the registration of deeds, which is the last stage of the conveyancing process. To provide for an effective system of registration the entire process of conveyancing has to be discussed. The next chapter shows how the conveyancing process evolved and the need to revise and review it.

CHAPTER TWO
END NOTES

1. Gibbs v. Messer (1891) AC 248. ✓
2. Ibid, at 254.
3. Abigail v. Lapin (1934) AC 500. ✓
4. Williams and Glyn's Bank v. Boland (1981) AC 487. ✓
5. Williams and Glyn's Bank v. Boland (1981) AC 487 & Epps v. Esso Petroleum Ltd (1973) All ER 465. ✓
6. Epps v. Esso Petroleum Limited (1973) All ER 465. ✓
7. Waring v. London & Manchester Assurance Co. (1935) CH 310. ✓
8. Re Chadwoods Registered land (1933) CH 574. ✓
9. Ibid.
10. Mvunga M.P. Land Law and Policy in Zambia, PhD Thesis, University of London, (UNZA Special Collections Division) at 579. ✓
11. The Lands Act, Cap. 184, Laws of Zambia, 1995. ✓
12. Lewis and Holland, Principles of Registered Land Conveyancing, (1967), Butterworths, London, at 4. ✓
13. S.R. Simpson, Land Law and Registration, (1976), Cambridge University Press, London, at 135. ✓
14. P.F. Dale, Cadastral Surveys within the Commonwealth, HMSO (1976) Dale carried out this project on the recommendations of the Conference of Commonwealth Survey Officers in 1971. The project was financed by the Ministry of Overseas Development, U.K. ✓

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15. S.R. Simpson, Land law and Registration, *supra* note 13, at X11.
 16. Refer to Appendix 'A'.
 17. P.F. Dale, Cadastral Survey within the Commonwealth, *supra* note 14, at 270-271.
 18. *Ibid.*
 19. Survey Department of Zambia, (Cadastral Services) and National land survey of Sweden, Cadastral Survey Manual, Lusaka January, 1986, at 4.
 20. *Ibid.*
 21. Refer to Appendix 'B'.
 22. Survey Department of Zambia, Cadastral Survey Manual, *supra* note 19, at 4.
 23. Refer to Appendix 'B'.
 24. Refer to Appendix 'C'.
 25. *Ibid.*
 26. Refer to Appendix 'D'.
 27. Survey Department of Zambia, Cadastral Survey Manual, *supra* note 19, at 4.
 28. Land Survey regulations, 1971.

29.

- Are vehicles in good condition?
- How much fuel is needed?
- How many theodolite, taped and other equipment is
- Needed?
- Is power supply available?
- How many beacons are to be placed?
- How may bags of cement are needed?
- Paper, pencils, field books, calculators,
- Computation forms are required
- camping equipment
- other small items

30. Land Survey regulations, 1971.

31. Refer to Appendix 'E'.

32. Interview held on Friday 30/12/1993 at 9.00 hours with the Assistant Surveyor-General, Mr. J.G. Nyangulu, who has been a registered Surveyor since 1981. ✓

33. Survey Department of Zambia Cadastral Survey Manual, supra note 19, at 4.

34. S.R. Simpson, Land Law and Registration, supra note 13 at, 133-137.

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35. P.F. Dale, Cadastral Surveys within the Commonwealth, *supra* note 14 at 35.
 36. *Ibid*, at 271.
 37. *Ibid*.
 38. Sir Dowson E., Land Registration, Colonial Research Publication (1955), at 89.
 39. T.O. Elias *The Nature of African Customary Law*, Manchester, (1965), at 162.
 40. Procedure on Land Alienation, Land Circular No. 1 of 1985, Ministry of Lands and Natural Resources, Lusaka, Government Printer.
 41. Lands and Deeds Registry Act, Cap 185, Laws of Zambia, 1995.
 42. Lands Act, *supra* note 11.
 43. Housing (Statutory and Improvement Areas) Act, Cap 194, Laws of Zambia, 1995.
 44. Agricultural Credits Act, Cap 187, Laws of Zambia, 1995.
 45. Reserves and Trustland (Adjudication and Titles) Act (Repealed).
 46. Procedure on Land Alienation, Land Circular No. 1 of 1985, *supra* note 40.
 47. Refer to Appendix 'F' and S.I. No. 89 of 1996.
 48. *Gibbs v. Messer* (1891) *supra* note 1 at 254.
 49. S.R. Simpson, Land Law and Registration, *supra* note 13, at 19.
 50. *Ibid*, at 20.

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51. T.B.F. Ruoff, Concise Land Registration Practice, (1967), Sweet & Maxwell, London, at 2.
 52. Colony of Singapore Government Gazette Supplement No.56 Bill No.4, 15th July 1955, at 1134.
 53. G. Wille, Principles of South African Law, 5th (ed), (1961), Juta & Co.Ltd. Johannesburg, at 1.
 54. Ordinance No.39 dated 19th January, 1828 .
 55. Coronel's Curaton v. Coronel's Estate, (1941), AD 338 .
 56. African and European Investment Co. v. Warren, (1924), AD 327.
 57. Lands and Deeds Registry Act, supra note 41.
 58. Ibid, Sec.33.
 59. Ibid, Sec.4.
 60. William Jacks & Co. (Zambia) Ltd. v. Registrar of Lands and Deeds and Construction & Investment Holdings Ltd, SJZ No.5 of 1967, at 54.
 61. Re Broad, (1901), 2 CH, 86.
 62. William Jacks & Co. (Zambia) Ltd. v. Registrar of Lands and Deeds and Construction & Investment Holdings Ltd, supra note 60.
 63. Harvey v. Pratt (1965) 2 ALL ER 786.
 64. William Jacks & Co. (Zambia) Ltd. v. Registrar of Lands and Deeds and Construction & Investment Holdings Ltd, supra note 60.
 65. Lands and Deeds Registry Act, supra note 41.
 66. Ibid, Sec. 21.
 67. In the matter of the Estate of Osman Tayub, 5 (1949-54), NRLR, at

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68. Land Registration Ordinance No.8 of 1916. ✓
 69. Land Registration Ordinance No. 12 of 1910. ✓
 70. Lands and Deeds Registry Act, supra note 41.
 71. Ibid, Sec. 5(3).
 72. Ibid, Sec. 2(f).
 73. Land Registration Act 1925. ✓
 74. Land Survey Act, Cap 188, Laws of Zambia, 1995. ✓
 75. Ibid, Sec. 4(2).
 76. Ibid, Sec. 4(3).
 77. Ibid, Sec. 10(3).
 78. Ibid, Sec. 32.
 79. Proposed Practice in the Issuance of Title Deeds for a unit in a Common Leasehold Scheme, Land Circular, Ministry of Lands and Natural Resources, Registry Department at 4. ✓
 80. Ibid.
 81. Ibid.
 82. Common Leasehold Schemes Act, Cap 208, Laws of Zambia, 1995. ✓
 83. Ibid.
 84. Ibid.
 85. Refer to Appendix 'G'.

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86. Refer to Appendix 'H'.
 87. Common Leasehold Schemes Act, supra note 82.
 88. Ibid, Sec. 5(3).
 89. Ibid, Sec. 5.
 90. Ibid, Sec. 7(1).
 91. Ibid, Sec. 8.
 92. Ibid, Sec. 17(1).
 93. Ibid, Sec. 19(1).
 94. Common Leasehold Schemes Act, supra note 82, sec. 8(1).
 95. Refer to Appendix 'G'.
 96. Common Leasehold Schemes Act, supra note 82.
 97. Ibid, Sec. 8(4).
 98. Lands and Deeds Registry Act, supra note 41.
 99. Housing (Statutory and Improvement Areas) Act, supra note 43.
 100. Ibid, Sec. 11.
 101. Ibid.
 102. Ibid, Sec. 48.
 103. Ibid.
 104. Ibid.
 105. Ibid.

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106. Ibid, Sec. 4.
 107. Ibid, Sec. 37.
 108. Land and Deeds Registry Act, supra note 41.
 109. Housing (Statutory and Improvement Area) Act, supra note 43.
 110. Ibid, Sec.13(1).
 111. Ibid, Sec.39(4).
 112. The Lands Act, supra note 11, Sec. 6.
 113. Ibid, Sec. 3(3).
 114. Housing (Statutory and Improvement Areas) Act, supra note 43.
 115. Ibid.
 116. The Lands and Deeds Registry Act, supra note 41.
 117. Housing (Statutory and Improvement Areas) Act, supra note 43.
 118. Ibid, Sec. 39(4).
 119. Lands and Deeds Registry Act, supra note 41.
 120. Housing (Statutory and Improvement Areas) Act, supra note 43.
 121. Ibid, Sec. 16.
 122. Sundi v. Ravalia, (1949), 5 NRLR, 345.
 123. Housing (Statutory and Improvement Areas) Act, supra note 43
Sec. 16.
 124. Lands and Deeds Registry Act, supra note 41.
 125. Housing (Statutory and Improvement Areas) Act, supra note 43.

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126. Ibid, Sec. 14.
 127. Ibid.
 128. Ibid .
 129. Agricultural Credits Act, supra note 43.
 130. Ibid, Sec. 3.
 131. Ibid.
 132. Ibid, Sec. 3(2).
 133. Agricultural Credits Act, supra note 43, Sec. 8(2).
 134. Ibid, Sec. 8(7).
 135. Water Act, Cap 198, Laws of Zambia, 1995. ✓
 136. Ibid, Sec. 45.
 137. Ibid, Sec. 50.
 138. Ibid.
 139. Water Act, supra note 135.
 140. Mweshi v. Mutale, Civil Review No. 3 of 1971 (Unreported) before Subordinate Court, Class 111, Kasama, Original case No. 66 of 1971, Mungwi Local Court. ✓
 141. Water Act, supra note 135.
 142. Ibid, Sec. 6.
 143. Ibid.
 144. Ibid.
 145. Ibid

CHAPTER THREE

CONVEYANCING IN ZAMBIA.

A. HISTORICALLY BACKGROUND TO CONVEYANCING IN ENGLAND.

In the primitive period, in England, permanent ownership of land was unknown, including the modern concepts of separate and individual ownership. During this era, certain tribes were pastoral and cultivated enough land each year to supply themselves with corn. They then moved on to fresh fields and new pastures. Others dwelt in small communities, each having his own homestead as a separate property. The arable land was divided year after year among the villages and ploughed afresh. Many more lived in scattered hamlets paying food as rents to the crown or other Lords.¹

This was followed by the feudal system established after the Norman Conquest of 1066. William the first conquered England and became the owner of Land, to reward his followers who submitted to him he granted

certain land and land rights, to be held off him as overlord. The land was held from the crown upon provision of certain services.

The kinds of land ownership known to Anglo-saxon Law were Folkland, Bookland or Laenland. Folkland mean "Land held by private persons according to the folk of customary Law."²

Rights in land were bounded and defined by the customs of the community. Bookland was land held under a book and was of ecclesiastical origin. The earliest grant by the book was from the King to the church,³ leading to the establishment of crown land. Laenland was based on Laen or Loan of land; as such, was a temporary gift usually given for a term of three lives.

In these three different kinds of land ownership the history of Anglo-saxon conception of landowning developed. There was little or nothing of the doctrine as to ownership, tenure or possession at this stage.

Along side the development of the principles of land law came the

practical application of this law in form of conveyancing documents.

During these times the only form of conveyance of land was bookland. For the other two, the symbolic methods of handing over a stick, a hasp, a ring, a cross, or a knife which was sometimes inscribed or curved or broken, marked the transaction.⁴ Before the Norman Conquest there is evidence in 1038 of a suit in which a verbal conveyance was declared in a gemot.⁵ Therefore, during this era the use of writing was the exception rather than the rule. "In the case of Bookland it is possible that the signing and delivery or the transfer of the book was all that was needed to complete the conveyance."⁶

It was after the Norman Conquest that the use of writing became more frequent, but the writings were short and meagre. Originally the land book served as a form of conveyance but later the delivery of the document replaced the symbolic handing over. The development of the Royal writ to communicate the King's pleasures to persons and courts became the new form of documents dealing in land, superseding the older form of grant by

book.⁷ However, it should be noted that the village community still depends on the primitive methods while among the wealthier classes, new forms of land ownership created by book, and later, by the Laen, came into existence.

B. CONVEYANCING REGULATED UNDER STATUTE

The idea that title could be transferred was first introduced through adopting the doctrines of the courts of Chancery into the Law Courts by virtue of the statute of uses.⁸ It produced the changes of great importance relating to the matter of conveyancing. Under the statute it was possible to make transfers of estates of any sort in land by merely agreeing that the title should pass at present or at some future time, provided the agreement had a sufficient consideration to support it. This brought about the beginning of the modern documents of deeds and indentures, setting forth recitals to transfer and deal in land transactions. The indenture still maintains the concept of the symbol of transfer, since it was either cut or indented like the teeth of a saw and the two parts when brought together formed the complete document, bringing about the development of the

Conveyancing Act 1881.

For centuries land has been the most important form of wealth and it has long been necessary to regulate the manner in which land, or rather estates in land, could be acquired. Conveyancing is the law relating to the transfer of property by act of the party, where any document is used for the purpose. It has been defined as:

The art of the alienation of property by means of appropriate instruments or conveyance; that part of the Lawyer's business which relates to the alienation and transmission of property and other rights from one person to another, and to the framing of legal documents intended to create, define, transfer or extinguish rights⁹.

In other words, conveyancing includes the investigation of the title to land and the preparation of agreements. At common law conveyances were said to be original or primary when they transferred the property without reference to a previous conveyance and derivative or secondary when they followed a previous conveyance, and took effect with reference to it. Further, in England there were two distinct systems of conveyancing. The old system called the conveyancing of registered land, when a legal

estate is to be transferred; the conveyance of the land or of any interest therein must be made by deed. The transferor is then bound to prove his right to make the transfer, mainly by production of the deeds.

Secondly, the new system which was called registration of title was regulated by the Land Registration Act 1925 to 1966; under this, land is transferred by the substitution of the transferor's name for that of the transferee on a register, kept by a government department. This system brought about the three principal kinds of land registration. The registration of deeds, which involves the registration on a public register of brief particulars of all conveyances, mortgages and other instruments executed in relation to land in the area concerned. A search of the register does not give a complete picture of the existing state of the title to that land. It does tell the purchaser what registrable documents are relevant and protects him from non-disclosure of such documents.¹⁰

Next, the registration of charges where the rights vested in third parties is registered. In this case, third party refers to persons other than the estate owner of the land affected. Therefore, the prospective purchaser has to

examine the title deeds to discover the name of the estate owner. Lastly, the registration of title, which in fact provides proof of title. A search of the register gives to the purchaser a description of land and the name of the registered proprietor; it also discloses many third party rights.¹¹

Registration of title, however, does not merely ease the task of a purchaser in finding evidence of his vendor's ownership and ability to convey. The underlying principle is that a person who is registered as proprietor becomes the owner of that title.¹²

C. DOCUMENTS REQUIRED TO BE REGISTERED AND THE INVESTIGATION OF TITLE.

For hundreds of years the system of transferring the title to property has involved the sealing of a deed on each occasion between the relevant parties. As a result, the number of deeds to any piece of land has increased proportionately with the number of transactions involving land.

In addition, as more rights have been granted over and burdens imposed on the land, the deeds have become endlessly complicated.

The transactions were usually effected by an Indenture. An Indenture can be defined as:

a deed made by more parties than one; so called because there ought regularly to be as many copies of it as there are parties, and formerly each one was cut or indented like the teeth of a saw, or in a waving line to tally or correspond with the other. By section 56(2) of the Law of Property Act a deed purporting to be an Indenture has the effect of an indenture, though not actually indented. By S53 of the same Act any deed whether or not being an Indenture may be described as a deed simply or as a conveyance, mortgage or otherwise according to the nature of the transaction.¹³

A conveyance under the English land tenure system includes an assignment, lease or other assurance made by deed or a sale, mortgage, demise or settlement of any property. Sale or transfer of freehold property is usually classified as a conveyance whereas an assignment refers to leasehold property. As the definition clearly points out, all the transactions are entered into by way of a deed, in its original form as an Indenture. In Zambia, the main form of the deed is an assignment and not a

conveyance since under section 5 of the Land (Conversion of Titles) Act,¹⁴ all land was converted from absolute, freehold, fee simple and leasehold title for a period exceeding 100 years to a statutory leasehold for 100 years. In other words, all leasehold property in Zambia is conveyed by an assignment.

The problems with reference to a system of conveyance was clearly expressed by the Real Property Commissioners, who were appointed in 1829 to inquire into English land law.

In all civilised countries the title to land depends in a great measure on written documents and the Purchaser looks and is empowered by the law to look, for proof of the seller's right beyond the fact of his possession. It is obvious that a documentary title cannot be complete, unless the party to whom it is produced can be assured that no document, which may defeat or alter the effect of those, which are shown to him, is kept out of sight. It follows, that means should be afforded by the law for the manifestation of all documents necessary to complete the title, or for the protection of Purchasers against the effect of any documents, which, for want of the use of such means, have not been brought to their knowledge, in other words, that there would be a General Register.¹⁵

The above quotation no doubt advocates for registered conveyancing, where the quality of a particular title is readily apparent from the register because it is described there with reference to the nature of each essential transaction.

The type of deed entered into depends on the class of registered title of which several are in existence under English land law conveyancing system. More accurately, there are three different kinds of title to registered freehold land and four kinds of title to registered leasehold land. At this point, it is important to note that in Zambia section 5 of the Land (Conversion of Titles) Act, is of great significance, since it converted title to land with effect from 1st July 1975.

S5: Every piece or parcel of land, which immediately before the commencement of this Act was vested in or held by any person-

- (a) absolutely, or as a freehold or in fee simple or in any other manner implying absolute rights in perpetuity; or
- (b) as a leasehold under a lease granted or deemed to have been granted by or held of the President for a term of years extending beyond the expiration of one hundred years from the date of the commencement of this Act; is hereby converted to a statutory leasehold and shall be deemed to have been so converted with effect from 1st July 1975.¹⁶

The problem is further complicated because under Section 4 of the said Act all land is vested in the President.

S4: Notwithstanding anything to the contrary contained in any other law, deed, certificate, agreement or other instrument or document, but subject to the provisions of this Act, all land in Zambia shall vest absolutely in the President and shall be held by him in perpetuity for and on behalf of the people of Zambia.¹⁷

The same provision is clearly repeated under section 3 of the Lands Act, Cap 184 Laws of Zambia 1995. This clearly indicates that even leasehold title in Zambia is qualified to some extent. Therefore, even though customary law and English land tenure concepts are applicable to Zambia, their application has to be made with caution because of the statutory qualifications outlined above. However, there may be a possibility that in the long run the reintroduction of freehold title will become inevitable and, therefore, discussion of the various class of title may prove worthwhile.¹⁸

The best class of title, which is nearly always granted in respect of

freehold land, is absolute freehold title. This title is where the effect of registering a person as first proprietor with an absolute title is to vest in him an estate in fee simple in possession in the land, together with all rights, privileges and appurtenances belonging to it, but subject to certain rights and interests, for example the incumbrances and other burdens entered on the register. In all other respects, the proprietor holds free from all other estates and interests, including estates and interests of Her Majesty. Further, before it can be granted the Chief Land Registrar must approve the title.

In the event where freehold title is disposed of by way of transfer or lease, for example, the application must be made to the registry to complete the disposition by registration. The transferee is then entered as the new proprietor of the freehold title or if it is a lease, the lessee becomes the proprietor of the leasehold title. Until this takes place there can be no change of ownership and the would-be proprietor will not be able to exercise his rights as the owner.¹⁹

But a possessory freehold title is granted when a squatter claims land and

also in cases where the applicant for first registration fails or is unable to produce the documents and deeds which he should have in his custody. This is usually considered to be a weak title. The title is guaranteed as far as all dealings after the date of registration are concerned, but no guarantee is given as to the title prior to first registration, which must accordingly be investigated by a purchaser in the same way as if the land were not registered. The effect of registering a person whether on first registration or on a subsequent transaction, as proprietor with a possessory title is that the registration does not affect the enforcement of any estate, right or interest adverse to the title of the first registered proprietor. After possessory freehold title has been registered for fifteen years it is capable of being converted into an absolute title on the occasion of a sale. It is also capable of conversion if the missing deeds or evidence is produced at the registry.²⁰

The last classification of freehold title is qualified freehold title. Where it appears to the Chief Land Registrar that even though the applicant seeks an absolute title, the title can only be established subject to certain reservations, he may grant a qualified title. Easements are one such

example, which can be qualified on the register.²¹

Before discussing the various leasehold titles a comparison between Freehold and Leasehold will clarify the point further.

There are certain obvious advantages in freehold. It provides the best form of security for credit and the sense of absolute ownership is a powerful incentive to development. Freehold provides opportunities for large profits when the value of land has substantially increased. It confers freedom from control by landlords, whether they are private individuals or Governments. The most obvious danger in freehold is that in the absence of specific laws against partition there is a danger of excessive fractioning so that what is left for holding is no longer substantial.

Under a leasehold system the state is more able to ensure an economical use of land, to take steps to meet new conditions and to insist on measures which will prevent unplanned development. Arguing for the leasehold title, it is clear that a lease of ninety-nine years with a reservation to the State of regulated opportunities of reviewing the return

which they make to the public revenue, would offer sufficient security for any enterprise, provided that they included certain safeguards in favour of lessees. In summary both systems have their advantages and disadvantages and it would be incorrect to state that one has priority over the other; clearly neither is perfect and the success of the one over the other depends on the national land policy of each country. In other words, one system may prove workable for one country but it may be unsuitable for another.²²

With reference to leasehold title, an absolute leasehold is secure from the point of view of a lender since the registry guarantees that the lease was properly granted by the lessor and the register reveals all the restrictive covenants which affect the reversion and which in law affect the lessee although he may know nothing about them. The effect of registering a person as first proprietor with an absolute leasehold title is to vest in him the possession of the leasehold interest with all implied or expressed rights and privileges attached to it.

While a good leasehold title does not affect or prejudice the enforcement

of any estate, right or interest, which would have prevented the lessor from effectively granting the lease, but in every other way it has the same effect as registration with an absolute title. A good leasehold title can be converted into an absolute leasehold title by an easy process.²³

Possessory leasehold title is not common and the effect of a person being registered with a possessory title does not effect or prejudice the enforcement of any estate, right or interest adverse to or in derogation of the title of the first registered proprietor and subsisting or capable of arising at the time of his registration.

A qualified leasehold title has become almost extinct and the registry cannot grant it unless an applicant who is refused a better class of title applies in writing for a qualified title. The entry in the register specifies the qualification either by stating the right or interest arising before a specified date, or arising under a specified document, or otherwise as particularly described in the register. Conversion of a qualified title to absolute or good leasehold is only possible if the applicant is able to produce evidence that the defect in the earlier pre-registration title has been removed.²⁴ In Zambia the existence

of only one type of title being a good leasehold title is evident with the qualification explained earlier. This title is passed from the seller to the buyer subject to a lease and what is transferred is the right or interest in that estate.

(D) THE TRANSACTION ITSELF: THE SALE AND PURCHASE OF REAL PROPERTY.

A common transaction in land in England, which is also true for Zambia, is the purchase of a house. Before the sale can take effect various steps and procedures have to be followed by Advocates of both parties. Different Advocates can act on behalf of the Vendor, who is selling the property, and the Purchaser, who is buying the property in question. However, one Advocate can act for both parties as long as there is no conflict of interest. It should be noted that much of the bargaining between the vendor and purchaser takes place even before the Advocate comes on the scene. Any prospective purchaser must first find what type of property he wants and then make sure that it satisfies his requirements. At this stage the purchaser

will have to approach his Advocate to establish certain facts, such as whether or not the vendor is the owner and he holds a valid title to the property being sold. This is to avoid problems at a later stage when both parties are bound by the contract. It is not usual to find some purchasers of real property being cheated because of lack of knowledge. A common example is where the purchaser is made to sign a piece of paper indicating that the property has been sold to him, he accepts and pays the vendor. This may be a valid contract for the sale of personal property but it is not so for real property. There is a lack of public awareness in this area of land law. The main problem evident here is the fact that many people who buy property are of the opinion that the transaction is similar to that of purchasing personal property. A research conducted at the National Institute of Public Administration reveals the problem clearly. A cross-section of the members of staff were interviewed, one being in the classified employee group working as a registry clerk, another in the middle level being the assistant bursar and finally a professional trainer. They had one thing in common.²⁵ They all agreed that a sale of property was similar to a sale of a motor vehicle, for example. In other words, everyone showed ignorance about land requiring a special contract for sale. This was also true for the procedure itself. A few people know the basics but most people

The transaction of the sale and purchase of real property falls into two main parts, i.e. pre-contract and post contract. A brief summary of the broad procedure may provide a useful guide in understanding the whole complex procedure.²⁷ From the onset it should be noted that until the contract of sale is signed by both parties only a gentleman's agreement exists. What amounts to a gentleman's agreement was judicially defined in the case of Golding v. Frazer,²⁸ as an agreement which experience shows is only too often a transaction in which each side hopes the other will act like a gentleman and neither intends so to act if it is against his material interests. In this case, the plaintiff was desirous of buying the defendant's house and land. He paid to the defendant's agent a sum of money for which he received a receipt. It was 10% deposit for seven acres of land, possession being given, 'subject to planning consents and subject to contract.' No contract was entered into between the plaintiff and the defendant and the agent became insolvent. The court held that the plaintiff's claim to the recovery of the money paid from the agent should succeed.

Once instructions have been received from the client, the vendor's advocate draws up a draft contract of sale, providing the purchaser's advocate with

the necessary particulars of the property, which is being sold. The contract is divided into particulars of sale (which describe the land being sold); and the conditions of sale (which set out the terms on which it is being sold); the contract is usually drafted using the standard form of printed contract.²⁹ There is also a statutory requirement under section 5 of The Lands Act ³⁰ for the vendor's advocate to apply for state consent to assign using a standard form ³¹ giving details of the unexhausted improvements on the land and accompanied by the appropriate fee.³² Without the state's consent to assign the transaction cannot proceed further. Three copies of the draft contract have to be prepared, two copies to be sent to the advocate of the purchaser while one copy is to be maintained on the file. This will enable the purchaser's advocate to make amendments on one copy and keep one copy as his record. The contract is divided into four sections: firstly, the parties clause; secondly, the particulars of the property; thirdly, the general conditions and lastly, the special conditions. It has to state the essential terms of the contract with sufficient certainty. Description of the parties to the Contract is one general condition. It is usual to describe the parties by both their first names and their surnames if the transaction is between two individuals. However, it is not uncommon for parties to be incorrectly described by accident or otherwise. In the case of Alexander Mountain &

Co. v. Rumeke,³³ where on a mere misnomer of a plaintiff on a writ, the defendant could compel the plaintiff to amend by way of a summons supported with an affidavit. If the defendant does not exercise this power, and the matter proceeds to trial, the misnomer can then be amended and in no circumstances can it affect the substantive judgment, which the court is called on to pronounce. However, the parties must be described with sufficient certainty as was explained by Lord Halsbury in the case of Simmons v. Woodward,³⁴

a very familiar principle of law, that where you are dealing with a grantee, you may describe that grantee in any way which is capable of ascertainment afterwards: You are not bound to give him a particular name; you are not bound to give his christian name or his surname; you may describe him by any description by which the parties to the instrument think it right to describe him.³⁵

Secondly, if the property in question had been sold once before, then its description is commonly taken from the 'parcels' of the last preceding conveyance. The 'parcels' clause in the conveyance describes in detail the property in question. Swinfen Eady J. in Re Sansom and Narbeth's Contract expressed this.³⁶ In this case the tenant Narbeth purchased lot 2. The

particulars and conditions did not contain or refer to any plan. It was agreed that the purchaser should have a plan copied from the 1887 plan on the root of title. In simple cases a purchaser is entitled to have land conveyed to him by reference to a plan on his conveyance. Nevertheless, great care must be taken and a physical inspection should be made to ensure that there was no change of boundary since the property was last described.

Some practitioners consider that a vendor may insist upon a repetition of the exact words of the Contract and may refuse to convey by any other description; but this is a misapprehension. The subject-matter of the Contract is not words but land; and if the Purchaser considers that the words used in the Contract do not describe the land which he intended to purchase with sufficient distinctness, he has a right to frame a new description either by means of a plan or otherwise.³⁷

If this is overlooked a problem may arise, as was the point in issue in the case of Wallington v. Townsend,³⁸ where there was a Contract to sell land described by a plan which was an exact copy of the plan on the conveyance to the vendor. Unfortunately, it had been overlooked that in the meantime the vendor had also purchased the adjoining bungalow and made certain alterations. Consequently, the Contract plan contained part of the bathroom,

lavatory, coal box and drains of the adjoining bungalow. Morton J. held that this 'disputed strip' was in fact included in the Contract. This sort of boundary alteration may be very difficult for the Advocate who is a conveyancer to discover by inquiry as was the main issue in the case of Hopgood v. Brown.³⁹ There, the conveyance to the Purchaser had been by reference to a plan on an earlier conveyance. The vendor, however, had in the meantime permitted the next-door neighbour to build a garage, which in fact substantially abutted into the proper dividing boundary, although neither had realised this. The Court of Appeal held that the vendor was estopped from denying that the proper boundary was as altered by the garage and that the purchaser as a successor in title was also estopped.

The only way to overcome these types of problems would be that, before contracting to sell, a vendor should have the property surveyed for the purpose of description to avoid the risk of misdescription. The main objection to this would be the unnecessary expense, which would be incurred, and the obvious delay in the transaction in Zambia.

The importance of the 'parcels clause' or the description of the property in the Contract is of great significance. Therefore, the most precise

draughtsmanship is required, making it a difficult task for the Advocate as well. Since that clause embodies the essential object of the whole exercise the partial difficulties in achieving this received sympathetic recognition in the House of Lords by Lord Sumner in the case of Eastwood v. Ashton,⁴⁰ where he said that: "Conveyancers, however, have to do the best they can with the facts supplied to them and it is only now and again that confusion arises."⁴¹

The facts of this case were that in 1911 the vendor as beneficial owner conveyed to the purchaser a farm. The plan included a small strip of land where the adjoining owners had acquired adverse title. It was held that the description by reference to the plan ought to prevail and that the strip of land was included in the conveyance.

A specimen of a draft clause within the Contract describing a particular property clarifies the points above.

ALL THAT piece of land in extent 0.340 of an acre more or less being Plot No. 123 situate in the Lusaka Province of Zambia which piece of land is more particularly delineated and described on Diagram No. 380 of 1962 EXCEPT and RESERVED all minerals oils and precious stones whatsoever upon or under the said land.

Secondly, the general conditions regulate a substantial number of matters for which the contract must make provision and which can be standardized and applied to all contracts without alteration unless expressly varied by special conditions. All the general conditions are outlined in the Law Association of Zambia General Conditions of Sale 1976.⁴² A general awareness both amongst lawyers and the general public can be achieved by enacting legislative provisions regulating these Contracts. A Lands Contract Act, being a proposed amendment to the land laws, could incorporate all the standardized conditions and the main special conditions. To provide for special circumstances it should be legislated that parties would be able to alter the special conditions as long as they are not inconsistent with any other statutory provisions. The Act may also provide that any dispute between the vendor and purchaser on any matter relating to land issues should be decided by the Registrar of Lands whose decision is subject to appeal to the Lands Tribunal, which is established under the Lands Act. These changes may provide a solution to the problem experienced by Advocates in drafting the contract and the procedure upon breach.

The standard law association contract form incorporates the Law Association of Zambia General Conditions of Sale 1976.⁴³ These include, in addition to the usual terms of the Contract, price and deposit etc, and detailed conditions covering a wide range of other matters. All the general conditions apply to the contracts drafted on the Law Association of Zambia General Conditions of Sale unless inconsistent with the special conditions or if they are varied by a special condition. An example will illustrate the point, i.e. the rate of interest on the unpaid balance of the purchase price to be paid by the purchaser if he takes possession before completion is (eight) 8% per annum under the General Conditions of Sale.⁴⁴ This can be varied by a special condition within the contract to increase or decrease the rate of interest.

When drafting the contract the vendor's Advocate has to take special note of three main points. Firstly, though the rate of interest specified in the general conditions ⁴⁵ is 8% per annum this is considered low compared with other rates of interest at the bank, for example, and gives an opportunity to the vendor to cause unnecessary delay in completing the transaction. This is mainly because of the prevailing economic conditions, which allow for high prices of buildings in general.

If a special condition in the Contract is included to the effect that possession is to be given to the purchaser upon exchange of contracts, care must be taken when approving such a Contract. The vendor must not forget that a purchaser in possession may feel less pressure for an early completion and may indeed decide not to complete at all. As was discussed in the case of Francis Jackson Developments Ltd v. Stemp,⁴⁶ where the appellant entered into a contract in writing with the respondents to purchase a house for £510. The date fixed for completion was 23rd September, 1939. The appellant entered into possession but signed a letter acknowledging that he was a tenant at will of the respondents. It was held that a purchaser in possession before completion who pays a periodic sum for the privilege might be either a tenant or a licensee of the Vendor. Under an open Contract such a purchaser will normally be regarded as a tenant. In the Zambian situation if possession is given upon exchange of contracts this will amount to breach of section 5 of the Lands Act,⁴⁷ since the Vendor should not part with possession without prior consent in writing of the President which can be withheld in some cases. In the case of Mutwale v. Professional Services Ltd,⁴⁸ a landlord agreed to let a flat to a certain man and no consent to the letting was obtained under section 13(1) of the Act.⁴⁹ No rent was ever paid although the purported agent's girlfriend occupied

the premises for two years. The court held that because section 13(1) prohibited any person from letting premises without consent, the whole of the contract, including the provision for payment of rent was unenforceable. This ruling was applied in the case of Jasuber R. Naik and Naik Motors Ltd v. Agness Chama,⁵⁰ where the premises were let without Presidential Consent and the court went further to state that it was the landlord's duty to obtain consent and to suffer from any illegality arising from failure to obtain such consent and the tenant is not at fault in the absence of any wrongdoing. The attitude taken in the case of Ailian v. Spiekerman and Ors⁵¹ was that the purchasers were to be protected from entering into such an illegal contract and when they had been so persuaded, the court would enforce the intention of the legislature, which was that the vendor should have no rights under an illegal contract but the purchasers should not lose the protection of the statute which was designed to protect them. After hearing arguments from both Advocates and applying this principle in the Zambian case of Jasuber R. Naik and Naik Motors Ltd v. Agness Chama,⁵² it was held that a tenant who is not in default himself does not lose the protection of the Rent Act as a result of a landlord's failure to obtain Presidential consent to a letting. In other words, even though in practice