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**COURSE CODE : GEE 3522**

**COURSE TITLE : LAND MANAGEMENT II**

**Rationale**

Land constitutes a basis for the Geomatics profession. The increasing demand of land in turn demands an equally vibrant land management system. Therefore understanding issues concerning how it is managed and the legal framework within which land is administered is therefore of paramount importance. This course therefore provides a firm understanding of land management and its legal framework that has been inadequately addressed previously.

**Aim**

The course aims at giving students with the understanding of law governing land and the issues of land administration such as registration and conveyancing

**Objectives**

Upon completion of this course, students will be able to:

- i. Explain the origins of land law, land tenure and land administration in general in Zambia.
- ii. Apply land law in different situations that arise in day to day life
- iii. Apply concepts of land administration in the ever increasing demand for the land resource, effectively.
- iv. Apply statutory provisions and controls in land administration

**Course content**

**Common Law Heritage and its Influence on Land Law in Zambia**

Sources of land law; common law; concepts of land; classifications and categories of property; law and equity; Concepts of estates and tenure; statutory provisions and controls

**Land Tenure**

Definitions and concepts; types of land tenure; formal and informal tenure; land and rights in land; property rights and property regimes; concept of ownership and interests in land; land tenure in Zambia; statutory provisions and controls

**Land Administration**

Definitions and concepts; process; benefits; demarcation, adjudication; allocation; registration; valuations and economic assessments; land governance and transparency; transparency assessment; access to information and public participation; professional ethics and integrity; institutional and organisational reforms; land administration in Zambia; statutory provisions and controls

**Pre-requisites**

None

**Time Allocation**

Lectures 4 hours/week

Laboratory/Tutorial 3 hours/week

**Assessment**

Assignments 5%

Labs 15%

Tests 20%

Final Exam 60%

**Prescribed text(s)**

1. Diane C.(2007), *Land Law*, Pearson Education, 8th Edition. ISBN13: 9781405858250, ISBN10: 1405858257
2. John D.(2008)*Law Express Land Law*, Pearson Education, 2nd Edition. ISBN13: 9781405873611, ISBN10: 1405873612
3. Dale, P. M.(2000) *Land Administration (Spatial Information Systems)*, Oxford University Press, USA, ISBN: 0198233906, 978-0198233909

**Recommended text(s)**

1. Mvunga M.P.(1982)*Land Law and Policy in Zambia*, Institute of African Studies
2. Mvunga M.P.(1980) *The Colonial Foundation of Zambia's Land Tenure System* NECZAM, Lusaka

# LAND LAW

## HISTORICAL BACKGROUND

The first people to acquire land in Zambia were mineral prospectors and they acquired land through two sources firstly, through mineral concessions with chiefs, and secondly through the decentralisation of North Eastern Rhodesia as a protectorate. In North Western Rhodesia the land use the land was acquired through mineral concessions with Traditional Authorities, and the first to come was made that he be entitled to mine in land authorized, and in exchange, he had to offer British protection and pay loyalties. The British South African Company bought the concessions from H. Ware but because they weren't happy with H. Ware so they sent Frank Lochivar to negotiate and many of the concessions were incorporated in Lochivar concession because the traditional authorities had hoped that the British government would send soldiers to help in the protection against enemies from the south. The B.S.A Co. however alienated the land although they had no such rights.

In North Eastern Rhodesia on the other hand the company claimed titles to the land through the declaration of North East Rhodesia as a protectorate under the **1899 orders-in-council**. The question is whether the declaration of the protectorate conferred of the administrative authority in the ownership of land, and this was finally resolved in the Southern Rhodesia [in the application of 1919 act 211-law report].

And in this case the Privy Council held that the declaration of the protectorate did not vest land in the crown. So if the crown wanted land it would have passed legislation to that effect and hence it was only in **1928 when the order-in-council** created reserves was passed that the crown owned land (Crown Land).

## COLONIAL LAND POLICIES

The land policies were passed on a belief that there would be lots of white settlers hence certain land was reserved for the anticipated settlers and the other land for Africans. However, the settler farmers relied on Africans for their labour, they were few and there was competition between African farmers and settler farmers. All this resulted in the BSA Co. handing over administration power to the British colonial office including the rights over land although rights over minerals remained with the

company. In 1928 an order-in-council was passed which created **native reserves**, and **crown land**. Although the land was meant exclusively for native use pressure from settlers especially missionaries forced the government to make allowances for non-natives to be granted leases in these reserves. The settlers favored this move because they did not want to have neighbors who had no knowledge of using the land.

### **PROBLEMS CREATED BY ESTABLISHMENT OF RESERVES**

1. Insufficient access to the rail line – this meant that Africans could not produce excess for sell
2. Most areas were inhabitable due to the absence of water supply and the presence of tsetse flies as a result there was congestion and overcrowding. As for the land left for the natives was largely unoccupied, this becomes vacant for the settlers were fewer than anticipated hence land with rich soils was left uninhabited whilst natives occupied small reserves with generally poor soils.

The problems created by reserves led to the formulation of a new land policy in 1938, under which trust lands were created. The native trust land was vested in the colonial secretary of state and it comprised land set aside for the exclusive use of the natives. The native trust land is differentiated from a native reserve by the duration of an interest to a non-native. Non natives in reserves can be granted an interest up to 5 years only where as in trust land such an interest may be up to 99 years such an interest in the trust land is a right of occupancy whereas in reserve land it is called reserve lease. The land policy was finally implemented by the 1947 order-in-council.

## **CROWN LANDS**

These were the lands available for non-native settlements and mining and covered all land with rich soils and all land along the line of rail as for the tenure (conditions under which land is held) the choice was between lease hold and freehold. The two systems of land tenure, freehold and lease.

**FREEHOLD TENURE** - The period for holding land is not prescribed and the rights continue forever under freehold to the owner.

**LEASE HOLD** – The period of tenure is fixed for a certain period of time and the rights ceases after that period of time.

### Advantages of freehold tenure

- 1) It gives greater tenure security, in lease hold one cannot make long term investment.
- 2) Lending institutions give more loans to freeholds than leaseholds
- 3) Leaseholds describe terms which have to be followed whereas with freehold there is complete freehold ownership

### Disadvantages

- 1) The government does not force any development initiatives and hence the land held under freehold may not develop their land waiting for it to increase in value so that they can sell it at a higher profit
- 2) The question of land fragmentation – a piece of land is divided into smaller unviable portions and as a result families on these portions cannot do any project or programme on very small pieces of land.

In 1924 the then Northern Rhodesia governor, he was for freehold arguing that settlers would be prevented from exploiting the soils fast before going back to their homes, however, the successor was for lease hold and his argument was that freehold was not conducive for agriculture development in that freehold. Freehold title give the holder the right to deal with the land in any way without restriction. The Northern Rhodesia legislative council supported Maxwell's policy and hence from 1931 the land along the line of rail could be alienated on leasehold tenure only. Other recommendations were that the term for

leases should be as long as freehold title and hence agriculture leases were to be of three types.

- a) long term leases for 99 years
- b) Short term leases to be for 30 years

Leases for small holdings to be for 99 years – As for long term leases the provision was to be made for minimum amount of development to be carried out within a specified time. So in 1947 the trust lands order-in-council was passed to set the trust land policy in motion.

## **THE CONCEPTS OF TENURE AND ESTATES**

Tenure comes from '*tenere*' which means to hold, and estate is a piece of land however in this context it means the length of someone's interests in a particular piece of land. In English law the concept of absolute ownership of land (*dominion*) does not exist. The crown owns all land and everybody else has a lesser interest.

Land Ownership has various sides to it. Important among the various facets is **Title** to land, a term indicating the legal right to land. Tenure refers to the conditions upon which land is held. The duration of a tenancy of land (i.e. the maximum time before which the tenancy must come to an end) is termed as **estate** for which the tenant holds the land. The conditions or services in return for which land is held tells the nature of tenure by which the tenant holds the land. Under freehold estate there exist 3 types-:

- 1) **Fee simple estate**
- 2) **Fee tail estate**
- 3) **Life estate**

**Fee** relates to interests that can be held and capable of being inherited.

**Fee Simple:** a fee without limitation to any class of heirs; they can sell it or give it away.

**Fee Tail:** a fee limited to a particular line of heirs, they are not free to sell it or give it away.

*Estate Pur Autre Vie*- this refers to **life estate** but here the measure doesn't count on the life of tenant but on a condition that it will be granted to a person as long as another one lives.

## **ESTATES**

Estates can be held in three types of ways

- 1) **Estates in possession** - here there is entitlement to immediate possession although not ownership
- 2) **Estate in remainder** – here you get the remainder after another interest has expired
- 3) **Estate in reversion** – here the land reverts to the owner after another's interests have expired

**ALIENATION:** To alienate property means to transfer to someone else.

**LAND OWNERSHIP:** A simple and not uncommonly assumed use of the term ownership is to describe a relationship between a person (the owner) and a thing (the object of ownership) in which the owner has every possible right in the thing in the most absolute degree.

Various schools of thought define ownership differently. The Roman Law based systems consider ownership in a concept known as *dominium*. This is where the relationship between the owner and the object of ownership in which the owner has every possible right in the item in the most absolute sense.

The English Law based systems on the other hand are generally characterized by the consideration of ownership as consisting of a bundle of rights over land of which any selection may be detached and given to a person other than the owner.

However, despite the differences in conceptual approach certain tendencies in behavior as regards ownership remain constant in both the Roman and English Law systems. For instance an individual who owns a pen will have the right to write with it or lend it out but at no time has he the right to poke it into another person's eye. This illustration of ownership rights and restrictions are universal, and shared by most legal systems whether being Customary, Common Law based, Roman Law systems.

A.M. Honore' in Oxford essays in Jurisprudence suggest a liberal concept of ownership as a series of rights and incidents as follows;

1. **Right to possess**
2. **Right to use**
3. **Right to manage**
4. **Right to income of the thing**
5. **Right to capital**
6. **Right to security**
7. **Right to incident of transmissibility**
8. **Absence of term**
9. **Prohibition of harmful use**
10. **Liability to execution**
11. **Incident of residuary**

**(Right to possess:** This is the privilege to hold or keep property by the owner. This is the right to exclusively control the land i.e. exclude other people from entry. This right may be exercised in a physical way to prevent other people from entry on property.)

Honore' further comments that the above listed may be regarded as necessary ingredients in the notion of ownership. But they are not individually necessary though they may together be sufficient conditions to designate ownership of an item in a given system.

Objectively speaking land is not capable of being owned in the most absolute sense. That is, you cannot own land and do as you wish with it without regard to other living beings. In this respect even the English system smartly avoids the direct connotation of owning land, but rather uses owning an estate in land.

'Ownership' is a word derived from a very simple term 'own', defined by the pocket oxford English dictionary as: **Not another's**

The Roman legal based systems correctly defines ownership in dominium as the unrestricted, and exclusive control which a person has over an item of ownership. However, whether this concept can be extended to be used over land is a matter of serious debate as land is a universal property which cannot be subject to absolute private ownership. It belongs to all living things, plants and animals. By virtue of their existence, all living things are entitled to some space, somehow, somewhere on earth. And it is not necessary that for any living being to exist it must first own some space to live on, on the face of earth. Nature has never acknowledged absolute private ownership of land, it is in actual fact is based on



interdependence of systems. The fact the living exists naturally gives them a right to live somewhere on land, and their existence does not depend on whether they own land or not. They cannot be excluded from land and get thrown into outer space for instance if the world gets completely owned by limited people. Land like fresh air and water, as necessity of life is *fungible* (not capable of being owned) and as such it falls into a category of thing that are common to all (*res communes*).

Land as a shared property will always create condition where other living beings will constantly impose restrictions onto the so called '*land owners*'.

## **NATURE OF ESTATES OF FREEHOLD**

In practice the fee simple owner is the actual owner of the land although his legal rights are less than those of the absolute owner. This is shown by-:

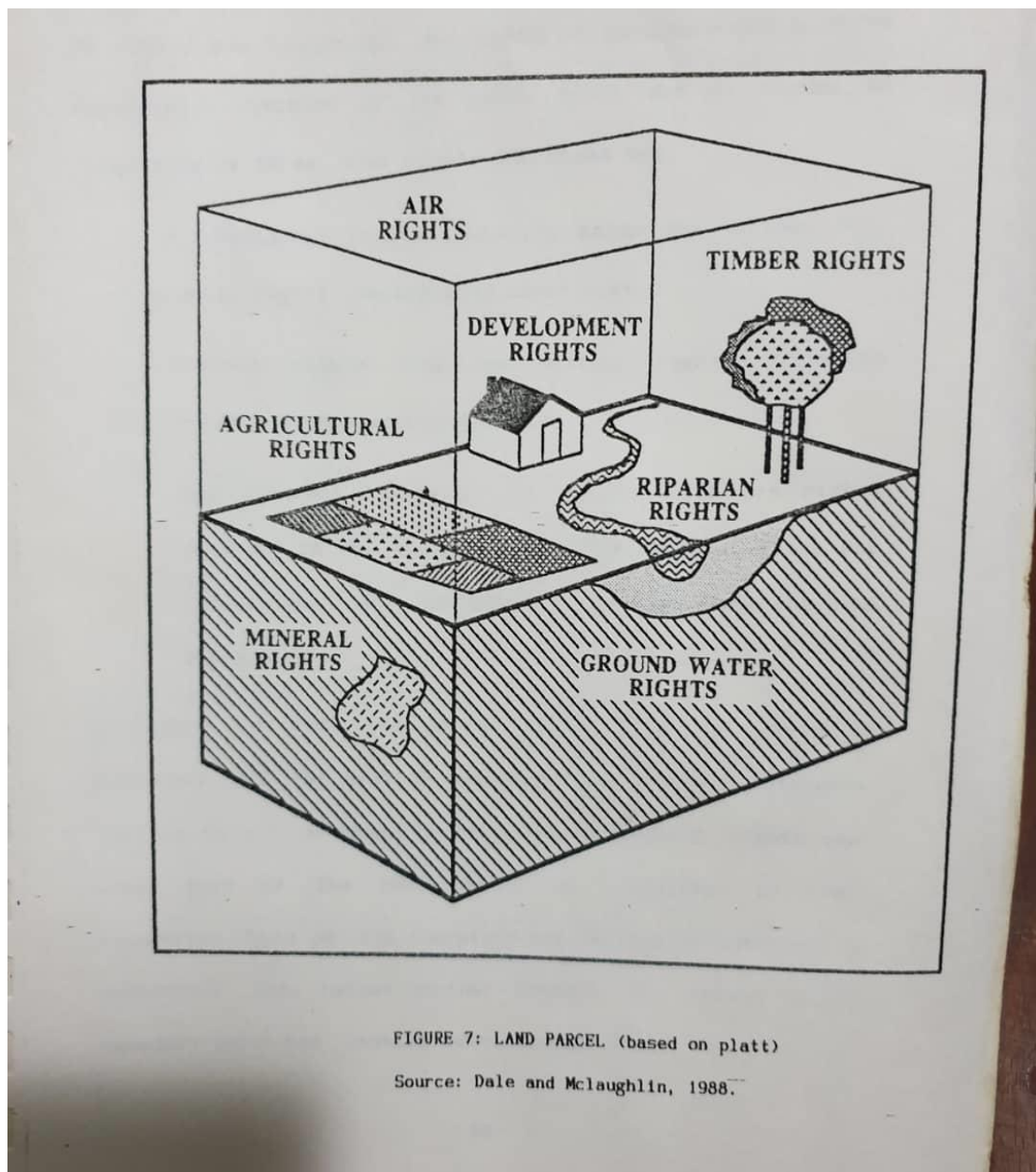
- a) the right of alienation , i.e. the right to transfer to another the whole or any part of the interest in land
- b) the right of ownership to everything in, on, or over the land

## **THE RIGHT OF ALIENATION**

The fee simple owner has the same right as the actual owner and hence independent to dispose of his land to anybody he deems fit. He is under no obligation to any third party apart from those he contracts with there is however a regulatory limitation vested in the state which tempers with freedom of the owner In the land e.g. a statute may prohibit him from building a home somewhere on his land.

## THE RIGHT OF EVERYTHING IN, ON OR OVERLAND

The general rule is that he who owns the soil is presumed to own everything up to sky and down to the centre of the earth *cujus est solum ejus est usque ad cœlum et ad inferos*. He is entitled to possession of any chattel not the property of any known person which is found under or attached to his land. But this does not apply to temporary chattel merely resting on the surface.



## EXCEPTIONS TO THE GENERAL RULE

- 1) **AIR SPACE** – Intrusion into the air space above land is a trespass and often also a nuisance. Aircrafts enjoy a wide dispensation under the civil aviation act Cap 704 Section 7 of the act provides that no action shall lie in respect of trespass or nuisance by reason only of the flight of aircraft over property at a height which is reasonable under the circumstances, otherwise there must be previous notice to the owner or occupier of the land.
- 2) **MINERALS** – These are vested in the president by mines and minerals act Cap 329.
- 3) **WILD ANIMALS** – At common law wild animals are not subjects of ownership, the owner has a qualified right in them in that he has the exclusion right to hunt and put them to his own use but as soon as they fall dead they belong to the land owner even if killed by a trespasser. Under the national parks and wild life act cap 316, they belong to the president
- 4) **WATER**- Act common law a fee simple owner has no property in water whether it percolates under the surface of his land or percolating water the land owner may draw off, any or all of it without regard to claims of neighbors. In case of water flowing through a defined channel, the riparian owner can always take all the water but he has certain variable rights first of all he has the sole right to fish in the water he is entitled to the ordinary and reasonable use of the water flowing over the land. Under the water Act Cap 312, Section 5 vests ownership of all water in the president provided the land owner has the right to take free of charge the water he may need for his own primary, secondary or tertiary use. Primary use refers to domestic purposes and annual life. Secondary use is for irrigation of land. Tertiary use is for mechanical and industrial purposes or for generation of power.

## **THE EXTENT TO WHICH THE DOCTRINE OF TENURE & ESTATE APPLY**

Under section 4 of land conversion of Titles Act 1975 all land in Zambia is vested in the President. However, 99% of land had already been vested in the head of state under the orders-in-council.

Section 31-2 of the Lands and Deeds Registry Act Cap 287, abolishes the existence of fee tail in Zambia.

Section 5 of the Lands Conversion of Titles Act converts all freehold estates of a term beyond 100 years to statutory leases of about 100 years. Under customary land tenure chiefs have interests in the control, whilst individuals have interests of use.

## **FIXTURES**

The maxim '*Quic Quid Plantatur Soloso Credit*' which means what is fixed or attached to the land becomes part of the land. There are two elements which have to be considered, firstly is the degree of annexation, there must be substantial connection with the land or building on it. Secondly, is the purpose of annexation? This infact is the main factor in that the degree of annexation is regarded as being of an importance as same as evidence of purpose. The rule is that articles not other wise attached to the land than by their own weight are not to be considered as part of the land unless the circumstances show that they were to be so. On the contrary articles are fixation. To the land even slightly are to be considered as part of land unless there is evidence to the contrary. if the purpose of fixation is to improve the land then they are fixtures but if the purpose is for decoration or enjoyment then it's a mere chattel. if the removal of the thing may cause damage either to the thing itself or to the land then one can safely say it has been attached as part of the land even if the person who fixed the thing is the land has no titles to the land itself it will still be considered as a fixture and cannot be removed. The general rule is that all fixtures attached by the tenant, become the landlord's fixtures however there are certain exceptions to the rule.

- i) If it's a chattel the tenant can remove it anytime but if it is a fixture you cannot have the right to remove it.

- ii) Trade fixtures -: These attached for the purpose of trade or business may be removed at anytime during the term but not long afterwards
- iii) Ornamental fixtures -: if they are for the purpose of improving the land, then they are irremovable but if they are there for ornamental purposes, they may be removed e.g. flower vessels and certain paintings etc., these are also removable.
- iv) Agriculture fixtures -: These are treated like trade fixtures

These exceptions were intended to encourage industrialisation.

## **LAW AND EQUITY**

### **CONCURRENT INTERESTS**

This can take various forms namely joint tenancy, tenancy in common, coparcenary and tenancy by entities.

### **JOINT TENANCY**

The distinguishing factors of a joint tenancy are as follows-:

- 1) The right of survivorship i.e. *Jus accrescendi*- it means that on death of one joint tenant his interests in the land passes to the other joint tenant and does not pass to the deceased descendants. The joint tenant who survives becomes the sole tenant and the right of survivorship operates notwithstanding the existence of the will. The only way a joint tenant can alienate his interests to another is by reversing the tenancy by inter vivos (= transfer of an interest in land whilst you are alive) [ converting the interest of a joint tenant to interests of tenants in common to allow your interest to pass to somebody upon death]
- 2) There must be the four units in existence namely (*vis a vis*) unity of inter unit of possession, unit of time and unit of title.

## **CONTENTS: CONCURRENT INTERESTS, LEASES, LICENSES AND TENACIES**

### **CONCURRENT INTERESTS**

Arise when two or more persons hold an **interest** in land in **possession** at the same time.

*Example:*

- a. Mulenga is granted land for life after which Simbangala is given a fee simple; No concurrent ownership they hold interests which are not in possession at the same time.
- b. Mulenga and Simbangala are simutenously granted fee simple; then Mulenga and Simbangala's interests are concurrent.

Co-ownership can take various forms namely **joint tenancy**, **tenancy in common**, **co-parcenary** and **tenancy by entireties**.

### **Joint Tenancy**

The distinguishing factors of a joint tenancy are as follows-:

- 1) The right of survivorship (i.e. ***Jus accrescendi***)- on death of one joint tenant his interests in the land passes to the other joint tenant and does not pass to the deceased descendants. The joint tenant who survives becomes the sole tenant and the right of survivorship operates notwithstanding the existence of the will. The only way a joint tenant can alienate his interests to another is by reversing the tenancy by inter vivos (i.e. transfer of an interest in land whilst you are alive) [ converting the interest of a joint tenant to interests of tenants in common to allow your interest to pass to somebody upon death]

2) There must be the four unities in existence namely *unity of interest, unity of possession, unity of time* and *unity of title*.

- a. *unity of interest*- the co-owners must hold the same interest in the land
- b. *unity of possession*- the property must be vested in possession to both of the parties at the same time. Common also to tenancy in common
  - i. Unity of possession exists when each co-owner is entitled to possession of the whole of the property: no one co-owner can claim possession of any part to the exclusion of others.
- c. *unity of time*- Co-owners must be able to take possession at the same time.
- d. *unity of title*- All the co-owners must acquire title to the land under the same document. Note that neither a corporation nor a limited company can have a joint tenancy with a natural person. Reason is because a company never dies and hence a natural person could have no effective right.

Note: Reversing the tenancy by intervivos is a person transferring his interests to another person, say while alive say X but X doesn't become a joint tenant but a tenant in common since the unities of title and time are not present.

### **Nature of Joint Tenancy**

The two partners are basically one and the same. As a separate individual he does not own anything at all but together with the other partners they own everything the result is that any joint tenant can occupy the whole premises or can be able to rent. Under the Particulars Act (1540) any joint tenant not happy with the way the joint tenancy is operating can bring an action to have the tenancy partitioned and thus destroy the joint tenancy.

## TENANCY IN COMMON

**Tenancy in Common** is a specific type of concurrent, or simultaneous, ownership of real property by two or more parties. This is a shared tenancy in which each holder has a distinct, separately transferable interest.

All **tenants in common** hold an individual, undivided ownership interest in the property. This means that each party has the right to alienate, or transfer the ownership of, her ownership interest. Each owner has the right to leave his share of the property to any beneficiary upon the owner's death.

A tenant in common holds any undivided share in a tenancy. It is differentiated from a joint tenant in that a tenant in common has undivided shares whilst a joint tenant has nothing at all or has everything. A Joint tenant has no right of survivorship compared to a joint tenant.

In a deed if the expression joint and severally is found the word joint is much adhered to, but in a will it is severally which is given word. The interests can exist both a common law, there was an inclination towards joint tenancies rather than common tenancies, the reason was because joint tenancies had certain advantages as regards land owners e.g.

1. It was easier for a landlord to collect the rent i.e. only from one tenant
2. Only one payment was made by the joint tenants whereas in common tenancies the tenants paid separately and hence paid more for one property.

There was a problem of conveyance. It was easier to investigate one title in a joint tenancy rather than titles of every one who was a tenant in common. The importance of investigating titles of tenants in common was because whereas in joint tenancy there was unity of title, tenants in common had no such unity.

Equity however created exemptions in this respect. Tenancy in common existed not only in those circumstances which tenants in common at common law existed but also in certain exceptions firstly, if money contributed is unequal they can not be joint tenants and tenants in common. If they contribute equal share equity presumes that they are joint tenants. Secondly, which refers to Partnership Act, they are held



by both parties as joint tenants and not as tenants in common. This is so irrespective of how much they contributed and it does not matter whether partnership is formal or not.

As regards determination of joint tenancies and tenancies in common this may be by partition, sale of premises, union in a sole tenant, the release by deed, and alienation by one joint tenant.

## **TENANCY BY CO-PARCENARY**

This arises by operation of the law i.e. it is not a deliberate action by one individual it arises where there is no male heir only female heirs available the partner will be parcenars and not joint tenants. This has certain characteristics of joint tenancies and some characteristics of tenancies in common e.g. the four units are normally present. It no longer exists.

## **TENANCY BY ENTIRETIES**

*These no longer exist* as from 1883, however prior to that a gift to a husband and a wife without words of limitation which could make them tenants in entireties and not joint tenants. Where there is a third person included in the grant the husband and wife will be tenants in the entireties but together will be joint tenants with the third person and hence they will get half and the third partner the other half. After 1883 any grant to the husband and wife makes them joint tenants. There are certain unique situations

1. A grant that creates a personal obligation on each of the partners creates a tenancy in common and not a joint interest in the debt although at law payment to one of them will be enough since they be regarded as joint tenancy.
2. Where a debt is owned to two partners who have a joint interest in the debt although at law payment to one of them will be enough since they be regarded as joint tenants this will not be the position in equity. In equity the partners will be regarded as tenants in common and not joint tenants both of the debt and hence the security held for it.

## Leases and Licences

A lease can mean the document or actually the interest that is being transferred. At common law there was no duration for the existence of a lease. In Zambia however, Section 5 of the Land (conversions of titles) Act 1975 converts all leases for the period over 100years to statutory leases of a 100years but the President can grant a lease for over 100years if it is an international interest relations.

### Terminology used in Leases

A *conveyance* is a transfer of a fee simple estate.

An *assignment* is a transfer of a leasehold estate. It is not all transfers which amount to leases. Sometimes it may amount to a mere **license**.

The test used to find out if it's a lease or license is one of exclusive possession. In a lease the tenant has the right to exclude the landlord from the premises in his possession. The landlord may have the right to inspect the land but if there is no such reserved right in the lease itself he becomes a trespasser. The exclusive right is derived from the construction of the document itself.

A **license** is a right or permission granted to a person to do certain things in the premises in the absence of which his business transactions whether or not a person was tenant or license depends entirely on existence of exclusive possession. In family relations the question of exclusive possession is not crucial or the mere fact there is exclusive possession does not make the landlord – tenant relationship.

Where a servant occupies his master's premises because that is regarded by the nature of his duties there is merely a service occupancy and the occupant is a license.

## Types of Licences

1. **Bare Licence:** This is one where no consideration has been given. It is always revocable and the revocation does not amount to a breach. However, the licensor has to give reasonable time to the licensee to clear off. It does not bind successors in title to licence.

2. **A Licence Protected by Estoppel or Equity**

The licensor is estopped from denying the type of a license he granted to a licensee i.e he had made a promise to the licensee. Such a licence is binding on successors' in title and whoever will be the purchaser.

A licence arising from *equity* is one in which the licensor is prevented from revoking the licence having regards to a promise he had earlier made.

The difference between equity and estoppel is that in equity there is a belief in the licensee that the licence will not be revoked and in estoppel the licensor is trying to back out from a promise he entered into with the licensee.

A licensor is a constructive trustee. This arose in the case of *Binions Vs Evans 1972 Chancery* ) in the case a certain company owned land and on the land an employee resided there. The employee died leaving a widow. The company sold the land to the purchaser and the conveyance was a term that the widow was to have a life estate. The effect of the estate was to effect the price of the land. The purchaser wanted to evict the widow. The court held that there was a licence which could not be revoked and which was binding on successive purchase.

3. **Licence Coupled with an Interest**

This is the one exercised for the purposes of enjoyment of the interest which a licensee has on land of the licensor

### *Profits a prendre*

Here the licensee has profits on the land of the licensor, and you can only enjoy this profit when there is a condition to enter the premises for the purposes of enjoying the profits.

## **4. Contractual Licence**

There is a consideration here, and hence there is a binding contract that he won't revoke the licence whilst in all others the question of revocability is not discussed.

## **5. The Matrimonial Homes**

In a number of cases the court has held that the wife has a revocable licence in a house of her husband and the licence is binding on any purchaser of a house who has notice of the licence. The licence can be revoked on either divorce or commission of a matrimonial offence e.g. adultery. The case of *National Provincial Bank Ltd Ainsworth* 1965 AC P1175. This case overruled earlier decisions. In this case the husband had deserted a wife and later alone conveyed the house to a certain company. The company charged the house for a loan to the bank.

When the company failed to pay the loan the bank sued for possession of the house. It requested the wife to vacate the house so that it may sale the house to realise the unpaid loan. The court held that the bank was entitled to possession and the wife was not a licensee. She had no right either in the land or the house itself unless they had jointly contributed the money for the purchase of the house. A wife remains in a matrimonial home as a result of the status of marriage. She is not a trespasser. She is not a licensee of her husband. She is lawfully there as a wife. Providing the wife's marital rights and nothing safeguarded her in some way, the court would not refuse to evict the wife.

## Leases and Tenancies

At common law a lease could be created orally by parole agreement in writing or by deed. There was no requirement that a lease be in writing except in cases of incorporeal rights (easement e.g. right of way). By statute of frauds of 1677 every lease was requested to be in writing and signed by the parties creating it. Only exception is in case of a lease of less than 3 years period. This could be made orally. The real Property Act 1845 required all those leases frauds to be made by deed, non conformity with formalities rendered it void at law.

### Types of Leases

1. ***Leases for fixed period***- Here the date of commencement and the date of determination of the lease are fixed. There must be certainty and if the duration of the lease depends on someone naming the term then the term must be named prior to commencement otherwise it will be void due to uncertainty.
2. **Leases for yearly period**- This continues from year to year and unless it is determined by notice, it will continue indefinitely. It arises where by express terms or by implication a lease has been entered into and payment of rent is calculated by reference of the term of months notice and its determined at the end of the year in which this lease is to finish.

### 3. Periodical leases

These continue from one time to another unless determined by notice which is of the duration of the lease itself. Weekly, monthly, quarterly

### 4. Tenancy at will

It arises whenever the tenant occupies the land with the consent of the landlord under the terms that a tenant or landlord may determine the tenancy any time. It is common that no rent is payable or else it will be converted into a different type of lease. The conditions which have to be fulfilled are that there must be consent of the landlord and the lease may be determined by either the tenant or the landlord depending on the terms of the tenancy. But tenant can pay some compensation to landlord for occupying of the premises.

## 5. Tenancy at sufferance

Strictly this is no tenancy at all since there is no privity of tenancy. It is opposed to a tenancy at will since the land lord does not consent to a person's possession after the determination of the previous lease.

## 6. Lease by Estoppel

Estoppel prevents someone from denying what he has already done.

### **ESTOPPEL**

(estopped) A bar which precludes someone from denying the truth of a fact which has been determined in an official proceeding or by an authoritative body. An estoppel arises when someone has done some act which the policy of the law will not permit her to deny.

In certain situations, the law refuses to allow a person to deny facts when another person has relied on and acted in accordance with the facts on the basis of the first person's behavior.

There are two kinds of estoppel.

*Collateral estoppel* prevents a party to a lawsuit from raising a fact or issue which was already decided against him in another lawsuit. For example, if Donna obtained a paternity judgment against Leroy and then sued him for child support, Leroy would be collaterally estopped from claiming he isn't the father.

*Equitable estoppel* prevents one party from taking a different position at trial than she did at an earlier time if the other party would be harmed by the change. For example, if after obtaining the paternity judgment, Leroy sues Donna for custody, Donna is now equitably estopped from claiming in the custody suit that Leroy is not the father.

A tenant is estopped from questioning the title of the landlord to the land or his own title to the land in the same way as the landlord is estopped from questioning the title of the tenant to the land. Lease by Estoppel only binds the parties to it and successors in title.

## **7. Perpetually renewable leases**

These renew themselves on certain conditions in English law they have cut down and may not exceed 21 years but in Zambia they may continue infinitum.

## **ESSENTIALS OF A LEASE**

Every lease must be in writing and signed. This is according to the statute frauds of 1677. The written agreement must include the following terms

- i) Names of the contracting parties
- ii) Property to be let
- iii) Length of the term for which the lease is granted and the date of commencement
- iv) The rent and preferably when it is to be paid
- v) Any special covenant (conditions)

## **William Jacks and Company against O'Connor 1967 ZLR**

As regards duration of leases in Zambia Section 5 of the Land (conversions of titles) Act provides for statutory leases of 100 years and any other leases for 99 years. A lease must exist for a time term certain or for a time which can be rendered certain. Hence it is not possible to create a lease for the duration of a war. The world's term of years certain were constituted in the case of S.J. Patel (Zambia) Ltd against Bancroft pharmaceuticals ltd (1924 ZLR) to mean a term certain not exceeding 21 years and include a term certain of less than one year. Thus even a term certain of

less than a year is included. This is specifically for Business Premises. It can be for 99 years to 100 years for any other leases.

## **Rights and Obligation of Landlord and Tenant**

These can be considered fewer than 3 situations

- i) The parties have agreed upon express terms of the lease
- ii) Certain terms classified as usual covenants exist
- iii) Statutory terms exist e.g. under the Rent Act

### **1) Where there are No Express Terms:-**

The landlord's obligation

#### **a) Implied covenant for quiet enjoyment**

There is an implied guarantee by the landlord that "no one is going to disturb the tenants in the enjoyment of the land. It's not personal enjoyment. The quiet refers to the tenants not being disturbed by someone claiming title to the land. It's not affected by noise and the covenant does not include the right of privacy. The question of quiet covenant only affects the landlord and those claiming lawfully under him. As a limitation the tenant has no complaint if he is evicted by someone with title paramount (one with a better title than him). The covenant may be broken if for instance the landlord tries to drive out the tenant by threats or breaking doors.

#### **b) Obligation not to derogate from the grant**

Derogation from the grant is doing something inconsistent with the existence of the grant. The landlord should not do something which will make the tenant unable to enjoy his property for instance cut off water or electricity supply. The right of privacy is not covered. Letting premises next door to a trade rival does not amount to a derogation from the grant.



c) **Implied covenant that the premises are fit for the purpose**

This is for situations where the premises are a finished house or lettings. It must be fit for human habitation. In the converse it can be said that the tenant has the right not to be derogate from the grant etc.

**The Tenants Obligation**

1) **Rent Payment**

If the tenant fails to pay rent the landlord may either sue for the money or he may distrain the rent. [The landlord seizing certain goods from the tenants premises] – this was the only thing to do at common law. The distress for Rent Act 1689 gave right in the landlord to sell the property after being in possession for five days. You could not seize growing crops perishables, tools of trade and clothes.

Impound breach – where the tenant interferes with the goods which have been seized the landlord could sue and the recovered money known as treble damages. A tenant has a right to rescue the goods after seizure [Replevin- this is paying so that the goods are recovered after they are impounded but before they are sold]

## 2) **Obligation not to commit waste**

There are various kinds of waste namely *ameliorating waste*, *permissive waste*, *voluntary waste*. Waste consists of any act or omission which alters the physical character of the land whether for the better or for the worse.

- a) *Ameliorating waste*- This is a change which amounts to the improvement in the physical character of the land. The landlord will not normally complain.
- b) *Permissive waste*- This is where the tenant has failed to do what he ought to have done, i.e he has permitted decay or disrepair of premises. There is an omission here.
- c) *Voluntary waste*- This is where the tenant has done something which deteriorates the condition of the premises or his act damages the premises. There is a commission here.
- d) *Equitable waste* This consists of acts of wanton destruction (eg. Stripping the roof, cutting of trees planted to provide shelter, pulling down the house etc). It is recognised under the law of equity that the tenant should keep the premises in the same way in which he would have kept them had he been the owner of the premises.

There is a distinction in how the law of waste affects the tenants. A tenant for a fixed period is liable both for permissive and voluntary waste unless there is a contrary term in the lease. A yearly tenant is obliged to keep the premises in tenants like manner or he will be liable for committing voluntary waste. For periodical tenancy the duty is on the landlord to keep the premises in repair, all the tenants does is to use the premises reasonably so as to prevent them falling under disrepair. Tenants at will and tenants at sufferance are only liable for voluntary waste. A tenant has an obligation to allow the landlord to come and review the state of repairs of the premises. The law on waste protects the interest of those who have remained in the reversion. This is so because if the land is changed for the worse the ones with the rights in reversion will not be able to enjoy the land or premises after the tenancy has expired. As a contrast to this, the law on emblement on the other hand is intended to safeguard the interests of the tenant after the determination of the lease so that he may invest in the land he will reap the benefits of his investment.

### 3) **Tenants right of emblements**

Emblements are growing of crops on the land of the landlord sown by the tenant. Since they are supposed to be part of the land if the tenancy ceases he is supposed to leave them when he vacates the land. The tenant has the right to remove the crops and reap the benefits of his investment. The tenant's right is however limited, firstly the tenant should not be the one responsible for the termination of the lease. Secondly, tenants at sufferance are not entitled to emblements and so are tenants for a fixed term of years. This is because they know when the tenancy will end.

### 4) **Estovers**

In English law, an **estover** is an allowance made to a person out of an estate, or other thing, for his or her support. **Estovers** for example may be wood, that a tenant is allowed to take, for life or a period of years, from the land he holds for the repair of his house, the implements of husbandry, hedges and fences, and for firewood.

A tenant for years and a tenant for life is entitled to estovers so long as the need or use is reasonable and necessary. Estovers is wood which a tenant is permitted to make use of for instance for domestic purposes. The tenant also has the right to remove fixtures. Certain fixtures do not become part of the land as such and may be removed by the tenant e.g. if fixing it to the land was the only way it could be enjoyed, trade fixtures, domestic fixtures, agricultural fixtures and ornamental fixtures.

### **Usual Covenant**

In determining what is usual one looks at the agreement and the character of neighbourhood. The usual covenants on part of the landlord are as follows:-

- i) **A covenant of quiet enjoyment**- This is usually in its qualified form i.e. extending only to the acts of lessor or the rightful acts of any person claiming for or under him. One part of the covenants, there is firstly the covenant to pay rent. Rent must be certain although not necessarily at the date of the lease but rather at the time of payment.

The landlord may enforce payment directly by an action for money or distress and indirectly by threat of forfeiture.

- ii) **Covenant to repair-** In long leases the tenant usually covenants to do all repairs and in short lease the landlord assumes liability for external and structural repairs. Subject to this in every case the matter is one for negotiations. The state of repair is viewed at the time of entering. Fair wear and tear refers to the deterioration of premises as a result of ordinary use of the premises or natural causes. The tenant is not obliged to make repairs but is obliged to prevent consequences following natural causes. Factors like age, character and locality of premises, class of tenant are considered in determining whether repairs have been kept in repair reasonably suitable for occupation.
- iii) **Covenant against assigning and subletting:** If the lease is silent on the matter tenant is NOT entitled to assign or sublet premises without landlord's consent. However, a covenant against assignment is often inserted in a lease. If a tenant subleases, the landlord is entitled to determine the lease and can evict the subtenant but if the landlord consents to sublease he has only got a remedy against a tenant and not against a subtenant.

#### Determination of a lease

- i) **By effluxion of time**  
This only applies to leases for a fixed period. No notice is needed unless otherwise expressly provided.
- ii) **By notice**  
This is only relevant for yearly and periodic leases. In yearly tenancies six months notice is required, in periodic leases the period of a lease itself. Notice must be certain that the exact date of determination must be named.
- iii) **Forfeitures**  
This arises by not fulfilling any of the conditions or covenants in a lease. The difference between a condition and a covenant is that a breach of a covenant gives rise to the right to claim damages whereas breach of a condition results in determination of a lease hence the question of adding a forfeiture clause will not arise where there is a breach of a condition.

although it is necessary in relation to a covenant of rent as an exception. The landlord has to forfeit peacefully.

**iv) Merger**

This applies where tenant acquires the remaining extent of a lease. Other mode of determining the lease includes by surrendering, satisfaction of the term and by disclaimer.

### **Distress for Rent**

At common law chattels remained as a pledge in the hands of the party making the distress and could not be sold. This is still valid law even at now although the statute has given the distrained power of sale if certain conditions are satisfied. These conditions are found in the Distress for Rent Act 1689. There are certain requisites for the landlord to levy distress firstly of the landlord –tenant agreement must exist at the time of distraining. Secondly, the rent must be certain and in arrear. Thirdly, the right to distrain may be prohibited by an agreement express or implied not to distrain by action amounting to estoppel on the part of the landlord. Fourthly, under section 14 of the Rent Act there must be leave of the court. As regards the procedure, distress can only be levied by the landlord personally or by a certified bailiff. And it may be done at anytime during the day. It is also confined on the land which is demised. Making a distress itself constitutes a demand hence actual previous demand is unnecessary. The distrainer may use any means to enter the premises although illegal entry renders the distress void. The tenant must be served with the notice of distress stating the rent due, the particular of goods seized, time and when the goods will be sold. This notice must be in writing.

### **Goods to be Distrained**

At common law all goods and chattels on premises could be distrained. However, there were certain exceptions on personal chattels. There are certain goods which are absolutely privileged e.g state property, diplomatic property, trade goods, fixtures, perishables and goods in custody of law. Some goods were conditionally privileged, these include tools of trade, husbandry and livestock. Some clothes beddings and tools of trade must be left out.

## Remedies

If the distress is illegal due to distraining after tender of rent or distress at right, breaking open outer door or window or distraining things which are privileged the remedies available are

- an injunction to restrain the landlord
- Lawfully rescuing the goods impounded or sue the distrainor in damages for full value of the goods taken without deduction or rent due.

## Irregular Distress

This is constituted by selling without notice, selling for otherwise than the best price, selling before the statutory period of five days and where the distress is levied by anybody other than the landlord or bailiff. Here the remedy available for the tenant is to sue for damages and only proved special damage may be recovered.

## Excessive Distress

This is where the goods seized are disproportionate to the rent due to other words where there is no evaluation of the goods distrained. The remedy available is the fair value of the goods after deducting the rent due. Damages may also be awarded for loss of use and enjoyment of the excess taken away and any inconveniences caused.

## Leasing

**Leasing** is a process by which a firm can obtain the use of a certain fixed assets for which it must pay a series of contractual, periodic, tax-deductible payments.

The **lessee** is the receiver of the services or the assets under the lease contract and the **lessor** is the owner of the assets.

The relationship

between the tenant and the landlord is called a tenancy, and can be for a fixed or an indefinite period of time (called the term of the lease). The **consideration** for the lease is called **rent**.

Under normal circumstances, a freehold owner of property is at liberty to do what they want with their property, including destroy it or hand over possession of the property to a tenant. However, if the owner has surrendered posse

ssion to another (the tenant) then any interference with the quiet enjoyment of the property by the tenant in lawful possession is unlawful.

Similar principles apply to **realproperty** as well as to **personal property**, though the terminology would be different. Similar principles apply to sub-leasing, that is the leasing by a tenant in possession to a sub-tenant. The right to sub-lease can be expressly prohibited by the mainlease.

## **Term**

The term of the lease may be fixed, periodic or of indefinite duration.

If it is for a 'tenancy for years', the term ends automatically when the period expires, and no notice needs to be given, in the absence of legal requirements.

The term's duration may be **conditional**, in which case it lasts until some specified event occurs, such as the death of a specified individual.

A **periodic tenancy** is one which is renewed automatically, usually on a monthly, weekly or on annual basis.

A **tenancy at will** lasts only as long as the parties wish it to, and may be terminated without penalty by either party.

It is common for a lease to be extended on a "holding over" basis, which normally converts the tenancy to a periodic tenancy on a month by month basis.

## **Rent**

**Rent** is a requirement of leases in common law jurisdiction, but not in civil law jurisdiction. There is no requirement for the rent to be a commercial amount. "Pepper corn" rent or rent of some nominal amount is adequate for this requirement.

## **Real estate**

There are different types of ownership for land but, in common law states, the most common form is the '**Fee Simple absolute**', where the legal term *fee* has the old meaning of real property, i.e. real estate. An owner of the 'fee simple' holds all the rights and privileges to that property and, subject to the laws, codes, rules and regulations of the local law, can sell or by contract or grant, permit another to have possession and

control of the property through a lease or tenancy agreement. For this purpose, the owner is called the **lessor** or **landlord**, and the other person is called the **lessee** or **tenant**, and the rights to possess and control the land are exchanged for some payment (called '**consideration**' in English Law), usually a monthly rent. The acceptance of rent by the landowner from a tenant creates (or extends) most of the rights of tenancy even without a written lease (or beyond the time limit of an expiring lease).

Although leases can be oral agreements that are periodic, i.e. extended indefinitely and automatically, written leases should always define the period of time covered by the lease.

A lease may be:

- a fixed-term agreement, in other words one of these two:
  - for a specified period of time (the "term"), and end when the term expires;
  - conditional, i.e. last until some specified event occurs, such as the death of a specified individual; or
  - a periodic agreement, in other words renewed automatically
- usually on a monthly or weekly basis
- 
- *at will*, i.e. last only as long as the parties wish it to, and be terminated without penalty by either party.

Because ownership is retained by the lessor, he or she always has the better right to enforce all the contractual terms and conditions affecting the use of the land. Normally, the contract will be *express* (i.e. set out in full and, hopefully, plain language), but where a contract is silent or ambiguous, terms can be *implied* by a court where this would make commercial sense of the transaction between the parties. One important right that may or may not be allowed the lessee, is the ability to create a sublease or to assign the lease, i.e. to transfer control to a third party. Hence, the builder of an office block may create a lease of the whole in favour of a management company that then finds tenants for the individual units and gives them control.

Under common law, a lease should have three essential characteristics:

1. A definite term (whether fixed or periodic)
2. At a rent
3. Confer exclusive possession



## Real property

Whether it is better to lease or buy land will be determined by each state's legal and economic systems. In those countries where acquiring title is complicated, the state imposes high taxes on owners, transaction costs are high, and finance is difficult to obtain, leasing will be the best norm. But, freely available credit at low interest rates with minimal tax disadvantages and low transaction costs will encourage land ownership. Whatever the system, most adult consumers have, at some point in their lives, been party to a real estate lease which can be as short as a week, as long as 99 years, or perpetual (only a few states permit ownership to be alienated indefinitely). For commercial property, whether there is a depreciation allowance depends on the local state taxation system. If a lease is created for a term of, say, ten years, the monthly or quarterly rent is a fixed cost during the term. The term of years may have an asset value for balance sheet purposes and, as the term expires, that value depreciates. However, the apportionment of relief as between business expense and depreciating an asset is for each state to make (all that is certain is that the lessee cannot have a double allowance).

## Private property

Rental, tenancy, and lease agreements are formal and informal contracts between an identified landlord and tenant giving rights to both parties, e.g. the tenant's right to occupy the accommodation for an agreed term and the landlord's right to receive an agreed rent. If one of these elements is missing, only a tenancy at will or bare licence comes into being. In some legal systems, this has unfortunate consequences. When a formal tenancy is created, the law usually implies obligations for the lessor, e.g. that the property meets certain minimum standards of habitability.

A tenancy agreement can be made up of:

- *express terms*. These include what is in the written agreement (if there is one), in the rent book, and/or what was agreed orally (if there is clear evidence of what was said).
- *implied terms*. These are the standard terms established by custom and practice or the minimum rights and duties formally implied by law.

## **Comparison of buying and leasing**

There are many distinct differences between buying and leasing, regardless if such a transaction or agreement applies to property, machinery, equipment or other assets.

The difference lies in that a lease is conceptually very similar to the principle of “borrowing.” The ownership of the leased property (be it land, equipment, merchandise, or etc.) is not transferred under the terms of the lease agreement. The lease gives the lessee the right to use the assets covered under the agreement for the duration of the contracted term, however, upon the completion of said term the lessee is required to return the assets in question to the lessor, thereby completing the terms of the agreement. In a general example having to do with an automobile lease, the vehicle is due back to the dealership at the conclusion of the lease term. Once the vehicle is returned, the automobile lease agreement is completed and the parties (lessor and lessee) separate with no further obligations to each other (assuming there is no damage on the vehicle entitling the dealer to some further compensation). The lessee has no further claim or right to use the vehicle and the lessor, or car dealer no longer collects any payment from the former lessee – the previous driver.

Many lease agreements contain clauses and addendums that outline additional rights, or options for the lessee, to be exercised at will upon the conclusion of the lease (there are numerous equipment lease types with individual features). In automobile leases as a general example, a lessee may have an option to purchase the vehicle, thereby restructuring the agreement and ultimately obtain the ownership of the asset previously leased. In the example of a property lease, the renter (or lessee) may have the option to extend the lease, under pre-determined terms. Such scenarios are numerous and are typically pre-set during the initial creation and negotiation of the agreement between the parties.

Purchasing, on the other hand, involves an agreement that outlines the terms under which the purchaser acquires ownership of the desired item, property or asset. The purchase agreement delineates the purchase price and the terms under which it is to be paid for by the buyer. The overall purchase price can be amortized over a period of time as in the case of financing, or it can be paid in full, resulting in the instant transfer of ownership to the purchaser. In the event that the purchase is financed over a period of time, the ultimate price paid for the item or asset can be greater than the original price due to interest. For an individual deciding between buying or leasing, it is crucial to understand the pros and cons of each.

## CUSTOMARY LAND TENURE

The word tenure in law relate to the legal rules regulating the *acquisition*, the *distribution* of rights and the *use of land* amongst a specific population. In Zambia the land tenure system varies from one area tenure to another due to difference in the customary authorities.

At present Zambia has two systems of land tenure altogether, land may either be held under **statutory law** or under **customary law** and hence the two categories of land namely, *state land* and *customary land*. For state land this may either be scheduled or non-scheduled land depending on whether the particular land appears in the schedule to the agriculture land Acts Cap 292. The customary land is what was basically trust and reserves, this is called customary land. Customary land because the interests in these lands are held under customary law.

## CUSTOMARY TENURE

- Customary Land is Land held, occupied or used under Customary Law according to the Malawi Land Act 1965.
- However, the pocket law lexicon defines custom as “unwritten law established by long usage”.
- Customary tenure is sometimes referred to as communal tenure. The word Tenure comes from a Latin word ‘*tenere*’ which means ‘to hold’.
- The implication of this, in the case of land tenure is that land is held under certain given conditions. Variations in conditions of tenure do exist though. For example the occupier may not necessarily be the land owner, and vice versa that the land owner may or may not be the occupier. Therefore considering the nature and conditions of tenure, the expression ‘land tenure’ can be seen as a wide one.
- It may incorporate in its wide range of meanings the ownership of land, or the right to use land without owning it, or something in between the two extremes. Sir G. Clauson offers the meaning of communal tenure as implying;

**“... That the enjoyment of rights in question, whatever they be, is not exclusive to one individual but is shared collectively by a community, that is,**

**a tribe, village, or other group of persons, by reason of kinship or residence in a particular area.”**

This may be perceived to mean that communal land is owned by the community or tribe. This however, may not truly reflect the picture of customary tenure on the ground as Elias observed and acknowledged;

**“ Since the relation between the groups and the land is invariably complex in that the rights of individuals’ members often co-exist with those of the group in the same parcel of land. But individual members hold definitely ascertained and well recognised rights within the comprehensive holding of the group” (Elias 1951).**

- Finally evidence from studies done by White on African Land Tenure in Zambia emphasizes the proprietary character of rights, and he criticised the use of expression of ‘communal tenure’ to imply that every community member has equal rights in every piece of tribal land. His investigation led him to the conclusion that rights over arable land are essentially individual (White: 1958).
- At this stage it is important to clarify the context in which the interchange of words between communal, and customary (or tribal). It is universal for land rights, whatever, they may be to be subject to some kind of external control.
- This external control may be exercised by the state, or like in primitive ancient days by an individual such as a King or a group of individuals, or as in other ancient communities by the custom or religious laws.
- Communal is therefore used in the context of community influences whereas customary is used in light of influence emanating from customs. Therefore customary is always communal although communal may not necessarily be customary.
- Customary tenure is one of the controversial concept.
- The nature of ownership, and title to land of customary tenure has raised considerable debate.

- Studies have failed to come up with conclusive agreement as to who owns the land in customary law, between the chief and the individual clan member. Issues are further pushed as to the exact nature of interest the chief enjoys as opposed to the clan member. However, the truth of the matter is that the diversity of customary tenure dictates that there can hardly be one answer to any one question on the nature of customary tenure.
- For instance, Zambia is country of 73 language groups (tribes), and within each of these language groups there are variations in customs, beliefs and cultural practices. Therefore, an attempt to try a generalisation on customary tenure would underpin the issue and likely result in confusion. That is why Sir Simpson (1976) wisely chose not to offer a definition of customary tenure. United Nations provided one as :

**The rights to use or dispose of use-rights over land which rests neither on exercise of brute force, nor on evidence of rights guaranteed by government statute, but on the fact that they are recognised as legitimate by the community, the rules governing the acquisition and transmission of these rights being usually explicitly and generally known though not normally recorded in writing (Progress in land reforms; Fourth report: 1966)**

The United Nations' definition raises a chain of questions. It leaves open the question of how the standard rules relating to land are arrived at, and introduces an element of controversy by declaring that the rules are explicit. It is suggested that most of the communal tenure rules are seen as being implicit rather than explicit for instance it is common practise for individuals to avoid taking up an already opened up field in customary land as this implies that land is already engaged and owners of such fields don't need to go around villages advertising that the field in such and such a place belong to them. Conversely virgin lands and derelict lands implies vacancy to would be occupiers.

Though the customary tenure is diverse, there are characteristic features which are standard. The operative feature of customary tenure is best summed up in the much quoted saying of a West African Chief by Meek:

**“Land belongs to a vast family of which many are dead, few are living, and countless numbers are still unborn” (Meek: 1968)**

Generally, customary tenure in Africa is based on tribal ownership of land. It may be wise at this juncture to first explore, and try to understand the concept of tribe. The concept of tribe is actually one with dual meaning. The black African understands tribe to mean an ethnic or language group. However, the implied meaning and use of the word by colonialist went further than that. The term tribe has been used to denote an early stage in social evolution moving from; the band, the tribe, the chiefdom and the state. The classification starts with the band as the most primitive and lowest of the social scale going up through the tribe, the chiefdom and finally the state. A tribal society is therefore seen basically as primitive and backwards. This is further illustrated in Sibanda’s sentiments on colonial Zimbabwe:

**“For once the Africans are characterised in the tribal category, their role in society is defined. Hence the Godlonton Commission of 1944 could make two broad categorisations of the total population of Rhodesia: ‘forward peoples’ who were to be the leaders or rulers – the Europeans generally; and the ‘backward peoples’, those to be led or ruled – the Africans generally. White domination is thus not only justified, they are in fact charged with the responsibility (or duty) to ‘help’ the Africans out of their archaic mode of existence, towards ‘civilization’ which the Europeans have come to epitomise” (Sibanda C. J. :1979)**

Therefore Colonialist affiliated authorities writing about communal tenure tend to propagate the idea that communal tenure is primitive and out dated as supported by Liversage:

**“In advanced communities land is regarded as form of property, the ultimate ownership of which must rest with some person or somebody. Amongst the most primitive communities it is not so; where sufficient space remains at the disposal of the population, land is considered a free good like fresh air” (Liversage V. : 1945)**

The expressed sentiments portrays a sensible notion on the care and use of land in ‘advanced communities’. However, what Liversage seem not to have taken into consideration on the part of ‘primitive communities’ (customary tenure) as widely acknowledged is that customary tenure is dynamic, and very adapted to changing needs for instance where land starts to get scarce, the rules change to suit the needs (for

example the Tonga of Zambia as established by Colson E. 1966, and also as reported by FAO (1967):

**Customary land law does seem to have inhibited the phenomenal increase in recent years in the production of cash crops in certain African countries. Meeting the challenge of cash economy, it has adapted and adjusted itself.**

Communal land tenure has generally been associated with primitive societies, and people tend to think that as civilization develops such communities should of necessity abandon the institution of communal land tenure. Such notions are biased and narrow minded because there exist forms of very successful communal holdings in the world today in some of the very technologically advanced, and so called civilized communities like Switzerland, Israel, Eastern Europe and China.

It has always been contended that the difficult with the Customary system of land tenure lies;

- **in its impression as to title,**
- **lack of security of tenure,**
- **lack of freedom of alienability and**
- **its being prone to fragmentation and parcellation.**

## **CUSTOMARY LAND TENURE**

The word tenure to the legal rules regulating the acquisition, the distribution of rights and the use of land amongst a specific population. In Zambia the land tenure system has varied from one area tenure to another due to difference in authorities in.

At present there about two different systems altogether, land may either be held under customary law or under statutory law and hence the two categories of land namely, state land and customary land. For state land this may either be scheduled or non-scheduled land depending on whether the particular land depending on whether the particular land appears in the schedule to the agriculture land Acts Cap 292. This customary land is what we basically trust and reserves we call them customary land and reserves. We call them customary land because the interests in these lands are held under customary law. It has always been contended that the difficult with the

Customary system of land tenure lies in its impression as to title, lack of security of tenure, lack of freedom of alienability and its being prone to fragmentation and parcellation.

## **Ownership of land in Customary tenure**

Land rights are acquired by virtue of membership in a particular tribe and once an individual is a member he becomes entitled to a piece of land. However, these rights are mentioned only if certain obligations are fulfilled. These are allegiance to the political authority. Rights in land should be differentiated from the title to land. Acquisition of rights in land does not imply acquisition of title to such piece of land. In most tribal societies in Zambia title to land is vested in the community as a whole and the chief holds this land as a trustee for all the people hence the chief has interests of control whilst the individual members of the community have beneficial rights. In other tribal societies title is vested in family groups. Here the family owns the land although the interests in such land are held by a member of the family. Although title may be vested in the community as a whole or the chief as trustee for the community, the interests acquired by individuals are distinct and exclusive. These interests will endure for as long as their heirs succeed him unless he effectively abandons the land. Hence the interests are so well established that they only fall short of freehold title.

## **ALIENABILITY OF CUSTOMARY LAND**

Another feature of customary land tenure i.e. say to inhibit both commercial and industrial development is the lack of freedom of alienability. An individual will be reluctant to invest in land where he may not realise his investment if he must move. In most tribal societies in Zambia however, there are no restrictions on the transfer or assignment of land by one individual to another. Land may be assigned by loan or gift without reference to any land authority. It is only in societies where clans are the land holding units that there is need to consult the other members of the clan. This form of alienation however is confined to the UN exhausted improvement on the land which can be sold as opposed to the land itself. In some tribal communities another form of alienation of land by individuals exists. Here an individual may allot a portion to his dependant who then proceeds to cultivate the plot. Here there is no actual transfer of the ownership of the land at all.

## **Customary Ownership of land**

Land rights are acquired by virtue of membership in a particular tribe and once an individual is a member he becomes entitled to a piece of land. However, these rights are mentioned only if certain obligations are fulfilled. These are allegiance to the political authority. Rights in land should be differentiated from the title to land. Acquisition of rights in land does not imply acquisition of title to such piece of land. In most tribal societies in Zambia title to land is vested in the community as a whole and the chief holds this land as a trustee for all the people hence the chief has interests of control



whilst the individual members of the community have beneficial rights. In other trades society's title is vested in family groups. Here the family owns the land although the interests in such land are held by a member of the family. Although title may be vested in the community as a whole or the chief as trustee for the community, the interests acquired by individuals are distinct and exclusive. These interests will endure for as long as their heirs succeed him unless he effectively abandons the land. Hence the interests are so well established that they only fall short of freehold title.

## **ALLIENABILITY OF CUSTOMARY LAND**

Another feature of customary land tenure i.e. say to inhibit both commercial and industrial development is the lack of freedom of alienability. An individual will be reluctant to invest in land where he may not realize his investment if he must move on. In most tribal societies in Zambia however, there are restrictions on the transfer or assignment of land by one individual to another. Land may be assigned though by loan or gift without reference to any land authority. It is only in society where clan members with land holding units that may need them to consult the other members of the clan. This form of alienation however is confined to the UN exhaustive improvements on the land which can be sold as opposed to the land itself. In some tribal communities another form of alienation of land by individuals exists. Here an individual may allot a portion to his dependent who then may proceed to cultivate the plot. Here, there is no actual transfer of the ownership of the land at all.

## **THE LANDS (CUSTOMARY TENURE) (CONVERSION) REGULATIONS 2006.**

### **Title**

1. These Regulations may be cited as the Lands (Customary Tenure) (Conversion) Regulations.

Procedure on conversion of **customary tenure into leasehold** tenure

2. (1) A person-

- (a) who has a right to the use and occupation of land under customary tenure; or
- (b) using and occupying land in a customary area with the intention of settling there for a period of not less than five years;

may apply, to the Chief of the area where the land is situated in *Form I* as set out in the Schedule, for the conversion of such holding into a leasehold tenure.

(2) The Chief shall consider the application and shall give or refuse consent.

(3) Where the Chief refuses consent, he shall communicate such refusal to the applicant and the Commissioner of Lands stating the reasons for such refusal in *Form II* as set out in the Schedule.

- (4) Where the Chief consents to the application, he shall confirm, in *Form II* as set out in the Schedule-
- (a) that the applicant has a right to the use and occupation of that land;
  - (b) the period of time that the applicant has been holding that land under customary tenure; and
  - (c) that the applicant is not infringing on any other person's rights;
- and shall refer the Form to the Council in whose area the land that is to be converted is situated.

### **Consideration of the application by the Council**

3. (1) The council shall, after receiving the Form referred to in sub-regulation (4) of regulation 2, and before making a recommendation to the Commissioner of Lands, consider whether or not there is a conflict between customary law of that area and the Act.
- (2) If the council is satisfied that there is no conflict between the customary law of that area and the Act, the council shall make a recommendation to the Commissioner of Lands in *Form III* as set out in the Schedule.
- (3) The Commissioner of Lands shall accept or refuse to accept the recommendation, and shall inform the applicant accordingly.

### **Conversion by council of customary tenure into leasehold tenure**

4. Where a council considers that it will be in the interests of the community to convert a particular parcel of land, held under customary tenure into a leasehold tenure, the council shall, in consultation with the Chief in whose area the land to be converted is situated, apply to the Commissioner of Lands for conversion.
- (2) The Council shall, before making the application referred to in sub-regulation (1)-
- (a) ascertain any family or communal interests or rights relating to the parcel of land to be converted; and
  - (b) specify any interests or rights subject to which a grant of leasehold tenure will be made.

### **Requirement to pay ground rent**

5. A person holding land on leasehold after the conversion of such land from customary tenure shall be liable to pay such annual ground rent in respect of that land as the Commissioner of Lands may prescribe.

### **Appeals**

6. A person aggrieved by a decision of the Commissioner of Lands may appeal to the Lands Tribunal.

(Regulations 2 and 3)

*FORM I*

(Regulation 2)

**APPLICATION FORM FOR CONVERSION OF CUSTOMARY TENURE INTO LEASEHOLD TENURE**

Particulars of Applicant

1. Name
2. Postal and Physical Address:
3. Location of land:
4. Size of the land and plan No.
5. Declaration of Rights:

(a) I or my family have had the right to the use and occupation of the land shown on the plan for a continuous period of ..... years;

(b) I am entitled to or my family's is entitled to (delete as appropriate), the benefit to the land and I am not aware of any other person's right to the use or, occupation of the land or part of the land except:  
And granting leasehold to me will not affect these rights.

**Signed:**

**Date:**

**Note:**

- (i) If in occupation for less than five years, describe how the use and occupation of the land began, by stating the name of the Chief or the Headman who gave you permission to occupy and use the land;
- (ii) Prove that the use and occupation of the land is exclusive, by describing the use that the land has been put to;
- (iii) Please attach six layout plans of the land in issue to this Form.

*FORM II*  
(Regulation 2)

**APPROVAL OF THE CHIEF OF AN APPLICATION FOR CONVERSION OF  
CUSTOMARY TENURE INTO LEASEHOLD TENURE**

I ..... Chief of ..... (village) confirm and certify that-

1. I have caused the right to the use and occupation of .....(property number) by.....  
(the applicant)..... to be investigated and the investigation has revealed that the  
applicant or his family has for the last ..... years been in occupation of the land described in the  
plan to which plan I have appended my signature.

2. I am not aware of any other right(s), personal or communal, to the use and occupation  
of the land or any other part of the land, except that these rights have always been enjoyed by  
the community and shall not affect the right of the applicant to the use and occupation of the  
land.

3. I have caused the consultation to be made with members of the community.

4. As a result of the consultation and the information made available to me I hereby  
**give/refuse** my approval for the said land to be converted into leasehold tenure.

**Signed:**

**Date:**

*FORM III*

(Regulation 3)

**APPROVAL OF THE LOCAL AUTHORITY FOR THE CONVERSION OF  
CUSTOMARY TENURE INTO LEASEHOLD TENURE**

I, ..... , in my capacity as Council Secretary of ..... District Council confirm and state that .....(property number) the land to be converted from customary tenure to leasehold tenure by the applicant .....(name of applicant) falls within the boundaries of .....District Council.

AND THAT the said.....(property number) falls within the Jurisdiction of Chief ..... The **approval/refusal** of the.....Chief for the land to be converted from customary tenure to leasehold tenure is herewith attached.

2. The applicant.....(name) has occupied and has had the right to the use and occupation of the said land for a continuous period of .....years.

3. I am not aware of any other rights personal or communal to the use and occupation of the land or any part of the land.

4. As a result of the information available to me, I hereby **give/refuse** my approval for the said land to be converted into leasehold tenure.

**Signed:**

**Date:**

# **CUSTOMARY LAND ADMINISTRATION IN ZAMBIA**

# CONTENTS

1. INTRODUCTION
2. HISTORICAL OVERVIEW OF THE ROLE OF CHIEFS IN LAND ALLOCATION
3. CUSTOMARY TENURE IN ZAMBIA
4. CONCLUSION



# 1. INTRODUCTION

- Land, like the other factors of production (labour, Capital and Technology) is critical to promote development
- By Law All Land in Zambia is vested in the President, both State Land and Customary Land
- Zambia has 2 land tenure systems , namely Customary tenure and Statutory (Leasehold) tenure systems.
- 94% of land in Zambia falls under Customary tenure , while 6% of the Land is Stateland under leasehold tenure.(These have remained static from 1928 and 1947 in terms of zone classifications)
- The Lands Act recognizes a dual Land Tenure System.
- Customary Land is administered by the Chiefs using the African Customary Laws applicable to each Chiefdom, **SUBJECT TO** Zambian Laws and natural Justice.



# Introduction Contd

- Because All Land is vested in the President, Government has a significant role to ensure that All Land (Including Customary Land) is administered in a way which benefits all  
Zambians
- Section 5(3) of the Lands Act provides that  
“All land in Zambia shall, subject to this Act, or any other law be administered and controlled by the President for the *use or common benefit, direct or indirect, of the people of Zambia*”

# HISTORICAL OVERVIEW OF THE ROLE OF CHIEFS IN LAND ALLOCATION

- Before the coming of European settlers in 1889, all land was administered by customary laws in all Chiefdoms
- With Zambia becoming a protectorate, settlers assumed powers over land, with both the BSA Co. and the Governor assuming powers to make dispositions and grants of Land



# HISTORICAL OVERVIEW OF THE ROLE OF CHIEFS IN LAND ALLOCATION

- From 1889, 1911, 1924, 1928, 1947 and 1959 Orders in Council, through into the Zambia Independence Order, Land alienation and Administration focused on the White Settler – **Laws were pro-settler**
- Land(Conversion of Titles) Act 1975 and Lands Act 1995 both directly and indirectly provided for the continuation of customary tenure maintaining the need to consult before customary land is given out



# CUSTOMARY LAND ADMINISTRATION IN ZAMBIA

- Customary Tenure is uncoded or unwritten in nature: There is need to define Customary Tenure
- Section 7 and 8 of the Lands Act recognises Customary Tenure but it is not defined
- Zambia is a Unitary State with 73 languages
- Customary tenure is more restrictive in terms of application: The development of some areas into metropolitan Urban Centres has meant that customary tenure is not able to deal with specific complications especially affecting non-chiefdom subjects
  - **Examples of What is in practice that is not allowed by Law**
    - Selling Land by Chiefs (Not allowed by Law, section 3 of the lands Act says only the President should collect consideration), Since all land is vested in the Presidency
    - Giving Land over 250 Hectares (i.e. in the process of conversion) Land Circular No. 1 of 1985.
    - Allowing a person who is a non- Zambian/or investor to start utilizing the land without bothering to notify government authorities
    - Getting into a land Agreement with an Investor over Land this is outside the scope of customary tenure



# CUSTOMARY LAND ADMINISTRATION IN ZAMBIA

- Land Circular No. 1 of 1985 places a responsibility on Traditional leaders to grant consent for any allocation where the Investor/Applicant wishes to obtain a Lease or a title, without a deliberate policy
- Under the Lands Act 1995, the consent forms are in a prescribed form; This is mandatory and cannot be replaced by a letter or other form of granting the consent
- The siteplan **MUST** be duly endorsed by the Chief, the Council under which the Land is situated
- The person recognised as Chief, for purposes of Land allocation is a gazetted Chief

# **CUSTOMARY LAND ADMINISTRATION IN ZAMBIA**

- Land Circular Limits the size a Chief can recommend or give to an investor or applicant to 250 Hectares
- In cases where larger than 250 Ha is given, **Ministerial (250 – 1000ha) and Presidential Authority (1000ha+) is required**
- Need to consult Indunas; The Supreme Court has ruled – This has been difficult in most Chiefdoms



# OTHER CHALLENGES OF CUSTOMARY LAND ADMINISTRATION IN ZAMBIA

- Threats of Forgeries and wrong date stamps on Consent Forms and Siteplans
- Protection of Pastoral/Communal Land and the need for servitudes (Easements and profits)
- Need for clarity on who should grant the Consent, **ONLY GAZETTED CHIEF** and not a Headman
- Cases of Displacement of Villagers
  - Villagers are protected by Law against displacement from their customary land
  - Need to know that such villagers can now complain legally against a traditional leader

# CUSTOMARY LAND ADMINISTRATION IN ZAMBIA

- Chiefdom Boundary Disputes and the need to work with government through the Office of the Surveyor General: Avoiding to give land beyond one's Jurisdiction
- Siteplan preparation complications; Scale and what is written
- Lands Tribunal Act is now law and will help all affected parties to seek redress; Both the traditional authorities and the subjects



# **CUSTOMARY LAND ADMINISTRATION IN ZAMBIA**

- **PROPOSED WAY FORWARD**

- **THERE IS NEED TO CHANGE THE LAWS AND ADDRESS THE VARIOUS CHALLENGES FACING ZAMBIANS.**
- **HENCE THE NEED IMPLEMENT WHAT THE PRESIDENT HAS GUIDED THAT SECURITY OF TENURE MUST BE PROTECTED FOR ALL CUSTOAMRY AREAS**
- **IN ADDITION, POLICY AND LEGISLATIVE ADJUSTMENTS WILL BE REQUIRED.**

# 5. CONCLUSION

- Land is Zambia's Heritage as; Development happens on land.
- There is a duty placed on the President under Section 5(3) of the Lands Act to administer Land in the interest of the Zambian People, hence the rules and regulations for Customary Land
- Chiefs are key to ensure the land is properly administered and all allocations follow laid down rules and regulations





**THE END**

# LAND ALIENATION PROCEDURE

## **LANDS CIRCULAR NO.1 OF 1986**



REPUBLIC OF ZAMBIA

MINISTRY OF LANDS AND NATURAL RESOURCES

## **Procedure on Land Alienation**

LAND CIRCULAR

No. 1 of 1985

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## INTRODUCTION

This Circular is intended to lay down general policy guidelines regarding the procedure all District Councils are expected to follow in the administration and allocation of land.

2. Your attention is drawn to the fact that all land in Zambia is vested absolutely in His Excellency the President who holds it in perpetuity for and on behalf of the people of Zambia. The powers of His Excellency the President to administer land are spelt out in the various legislations some of which are: The Zambia (State Land and Reserves) Orders, 1958 to 1964, the Zambia (Trust Land) Orders, 1947 to 1964, the Zambia (Gweru District) Orders, 1959 and 1964 and the Land (Conversion of Titles) Act No. 29 of 1975 as amended. His Excellency the President has delegated the day-to-day administration of land matters to the public officer for the time being holding the office or executing the duties of Commissioner of Lands. Under Statutory Instrument No. 7 of 1964 and Gazette Notice No. 1345 of 1975, the Commissioner of Lands is empowered by the President to make grants or dispositions of land to any person subject to the special or general directions of the Minister responsible for land matters.

3. Pursuant to the policy of decentralisation and the principle of participatory democracy it was decided that District Councils should participate in the administration of land. To this effect, all District Councils will be responsible, for and on behalf of the Commissioner of Lands, in the processing of applications, selecting of suitable candidates and making recommendations as may be decided upon by them. Such recommendations will be invariably accepted unless in cases where it becomes apparent that doing so would cause injustice to others or if a recommendation so made is contrary to national interest or public policy.

4. Accordingly, the following procedures have been laid down and it will be appreciated if you shall ensure that the provisions of this Circular are strictly adhered to.

### A. PREPARATION OF LAYOUT PLANS

- (i) The planning of stands for various uses is the responsibility of the appropriate planning authority of the area concerned. Once a chosen area has been properly planned, the planning authority shall forward the approved layout plans to the Commissioner of Lands for scrutiny as to the availability of the land.
- (ii) Upon being satisfied that the layout plans are in order, the Commissioner of Lands shall request the Surveyor-General to number and survey (or authorise private survey) the stands.
- (iii) Thereafter, a copy of the layout plan showing the order of numbering, shall be sent back to the District Council and the planning authority concerned.

### B. ALLOCATION OF STANDS

- (i) Stands recommended for allocation to the Commissioner of Lands will be assumed to have been fully serviced by the District Council concerned. If the stands are not serviced, the District Council shall give reasons for its inability to provide the necessary services before the recommendations can be considered.
- (ii) Before stands are recommended, the District Council concerned may advertise them in the national press inviting prospective developers to make applications to the District Council in the form appended hereto and numbered as Annexure A.
- (iii) On receipt of the applications the District Council concerned shall proceed to select the most suitable applicants for the stands and make its recommendations in writing to the Commissioner of Lands giving reasons in support of the recommendations in any case where there may have been more than one applicant for any particular stand, or where an applicant is recommended for more than one stand.
- (iv) On receipt of the recommendation(s) from the District Council(s), the Commissioner of Lands shall consider such recommendation(s) and may make offer(s) to the successful applicant(s), sending copies of such offer(s) to the District Council(s) concerned.

- (v) Where the District Council is not the planning authority, an applicant whose recommendation has been approved by the Commissioner of Lands shall be directed, in a letter of offer in principle, to apply for and obtain planning permission from the relevant planning authority before a lease can be granted.
- (vi) If the District Council is aggrieved by the decision of the Commissioner of Lands, the matter shall be referred to the Minister of Lands and Natural Resources within a period of thirty days from the date the decision of the Commissioner of Lands is known, who will consider and decide on the appeal. The Minister's decision on such an appeal shall be final.
- (vii) No District Council shall have authority in any case to permit, authorise or suffer to permit or authorise any intending developer to enter upon or occupy any stand unless and until such developer shall have first received the letter of offer, paid lease fees and the development charges, and has obtained planning permission from the relevant planning authority.
- (viii) Prior to the preparation of the direct lease, the District Council concerned shall inform the Commissioner of Lands the minimum building clause to be inserted in the lease.
- (ix) Prompt written notification of the relevant particulars upon the issue of a certificate of title shall be given by the Commissioner of Lands to the District Council concerned.

#### C. UNSCHEDULED AGRICULTURAL LANDS

- (i) Any State Land required for agricultural use shall be notified to the Commissioner of Lands so that its status and availability can be determined. Once the Commissioner of Lands is satisfied that the land in question is available the Department of Agriculture in consultation with the District Council shall be requested to plan the area into suitable agricultural units. The layout plans duly approved by both the Department of Agriculture and the District Council concerned shall be submitted to the Commissioner of Lands for survey and numbering.
- (ii) Once the District Council is in possession of information from the Commissioner of Lands regarding the numbered farms or small-holdings the procedure outlined in paragraph 4B (ii) (iii) (iv) and (vi) above shall apply. And the application form to be completed by the applicants shall be as per Annexure 'C'.
- (iii) No District Council shall have authority in any case to permit, authorise, or suffer to permit, or authorise any intending developer, to enter upon or occupy any agricultural farm or small-holding unless and until such developer shall have first received the letter of offer and has paid the lease fees.

#### D. RESERVES AND TRUST LANDS

- (i) In the Reserves and Trust Lands, the powers of the President, in making grants or dispositions of land, are limited by the requirement to consult the local authorities affected by such grants or dispositions of land.
- (ii) Local authority, in the Orders, has been administratively understood to mean the Chief and the District Council. This means, therefore, that the consents of the Chiefs and District Councils shall continue to be the basis for any approval of applications for land in the Reserves and Trust Lands.
- (iii) As has been the practice before, to ensure that a local authority has been consulted, the Commissioner of Lands will insist that each recommendation is accompanied by the following:
  - (a) written consent of the chief under his hand;
  - (b) extracts of the minutes of the Committee of the Council responsible for land matters embodying the relevant resolution and showing who attended, duly authenticated by the Chairman of the Council and the District Executive Secretary;
  - (c) extracts of the minutes of the full Council with the relevant resolution and showing who attended, duly authenticated by the Chairman of the Council and the District Executive Secretary;



- (d) four copies of the approved layout plan showing the site applied for, duly endorsed and stamped by the Chief, Chairman of the Council and the District Executive Secretary.
- (iv) The preparation of the layout plan showing the area applied for, should be done by persons possessed with the cartographic know-how. At Annexure 'B' of this circular is a model layout plan which provides the necessary details for an acceptable layout plan.
- (v) It has been decided, for the time being, not to allocate more than 250 hectares of land for farming purposes in the Reserves and Trust Land areas. The District Councils are, therefore, advised not to recommend alienation of land on title in such areas in excess of 250 (two hundred and fifty) hectares as such recommendations would be difficult to consider.
- (vi) In each case recommended to the Commissioner of Lands, the recommending authority shall certify that it has physically inspected the land applied for and confirm that settlements and other persons' interests and rights have not been affected by the approval of the application.

#### E. APPLICATIONS FOR LAND BY NON-ZAMBIANS

- (i) You are now aware that under the Land (Conversion of Titles) (Amendment) (No. 2) Act of 1985 no land can be alienated to a person who is not a Zambian. However, under the same Amendment, a non-Zambian can be granted a piece of land if his application has been approved in writing by His Excellency the President.
- (ii) To obtain the approval of His Excellency the President, a non-Zambian wishing to own a piece of land will be required, in the first place, to submit his application to the District Council concerned for scrutiny. In considering the application, the District Council will be at liberty to solicit for as much information as possible from the applicant about the intended development.
- (iii) When recommending the application to the Commissioner of Lands, the District Council shall be required to give full back-up information in support of or against the applicant in addition to the following:
- (a) extracts of the minutes of the Committee of the Council responsible for land matters, embodying the relevant resolution and showing who attended the meeting duly authenticated by the Chairman of the Council and the District Executive Secretary;
  - (b) extracts of the minutes of the full Council, with the relevant resolution and showing who attended the meeting, duly authenticated by the Chairman of the Council and the District Executive Secretary; and
  - (c) four copies of the approved layout plan, showing the site applied for, duly stamped and endorsed by the Chairman of the Council and the District Executive Secretary where the site has not been numbered.
5. *Consultations*—Development projects of great significance both to the District and the nation, shall be referred to the Provincial Authority for guidance before communicating the decision to the Commissioner of Lands.
6. *Decentralisation of Lands Department*—Necessary plans to further decentralise the various aspects of land administration and alienation to the Provincial Headquarters have been made. These plans will be operational as soon as funds are available.
7. *Reserved Powers*—The Minister responsible for lands shall have the right in any case or cases or with respect to any category or categories of land, to modify, vary, suspend or dispense with the procedure outlined above or any aspect of same as he may see fit in the circumstances.

F. CHELA,  
Minister of Lands and Natural Resources

cc The Rt Hon. Prime Minister.  
cc Hon. Chairman of the Rural Development Committee.  
cc Administrative Secretary, Freedom House.

cc All Hon. Members of the Central Committee in charge of provinces.  
cc Hon. Minister, **Ministry of Decentralisation, Lusaka.**  
cc Hon. Minister, **Ministry of Agriculture and Water Development, Lusaka.**  
cc Hon. Minister, **Ministry of Legal Affairs, Lusaka.**  
cc All Chairmen of District Councils.

ANNEXURE 'A'

Government of the Republic of Zambia

LANDS DEPARTMENT

Application for Residential/Commercial/Industrial/Special User Stand in the.....  
..... council area.

(To be completed in duplicate and both copies submitted to the District Executive Secretary,  
..... District Council).

1. First choice: Stand No.....Town.....
2. Other choices: Stand No.....
3. If more than one stand is required because of the scale of the proposed development give details here.....
4. If the area applied for is not numbered, provide four copies of the approved layout plan.

A. APPLICATIONS BY INDIVIDUALS

1. Name (in block letters).....
2. Address.....
3. Age..... birth place.....
4. Nationality.....
5. National Registration Card Number.....
6. Date and place of issue.....
7. Residence in Zambia (non-Zambians) from.....
8. Passport No. (non-Zambians).....
9. Date and place of issue.....
10. The name of the mortgagees.....
11. If you do not intend to borrow, state your sources of income with which to finance development. (Provide evidence).....
12. Occupation.....
13. Full description of type of development proposed on the stand applied for.....
14. Will the proposed building be owner occupied?.....
15. Estimated cost of proposed development: K.....

16. Particulars of land owned by or leased to applicant or husband/wife of applicant.

Property	Stand No.	User Clause	District	Term of Lease

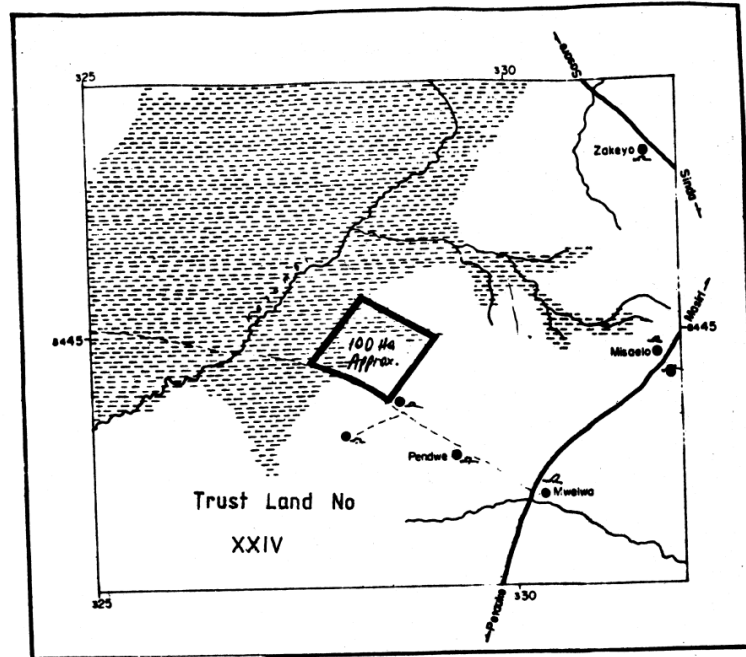
**B. APPLICATIONS BY COMPANIES AND ORGANISATIONS**

1. Name.....
2. Address.....
3. Is the company incorporated or organisation registered under Zambian laws?  
.....
4. Is the company or organisation legally competent to hold land in Zambia?.....
5. Issued and paid up capital: K.....
6. Name, usual country of residence and nationality of shareholders, trustees etc.
  - (i) .....
  - (ii) .....
  - (iii) .....
  - (iv) .....
  - (v) .....
7. Full description of type of development proposed on stands applied for.....  
.....  
.....
8. Particulars of land owned by or leased to company or organisation.

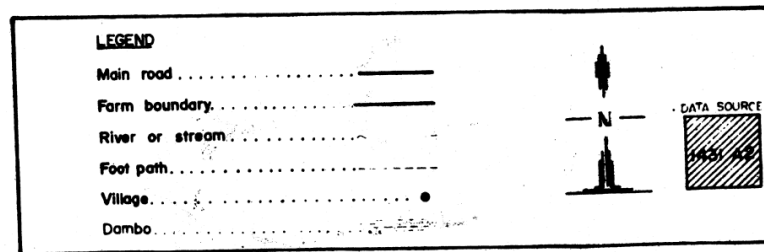
Property No.	Stand No.	User Clause	District	Term of Lease

9. Estimated cost of proposed development: K.....
10. Do you intend to sell or let the completed development?.....  
.....  
.....
11. If yes, have you a purchaser/tenant in mind?.....

ANNEXURE B MODEL LAYOUT PLAN



Scale 1:50,000



C. APPLICATIONS BY NON-ZAMBIANS

(Additional information in support of the proposed development should be given here. The applicant is advised to write as much as possible about himself and the intended project. Additional paper may be used if this space is not adequate).

D. STATUTORY DECLARATION

I, .....do solemnly and sincerely declare that the particulars given in this application form are true and correct and that I have not withheld any information which might affect my application AND I make solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declaration Act, 1835.

Signature.....

E. FOR USE BY THE DISTRICT COUNCIL

1. The application under A/B is recommended for the following reasons:

.....  
.....

2. The application under A/B is not recommended for the following reasons:

.....  
.....

CERTIFICATE

I hereby certify that this application was approved by the full Council under item No. ....  
on the .....

Official Date Stamp

.....  
*District Executive Secretary*  
*(The District Executive Secretary should sign the certificate personally)*

ANNEXURE 'C'

GOVERNMENT OF THE REPUBLIC OF ZAMBIA

LANDS DEPARTMENT

Application for a farm or small-holding in..... council area.  
(To be completed in duplicate and both copies submitted to the District Executive Secretary,  
..... District Council).

1. First choice: Farm/Lot No..... Town.....
2. Other choices: Farm/Lot No. ....
3. If more than one farm or small-holding is required because of the scale of the proposed development give details here.....  
.....  
.....
4. If the area applied for is not numbered, provide four copies of the approved layout plan.

A. APPLICATIONS BY INDIVIDUALS

1. Name (in block letters).....
2. Address.....
3. Age..... Birth place.....
4. Nationality.....
5. National Registration Card Number.....
6. Date and place of issue.....
7. Residence in Zambia (non-Zambians) from.....
8. Passport No. (non-Zambians).....
9. Date and place of issue.....
10. The name of the mortgagees.....
11. If you do not intend to borrow, state your sources of income with which to finance development (Provide evidence).....  
.....  
.....
12. Married or single.....
13. If married, number, sex and age of children.....  
.....
14. Present occupation.....
15. Full description of type of development proposed on the farm or small-holding applied for:  
.....  
.....



16. Will the farm or small-holding be owner occupied?  
.....

17. Estimated cost of proposed development: K.....

18. Particulars of land owned by or leased to applicant of husband/wife of applicant.

Property	Farm/Lot No.	User Clause	District	Term of Lease

**B. APPLICATIONS BY COMPANIES AND ORGANISATIONS**

1. Name.....

2. Address.....

3. Is the company incorporated or organisation registered under **Zambian laws**?  
.....

4. Is the company or organisation legally competent to hold land in **Zambia**?  
.....

5. Issued and paid up capital: K.....

6. Name, usual country of residence and nationality of shareholders, trustees etc.

(i) .....

(ii) .....

(iii) .....

(iv) .....

(v) .....

7. Full description of type of development proposed on the farm or small-holding **applied for**.  
.....  
.....

8. Particulars of land owned by or leased to company or organisation.

Property No.	Farm/Lot No.	User Clause	District	Term of Lease

9. Estimated cost of proposed development: K.....

10. Do you intend to sell or let the completed development.....

11. If yes, have you a purchaser/tenant in mind?.....

C. APPLICATIONS BY NON-ZAMBIANS

(Additional information in support of the proposed development should be given here. The applicant is advised to write as much as possible about himself and the intended project. Additional paper may be used if this space is not adequate).

D. STATUTORY DECLARATION

I.....do solemnly and sincerely declare that the particulars given in this application form are true and correct and that have not withheld any information which might affect my application AND I make solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declaration Act, 1835.

Signature.....

E. FOR USE BY THE DISTRICT COUNCIL

1. The application under A/B; is recommended for the following reasons:

.....  
.....

2. The application under A/B; is not recommended for the following reasons:

.....  
.....

CERTIFICATE

I hereby certify that this application was approved by the full Council under item No..... on the.....

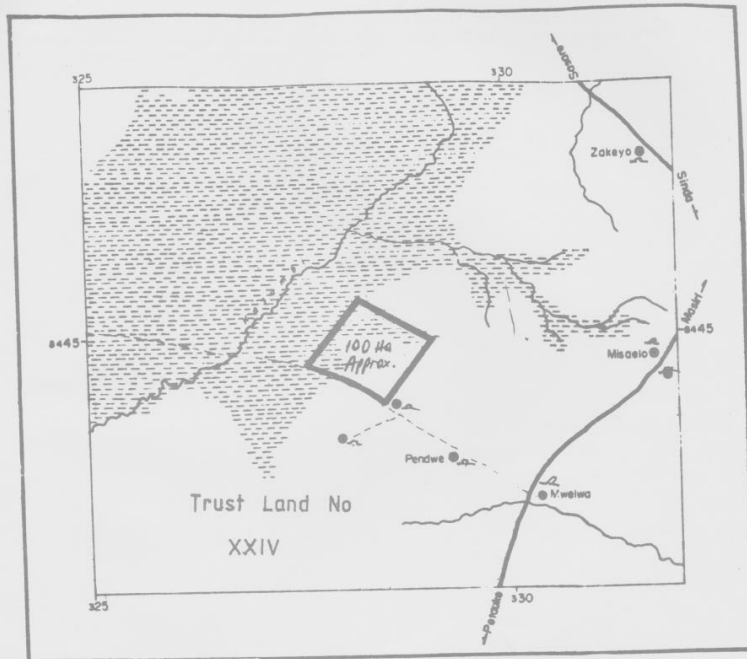


.....  
*District Executive Secretary*  
*(The District Executive Secretary should sign the certificate personally)*

091  
089  
09Σ1  
21  
089

02Σ01  
098  
02Σ1  
2  
078

ANNEXURE B MODEL LAYOUT PLAN



Scale 1:50,000



**LEGEND**

- Main road . . . . .
- Farm boundary . . . . .
- River or stream . . . . .
- Foot path . . . . .
- Village . . . . .
- Dambo . . . . .

N

DATA SOURCE

The legend defines symbols for main road, farm boundary, river or stream, foot path, village, and dambo. It also includes a north arrow pointing upwards and a box labeled 'DATA SOURCE' with a hatched pattern.



# LAND REGISTRATION

GEE3522

Prepared by:  
D. Mubanga

# INTRODUCTION

- Sec. 3 (1) – All land vest in the President
- Sec. 3 (2) – the President may alienate land to any Zambian
- Sec. 3 (3) – or non-Zambian under the following circumstances;

# Conditions for non-Zambians

- a) Where the non-Zambian is a permanent resident
- b) Where the non-Zambian is an investor
- c) Has obtained the Presidential consent
- d) Is a Company with at share holdings less than 25% for non-Zambians
- e) Is a statutory corporation created created by Parliament



# Conditions for non-Zambians

- (f) Is a co-operative society with less than 25% shares by non-Zambians
- (g) Registered under the Land (Perpetual Succession) Act as a non-profit organisation
- (h) - (k)

# what is alienation?

- Another mode of disposal of state land  
– sec 42(1) (a)
- The best mode of disposal;
- Means to convey or give away a right and title of a piece of state land.

# Why alienation is the best mode of disposal?

- Proprietor will get title to the land;
- Period is longer than other mode of disposal;
- Proprietor feels secured to develop and invest in the land;
- If land is acquired by Govt for public purpose, proprietor will get compensation;
- Proprietor can deal with the land.

## ...continue

alienation consists of:

- (a) term not exceeding 99 years; and
- Payment of Consideration;
- Payment of Ground Rent;
- Subject to category of land use;
- Subject to conditions and restrictions in interest

# Survey for alienation under final title

When alienation is approved and payment of land dues are made, title will be issued to the applicant. Before title can be issued, survey to the land must first be done.

- 'Land Surveyor' will conduct a survey to determine boundaries
- Survey is approved by Survey General

## ...continue

- The actual area of land for alienation at the time of approval is provisional i.e not definite and exact;
- After survey, it may became slightly smaller or bigger;
- Area should as closer to what is stated on the siteplan and description to which has been approved.

# Final Title

After is done, final title will be issued.

Chief Registrar will determine what forms of final title to be issued (look at the type of land);\_

- **Certificate of Title – Govt.**
- **Occupancy Licence - Councils**

# What is registration?

After payment of land dues, survey done (for final title) and preparation of title completed, registration to be completed.

Registration requires :-

- Authentication (signed), and
- Seal

by the Registrar of Lands





**THANK YOU**

# Registration of Land

## Registration of Land Titles

*A system by which ownership of real property is established through the issuance of an official certificate indicating the name of the individual in whom such ownership is vested.*

Land titles are registered through a statutory process called the *Torrens title system*, in somewhat the same way that automobile titles are registered in most states. Under Torrens system, land ownership can be readily ascertained without any need for repeated examinations of voluminous public records, and the resulting titles are generally secure and ready for transaction.

## Torrens title

The purpose of the *Torrens system* is to provide certainty of title to land.

Torrens Title is a South Australian invention that revolutionised the method of recording and registering land ownership. It is a system where land ownership occurs when the document that transfers ownership of the property is filed at the local Land Titles Office. The purpose of the Torrens system is to provide certainty of title to land.

The Torrens Title System was first introduced in South Australia in 1858, and subsequently used in other Australian states and around the world. Torrens Title is named after its inventor, Sir Robert Richard Torrens, who was instrumental in the implementation of this unique and efficient system of dealing with land. The system resulted from Sir Torrens' desire to improve on the old English land law system which was very complex, time consuming and expensive.

The main object of the Torrens Title System is to make the register conclusive. Once your name is registered on the Torrens Title register, you become the owner of the property to the exclusion of all others. You therefore obtain **'title by registration'**, which is a pivotal concept of Torrens Title.

Under the system, a Certificate of Title exists for every separate piece of land. The certificate contains a reference that includes a volume and folio number, ownership details, easements and/or rights of way affecting the land and any encumbrances including mortgages, leases and other interests in the land.

Torrens Title is useful because it eliminates grounds for most dispute litigation, avoids the consequences of lost certificates and greatly reduces the costs of land sale and transfer. People can change the Torrens Register through lodging and registering a 'dealing'.

Normally, the person who is recorded as the owner of a parcel of land cannot have their title challenged or overturned. This concept is known as '**indefeasibility of title**'. There are, however, a few exceptions to this general rule such as if the land was registered fraudulently.

Upon registration of the decree, a designated officer, ordinarily called the **registrar of titles**, makes and files the original certificate of title in the proper register. A duplicate of the certificate must be delivered to the registered owner. Once this procedure has been completed, the land becomes registered land. Any subsequent transfers and dealings regarding it must be made according to statute.

**Torrens title** is a system of land title where a register of land holdings is maintained by the state, it guarantees an **indefeasible title** to those included in the register. Land ownership is transferred through registration of title instead of using deeds. Its main purpose is to simplify land transactions and to certify to the ownership of an absolute title to real property. It has become pervasive around the countries strongly influenced by Britain, especially those in the Commonwealth and has spread to most other non-commonwealth countries.

## Overview

The Torrens title system operates on the principle of "**title by registration**" (i.e. the indefeasibility of a registered interest) rather than "registration of deed." The system does away with the need for a chain of title (i.e. tracing title through a series of documents). The State guarantees title and is usually supported by a compensation scheme for those who lose their title due to the State's operation or omission.

The Torrens system works on three principles;

1. **Mirror principle** – the register (Certificate of Title) reflects (mirrors) accurately and completely the current facts about a person's title. This means that, if a person sells an estate, the new title has to be identical to the old one in terms of description of lands, except for the owner's name.

2. **Curtain principle** – one does not need to go behind the Certificate of Title as it contains all the information about the title. This means that ownership need not be proved by long complicated documents that are kept by the owner, as in the Private Conveyancing system. All of the necessary information regarding ownership is on the Certificate of Title.
3. **Indemnity principle** – provides for compensation of loss if there are errors made by the Registrar of Titles.

## Common law

At Common law, land owners needed to prove their ownership of a particular piece of land back to the earliest grant of land by the Crown to its first owner. The documents relating to transactions with the land were collectively known as the "**title deeds**" or the "**chain of title**". This event could have occurred hundreds of years prior and could have been intervened by dozens of changes in the land's ownership. A person's ownership over land could also be challenged, potentially causing great legal expense to land owners and hindering development.

Even an exhaustive title search of the chain of title would not give the purchaser complete security, largely because of the principle *nemo dat quod non habet* ("no one gives what he does not have") and the ever-present possibility of undetected outstanding interests. The common-law position has been changed in minor respects by legislation designed to minimize the searches that should be undertaken by a prospective purchaser. In some jurisdictions, a limitation has been placed on the period of commencement of title a purchaser may require.

## Deeds registration

The effect of registration under the Deeds Registration System was to give the instrument registered "priority" over all instruments that are either unregistered or not registered until later. The basic difference between the deeds registration and Torrens systems is that the former involves registration of instruments while the latter involves registration of title.

In contrast of

Torrens system in which basically the one who registered in a land registry as owner of a piece or parcel of land has an indefeasible title of the land, deeds

registration system is merely a registration of all important instruments related to that land. In order to establish one's title to the land, a person (or usually their purchasers' attorney) will have to ascertain, for example:

- all the title documents are properly executed;
- "a chain of title" is established, i.e. the proper ownerships from the granting of the land from the government to the present owner;
- there are no encumbrances on the land that probably will harm the title of the land.

Moreover, though a register of who owned what land was maintained, it was unreliable and could be challenged in the courts at any time. The limits of the deeds-registration system meant that transfers of land were slow, expensive, and often unable to create certain title.

## Creation



Under the system many maps showing property boundaries need to be kept.

In order to resolve the deficiencies of the common law and deeds registration system, Torrens introduced the new title system in 1858, after a boom in land speculation

and a

haphazard grant system resulted in the loss of over 75% of the 40,000 land grants that was issued in the colony. He established a system based around a central registry of all the land in the jurisdiction of South Australia, embodied in the

Real Property Act 1886 (SA). All transfers of land are recorded in the register.

Most importantly, the owner of the land was established by virtue of his name being recorded in the government's

register. The Torrens title also records easements and the creation and discharge of mortgages.

The historical origins of the Torrens title are a matter of considerable controversy.

Torrens

himself acknowledged adapting his proposals from earlier systems of transfer and registration, particularly the system of registration of merchant ships in the United Kingdom. The Prussian mortgage legislation also served as an example.

James E. Hogg, in *Australian Torrens*

*System with Statutes* (1905), has shown that Torrens derived ideas from many other sources

and that he received assistance from a number of persons within South Australia.

Stanley Robinson, in *Transfer of Land in Victoria* (1979) has argued that Ulrich Hübner, a German lawyer

living in South Australia in the 1850s, made the most important single contribution by adapting principles borrowed from the Hanseatic registration system in Germany.

Nevertheless, it cannot be denied that Torrens' political activities were substantially responsible for securing acceptance of the new system in

South Australia and eventually, in other Australian colonies and New Zealand.

He oversaw the introduction of the system in the face of often-

vicious attack from his opponents, many of whom were lawyers, who feared loss of work in conveyancing, because of the

introduction of a simple scheme. The Torrens system was also a marked departure

from the common law of real property and its further development has been characterised by the reluctance of common-law judges to accept it.

## Land register

The land register is the central aspect of the Torrens system. Originally the register was a bound paper record, but today the register is typically kept in a (Computerised) database.

On the first registration of land under the system, the land is given a unique number (called a folio) which identifies the land by reference to a registered plan. The folio records the dimensions of the land and its boundaries, the name of the registered owner, and any legal interests that affect title to the land. To change the boundaries of a parcel of land, a revised plan must be prepared and registered. Once registered, the land cannot be withdrawn from the system.

A transfer of ownership of a parcel of land is affected by a change of the record on the register. The registrar has a duty to ensure that only legally valid changes are made to the register. To this end, the registrar will indicate what documentation he or she will require to be satisfied that there has in fact been a change of ownership. A change of ownership may come about because of a sale of the land, or the death of the registered owner, or as a result of a court order, to name only the most common ways that ownership may change. Similarly, any interest which affects or limits the ownership rights of the registered owner, such as a mortgage, can also be noted on the register. There are legal rules which regulate the rights and powers of each of these interests in relation to each other and in relation to third parties.

The State guarantees the accuracy of the register and undertakes to compensate those whose rights are adversely affected by an administrative error. Claims for compensation are very rare.

## Effect of registration

The main difference between a common law title and a Torrens title is that a member of the general community, acting in good faith, can rely on the information on the land register as to the rights and interests of parties recorded there, and act on the basis of that information. A prospective purchaser, for example, is not required to look beyond that record. He or she does not need even to examine the Certificate of Title, the register information being paramount. This contrasts with a common law title, which is based on the principle that a vendor cannot transfer to a purchaser a greater interest than he or she owns. As with a chain, the seller's title is as good as the weakest link of the chain of title. Accordingly, if a vendor's common law title is defective in any way, so would be the purchaser's title. Hence, it is incumbent on the purchaser to ensure that the vendor's title is beyond question. This may involve both inquiries and an examination of the chain of title.

The registered proprietor of Torrens land is said to have an indefeasible title. That means that only in very limited circumstances can his or her title be challenged. These challenges are established in the legislation, and are subject to rules made by courts. For example, in Victoria such challenges are established in section 42 of the Transfer of Land Act 1958. A court can also adjust rights as between parties before it, and order changes to the register accordingly.

## Indefeasibility of title

Indefeasibility of title applies to the registered proprietor or joint proprietors of land.

This indicates that the registered interest holder will be free from all encumbrances other than *inter alia*:

- Those listed on the title;
- Those claiming the land on a prior folio;
- where the land is included by wrong description on the part of the Registrar and the proprietor is not or has not derived title from a purchaser 'for value';
- paramount interests- (f) – these interests, although even possibly unregistered, are 'superior' to interests that are registered.

Additionally, there exist exceptions or circumstances that can penetrate the indefeasibility. Common factors that, when evidenced by a party, may penetrate and defeat the registered holder's claim include:

- Fraud committed by the registered interest holder [principle of immediate indefeasibility].
- Judicial action, where it can be shown that there was some contractual promise or undertaking by the registered party *vis-a-vis* the unregistered party;



- Inconsistent legislation (in which case the most recent legislation prevails);
- Volunteer, where the registering party acquires the interest for no consideration (e.g. bequeathed in a will).

# TOPIC 3 – INDEFEASIBILITY OF TITLE

## Objectives of Torrens system

- Registration under the Torrens system has the following **objectives**, namely to:
  - provide a register from which persons who proposes to deal with land can discover all the **facts** relevant to the title;
  - ensure that a person dealing with land which is registered is not **adversely** affected by any **defects** in the vendor’s title which do not appear on the register;
  - guarantee the **conclusiveness** of the register; and
  - provide adequate **compensation** to any person who suffers a loss as a result of this guarantee

## Indefeasibility of title

- The Torrens system operates upon the fundamental principle that registration confers an “indefeasible title” to the registered proprietor
- Meaning of “Indefeasible title” under Land Titles Act (Tas) s 40:
  - “subject only to such estates and interests as are recorded on the folio of the Register or registered dealings evidencing title to land”
- Indefeasibility of title is the **immunity** from attack by an dverse claim to the land which the registered proprietor enjoys (*Frazer a v Walker*).
- Indefeasibility refers to the fact that every time a title is registered, it is created **anew** and acquires a greater level of protection
- It means that at the time of registration, the registered proprietor of an interest in land receives **unassailable** rights to the land which are only **subject** to other interests registered on the title (encumbrances) and statutory or non-statutory exceptions
- Upon registration of an interest it automatically acquires **statutory protection**
- Title is not historical or derivative (ie it does not derive from your predecessor or is not based on historical events. It is created anew.
- Title is a product of registration

## Meaning of indefeasibility

- A registered holder will not be affected by the **doctrine of notice** – save fraud (**s43**) – and the **nemo dat non habent rule**

*“The object is to save persons dealing with Registered Proprietors from the trouble and expense of going behind the register”.* **Gibb v Messer 1891**

The technical meaning of indefeasibility is **indestructibility** or inability to be made invalid:

1. This is true insofar as it applies to the provisions of the Torrens system:
  - Upon registration under the Torrens system, an interest holder cannot have his or her interest defeated by an unregistered interest, even where the interest holder registers with notice of the existence of the unregistered interest- it is indefeasible
2. This is not true insofar as it does not mean that the registered interest is completely indestructible:
  - a) The security that the Torrens system provides is not **absolute**: all registered interest holder will take subject to those **encumbrances** which have already been, or which may in the future be registered on the title;
    - An encumbrance is any right or interest that exists in someone other than the owner of an estate and that restricts or impairs the transfer of the estate or lowers its value. Ex: an easement, a lien, a mortgage and unpaid taxes.
    - The encumbrance must be recorded in folio/a paramount interest to restrict a Torrens estate.
  - b) A registered interest holder is fully capable of alienating his or her interest and, once a subsequent transfer of the interest is registered the subsequent registration will **defeat** the prior registration; and
  - c) The indefeasibility of title conferred upon a registered interest holder is subject to an extensive range of statutory and non-statutory **exceptions** in all states

### **INDEFEASIBILITY UNDER THE TORRENS SYSTEM IS A RELATIVE CONCEPT:**

- it refers to the fact that if a title is examined or attacked at a given point of time, it cannot be defeated or annulled
- it does not mean that the title can never be defeated
- The effect of indefeasibility is set out in the so-called **paramountcy/indefeasibility provisions** of the Torrens legislation of each State
- Paramountcy provisions is the foundation of the Torrens system
- The overall **effect** of the of the indefeasibility is described and **not indefeasibility** as such
- Provisions ensures that a state guaranteed title is acquired subject only to registered interests and statutory and non-statutory exceptions

### **PARAMOUNTCY PROVISIONS**

The statutory provisions which, in combination, have conferred the indefeasible status upon a registered interest holder are known as the “paramountcy provisions.”  
In TLA (Vic):

- S 40: **effect** of registration;

- S 41: certificates of title are **conclusive** evidence of title;
- S 42: **conferral** of indefeasible title upon registration;
- S 43: abolition of the **doctrine of notice**; and
- S 44: the effect of **fraud**
- Paramountcy provisions represent the core of the Torrens legislative provisions in each State
- Provisions basically provides three forms of **protection**:
  - a. Priority over unregistered rights
  - b. Protects registered proprietors from the effect of notice
  - c. Protection from interference with possession

### Paramountcy provisions in detail:

#### ***S 40: instrument not effectual until registered***

*s 40(1): "Subject to this Act no instrument **until registered** as in this Act provided shall be effectual to create vary extinguish or pass any estate or interest or encumbrance in on or over any land under the operation of this Act, but upon registration the estate or interest or encumbrance shall be created varied extinguished or pass in the manner and subject to the covenants and conditions specified in the instrument or by this Act prescribed or declared to be implied in instruments of a like nature".*

\*\*s 40(2) has been repealed

#### **Meaning of s 40(1)**

- Strict reading: no interest can exist prior to registration (unregistered interests not recognised by the system)
- Unregistered interest however do exist under TS
- Other provisions in statute recognises unregistered interests
- Denial of the effect of a right until registration does not touch whatever right is behind it (*Barry v Heider*)
- Section 40(1) does not preclude the existence of unregistered interests but merely sets out where capable of being registered, the benefits of registration will not be conferred until the instrument is actually registered
- Registered interest is subject to covenants/conditions in instrument or prescribed by the TLA or implied in a similar interest
- Conclusion of contract or execution of a deed will not create a property right in TS.

#### **S 41: CERTIFICATE TO BE CONCLUSIVE EVIDENCE OF TITLE**

*“No folio of the Register under this Act shall be impeached or defeasible by reasons or on account of any informality or irregularity in any application or instrument or in any proceedings previous to the creation of the folio or the making of any recording on it; and every folio of the Register shall be received in all courts as **evidence** of the particulars recorded in it and all the recordings of those particulars in the Register, and **shall be conclusive evidence** that the **person** named in the folio as the proprietor of, or having any estate or interest in, or power to appoint or dispose of, the land described in the folio is seised or possessed of that estate or interest or has that power.”*

#### **Meaning of s 41**

- Prior irregularities does not make present title indefeasible
- Folio is evidence of the recordings in it as well as recordings of that particulars in register
- S41, the evidentiary provision, sets out every Crown grant or certificate of title is to operate as conclusive evidence of proprietorship existing in a particular folio of land
- Section 41 endorses the fact that Registrar provides conclusive evidence of title
- Prospective purchasers can rely upon the accuracy of the register

#### **S 42: ESTATE OF REGISTERED PROPRIETOR PARAMOUNT**

*S 42(1): “Notwithstanding the existence in any other person of any estate or interest (whether derived by grant from Her Majesty or otherwise) which but for this Act might be held to be paramount or to have priority, the registered proprietor of land shall, **except in case of fraud**, hold such land **subject** to such **encumbrances** as are recorded on the relevant folio of the Register but absolutely **free** from **all other encumbrances** whatsoever, **except—***

*(a) the estate or interest of a proprietor claiming the same land under a prior folio of the Register;*

*(b) as regards any portion of the land that by wrong description of parcels or boundaries is included in the folio of the Register or instrument evidencing the title of such proprietor not being a purchaser for valuable consideration or deriving from or through such a purchaser.”*

#### **Effect of s 42(1)**

- This is the “general rule” of indefeasibility

- The effect of s 42(1) may be summarised as follows, namely that:
- Common law priority rules are abolished if interests
- The registered proprietor acquires a guaranteed statutory title and will only be subject to those encumbrances **actually noted** /recorded on the folio of the Register
- Registered proprietor is free from other encumbrances
- Once registered, the registered proprietor will have priority over the land despite the existence of other interests
- **Fraud** (of registered proprietor) will **vitiates** (extinguish) the priority of a registered proprietor: registration was obtained by proprietors own fraud
- The exact nature of the fraud is not described or elaborated

### Meaning of proviso to s 42(1)

- The title will be subject to the exceptions set out in sub-ss (a) and (b):
  - a. The prior folio or certificate of title exception applies where there are two folios or certificates in existence at the same time in respect of the same land.
    - Indefeasible title will not be given if the same land is given to a previous proprietor under a prior folio
    - The “paramountcy provision” protecting the **first registered proprietor** has priority over the “indefeasibility provision” of the second registered proprietor.
  - b. Indefeasible title will not be given if the land is to be included by **wrong description** and the proprietor is not a purchaser for value or has not derived title through such purchaser

#### **S 42(2) INDEFEASIBLE TITLE SUBJECT TO EXCEPTIONS:-**

*“Notwithstanding anything in the foregoing the land which is included in any folio of the Register or registered instrument shall be subject to*

*(a) the reservations exceptions conditions and powers (if any) contained in the Crown grant of the land;*

*(b) any rights subsisting under any adverse possession of the land;*

*(c) any public rights of way;*

*(d) any easements howsoever acquired subsisting over or upon or affecting the land;*

*(e) the interest (but excluding any option to purchase) of a tenant in possession of the land;*

*(f) any unpaid land tax, and also any unpaid rates and other charges which can be discovered from a certificate issued under section three hundred and eighty-seven of the **Local Government Act 1958**, section 158 of the **Water Act 1989** or any other enactment specified for the purposes of this paragraph by proclamation of the Governor in Council published in the Government Gazette*

*notwithstanding the same respectively are not specially recorded as encumbrances on the relevant folio of the Register”.*

#### **Meaning of s 42(2)**

- Section 42(2) provides a further exception to the primacy of the registered proprietor's title as established in section 42(1)
- Where an interest is classified under sub sections (a)-(f), it is described as a **paramount interest** and all registered interests must take subject to paramount interests
- PARAMOUNT interests (s 42(2)(a)-(f)) - these interests, although even possibly unregistered, are 'superior' to interests that are registered.
- Paramount interests are exceptions to indefeasibility of registered title
- Paramount interests remain enforceable against all registered interest holders despite the fact that they have not been registered on the folio

**In addition to paramount interests, there are other exceptions** or circumstances that can 'penetrate' the indefeasibility: These are:

- **FRAUD** - where fraud is committed by the registered interest holder (principle of immediate indefeasibility);
- **IN PERSONAM**- where it can be shown that there was some contractual promise or undertaking by the registered party vis-a-vis the unregistered party.

- **INCONSISTENT LEGISLATION**- where legislation enacted after the Torrens legislation is inconsistent with the Torrens legislation, the later will prevail
- **VOLUNTEER** - where the registering party acquires the interest for no consideration (e.g. bequeathed in a will).

**S 43: PERSONS DEALING WITH THE REGISTERED PROPRIETOR NOT AFFECTED BY NOTICE**

- *“Except in the case of fraud no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any land shall be required or in any manner concerned to inquire or ascertain the **circumstances** under or the **consideration** for which such proprietor or any previous proprietor thereof was registered, or to see to the application of any purchase or consideration **money**, or shall be affected by **notice** actual or constructive of any **trust** or **unregistered** interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as **fraud**.”*

**Meaning of s 43**

- S 42 is reinforced in its effect by s 43.
- Except in case of fraud, a person dealing with register is not required to ascertain the circumstances under which the proprietor/previous proprietor was registered
- A person dealing with the register is also not effected by notice of any trust or unregistered interest
- The aim of s 43 is to abolish the common law doctrine of notice
- As soon as a purchase is registered, the purchaser will take free from any outstanding unregistered interest, even if he or she has notice of its existence prior to registration.
- Mere knowledge that a prior interest existed will be insufficient to constitute such fraud
- Affords a greater level of protection than under general law land: the registered holder may enforce the title, even where they took title with notice of existence of previous title

**S 44: CERTIFICATES ETC VOID FOR FRAUD – AGAINST THE PERSON DEFRAUDED**

*S 44(1): “Any folio of the Register or amendment to the Register procured or made by fraud shall be void as against any person defrauded or sought to be defrauded thereby and no party or privy to the fraud shall take any benefit there from.”*

**Meaning of s 44(1)**



- The purpose of s 44(1) is to set out expressly that any transaction which is procured or made by fraud shall be void as against the person defrauded or sought to be defrauded, and no party who is privy to fraud shall take any benefit.
- Title of a fraudster is void as against the previous and the fraudster's title is defeasible
- Fraudster or person privy to fraud is targeted
- Fraud not defined
- Section 44(1) allows a person who has been defrauded to bring an action against the registered proprietor on the title

#### **S 44(2)**

- *“But nothing in this Act shall be so interpreted as to leave subject to an action of ejectment or for recovery of damages or for deprivation of the estate or interest in respect of which he is registered as proprietor any bona fide purchaser for valuable consideration of land on the ground that the proprietor through or under whom he claims was registered as proprietor **through fraud or error** or has derived from or through a person registered as proprietor through fraud or error; and this whether such fraud or error consists in wrong description of the boundaries or of the parcels of any land or otherwise howsoever.”*

#### **Meaning of s 44(2)**

- **Registered proprietors that acquired their rights in good faith** and for value are not subject to an action of ejectment or for recovery of damages or deprivation of an estate or interest on the ground that they have derived title from a person registered as a proprietor through fraud or error (ejectment section)
  - This is a qualification of **s 44(1)**- the **fraudster cannot benefit**- a person acting in good faith is protected (a bona fide third party)
  - A is registered proprietor- (bonafide purchaser for valuable consideration), the fraudster (who is also a solicitor) Mr X fraudulently registers the property in their name and subsequently it ends up in the hands of B (who acted in good faith and is bona fide). If you take ss 44(1) in the events between A and the solicitor Mr X, the solicitor cannot benefit from it and the transaction is void visa via the victim (A). The original victim cannot institute these actions against C the bonafide purchaser for value.

- **S 44(2)** qualifies the effect of **s 44(1)** by noting that nothing in the Act is to be read so as to deprive a bona fide third party purchaser for valuable consideration of an estate or interest
- On the wording of s 44(2), it seems that, even where the proprietor from whom the bona fide third party purchaser received the estate is proven to have been registered through fraud, the title of the bona fide third party purchaser will not be invalidated

### **Combined meaning of s 44(1) and (2)\*\*\*\*\***

- Section 44(1) and (2) are unique to the TLA (Vic)
- Their exact effect has been the subject of some debate.
- The combined effect of s 44(1) and (2) can be summarised as follows:
  - any registration of title shall be void as against any person who has been defrauded, and no party who is a subject to the fraud shall receive the benefit of registration. The solicitors title is defeasible.
  - The court will uphold the registration, even if acquired by fraud, if voiding the registration has the effect of interfering with an interest acquired by a bona fide third party purchaser
- Where a transaction has been tainted by fraud and that fraud has not been committed by the person seeking registration, section 44(1) is not applicable: “immediate indefeasibility” occurs upon registration.

### **Conclusion:**

#### **Indefeasibility has four features:**

1. Registered title is **conclusive** regardless of a defect in prior transactions or the process of registration itself
2. Registered proprietor is subject to statutory and other **exceptions** to indefeasibility
3. Registered title has **priority** over unrecorded interests
4. Registered proprietor is not affected by actual or constructive **notice of any unregistered interest** and is under no obligation to enquire into the circumstances in which the previous registered titles were obtained

### **IMMEDIATE AND DEFERRED INDEFEASIBILITY**

- Paramountcy provisions are subject to different **interpretations**
- In the debate between immediate and deferred indefeasibility the issue is whether **indefeasibility** should attach to a registered instrument if the proceeding **process of transfer** is **flawed**

- One must distinguish between the **process of transfer** (executing registrable documents) and **process of registration** (by Registrar)
- Is indefeasibility obtained **immediately** upon registration of the **flawed transaction** or is it deferred to one transaction after the flawed transaction?
- Example: A, the registered owner of Blackacre, leaves his certificate of title with his solicitor S for safekeeping. S forges A's name to a transfer of land in favour of B. The transfer is registered and B becomes the registered owner. A and B are both innocent. (Does B have indefeasible title or can A maintain an action to recover his land?) B subsequently transfers to C and C became the registered owner. (Does only C acquire indefeasibility?)
- Issue: Whether indefeasibility is acquired **immediately** upon registration subject only to fraud committed or brought home to the registered proprietor or whether defeasible title is deferred where the transaction is tainted by fraud or flawed
- The **answer** depends on whether immediate/deferred indefeasibility is adhered to
  - ANSWER
    - A, the registered owner of Blackacre, leaves his certificate of title with his solicitor S for safekeeping. S forges A's name to a transfer of land in favour of B. The transfer is registered and B becomes the registered owner. A and B are both innocent. B subsequently transfers to C and C became the registered owner.
    - Note: B has become registered under a void instrument because of the forgery. C took under a valid instrument
    - On the theory of **immediate indefeasibility B's** title is indefeasible.
    - On registration a registered proprietor **immediately** acquires an indefeasible title (unless statutory fraud has been committed or brought home to registered proprietor)
    - On the theory of **deferred indefeasibility B'** title is not indefeasible: defeasibility is deferred to one transaction away from the problem transaction. **C's** title would be indefeasible and would not be subject to attack by A.
    - Registered proprietor will have indefeasible title **deferred** in circumstances where the transaction has been affected by fraud which may not have been committed or brought home to the registered proprietor

**There are two approaches: -**

### **1. Immediate indefeasibility**

- Distinguish **process** of transfer (executing registrable documents) and process of registration (by the Registrar)
- Immediate indefeasibility means that a **proprietor is protected** as soon as his/her title is registered, regardless of the **invalidity** of the process of transfer or the defects in the transferor's title
- Upon registration the title of the registered proprietor is immediately indefeasible
- Immediate indefeasibility means that upon registration based on an **invalid document** the registered proprietor is entitled to the same priority as any other property right
- **A bona fide purchaser** for value whose interest becomes registered obtains good title (immediate indefeasibility) even where the transaction is affected by **fraud**
- Greater credence is given to the **registration provisions** than to the fraud provisions
- Immediate indefeasibility favours the conferral of absolute title upon registration by a bona fide purchaser unless a clear **actual fraud** committed by the person seeking registration can be established
- Fraud can only **set aside** the title of the registered proprietor where the registered proprietor was clearly involved in fraud
  - Torrens system is all about certainty and the RP will always retain title unless there is fraud involved
- The mere fact that the transaction is **tainted by fraud** is insufficient

## 2. Deferred indefeasibility

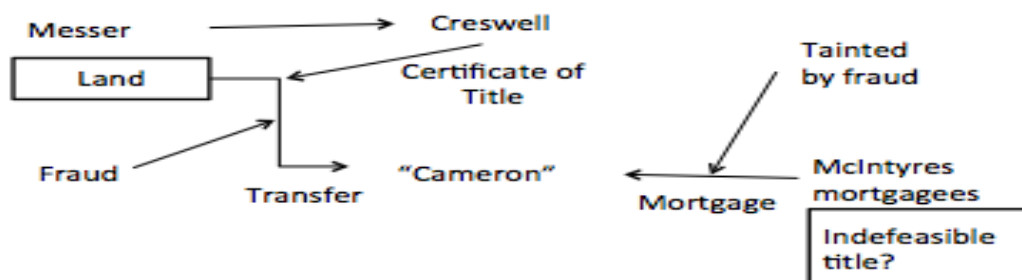
- Under deferred indefeasibility, if the instrument of the transferor is a nullity (forged signature – before registration), the transferee is unable to defeat a claim by the true owner
- Indefeasibility is deferred to **one transaction away** from the problem dealing
- Indefeasibility is deferred where the transaction creating the registration is **tainted by fraud**, even though fraud was not actually committed by the registered proprietor
- Rationalised on the ground that a proprietor should not be allowed to obtain a **benefit** from a fraudulent transaction
  - The register only gives protection to real people and so if a fictitious person is involved then they should not be afforded the same protection
- **Fraud provisions** are given greater credence than the registration provisions
- Thus, under deferred indefeasibility a bona fide purchaser whose interest becomes registered under a forged or void title will not obtain a good title, although protection may be given to a subsequent registered bona fide purchaser

- Deferred indefeasibility means that registration can be **cancelled**, but the cancellation will not affect the indefeasibility of any subsequently registered property right

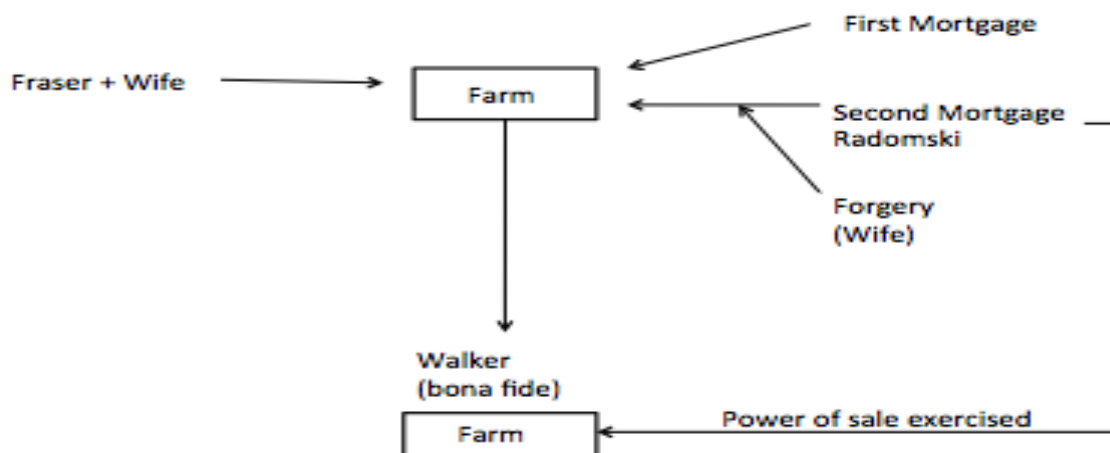
### Fictitious person exception

- A fictitious person is an exception to immediate indefeasibility
- It has been **held** where a person transacts with a fictitious person (person made up as part of fraudulent scheme or who does not exist at all), any subsequent registered title will be deferred. If it is a fake person on the register the person will not be protected.
- Rationale: system will only confer protection on a person who has actually derived title from a real person existing on the register (thus a form of deferred indefeasibility)

## *Gibbs v Messer*



## *Frazer v Walker*



**Gibbs v Messer (pc) (deferred indefeasibility / fictitious person exception)**

**FACTS:**

- Mrs Messer was the registered proprietor of land. Messer's solicitor was Mr Creswell. Creswell forged a transfer to a fictitious person, "Hugh Cameron". (Registered proprietor did not exist).
- Creswell then purported to act on behalf of Cameron and obtained a loan from the McIntyres. Loan was secured by a mortgage registered over the land of Messer. The mortgagees acted in good faith in registering the mortgage. Creswell absconded with the mortgage moneys.
- Mrs Messer sought to have her name reinstated on title, without the land being subject to the mortgage of the McIntyres.
- Mortgagees claimed that they had an indefeasible title which could not be set aside by the fraud in the transaction

**ISSUE:**

- Whether the McIntyres held an indefeasible title in mortgage given that registration had occurred pursuant to a fraud involving a fictitious person
- Messer was successful in the application. The PC ordered that her name be restored to title and decided that the mortgage did not enjoy indefeasibility, because it was provided for a non-existent person.

**Indefeasibility was to be deferred.**

**HELD:**

- The protection afforded by statute to persons transacting on the faith of the register is limited to persons actually dealing with and derive a right from a proprietor whose name is upon register.
- Those who deal not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register
- Those persons cannot by registration of a forged deed acquire a valid title in their own person
- However, the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration (**deferred indefeasibility obiter**)
- Hugh Cameron was a myth having no existence: could not execute a transfer nor a mortgage. McIntyres must have understood Creswell and Cameron to be distinct individualities whereas this was not the case
- Mortgage of the McIntyres is a nullity: did not deal with a registered proprietor: rights under null deed not indefeasible
- Lord Watson: no indefeasibility. Fraud in transaction + dealt with forger not real person.

*'The McIntyres cannot bring themselves within the protection of the statute, because the mortgage which they put upon the register is a nullity. The result is unfortunate, but it is due to their having dealt, not with a registered proprietor, but with an agent and forger, whose name was not on the register, in reliance upon his honesty.'*

**Comment:**

Decision appears to be:

- Either an instance of "deferred indefeasibility" where the transaction is tainted by fraud or
- An unusual exception, namely a registered title holder cannot claim the protection of indefeasibility where they have dealt with a fictitious person rather than the registered proprietor
- If the latter, the registered title holder can only claim indefeasibility if one takes transfer from a real person
- **Decision no longer followed but has never been overruled**

With regard to *Gibbs v Messer*: It is an open question as to whether it is an historical anomaly or a genuine exception to the principle of immediate, indefeasibility. **But it has not been followed nor overruled.**

**FRASER V WALKER (PC) (IMMEDIATE INDEFEASIBILITY)**

**FACTS:**

- Mr and Mrs Fraser were registered proprietors of land. Mrs Frazer borrowed money from the Radomski's, providing her with a (2nd) mortgage over the land. In achieving this, she forged her husband's signature (void). When the money was not repaid under the 2nd mortgage, the Radomskis exercised their power of sale and sold the land to Walker. Walker became the registered proprietor of the land. Mr Frazer resisted registration by arguing that the mortgage was a nullity as his name was forged on the mortgage documents.

**ISSUE:**

Could the mortgage be set aside given the mortgage transfer was void through forgery?

**PC HELD:**

- Upon registration of the mortgage, the mortgagee obtained an indefeasible title
- It was held that title of the Radomski's was an indefeasible transaction from the time of registration
- Radomski's took without fraud and the fact that the mortgage was a void document at common law did not affect the indefeasibility of their title
- PC endorsed immediate indefeasibility
- ***Gibbs v Messer* was distinguished** – bona fide purchaser taking from a fictitious person and a bona fide purchaser taking from a real registered proprietor.
- Although at common law, the mortgage was void as a forgery, registration cured this defect by enabling the binding of the mortgage to the land. Registration was sufficient to confer an unimpeachable title
- Indefeasibility does not deny the right of a plaintiff to bring a claim *in personam* founded in law or equity against a registered proprietor (see in later topics)
- Lord Wilberforce: Walker held indefeasible title. If no fraud then intention was to confer full title on registered proprietor subject only to *in personam* obligations

*'Registration under the Land Transfer Act 1952 (TLA in Vic) confers on a registered proprietor a title to the adverse claims, other than those specifically excepted.*

*In doing so they wish to make clear that **this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim in personam founded in law or in equity**, for such relief as a court acting in personam may grant.'*

- Mortgagee has passed title to innocent third party purchaser, who, upon registration, acquired protection of the legislation
- PC found in favour of Walker because his title as a registered bona fide purchaser for

## **BRESKVAR V WALL (HC)(IMMEDIATE INDEFEASIBILITY) NEED TO GO OVER**

### **FACTS**

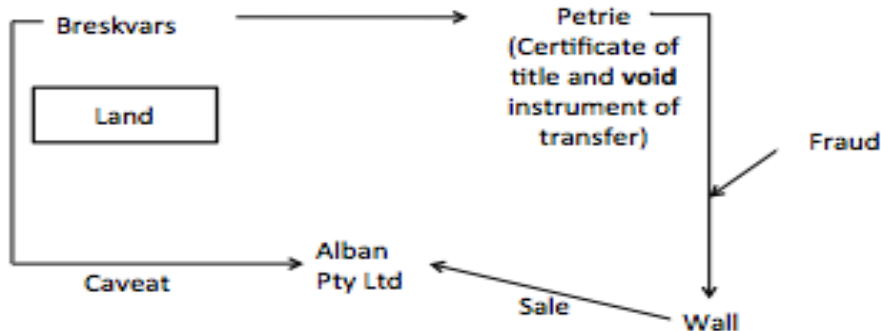
- Breskvars were registered proprietors of land. They obtained a loan from Petrie, providing him with the duplicate certificate of title and a signed blank transfer form
- Section 53(5) of the Queensland Stamp Act of 1894 provided that no transfer “shall be valid either at law or in equity unless the name of the purchaser or transferee is written therein in ink at the time of the execution thereof. Any such instrument so made shall be absolutely void and inoperative ...”
- Thus, due to these legislative requirements in Queensland, the transfer was void because the name of the purchaser was not inserted.
- Petrie subsequently fraudulently inserted the name of his grandson, Wall into the transfer.
- Wall became the registered proprietor and contracted to sell the land to Alban Pty Ltd and executed a deed.
- Before Alban registered their interest, the Breskvars had discovered what had gone on, and lodged a caveat against dealings with the land.
- Breskvars argued that they retained title because registration of a void instrument was ineffective to transfer interest to Wall

### **HELD:**

- Invalidity of process of transfer did not have the effect of preventing the passing of title upon registration
- Torrens system is not a system of registration of title but a system of title by registration. The title which the certificate certifies is not historical or derivative
- It is the title which registration itself has vested in the proprietor
- Consequently, a registration which results from a void instrument is effective according to the terms of the registration
- The reason for voidness is irrelevant – the only relevancy of a property interest is registration of title
- The effect of Stamp Act upon memorandum of transfer is irrelevant to question whether certificate is conclusive of its particulars
- Upon registration of memorandum of transfer title was vested in Wall
- The conclusiveness of the certificate of title is definitive of title of registered proprietor
- “...there is immediate indefeasibility of title by registration of the proprietor’s named in the register”
- **Held that although Wall was party to fraud, this simply meant that his title was defeasible. If he had not been a party to the fraud, his interest would be immediately indefeasible**
- Wall became the registered proprietor when he registered his instrument. His involvement in the fraud deemed his registered title defeasible. Given he had registered title, he was still able to create a valid equitable interest in a third party.
- As the Alban had not registered their instrument, they were not registered proprietors.
  
- Actually the decision involved a dispute between unregistered interests of Breskvars against equitable interest of Alban under the contract of sale. Breskvars has the right to sue and recover the land and have the register rectified.
- As the Breskvars had armed Petrie with the power to deal with land as owner and thus enabled him to transfer title to Alban, interests of the Breskvars were postponed and resolved in favour of Alban:
  - Memorandum of transfer was executed without inserting name of purchaser
  - Handed over duplicate certificate of title
  - Authorised exercising of powers by mortgagee
- Lost priority to which their prior interest would have entitled because Breskvars armed Wall with means of placing himself on the register (approved **Abigail v Lapin**) – applied **Rice v Rice** test.



# Breskvar v Wall



**Barwick CJ:** ‘The Torrens system of registered title of which the Act is a form is **not a system of registration of title but a system of title by registration**. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. **The title it certifies is not historical or derivative**. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void.’

## Comments:

- If a registered proprietor receives transfer from a fraudulent transferor, and the transaction is tainted by fraud, Torrens legislation will confer immediate indefeasibility on the title of the subsequently registered proprietor if they have not been personally involved in fraud

## Criticism:

- It has been argued that a more lenient approach should be taken and that title of registered proprietor should be set aside where the transaction was tainted by fraud, even though the registered proprietor was not directly involved with fraud.
- s 44(1): any folio procured or made by fraud is void (however, s 42(1) refers to fraud on the part of the proprietor)
  - S 44(1) include all kinds of frauds (**Chasild Pty Ltd Taranto**)
  - Fraud in s 44(1) should be the same as s 42(1), namely fraud committed by the registered proprietor (**Vassos v State Bank of SA**); thus immediate indefeasibility
    - i. **Vassos v State Bank of South Australia**, the bank obtained a mortgage over land owned by three tenants-in-common. One of the tenants-in-common subsequently obtained a substitute mortgage for a greater sum by forging

the signatures of the other two tenants-in-common. In this case the bank's mortgage was not obtained as the result of fraud, nor was there an exception under the *in personam* exception. On the *in personam* exception, Hayne J said this case was distinguishable from *Mercantile Mutual v Gosper*. He reaffirmed that more than a mere forgery was required. Even though the bank was negligent in the manner in which it took the forged mortgage, there was, at 333, 'no misrepresentation by it, no misuse of power, no improper attempt to rely on its legal rights, no knowledge of wrongdoing by any other party. ... Even if by making reasonable enquiries the bank could have discovered the fact of the forgery I do not consider that that fact alone renders its conduct unconscionable'.

- If fraud is not **committed by a registered proprietor s 44(1) does not apply**

**\*\*\*\*Accepted that immediate indefeasibility interpretation is consistent with the aims of the Torrens system\*\*\***

### ***City of Canada Bay Council v Bonaccorso Pty Ltd NSWCA***

- The CCB council sold two parcels of land and the purchaser registered the transfer of each lot. The council would have **lacked the power** to sell or dispose of the land if the land qualified as "community land" in terms of the Local Government Act, (s 45)
- On the facts it was found by the court that parcels of land were indeed "community land"
- Issue was whether purchaser obtained **indefeasible** title to land upon registration pursuant to the Real Property Act 1900 of NSW, notwithstanding **breach** of section 45 of the Local Government Act
- Found that **until** registration there was opportunity to **set aside** the transaction and prevent registration; opportunity was lost upon registration
- Held there was no implied repeal of indefeasibility provisions by s 45
- S 45(1) merely **deprives** a Council from power to sell "community land"; it does not declare transfer/registered transfer to be **void** nor does it render unlawful the acquisition of title to land by purchaser
- Held that the legislature did not **intend** to deny the transferee of community land the benefit of indefeasibility of title upon registration

#### **Terms in registered instrument:**

- Indefeasibility of what? All covenants of instrument?

- Although an instrument is indefeasible when registered not all the covenants in the instrument may be indefeasible
- Distinguish between **personal contractual obligations (defeasible) and land interests (indefeasible)** in instrument
- Indefeasibility only conferred on covenants which are integral to registered interest
- Not covenants which are merely personal
- Test used is 'touch and concern' test
- Registration validates those terms which **delimits** or **qualify** the estate or interest

**MERCANTILE CREDITS LTD V SHELL CO OF AUS LTD - this refers to a REGISTERED LEASE**

**FACTS:**

- Shell was granted a five year lease by Celtic Agencies. Within the five year lease there were a number of covenants allowing Shell to renew the lease. The lease was registered.
- Celtic Agencies granted a mortgage over the land to Mercantile Credits. When Celtic Agencies defaulted in making payments, Mercantile Credits sought to exercise the power of sale.
- Shell lodged a caveat prohibiting the registration of any dealing unless that dealing was to be subject to the renewals granted in the lease. Mercantile Credit sought a declaration that the renewals within the lease were not binding on it.

**Held:**

- **Barwick CJ** held that the title of the registered proprietor of the lease, including the interest in land derived from the covenant for renewal, became absolute and indefeasible
  - **Reasoned: A right of renewal within a lease shall receive the same indefeasibility protection as all other terms and conditions incorporated within the lease**
  - Legislation dealt with registrable instrument rather than registrable interest (right of renewal *per se* not registrable)
  - A promise to renew which is not contained in a memorandum of a lease is not registerable
  - If covenant to renew is part of a memorandum of lease it is indefeasible
  - *Once an interest defeated by subsequent registration is extinguished it cannot be revived against later proprietor: Leros v Terar*
- **Gibbs J:** right of renewal is so intimately connected with the term granted to the lease, which it qualifies and define, that it should be regarded as estate or interests which the lessee obtains under the lease. On registration it is entitled to same priority as the term itself.
  - **Reasoned:**
  - Drafters of Torrens legislation could not have contended the inconvenience that a right to renew could be defeated by a subsequent registration of a mortgage
  - Legislation itself supports the view that right of renewal should be protected

### Extent of indefeasibility

- Scope of protection provided by registration extends to include **all associated** interests
- A registered lease will protect all properly created and **attached** covenants, including **options to renew**
- The Act deals with registrable **instruments** not with registrable interests
- A right to renew incorporated into the instrument creating the lease will receive the same level of **protection** from the Torrens system as would be conferred upon any of the provisions contained within the lease instrument
- Right to renew is so **intimately** connected to the term granted to the lessee, which it qualifies and defines, that it should be regarded as part of the estate or interest which the lessee obtains under the lease.
- On **registration** of the lease, the lessee is entitled to the same **priority** as the term itself
- Registration of a **mortgage** will not necessarily result in validation of all terms of mortgage
  - Covenant to pay specified amount of money is integral to mortgage: is indefeasible on registration of mortgage
- Distinguish between personal **contractual obligations** and land interests (limitation or qualification of estate/interest)

### Conclusion

- Title is acquired by **registration**
- Registration is **separated** from process of transfer
- Upon registration of a document **title** is acquired by the transferee whatever the **invalidity** of the process of transfer
- If the invalidity of the process of transfer did not amount to **fraud** on the part of the registered transferee the title is **indefeasible**
- If the invalidity of the process of transfer involves **fraud** on the part of the registered transferee, title still vest in the transferee but it is **defeasible**
- A previous registered proprietor who has been defrauded is able to bring an **action** to recover title

### Immediate indefeasibility

- Immediate indefeasibility is followed by the Australian courts
  - Immediate indefeasibility is a harsh blunt instrument resulting in the lost of title by the true owners through no fault of their own (Ex Mr Frazer)
- The innocent purchaser trumps the interest of the previous registered proprietor (Ex Walker)
- It, however, provides legal certainty
- Argued that immediate indefeasibility is indefensible and should be altered
- Argued that purchaser of land from a void instrument (such as forgery) should be compensated by money rather than the owners
- Human rights consideration: present value judgement in favour of immediate indefeasibility may come under scrutiny

## CHAPTER 1.

### INTRODUCTION.

#### 1.1 THE CADASTRE.

A cadastre is essentially a record of interests in land encompassing both the nature and extent of these interests. The cadastre has basic elements which include the unambiguous definition of land parcels and their related information like area, value, location and ownership. The validity of the cadastre tends to lie in its official status. The factors of land, law and people influence the operation of the cadastre in any given environment. Generally speaking, cadastres are composed of two parts, the first part being the written record of land parcel information; the second part consisting of a detailed map or plan depicting the land parcel in question.

Cadastrals may be classified into the following functional classes, namely

Fiscal cadastre,

Legal cadastre, and

Multipurpose cadastre.

#### **FISCAL CADASTRE:**

Fiscal cadastrals were historically compiled for the purpose of providing an information base which was used for raising revenue through land taxation. However, nowadays the trend of the fiscal cadastre has changed towards legal and multipurpose cadastrals, though their theme of equitable and efficient assessment of real properties, and the provision of the framework for valuation and equitable assessment for improvements of the land still remains the cardinal feature of fiscal cadastrals.

## LEGAL CADASTRE:

This kind of cadastre is a general official register which contains records of proprietary interests in land. The purpose of the legal cadastre is to provide information about the legally recognised interests in land parcels. It also provides a means of legal transfer of the recognised land interests. The Zambian cadastre falls into this category. A conceptual (ideal) legal cadastre is built upon the following four principles:

- \* booking principle
- \* agreement principle
- \* publicity principle, and
- \* speciality principle

- The booking principle requires that an interest in land before it can be legally transferred, and must be registered in the cadastral record. This requirement is partially fulfilled in Zambia. However, due to the emergence of the informal sector as will be later explained in detail in chapter 5, this principle is being overlooked.



- The agreement principle implies that the transfer of landed interests should be based on formally recognised agreement between the vendor and the vendee of such interests.
- The principle of publicity means that the cadastral record should be kept open to the public at all times, and
- The principle of speciality implies that the cadastral record and the land parcel must be legally related in some way, and usually the link between the two is a parcel identifier (elaborated on in chapter 5.).

#### **MULTIPURPOSE CADASTRE:**

A multipurpose cadastre is a parcel based land information system which holds information pertaining to land ownership, land economics, physical and economic planning, statistics and management. Therefore it can be viewed as encompassing both fiscal, legal and a host of other utility and inventory functions.