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Security And Economy In Land Transactions: Some Suggestions From Scotland And England*

by Ted J. FifiLes**

ALTHOUGH the Torrens system of title registration as known in the United States is virtually dead in all but a few places,¹ there is much reason to believe that the inherent weaknesses of the recording system, with and without title insurance, are such that we must ultimately convert to a title registration system which does not have the defects of Torrens.

Most current writers, including those who believe that title registration is superior to recording, hold precisely the opposite view; i.e., that recording with title insurance ultimately will be the primary mode of assuring titles in the United States.² What are the reasons for my more optimistic view?

I. Factors Pointing Toward Title Registration

It is unnecessary to point out the shortcomings of recording and title insurance since these have been adequately explored elsewhere.³

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¹ See, e.g., Johnstone, Title Insurance, 66 YALE L.J. 492, 514 n.93 (1957); Payne, In Search of Title, 14 ALA. L. REV. 11 (1961).

² E.g., Q. Johnstone & D. Hopson, Lawyers and Their Work 312-14 (1967) (by clear implication); Cribbett, Some Reflections on the Law of Land—A View from Scandinavia, 62 NW. U.L. REV. 277, 283 (1967); Cribbet, The Lawyer and Title Insurance, 1 REAL PROP., PROB. & TRUST J. 355-56 (1966) (panel discussion). All three authors have concluded that even the worst of the title registration systems—Torrens—is better than recording, by all standards, except for the expense and delay of initial registration. Q. Johnstone & D. Horson, supra at 276, 313; Cribbet, Conveyancing Reform, 35 N.Y.U.L. REV. 1291, 1303 (1960); see Johnstone, Title Insurance, 66 YALE L.J. 492, 513 (1957).

³ E.g., Cross, Weaknesses of the Present Recording System, 47 IOWA L. REV. 245 (1962) (also citing numerous other authorities to the same effect).

The makeshift, patchwork "improvements" of the recording acts may raise their own problems which will come back to haunt future generations. See Barnett, Marketable Title Acts—Panacea or Pandemonium?, 53 CORNELL L. [171]
The principal factors leading to the conclusion that, in spite of the demise of Torrens, title registration is the cure for these defects are: the recent advances in technology (especially in computer technology); a change in the nature of relationships among federal, state and local governments (including the intensified interest of the federal government in urban affairs); a change in the power structure of those groups and persons interested in conveyancing; and the experience of other nations.

This paper is concerned primarily with the fourth factor, the experience of other nations, and, as to it, only with the English and the Scottish experience. Nevertheless, a cursory word about the other three factors is in order.

A. Recent Advances in Computer Technology

Concerning the first of these, it is clear that computers will work profound changes in conveyancing. Already private title insurers and public recording offices are making good use of existing equipment.

Rev. 45 (1967).

The most serious drawbacks to the use of title insurance are: (1) a law analogous to Gresham's—wherever title insurance has been in widespread use, independent representation by counsel has diminished drastically; (2) as a concomitant, no one, including the title insurer, performs certain functions to protect the parties; (3) the premiums are very high; (4) the title insurance industry, like electric and gas utilities, tends to be monopolistic; (5) title insurers cannot tolerate and therefore must oppose reforms which diminish the defects in recording. See generally Fiflis, Land Transfer Improvement: The Basic Facts and Two Hypotheses for Reform, 38 Colo. L. Rev. 431, 444-48, 461-62 (1966) [hereinafter cited as Fiflis, Land Transfer Improvement].


The most extensive work to date in exploring the use of computers and modern surveying techniques in conveyancing has been performed by Professor Robert N. Cook of the University of Cincinnati College of Law. He has compiled a useful bibliography of materials relating to uses of computers and other technology with respect to land records. Proc. Tri-State Conf.: Comprehensive, Unified Land Data System 232 (R. Cook & J. Kennedy, Jr. eds. 1967) [hereinafter cited as Tri-State Conf.].

One of the most sophisticated applications to date is that of Chicago Title and Trust Company. That company is now developing its system so that virtually all title reports in its Chicago office will be processed by computers.\(^6\)

Previously the company had preserved all information relating to each parcel of land in Cook County in five indexes known as the tract, general tax, special assessment, judgment and miscellaneous indexes. All items required to be recorded under the recording act were indexed in the tract index. The purposes of the general tax, special assessment and judgment indexes are manifest. The miscellaneous index covered bankrupts', minors' and decedents' estates. The first three indexes were organized by tract and the last two by names.\(^7\) Computer systems for storage and retrieval of the information for all but the tract index had been developed and put into at least partial operation by mid-1965.\(^8\) Since then the company has developed and is about to put into operation its automated system for indexing the data which until now has been placed in the tract index. This was a major breakthrough, since as late as 1966 it was assumed that it would not be economically feasible to use any then available computer to store and retrieve this volume of data.\(^9\) It was made possible by the production of an improved memory storage device capable of storing 400 million characters and providing rapid direct access.

The Company's system calls for the gradual development of a single parcel tract index. As a new order is placed, the tract will be given the number of the last prior order for that parcel and the data compiled in the conventional search will then be put on the memory device. Thereafter, all data relating to that parcel will be indexed according to the tract number thus designated. When a subsequent order is placed for a search of that same parcel, there will be no need for a conventional search. The computer will simply be directed to add to the original data all the information subsequently implementing a computer system); Workshop Sessions, Automation—To Date, 45 TITLE NEWS 104 (1966) (panel discussion); Alldredge, Improved Record Systems, in TRI-STATE CONF. supra note 4, at 146.

\(^6\) Interview with Mr. Edward Grskovich, vice president, Chicago Title and Trust Company, in Chicago, Illinois, June 8, 1967 [hereinafter cited as the Grskovich Interview].

\(^7\) Different tracts were used for the tract index, on the one hand, and the general tax and special assessment indexes on the other. The tax index tract was a single parcel of land as carried on the tax assessor's books whereas the tract index tract was usually several parcels (e.g., a square block composed of several parcels).

\(^8\) For an excellent detailed description of the company's operations to that time, see Q. JOHNSTONE & D. HOPSON, LAWYERS AND THEIR WORK 297 (1967).

\(^9\) Grskovich Interview, supra note 6.
recorded with respect to that parcel number. Because the average turnover rate of Company insured land in Cook County is faster than once in seven years, it estimated that data for about 75 percent of the title insurance orders in the county will be stored in the memory bank within ten years.10

A little reflection will lead one to recognize, as Johnstone and Hopson did, that “a continual running record of the insurability of all land parcels resembles Torrens registration,” and to raise this question: “[A]s the records involved are government records that government instrumentalities must keep in some form, might it not be most efficient for a government agency to store, retrieve, and evaluate these records as machine-processed Torrens certificates, registration being mandatory?”11

The same question is raised when one considers the current literature calling for use of computers in public recording offices. All the work of the ABA Committee on Improvement of Land Records is consistent with the ultimate development of a title registration system, although the Committee has never hinted that it favors title registration.12 This fact simply reinforces a point made in a prior article to the effect that recording acts and title registration acts are part of a single continuum, and as recording acts are improved, they approach ever nearer to title registration.13

B. Intergovernmental Relationships

The second factor which augurs well for title registration is the strong relationship evolving between the national and local governments and the intensified interest of the federal government in urban affairs.14 Increasingly, the states are being by-passed in favor of direct dealings with metropolitan areas. The clearest manifestation of this tendency is the formation of the cabinet level Department of Housing and Urban Development which is concerned directly with cities and metropolitan areas. Also, population trends point clearly to the ultimate result that the overwhelming proportion of our population will soon be residing in metropolitan areas.

As closer relationships between the federal government and metropolitan areas develop, and as the extensive programs for rejuvenating these areas require cheaper and more efficient land use de-

10 Id.
11 Q. JOHNSTONE & D. HOPSON, LAWYERS AND THEIR WORK 301 (1967).
12 Note 4 supra.
13 Fiflis, Land Transfer Improvement, supra note 3, at 434.
velopment tools, the federal government certainly might press to make one of these tools—the title records of land—more readily usable.\[^{15}\] And since the title registration system is clearly the most efficient title records system, we can expect that any such change will be directed toward the adoption of more of the features of title registration.

C. Change in Power Structure

The third factor mentioned, a change in the power structure of those groups and those persons interested in conveyancing, is also in the initial stages. Professor Payne has described the power structure which existed, until recently, for many years.\[^{16}\] He stated that title insurance companies were then the only effective force among all those groups and persons (title insurers, mortgage lenders, public officials, lawyers, and bar associations) interested in conveyancing. However, he suggested that the effect of the new technology on this power structure could be significant; i.e., that the industrial giants in the computer industry might look upon the 3050 local courthouses in the United States as suitable customers for computers and that they might, therefore, counterbalance the power of the title insurers.

In addition to this new force in the power structure, there has been some shifting within the existing structure. The American Bar Association Section of Real Property, Probate and Trust Law has been the mistress of the title insurance industry since the mid-thirties,\[^{17}\] but there is some evidence of a weakening of the grip of the insurers. In addition, through very astute management, several members of the ABA have succeeded in by-passing that Section, and have gained a voice through a temporary special committee on Lawyers' Title Guaranty Funds which has now become a permanent Special Committee. This committee has been very effective in fostering growth of the only real competition to commercial title insurance companies. Its latest forward step was the gaining of approval in principle from the House of Delegates for the formation of a national bar-related title assurance corporation.\[^{18}\]

At the meeting where this approval was given, an incident oc-

\[^{15}\] See, e.g., Dunham, *A Modern System of Land Title Records*, in Tri-Table Conf., supra note 4, at 27.


curred which further evidences the diminishing significance of the Section of Real Property, Probate and Trust Law. On the day before the approval in principle, the Section had approved the formation of a national conference, with a membership consisting of six representatives each from the ABA and the American Land Title Association (the title insurance trade association), whose purpose would be to consider and act with respect to the problems between the bar and the title industry.  

After the proposal of the Special Committee on Lawyers' Title Guaranty Funds was approved, it was further moved that the Special Committee, working with a subcommittee of the Board of Governors, draft a definitive plan for the national bar-related corporation. A proposal which would have effectively torpedoed the whole program was then made—it was moved that instead of the Special Committee working with the Board of Governors' subcommittee, it work with the newly approved National Conference. Fortunately, this proposal was defeated. Perhaps at last the organized bar has recognized the enemy within.

It is possible that a further significant change in the power structure will occur. It is common knowledge that attorneys have a powerful voice in most legislatures and have often put their own interest first in any move for law reform. Until now many attorneys have had the same vested interest in preserving the recording system as do the title insurers; in perhaps 50 percent of real estate transactions (mostly outside of the big cities) an attorney's opinion has been required. But as title insurers expand their operations, driving out increasing numbers of attorneys, this vested interest will evaporate, with the possible result that this very effective voice in legislatures now will weigh proposals for title protection systems more objectively. As will appear later, title reform in Scotland and England was greatly facilitated when the loss of income to the bar became an irrelevant factor because of a shortage of lawyers. Due to this shortage, substantial incomes could be made by means other than by the receipt of conveyancing fees.

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20 At least half the members of the National Conference would represent title insurance interests.
21 For a summary of the proceedings, see ABA Section of Real Property, Probate & Trust Law, Report, 53 A.B.A.J. 965, 969-70 (1967).
22 "The examination of an abstract or of the records themselves is still the predominant method outside the major cities and has a strong following even there in some areas, particularly New England." Committee on Improvement of Land Records, Proc. Real Prop., Prob. & Trust Law: Pt. II, at 190 (1964).
23 See notes 91, 167-68 infra.
D. Experience of Other Nations

The fourth factor from which ultimate success for title registration may be forecast, and the one with which this paper is primarily concerned, is the experience of other nations. Pressures for reform in other countries have led, almost without exception, to the adoption of some form of title registration rather than of a competing system. For example, England long ago adopted title registration, and Sweden, Scotland, and France are now considering it. The remainder of this paper concerns the recent conveyancing developments in England and Scotland, whose laws and culture are perhaps closest to our own.

II. The Scottish Experience

The Scots are about to abandon their existing recording system and adopt title registration. Because, until now, their conveyancing has been based on statutes and case law having a surprising similarity to our own recording system, their experience and their proposal for a title registration act should be especially valuable. For this reason, a study of the Scottish reform cannot be met with the objection raised regarding a study of the English system—i.e., that English conveyancing before title registration was basically private, without the recording of deeds, and therefore the conditions calling for title registration varied so fundamentally from conditions in the United States as to make the English success with title registration meaningless.

24 See Fiflis, English Registered Conveyancing: A Study in Effective Land Transfer, 59 Nw. U.L. Rev. 468 (1964) [hereinafter cited as Fiflis, Effective Land Transfer].


26 See text accompanying notes 132-38 infra.


28 This section of the article has been read for substantive correctness by Mr. G. E. Taylor, Solicitor to the Secretary of State for Scotland, and Mr. Gerald Black, Keeper of the Register of Scotland. Messrs. Taylor and Black have kindly provided their comments regarding some of the conclusions herein which were based on written committee reports and interviews. The substance of these comments has been included in the article. [Hereinafter cited as Comments] (copy on file in the Hastings Law Library).

29 See Committee on Conveyancing Legislation and Practice, Cmnd. No. 3118, at 10 (Scot. 1986) [hereinafter cited as the Halliday Report].

30 A recording system is now in effect in Yorkshire, England. Since 1925, recording of a memorial of a deed in the Yorkshire Deeds Registry is deemed to give "actual notice" to all, and recording establishes priority over unrecorded instruments. For further explanation, see 23 Earl of Halsbury, Hals-
The Scottish substantive law of real property does differ greatly from ours, principally in that the feudal system is still in bloom there. Early Scots law was borrowed in wholesale lots from Anglo-Norman law in the 12th and 13th centuries. During this period, most of the body of substantive English law was composed of the law of real property, which had become quite well developed. But for various reasons, reception of English law was minimal subsequent to the 14th century, and instead Roman civil law became the major source of Scots law until the 18th century. Thereafter, Anglo-American law attained greater significance. As a result, we find that the present day Scots law of ownership of real property is closely similar to old English common law, although in most other respects Scots law, including other aspects of land law, is based on the civil law of the continent.

Unlike in England, where the Statute of Quia Emptores was enacted in 1290, subinfeudation has never been prohibited by law in Scotland. As a result, the feudal hierarchy exists for most real

BURY'S LAWS OF ENGLAND 359 (3d ed. 1958). Since registration will soon be extended to Yorkshire, a comparison of the workings of the old and new systems there will be valuable. However, since the reason for extension of registration to Yorkshire is to conform the Yorkshire system to that of the rest of England and Wales, less can be expected of a study of this change than of a study of the Scottish change.

31 Cooper, From David I to Bruce, 1124-1329, in INTRODUCTION TO SCOTTISH LEGAL HISTORY 3 (Stair Soc'y Pub. No. 20, 1958) [hereinafter cited as SCOTTISH HISTORY].


36 For the early history of Scots feudal tenures, see Milne, Heritable Rights: The Early Feudal Tenures, in SCOTTISH HISTORY, supra note 31, at 147. Good comprehensive summaries of the development of Scottish land law, in addition to various articles in SCOTTISH HISTORY, are: C. Farran, Principles of Scots and English Land Law (1958); T. Smith, supra note 35, at 3-24, 459-546.

A good summary of current substantive law of land tenure is contained in the HALLIDAY REPORT, supra note 29.

37 HALLIDAY REPORT, supra note 29, at 62-66; T. Smith, supra note 35, at 510; see Monteath, Heritable Rights: From Early Times to the Twentieth Century, in SCOTTISH HISTORY, supra note 31; at 160, where it is said that a spu-
estate with the Crown holding title to all lands, a superior (tenant in chief) holding of the Crown, and a vassal (tenant) or vassals beneath him. Any number of links in the chain of tenancies may exist. Each tenant is a superior of the tenant beneath him in the chain, and a vassal of the tenant above him.

Just as in England, where incidents and services once were owed to the lord, so too in Scotland, “casualties” and services presently are owed. Today, however, incidents of tenure have been transformed into obligations to make periodic payments of money. Most, perhaps 80 percent, of all land in Scotland is held as feudal land. In addition, there is a right to convey by substitution instead of by subinfeudation.

It may be questioned whether the present existence of feudalism in Scotland renders its decision to adopt title registration less persuasive as an argument in favor of a similar American decision. Each of two committees—known as the Reid Committee and the Halliday Committee—recently appointed to study conveyancing in Scotland concluded that the feudal system is not incompatible with a title registration system. The Reid Committee found that, in fact, feudalism would provide additional difficulties. And neither Committee suggested that it would make title registration more feasible or desirable. If feudalism was neither a factor favorable to the adoption of title registration nor a reason to reject such a system, one must conclude that this aspect of the Scottish conveyancing milieu does not constitute a substantial reason why the decision to adopt title registration there is not persuasive in our own case.

rious Quia Emptores may have been adopted in Scotland, although it was never enforced.

One who enjoys antiquity should take special delight by a reading of the ancient statutes and reports of cases in this area. Such expressions as the “tinsel of the feu,” and spelling like that contained in an act Anent the Reg-ratione of reversiones Sealingis and vtheris writis, 4 Acts of Parliament of Scotland, c. 16, at 545 (1617), are especially delightful. There are many further examples, such as “altogidder” (altogether), “hienes” (highness), “aduyis” (advice), and “ane” (one).

39 There has never been a general restriction on subinfeudation, but alienation by substitution was not permitted until 1747 without the lord’s consent. T. Smith, supra note 31, at 512-13.
40 Halliday Report, supra note 29, at 64-65; Committee on Registration of Title to Land in Scotland, Cmd. No. 2032, at 36 (1963) [hereinafter cited as the Reid Report].
41 Reid Report, supra note 40, at 36.
42 It should be noted that it was concluded that the feudal system should be retained, but that it be reduced to a two tier system with all the perpetual holdings being of the Crown. Under one suggestion of the committee, any holder could create a new tenurial relationship for 60 years. Under an alter-
But this is sheer speculation. It is hard to determine whether these differences in the substantive law are of any consequence in determining the applicability of Scottish conveyancing experience to the United States. Perhaps this determination best can be made by considering conveyancing practices in both countries. But first it is necessary to examine the Scottish statutes concerned with recording of conveyances, in order to ascertain whether they are similar indeed to American recording acts.

A. Scottish Recording Statutes

The original act, like its American counterparts, is short and poorly drafted, in keeping with the legislative habits of the age—the early 17th century. It reads, in pertinent part:

(Original)
ANENT the Regratione of reuersiones Searingsis and vtheris writis
Oure Souerane Lord Consideriding the gryit hurt sustened by his Maiesties Liegis by the fraudulent dealing of pairties who haveing annaliet thair Landis and ressauit gryit soumes of money thairfore / Yit be thair vnjust concealing of sum privat Right formarlie made by thame rendereth subseuent alienatioun done for gryit soumes of money altoigidder vnprofitable whiche can not be avoyded vnles the faidis privat rightis be maid publict and patent to his hienes liegis FOR remedie whereof and of pe manye Inconvenients whiche may ensue thairupoun HIS Matie with aduyis and consent of pe estaitts of Parliament statutes and ordains That thair salbe ane publick Register In the whiche all ... instrumentis of seasing / salbe registrat within thriescore dayes after pe date of the same: ... And gif it salhappin any of the faidis writtis wche ar appoynted to be registrat as said is not to be dewlie regrat within the said space of thriescore dayes Then and in that case his maestie with aduyse and consent foirsaid Decernis 'the same to mak no faite in Judgment by way of action or exceptioun in preijudeice of a

(Translation)
Concerning the Registration of reversions, Seisins and other writs
Our Sovereign Lord Considering the great hurt sustained by his Majesty's Lieges by the fraudulent dealing of parties who have alienated their Lands and received great sums of money therefor, Yet by their unjust concealing of some private Right formerly made by them rendereth subsequent alienation done for great sums of money altogether unprofitable which cannot be avoided unless the said private rights be made public and patent to his highness's lieges FOR remedy whereof and of the many Inconveniences which may ensue thereupon HIS Majesty with advice and consent of the estates of Parliament statutes and ordains That there shall be one public Register In the which all ... instruments of seisin shall be registered within threescore days after the date of the same: ... And if it shall happen any of the said writs which are appointed to be registered as said is not to be duly registered within the said space of threescore days Then and in that case his majesty with advice and consent aforesaid Discerns the same to make no faith in Judgment by way of action or exception in prejudice of a

native suggestion, existing holdings would be eliminated within 60 years, so that the tenant in possession holds of the Crown, but any holder could subinfeudate and create new tenurial relationships. **Halliday Report, supra** note 29, at 72–80.
third pairtie who hathe acquyred ane perfyt and lauchfull right to the saidis landis and heritages but prejudice always to thame to use the said writs against the party maker thereof, his heirs and successors.\textsuperscript{43}

The first American recording act, enacted a few years later, in 1640, read:

For avoyding all fradulent conveyances, & that every man may know what estate or interest other men may have . . . in lands . . . they are to deal in, it is therefore ordered, that . . . no mortgage, bargaine, sale or grant hereafter to bee made of any houses, lands, rents or other hereditaments, shalbee of force against any other person except the grantor & his heires, unlesse the same bee recorded. . . .

And it is not intended that the whole bargaine, sale, etc., shalbee entered, but onely the names of the graunter & grauntee, the thing & estate granted, & the date . . . .\textsuperscript{44}

This act is basically the same in most respects as the modern American recording acts.\textsuperscript{45}

\textsuperscript{43} An act Anent the Regratione of reuersiones Seaingis and vtheris writis, 4 Acts of Parliament of Scotland, c. 16, at 545 (1617). Different publications spell words differently. See, e.g., the collection of acts printed by David Lindsay of Edinburgh in 1682 and 1683 and by Robert Freebairn and Company in 1731.

An “instrument of seisin” at this time meant an attestation by a “public notary” that seisin (i.e., possession) had been given by the grantor or his agent to the grantee or his agent. 1 J. Erskine, An Institute of the Law of Scotland 224 (5th ed. 1812) [hereinafter cited as Erskine]. The public notary’s statement, and not the deed, was registered. Id. at 237. Thus, the term “registration” is used commonly instead of “recording.”

In 1503, 1540 and 1555, statutes were enacted requiring registration of instruments within a certain time. Id. at 228. In 1599, and again in 1600, the Scottish Parliament, in two unprinted acts, required registration of instruments of seisin and other rights in real property within 40 days after the date of the instrument on pain of nullity. 1 G. Bell, Commentaries on the Laws of Scotland 676 n.1 (5th ed. 1828) [hereinafter cited as Bell]; 1 Erskine, supra at 228. But these acts had the effect of nullifying grants so that a grantor benefited. Since the primary aim of modern recording acts is not to protect grantors but to protect subsequent purchasers against unrecorded deeds, the 1617 Act marks the beginning of the modern recording system in Scotland.


\textsuperscript{45} In Beale, The Origin of the System of Recording Deeds in America, 19 Green Bag 335, 339 (1907), the author concluded that “[t]he most distinctive feature of the American system, the priority given to the earliest recorded deed, appears to have no prototype among foreign systems.” Haskins, supra note 44, at 303 n.111 is in agreement. Neither writer evidenced an awareness of the possibility that the prior Scottish legislation might have had some influence. In G. Haskins, Law and Authority in Early Massachusetts 172-
The fundamental similarity of the two quoted acts is apparent. The preamble to each states that the purpose of the act is to make conveyances public knowledge, in order to avoid injury to subsequent purchasers (who otherwise would be harmed by the rules of priority). They both permit the deed, in the one case, and the instrument of seisin, in the other, to be effective to pass the real rights in the land even without registration; however, they both avoid this effect as to third parties—but not the grantor and his heirs—unless the deed or instrument of seisin is registered.46

74 (1960), the author again fails to consider Scottish legislation, but here greater weight is given to English and Dutch customs.

Beale and Haskins both consider three features of American recording acts to be distinctive: (1) the whole deed is recorded, (2) the deed is operative without recording and (3) an unrecorded deed is void as against a subsequent purchaser. Haskins believes the requirement of acknowledgment is also a significant distinguishing feature. The 1640 Massachusetts Bay Colony Act required acknowledgment, but expressly precluded recording of the whole deed. The Scottish act required no acknowledgment, but the Instrument of Seisin was itself an eyewitness account by the "public notary" and thus differed from the American acknowledgment which presumably was, as it is now, a certification by a public official that the grantor acknowledged proper execution of the instrument. It was not until 1858 that full deed recording was permitted in Scotland. Titles to Land Act, 21 & 22 Vict., c. 76 (1858) (Scot.).

46 The Scottish act adds, "and successoures" to the words, "the party maker thairof, his heris . . ." In context the word "successoures" cannot be taken to include third party purchasers. It could be construed to mean inter vivos and testamentary donees and others standing in the shoes of the grantor. (In construing statutes of this age, one must remember that the draftsmanship is likely to be less than lucid.)

However, in 1847 the act was construed to mean that unless the deed was registered, the grantor retained title and that the grantee had only a personal claim against the grantor. Young v. Leith, [1847] Sess. Cas. 932. As a result of this construction, unregistered 1776 and 1797 instruments were denied effect. The dissent contains a clear and cogent statement of the more reasonable result. Id. at 977.

At any rate Young overrules prior contrary decisions. See, e.g., Keith v. Sinclair, 16 Morrison's Dictionary 13,562 (Ct. Sess. 1703); Simpson v. Blackie, 16 Morrison's Dictionary 13,553 (Ct. Sess. 1678). In addition, for at least two hundred years after enactment, the "institutional writers" thought that an unregistered instrument was valid as between the grantor and grantee. 1 BELL, supra note 43, at 680; 1 ERSKINE, supra note 43, at 228-29. Thus, we have the ever-recurring phenomenon of a generally held opinion as to the meaning of a statute being reversed by a court which holds that the statute has always meant something else.

The peculiar Scottish characteristic of so-called "institutional writers" requires some explanation. One good explanation is contained in D. WALKER, THE SCOTTISH LEGAL SYSTEM 250-51 (1951) where it is said: "Statements as to the law made by legal writers have varying degrees of authority, but always less than that of statute or case-law in that in case of conflict the rule laid down by statute or worked out by the courts has undoubtedly to be given
There are other parallel provisions in portions of the acts not quoted in the text. Both acts establish an official registration fee and provide for transmission by local registrars to a centralized registry. In addition, the Scottish act exempts instruments of seisin of royal burghs from the registration requirements, and the Massachusetts Bay Act exempts grants by a township. The explanation for this exemption in each case is the same; viz., that adequate records of such conveyances are kept otherwise. Interestingly, both acts also fail to resolve expressly such questions as whether the third party must be a bona fide purchaser for value without notice, whether the third party must himself first record, whether an official index must be kept, and the effect of the registrar's errors.

The close similarity of the provisions of these acts does not necessarily indicate that the Puritans plagiarized the Scots. Indeed, the difference in terminology indicates that this was not the case. And the historians apparently never received a clue that the Scottish act was copied in America.

A more likely explanation is that both acts were the result of the conditions of the times and the logical response to those conditions. Until about the 16th century, the ceremony of livery of seisin ("infeftment") in Scotland provided ample publicity for convey-
ances. But as written instruments of conveyance replaced this ceremony, fraudulent transfers increased, and this perhaps forced the Scots, for the first time, to resolve the problem that arose from the fact that their society had its share of get-rich-quick knaves who desired the benefits of easily multiplying their wealth by multiple sales of the same land.\textsuperscript{50} Apparently, the Puritans' similar impurity caused them also to adopt the same logical technique for avoiding the problem. Whatever the reasons, the fact is that the acts are very similar on their faces.

The obvious defects in the Scots' legislation were bound to give trouble which would lead to subsequent legislation and judicial construction, although the act apparently worked fairly well.\textsuperscript{51} The volume of transactions became great enough in 1672 to merit a requirement that the registrar keep a names index and a rough tract index.\textsuperscript{52} A few years later the previously excluded borough conveyances were included in the system.\textsuperscript{53}

The original statute required recording within 60 days. The problem was raised whether the 60 day period established a period of grace during which a recording by a purchaser would be valid against any other grantee who acquired a deed after the purchaser but before the purchaser recorded.\textsuperscript{54} The 1693 legislation established that priority should depend on recording, thereby eliminating the possibility of interpreting the statute as a period of grace type statute.\textsuperscript{55} And much later, in 1845, the 60 day requirement was excised.\textsuperscript{56}

In 1686, the Scottish Parliament had provided that a party who filed his instrument was protected against loss caused by the registrar's failure to register it properly, and that a defrauted subsequent

\textsuperscript{50} This is given as the reason for the 1617 act. \textit{Id.} at 158-159.

\textsuperscript{51} The preamble of a 1681 amendment begins, "Our Soveraign Lord Considering the great security that this Kingdom enjoyes by the publict Register of Sasines . . . ." \textit{Act concerning the Registration of Sasines, 3 Car., c. 11 (1681) (Scot.).}

\textsuperscript{52} \textit{Act concerning the Regulation of the Judicatories, 2 Car., c. 16, § 32 (1672) (Scot.).}\textit{The Land Registers Act, 31 & 32 Vict., c. 64 (1868) (Scot.).}\textit{Further developed the requirement that there be both a name index and a tract index.}

\textsuperscript{53} \textit{Act Concerning the Registration of Sasines, 3 Car., c. 11 (1681) (Scot.).}

\textsuperscript{54} See the period of grace type statute of Delaware. \textit{25 Del. Code § 153 (1953).}

\textsuperscript{55} \textit{Act concerning the Registers of Sasines, Reversions etc., 5 W. & M., c. 22 (1693) (Scot.). Chapter 23 also required the minute book (see note 81 \textit{infra}), that entries therein be made in chronological order, that instruments be registered in the order they appear in the minute book and established that the Keeper (recorder) shall be personally liable for failure to observe these statutory requirements.}

\textsuperscript{56} \textit{Infeftment Act, 8 & 9 Vict., c. 35, § 3 (1845) (Scot.).}
purchaser could recover damages from the registrar. But the policy of encouraging reliance on the records was disserved by this enactment. Ten years later the result was reversed, so that a subsequent purchaser got title and the prior purchaser obtained a right to damages against the registrar.

One problem with this early legislation, also faced in the United States, was whether the subsequent purchaser must be a bona fide purchaser. Just as was true in many of the American cases, where the statute was silent on this point, a *bona fides* requirement was read into the Scottish acts. This still did not resolve the question whether the statute was a “notice” or “race-notice” type. For example, if a purchase by A was followed by a purchase by B, a bona fide purchaser from the same grantor, but A then recorded before B did, who would prevail? One writer, without adverting directly to the question, implies that the statute was a race-notice type—i.e., that A would prevail. Since today a real right does not pass until registration, A clearly would prevail.

The requirement of registering the instrument of seisin continued until 1858 when it was provided that, thereafter, the instrument need no longer be registered, but instead the deed itself must be recorded in full. And ten years later a consolidating act substantially restated the 1858 legislation as follows:

> It shall not be necessary towards obtaining Infeftment in Land to expede and record ... an Instrument of Sasine ... but it shall be competent and sufficient ... to record the Conveyance or Deed itself ... and the Conveyance or Deed ... being so recorded ... shall have the same legal Force and Effect in all respects as if [it] ... had been followed by Instrument of Sasine ... expede in [his]

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57 Act Anent the Registration of Seisins and Reversions, 1 Jac., c. 19 (1686) (Scot.). See two American cases going different ways on the question of whether an instrument was “recorded” when filed with the recorder but not properly indexed. Prouty v. Marshall, 225 Pa. 570, 74 A. 550 (1908) (filing is not recording); Jones v. Folks, 149 Va. 140, 140 S.E. 126 (1927) (filing is recording).

58 Act Anent Registration of Seisins and uthir writts and diligences, 1 Will., c. 18 (1696) (Scot.). This act omitted the word “successoures” and was phrased more nearly like the Massachusetts Bay Act. It read “... that no seisin, or other Writ or Diligence appointed to be Registrate, shall be of any Force or Effect against any but the Granters, and their Heirs, unless it be duly Booked and Insert in the Register ... .”

59 Concerning the United States, see authorities cited in 4 AMERICAN LAW OF PROPERTY § 17.4 (A.J. Casner ed. 1952).


61 Bell, supra note 43, at 680.

62 Titles to Land Act, 21 & 22 Vict., c. 76, § 1 (1858) (Scot.). Conceivably, if one conveyed by an ancient livery of seisin, a real right would pass since the statute does not read exclusively.

63 Id.
favour... and recorded... at the Date of recording the said Conveyance or Deed... 64

Before 1858, the deed itself had the effect of giving only a cause of action to the grantee against the grantor, somewhat like a contract of sale under American law. 65 The instrument of seisin and the recording thereof gave the grantee a real right. 66 With elimination of the need to record the instrument of seisin by the 1858 act, a question arose as to what event established a real right in the grantee. Given the then existing law as to the effect of a deed, the only logical conclusion, based on the statute, was that the act of recording now became the act which established the real right, so that the statute became quite different in its effect—not only did it perform the function of fixing priorities between grantees; it also served to establish the time at which the grantee obtained real rights in the land vis à vis the grantor.

This characteristic of the Scottish system, because it is common to the title registration system and is not found in any current American recording act, may be thought to disqualify the Scottish experience. As noted, Beale thought that the converse characteristic (title passes regardless of recording) was a distinctive feature of American recording acts, which distinguished them from title registration acts. 67 But I have suggested elsewhere that the distinctions between recording acts and title registration acts are not generic. In fact, the two types are but different portions of a single continuum, i.e., recording acts vary in their characteristics and, as certain features are added to or subtracted from recording acts as we know them in the United States, they approach a similarity to title registration acts. 68 The feature added by the 1858 Act, whereby recording was made to effect the same change once accomplished by livery of seisin, is merely one of such changes of the recording act in Scotland

64 Titles to Land Consolidation Act, 31 & 32 Vict., c. 101, § 15 (1868) (Scot.).
65 ERSKINE, supra note 43, at 234. See note 45 supra.
66 Id. at 235.
67 Beale, supra note 45, at 339. As was so often true, Beale was wrong. The North Carolina statutes until 1885 were construed to make instruments invalid even between the parties until recorded. Hargrove v. Adcock, 111 N.C. 166, 16 S.E. 16 (1892); see N.C. Gen. Stat. § 47-18(b) (1966).
68 See Fiflis, Land Transfer Improvement supra note 3, at 434.
which tended to assimilate the system to a title registration system. The Scottish act thus further supports this thesis.

Additional features of the Scottish recording system which have been enacted since 1858 and which bring the system closer to being a title registration system are: The requirement of a tract index; the checking by the recorder of instruments submitted for recording to ascertain whether they are properly executed; the determination of whether the grantor is the apparent title holder; and the use of "search sheets." With these modifications, there is a close similarity between the present Scottish system and an American race-notice type statute. The prototype case, in which the first purchaser fails to record, and a subsequent bona fide purchaser obtains a better title only if he also records before the first purchaser, is resolved in precisely the same way in Scotland.

B. Scottish Conveyancing Practices

1. The Typical Land Transaction

Given this existing legal matrix, how is the typical Scottish real estate transaction consummated?

Until recently, sale by public roup (auction) was fairly common. Today most purchases and sales are negotiated. In a negotiated transaction, the purchaser generally will retain a solicitor who will write to the seller (or to his agent who, interestingly, is often a solicitor rather than a real estate broker) making an offer to buy on specified conditions. No standard form is in use. If the seller's agent is not a solicitor, the seller will retain one, and if the terms of the offer can be agreed to by the two solicitors, the contract is completed by acceptance. One requirement is that both the offer and the acceptance must either be handwritten, or, if typed, executed beneath the statement, "adopted as holograph." In only a few cases is one party or the other not represented by a solicitor, and very rarely is neither party represented.

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69 Land Writs Registers Act, 31 & 32 Vict., c. 64, §§ 9, 10 (1868) (Scot.).
70 See text accompanying note 81 infra.
71 Id.
72 See text accompanying notes 84-87 infra.
74 Obviously, there is a wide variation between the operations of the Scottish and American acts. But the same degree of variation exists among American acts.
75 Except where otherwise indicated, the materials in this section are based on interviews with Mr. G. E. Taylor, Solicitor to the Secretary of State for Scotland, and Mr. Gerald Black, Keeper of the Public Register of Scotland, in Edinburgh, Scotland, July 7, 1967.
After affixation of a revenue stamp (6d. or so) to the contract, the seller's solicitor will send the title deeds and an abstract of title (called a "search") to the purchaser's solicitor for examination. The typical period of search is 20 years, and indeed, unless the contract otherwise provides, title need be shown only for these 20 years.\textsuperscript{77}

Instead of the abstract being prepared and maintained by an abstract company, as in many areas of the United States, the parties, through their solicitors, will draft a "memorandum for continuation of the search," which epitomizes the current deed, and which will be added to the search when it is recorded. Thereupon, the search is sent either to a professional title searcher or to the Keeper of the Public Register, who will search the public records and bring the search up to date. This search, however, is not the basis for determining whether or not to close, since it generally is not completed in fewer than six months.

As a result, the parties rely on other devices to assure title. In nearly all cases the seller's solicitor will undertake personally to deliver a search establishing title in accordance with the deed.\textsuperscript{78} In some cases, an informal check of the search sheet will be made. This search sheet is an unofficial abstract maintained by the Keeper of the Public Register for virtually every parcel of land in Scotland.\textsuperscript{79} Another safeguard employed prior to closing is the interim report of the Keeper of the Public Register, which is an informal current statement of matters appearing in the records. But it is not conclusive.\textsuperscript{80} The contents of the interim report and the official searcher's report are usually identical except that the interim report is less formal.

Sometimes, when the title appears defective but the defect is not likely to be real, an insurance policy will be purchased—just as in the United States, casualty title insurance will be purchased to insure against some defects. Although most titles are good (partly, no doubt, because of the careful work of the Keeper of the Public Register), insurance is used where the expense of curing the defect exceeds the cost of the insurance premium.

\textsuperscript{76} This "search" is not to be confused with "the search sheet" contained in The Registry's Search Book. See text accompanying notes 79, 84–87 infra.

\textsuperscript{77} The period has become customary, in part, because the period of acquiring title by prescription and for the barring of obligations is 20 years. Conveyancing Act of 1924, 14 & 15 Geo. 5, c. 27, §§ 16–17.

\textsuperscript{78} \textit{Reid Report}, supra note 40, at 25.

\textsuperscript{79} The search sheet is something more than an abstract. See text accompanying notes 84–87 infra.

\textsuperscript{80} \textit{Reid Report}, supra note 40, at 25.
Once defects are waived, cleared or insured against, the purchaser's solicitor prepares a draft deed, and when it is satisfactory to both parties, the deed is exchanged for the purchase price. It is then presented for recording. At this point, a brief description of the operations of the registry is required in order to understand fully the conveyancing process.

2. The Operation of the Registry

On presentment for recording, the instrument is noted in the "Presentment Book" (corresponding to the "Daily Sheet" in the United States). Before entry in the Minute Book, which governs priority of registration, however, the Keeper of the Public Register examines the instrument to make sure that it is in the form required to achieve its purpose, that it has the correct amount of revenue stamps affixed, that the grantor is the title holder according to prior records, that there are no conflicting titles, that the legal description and plan, if any, are accurate, and that it is correctly executed.81 If any errors are detected, the solicitors for the parties will be given the opportunity to rectify them.82 If no errors are detected, a minute is drafted stating the date and hour of presentment, the nature of the transaction, the names and occupations of the parties, a concise description of the parcel, and any title exceptions.83 The minute is then entered, in the order of presentment (i.e., the same order as noted in the Presentment Book, as adjusted for mailed and over-the-counter filings), in the Minute Book (which has no American counterpart). Each volume of the Minute Book is indexed by the names of the parties and by place.

The place index is not always a single parcel tract index. In some cases, where a parcel is known by a name ("the Hill Farm"), it is indexed under this designation. In cases of city lots, all the lots on a particular street will be indexed together. Since a single street will have one name for a short distance, another name for another distance, and so forth, indexing by street name is like indexing by city blocks—a tract greater than one parcel but not of an unwieldy size. The place index is thus a tract index by common names of the tracts rather than by geographic position, and the tracts vary from one-parcel tracts to multi-parcel tracts.

81 Keeper of the Registers of Scotland, Memorandum by the Keeper of the Registers of Scotland on the System of Registration of Land Rights in Scotland 3-4 (1963) (preparing for the use of the Reid Committee in preparation of the Reid Report) [hereinafter cited as Memorandum of the Keeper of the Registers].
82 Id. at 4.
83 Id. at 3.
In addition to place and name indexing, a photocopy of the instrument is made and entered in the record volumes in the order in which the record of the instrument appears in the Minute Book. The volume and page where the instrument appears in the record volume are then entered in the Minute Book as part of the minute relating to the instrument.

One of the finest innovations of the Scots is the "search sheet." Because of the Scottish reputation for concern with money matters, and because every Scottish schoolboy is conversant with bookkeeping before he learns the alphabet, the Scots explain the search sheet by comparing it with a ledger sheet. This analogy is apt. The Minute Book, like a journal, contains information with respect to instruments presented for registration in the order that each instrument is presented for filing. On the other hand, the Search Book, like a ledger, contains a separate search sheet for each parcel of land. When an entry is made in the Minute Book affecting Parcel A, for example, the search sheet for Parcel A is updated by making the entry there also. Thus, the Search Book is a true tract index on a single parcel basis. However, given the fact that a registry employee has checked the instrument previously for the matters mentioned earlier, it is superior to any American tract index under the recording system and approaches a Torrens tract index (title certificate record) in terms of completeness, reliability, and ease of determination of the state of the title.

The Search Book was initiated in 1871, and hence, virtually all relevant information for almost any parcel in Scotland can be ascertained by looking at a single page or series of pages in the Search Book.

84 An amusing indication of Scottish thrift is embodied in a statute of 1609 quoted in C. FARRAN, PRINCIPLES OF SCOTS AND ENGLISH LAND LAW 208 (1958): "Forasmehkle as the estaitis presentlie conveyed undirstanding of the just grief and miscontent which the subjectis of this kinebodye of all degreis and rankis has consavite upoun the [e]rectioun of that unnecessair register callit the register of the secretarie. . . . The same register serveing for little or na uther use then to acquire gayne and commoditie to the clerkis keiparis thairof and to draw his majesties good subjectis to neidles extra-ordinaire trouble tornyole fascherie and expens . . . the saidis estatis acknowledgeing and considering that faderlie cair qlk the kingis most sacred majestie has evir had to avoid the overchargeing of his heynes subjectis with ony unnecessairie burdyngis and how that his majectie has evir abhored and detested the introduction of ony new Innovationis qlkis howsoever by private men for their particulair gayne were pretendit for the good and benefit of the estate do nevirtheless oftymes prove nothing but ane cullor for ane extraordinarie intentit extortioun of his majesties subjectis . . . THAIRFORE the saidis estatis . . . freethis exoneris and relevis all his majesties subjectis of that neidles and extraordiner burdyne." 5 Acts of Parliament of Scotland 407 (1609).

85 See text accompanying note 81 supra.
Book. The search sheets, to the extent they are accurate and the instruments reflected therein are valid, disclose the present recorded ownership of every parcel for which an instrument has been registered since 1871. There are approximately 600,000 separate search sheets.

Unfortunately, since there is no statutory authority for the Search Book, it cannot be conclusive. In addition it is available for public use only on payment of a fee. Its major uses are by the Registry in: (1) checking the matters mentioned previously, before entry in the Minute Book, and (2) preparing searches (abstracts) on request, for a fee. Nevertheless, its usefulness for the first purpose does redound to the ultimate benefit of purchasers of land, in providing an additional assurance of title.

In Scotland, as in the United States, certain interests in land arise due to the relationship of a particular individual to the land. For example, a judgment may be a lien on all the land owned by a particular person during the subsistence of the judgment. And, as in the United States, it has not been feasible in most cases to require registration of such an interest against the particular parcel. Hence, another register is kept which lists interests in any lands owned by the named persons. This is the Register of Inhibitions and Adjudications. Entries in this register do not appear in the previously mentioned Presentment, Minute or Search Books, but are separately registered and maintained. Thus, any search is not complete without examination of this register to determine the existence of interests affecting lands owned by any of the prior proprietors. A feature of this register which finds a parallel in our own Marketable Title Acts is that each entry expires in a limited period of time (5 years) unless re-registered.

The Scottish conveyancing system as it presently exists does have certain features which have been proved in practice and which could be utilized to great advantage in the United States. Foremost among these are (1) the Search Book, (2) the Keeper's checking of instruments presented for registration to ascertain correctness of form and execution, and (3) the Keeper's determination that there are no competing interests in the record. The first two have been recommended previously as rather obvious improvements in American recording acts. The third has been rejected as impracticable.
but for reasons that do not appear convincing.\textsuperscript{90} The Scots have proved that all three are feasible in practice, in a situation where both conveyancing practices and statutory recording acts are similar to their American counterparts.

C. The Reform Movement

Since the reform of most esoteric subjects is left to their initiates, it comes as no surprise that the Scots failed to adopt title registration until the current shortage of solicitors compelled the profession to seek to alleviate its excess workload.\textsuperscript{91} Although two official commissions had been established to consider title registration in years past,\textsuperscript{92} it was not until 1963 that a committee reported in its favor.\textsuperscript{93}

that an official tract index may or may not be desirable depending on local conditions.

\textsuperscript{90} Id. at 75.

\textsuperscript{91} The Reid Report, supra note 40, at 16-17 states: “Apart from reducing cost there is another compelling reason for seeking to reduce the amount of work now performed by solicitors in conveyancing transactions. We have been given disturbing evidence to the effect that the manpower position in the legal profession is becoming grave. Since the Dunedin Commission sat in 1910 there has been a fundamental change in the picture and pattern of conveyancing in Scotland. Many landed estates have been broken up, and this has resulted in a large number of smaller properties becoming the subject of sale and transfer and has led to the delay and inconvenience of tracing common writs [deeds]. In addition, many new houses have been built and old houses converted into flats. All this has led to a large increase in the number of property owners, and properties also tend to change hands more rapidly. In 1935, 46,000 writs were registered in the Register of Sasines. In 1958 the intake of writs in the Department of the Registers was 84,000, and by 1960 the figure had risen to 97,000. In every transfer of ownership or granting of a heritable security the same title has to be re-examined for validity by the solicitor—and frequently, where there is a simultaneous sale and heritable security, the title is examined by two separate solicitors. This has led to a vast increase in the volume of conveyancing work while, at the same time, the number of solicitors in private practice has tended to decrease. 3,412 solicitors took out practising certificates in 1910/11, as compared with 3,259 in 1960, of whom over 500 were engaged otherwise than in the ordinary business of practising solicitors. The unqualified conveyancing clerk, who formerly relieved the solicitor of much of the burden of conveyancing work, has virtually disappeared. In addition, the solicitor in private practice has to cope with a vast increase, not only in the amount but also in the complexity, of non-conveyancing work. We think that some reform is required which will relieve the existing pressure.”

\textsuperscript{92} Reid Report, supra note 40, at 2-3.

\textsuperscript{93} Id. The Dunedin Committee had members who published a report favoring title registration; however, the McMillan Committee failed to meet due to illness.
In 1965, the government accepted, in principle, the proposition that registration of title to land should be introduced in Scotland as soon as possible. At present, a committee is engaged in preparing a scheme for the introduction and operation of the system. Thereafter, a bill will be submitted to Parliament. Although the proposal is still confidential, it may be assumed that it will follow the outlines of the recommendations of the Reid Committee, which studied the two questions of the desirability of introducing title registration to Scotland and the method by which it might be implemented.

1. *The Reid Committee Report: A Comparison*

Both aspects of the Reid Committee's report are of interest. First, as to the desirability of introducing title registration in Scotland, the Committee studied the historical background of the present recording system, the present structure of the system, together with its merits and defects, possible modifications in it, title registration in England, the significance of the existence of the feudal system in Scotland, and an alternative scheme of certification of title. No consideration was given to private title insurance as an alternative, although, as previously noted, the casualty aspect of title insurance is not unknown in Scotland.

The Committee felt that the present Scottish system of conveyancing worked very well, and that the introduction of title registration, "which must cause some initial difficulties and dislocation, would only be justified if it both retained the principal merits of the present system, and also offered substantial advantages over the present system." The Committee, therefore, established the following stringent conditions which must be fulfilled before a title registration system would be deemed preferable to the existing system:

1. It must retain the merits of the present system as regards security, flexibility and publicity.
2. It must in the long run result in a substantial saving in time.

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95 *Id.* This committee is known as the Henry Committee.
96 See text following note 80 *supra*.
97 "In the evidence presented to us we were impressed with the large volume of support given to the present Scottish system, and in our view it has great merits. It has evolved over a long period of time to a high degree of perfection and adapted itself to the needs of the country and the special characteristics of the feudal system of tenure. It affords security without losing flexibility. It is public. It has facilities for remedying defects without undue trouble and nearly all disputable questions are now settled by authority. It keeps bureaucratic control to a minimum and allows maximum freedom of contract. In short, it is a practical system which works well." *Reid Report*, *supra* note 40, at 15.
98 *Id.*
occupied in legal work and in cost to the public.

(3) Its character must be such as to prevent dislocation or substantial practical difficulties during the transitional period while it is being introduced: it must therefore be in the nature of an evolution or development of the present system.

(4) The first registration of title of any subjects must not be unduly expensive. In particular we would not favour any system which required intimation to neighbouring proprietors as a preliminary to such registration, because that would inevitably stir up disputes and involve expense in many cases in settling or litigating questions which are at present dormant. So the existing rights of neighbouring proprietors must be adequately safeguarded without their having to intervene.\(^9\)

The Committee concluded that there was little prospect of reducing costs and legal work by improving the recording system and that the only hope lay in introducing title registration.\(^10\) The feudal system was found to be not “incompatible with registration of title, although it [was noted that it would] undoubtedly give rise to some difficulties in practice.”\(^11\)

The other instruction to the Reid Committee was to suggest a method by which title registration might be implemented. Among the features suggested were several that require some mention.

a. Introduction of the Title Registration System

The English system of gradual introduction was suggested. Thus, one district would be selected for initiation of the system, and only after it began operating effectively in the first district would registration be extended to a second.\(^12\) In addition, parcels in the district would be registered compulsorily only on the occasion of a conveyance for consideration, but a parcel in the district could be registered voluntarily at any other time.\(^13\)

The initial plan is to have only one centralized registry.\(^14\) This should enable easier recruitment and retention of qualified personnel. The English, who originally had only one registry office and who seemed to benefit thereby, have in the last several years opened nu-

\(^9\) Id. at 17.
\(^10\) Id. at 21-22.
\(^11\) Id. at 36. The Halliday Committee has come out strongly in favor of modifying the system of tenure. Halliday Report, supra note 29, at 66-80.
\(^12\) Reid Report, supra note 40, at 22-23.
\(^13\) Id. A title registration system which is not compulsory may succeed if instituted before much land comes under private ownership. Brett, North Borneo: Redrafting the Land Legislation of Brunei, 6 Am. J. Comp. L. 555, 574-75 (1957). But even in such areas it is likely that compulsion will be necessary ultimately to bring onto the register any parcels not voluntarily registered. See Moore, Compulsory Conversion to Torrens Title—An Admission of Failure?, 40 Austl. L.J. 190, 201 (1966).
\(^14\) Reid Report, supra note 40, at 23-24.
numerous branch offices. As a consequence, many inconveniences have resulted from the mistakes of solicitors as to the appropriate office with which to deal in various matters. Otherwise, however, the problems are minimal. Nevertheless, it seems that the Scots would be well advised to use the centralized registry until sufficient personnel have been trained to permit efficient decentralization.

If the single registry office system is adopted, as seems likely since a central register is used under the present system, some consideration must be given to the handling of registrations by mail, since conveyances made in outlying areas would be unduly expensive if personal attendance at the registry were required. The English have adopted two innovations for facilitating mailed registration. One is the practice of mailing a notice, when it seems desirable, to the registered owner when an instrument is received for registration. The purpose of this notification is to minimize the chance of a fraudulent registration without the owner's knowledge.

The second, and in practice the most important, device used is the grant of priority to an instrument filed within 14 working days after the official search. Thus, no interest can take priority over an instrument if the recipient of the official search files his instrument for registration within the 14 working day period. The Reid Committee, however, rejected this "considerable innovation." The reason for rejection is apparent—at present, solicitors and the public are accustomed to closing real estate transactions on the strength of the interim report of the search and the personal undertaking of the seller's solicitor to supply a clear search report, which generally is delivered several months after closing.

However, the draftsmen of the new bill should not overlook this device in seeking to attain the goal of making conveyancing as cheap, safe and simple as possible. If purchasers could be assured of title upon closing the transaction, the extra nuisances of obtaining a personal obligation from the seller's solicitor, of following up on the matter, and of any additional fee charged to sellers or any cost incurred by their solicitors in occasionally making good on such obliga-

105 Interview with J. C. Poynter, H. M. Land Registry, in London, England, July 4, 1967. It should be noted that the reasons for decentralization of the English registry have been political and economic rather than functional. The main registry building was overcrowded, so that expansion became necessary and available space in the vicinity is very high priced, and, in addition it was thought that opening offices in outlying areas would aid the economy by providing employment outside London. Id.
107 Id. at 422.
108 Reid Report, supra note 40, at 25.
tions could be eliminated. In addition, the 14-day priority cannot prejudice any third party taking a voluntary conveyance. Anyone applying for a search within the 14-day period would receive notice of the existence of the other search and of the potential priority which might be obtained by the holder of the first search certificate. Perhaps the period-of-grace protection to purchasers, at the expense of a few involuntary grantees (e.g., judgment lienors), is worthwhile. It is unfortunate that the Reid Committee rejected this solution.109

b. The General Boundaries Rule

One of the important features of the English system is the “general boundaries rule” to the effect that the filed plan or map is deemed to indicate the approximate boundaries only. For example, where a fence or hedge is shown as the boundary, the exact location of the line—whether the boundary falls on one side or the other or in the middle of the fence or hedge—will not be guaranteed.110 This rule generally has been maligned as leading to inaccuracy of property bounds. Even experienced conveyancers in the United States and England, however, fail to realize that this rule provides no less assurance than the recording system with or without title insurance,111 or than private conveyancing.

The Reid Committee also disapproved the general boundaries rule, stating that “the purchaser in Scotland generally expects to be given a fixed boundary which can be plotted on the ground and which is guaranteed by the seller’s warrandice [warranties].”112 But this thinking evinces a misunderstanding which is difficult to comprehend. The lack of a state guarantee under the general boundaries rule by no means precludes a guarantee of boundaries by the grantor’s warranty.

The reason for the general boundaries rule is clear. In order to fix more accurately the location of boundaries so as to enable the state to guarantee them, it would be necessary to make a careful survey and to notify adjoining owners, giving them an opportunity to contest the boundaries so ascertained.113 The survey, notice and hearing would cost something—probably a good deal. And since neighbors ordinarily do not quarrel about boundaries until someone

109 The reason given, however, is that the system is too elaborate and costly when compared with the solicitor’s letter of obligation, with which the Scots have had no trouble. Comments, supra note 28.


111 The recording system provides no “guarantees” of boundaries. The typical title insurance policy excepts “matters of survey” as well as “rights of parties in possession.”

112 Reid Report, supra note 40, at 27.

113 G. Curtis & T. Ruoff, supra note 106, at 63.
brings up the subject, it has been thought better to "let sleeping
dogs lie."114

To supplement the sleeping-dogs policy, the English Act, unlike
the American Torrens acts, permits title to be quieted by adverse pos-
session.115 Thus, if the dog sleeps long enough, in many cases the prob-
lem will be solved. However, if an owner wishes to have the exact
boundaries of his land ascertained, he may undertake voluntarily
the necessary procedure.116

The English experience with the general boundaries rule has
been good.117 The Scots nevertheless hope to provide for an ex parte
determination of boundaries, although for cause shown, the registrar
(Keeper of the Public Register) may refuse to guarantee a fixed
boundary.118 His decision would be appealable to an administrative
tribunal established to hear appeals from all determinations of the
Keeper and, if necessary, to the court.119 It would appear that this
practice might lead to many unnecessary disputes.

Apparently, to compound the error, the Reid Committee seems
to have rejected without explanation the supplemental rule that title
to registered land may be acquired by adverse possession.120 The
reason for this important deviation from the English law, however, is
a desire to keep the present Scottish system of acquiring land by
adverse possession.121 Currently, title to land in Scotland may be so
acquired by 20 years uninterrupted possession only if the trans-
feree in possession records his conveyance. Registration is not, how-
ever, a prerequisite to the acquisition of title by adverse possession
in England. The Scots prefer the system whereby such acquisition
may not occur without notice on a public record.

It is regrettable that the Scots plan to incorporate their pres-
ent adverse possession rule in the new registration system. The
American Torrens acts122 and the pre-1897 English statute123 likewise
provided that title to registered lands could not be thus acquired. The
American Torrens acts have failed, and the 1875 English Act

114 Id.
115 Land Registration Act, 15 Geo. 5, c. 21, §§ 70(1) (f), 75, at 812, 817-18
(1925).
117 G. CurtiS & T. RuoFF, supra note 106, at 68.
118 REID REPORT, supra note 40, at 27.
119 Id.
120 Id. at 28.
121 Id. at 28.
122 Comments, supra note 28.
124 Land Transfer Act, 38 & 39 Vict., c. 87, § 21, at 958 (1875). The 1897
Act made it possible, but difficult, to acquire title by adverse possession to
registered land. Land Transfer Act, 60 & 61 Vict., c. 65, § 12, at 191 (1897).
failed. Of course, this single feature was not the sole cause of the failures, but the English thought it sufficiently important to neutralize the rule in 1897, and to reverse it in 1925. At present, the English system works very well, as a logical analysis would indicate it should. This experience should not be treated lightly.

c. Removal of Stale Burdens

One of the defects in the American registration acts about which complaints are most often heard is the impotence of the registrar to remove or omit burdens which no longer can affect the registered parcel. For example, an easement may exist on a parcel which is subdivided in such a way that it no longer affects several of the lots. It is unfortunate that this anomalous interest should continue to be shown on the title certificate of these lots. To cure such a defect in the Scottish system, it was suggested that the Keeper of the Public Register should be given the power to remove stale interests. The suggestion was rejected on the ground that "this might give rise to difficulties and disputes," though the Keeper has this power if all parties agree. It is submitted that the intelligent exercise of such a power, coupled with a right of appeal by the parties whose interests might be affected, would result in few disputes.

d. Payment of Claims

An enlightened view of the function of the state guarantee of the registered title apparently has led the Committee to recommend that no fund be established to meet claims, but that compensation be paid "out of moneys voted by Parliament." Hopefully, this recommendation means to suggest that Parliament provide generally for payment of claims without the need for a private bill to meet each claim. Nevertheless, because of the probable infrequency of claims, the procedure is not of great importance.

In the United States, the mere existence of the fund requirement has had some unfortunate results. In some cases, private title insurers

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124 See Fiflis, Effective Land Transfer, supra note 24, at 469-70.
125 Land Registration Act, 15 Geo. 5, c. 21, §§ 70(1) (f), 75, at 812, 817-18 (1925); Land Transfer Act, 60 & 61 Vict., c. 65, § 12, at 191 (1897).
126 Fiflis, Land Transfer Improvement, supra note 3, at 463.
127 Reid Report, supra note 40, at 29.
128 Id.
129 Although the English land registration rules grant broad powers to the registrar, [1925] 12 Stat. R. & O. 81 (No. 220), they are not exercised as fully as they might be. See, e.g., In re White Rose Cottage, [1965] 2 W.L.R. 337, 344 (C.A.). But see G. Curtis & T. Ruoff, supra note 106, at 12.
130 Reid Report, supra note 40, at 31; see Fiflis, Land Transfer Improvement, supra note 3, at 458, where this step was suggested for United States acts.
have compared, in their advertising and lobbying, the size of the fund with their larger reserves and argued successfully that the greater reserves indicate greater security of title—failing to note that title insurance provides indemnity against defects whereas title registration prevents most defects from arising. In any case, the experience of both title insurers and title registration funds shows very small losses.\(^{131}\)

Another worthwhile contribution of the Reid Committee is the suggestion that instead of giving adjudicative functions to the administrator of the registration system, as is done in England,\(^{132}\) such functions should be performed by an informal tribunal.\(^{133}\) The Committee set forth its view as follows:

Such a tribunal could consist of, say, three persons of whom two would be experienced conveyancers and the third could, in appropriate cases, be a surveyor. In disputes between parties it would not be necessary for this tribunal to sit in Edinburgh and there could be a panel of suitable people throughout Scotland from which such ad hoc tribunals could be formed. It would probably be necessary to hear in Edinburgh any disputes to which the Keeper was a party. In all cases provision should be made for a further appeal to the courts. The Keeper should, of course, have power of decision in matters affecting the layout of the Register, but in all other matters in which the Keeper has a discretion there ought, in our view, to be provision for an appeal to the Appeal Tribunal.\(^{134}\)

On the other hand, the English system seems to suffer from providing that one of the two opposing parties be the judge, with the result that the decision might be unduly biased—a result which many English solicitors feel is the case.\(^{135}\) However, the American solution, of giving little or no discretion to the registrar and forcing parties to bring lawsuits to resolve questions, seems unnecessarily rigid. It will be interesting to see whether the Scottish technique in practice avoids both of these problems.

e. Registration of Creditors' Claims

One of the objectives of most title registration systems is to provide a single register where all matters which affect the title are consolidated. Ideally, all items omitted from the register are void as to third parties and all matters appearing in the register are valid. The Reid Committee has not met this objective adequately with respect to creditors' claims.

Two common means of enforcing creditors' rights in Scotland are

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\(^{131}\) See Fiflis, Land Transfer Improvement, supra note 3, at 442-44, 458.

\(^{132}\) See Fiflis, Effective Land Transfer, supra note 24, at 477-78.

\(^{133}\) Reid Report, supra note 40, at 31-32.

\(^{134}\) Id. at 32.

\(^{135}\) Interviews of numerous solicitors, conducted during the summer of 1967. This appeared to be the complaint of a significant number.
the inhibition and the adjudication. An inhibition is a judicial writ prohibiting a person from conveying his property to the prejudice of his creditors, and an adjudication is an order transferring property to a creditor in satisfaction of a debt. At present, the Scots maintain a Register of Inhibitions and Adjudications in which these orders are filed by names of the parties involved. The inhibitions and adjudications need not, and therefore generally do not, refer to specific real property, since they affect all land owned by the addressee of the writ or order. The operation of these remedial devices is much like that of a judgment lien in most American states.

The Reid Committee proposes to continue the separate Register of Inhibitions and Adjudications after title registration is instituted. Thus, a separate search of this Register would continue to be necessary. The Committee gives no reason for this recommendation. There is no suggestion in the report that either the English or the American experience indicates that one who obtains an inhibition or adjudication should not be required to register his interest against the specific parcel. The only conclusion which reasonably can be drawn is that the Committee was overly solicitous toward creditors as a class in thus easing their mechanical task of obtaining rights in the property of debtors at the expense of land purchasers. Since this is inconsistent with the whole thrust of modern conveyancing reform, it is out of harmony with the spirit of the title registration proposal as a whole.

The Scots' resolution of this particular problem, however, is undesirable primarily because of the inconvenience it will cause. In order to facilitate the filing of inhibitions and adjudications for a small number of creditors, every person who buys or sells land will have to pay, directly or indirectly, in money or otherwise, for the separate search of the Register of Inhibitions and Adjudications. Although this extra cost may be slight, it nevertheless seems to be unnecessary.

If the Scottish Parliament adopts all the recommendations of the Reid Committee as to the implementation of title registration, the resulting system may be less than perfect. Nonetheless, it will be an improvement on the existing system and will provide a useful prototype, deserving of close attention by American conveyancers.

137 Reid Report, supra note 40, at 33.
138 One apparent reason for keeping the separate register is that the creditor may not know of any or all of his debtor's land holdings, and an inhibition or adjudication covers all of his land. Also, not all land will be registered. The factors apparently outweighed, in the eyes of the Committee, the costs of requiring the Keeper to search the Register of Inhibitions and Adjudications before issuing a certificate of title. Comments, supra note 28.
III. Developments in England

The English have already gone through the process of developing a workable title registration system. Perhaps their experience, when added to that of the Scots, can further our learning.

Elsewhere I have summarized the English system and part of its history. But there were limitations on that study because of lack of first hand knowledge. The interviews of solicitors, barristers, academicians and government officials which form the basis for the present study have minimized this defect. This research has led to the surprising finding that what had been nearly monolithic opposition to title registration by solicitors as recently as 1952 has become enthusiastic support by many (perhaps half of all solicitors) and, at worst, a neutral attitude on the part of most of the rest.

Registration of title has been compulsory in parts of London since 1899. It was extended gradually on a compulsory basis to other areas, but even as late as 1951 it was in force in areas having only one-fifth of the total population. In 1951, the government announced that it would hold hearings on the question whether to extend registration to the county of Surrey in accordance with a 1939 announcement, which had not been acted upon because of the war. The solicitors determined to fight the extension vehemently.

139 Except where otherwise indicated, the materials in this section are based on extensive interviews with numerous solicitors in England, during the summer of 1967.

140 Fiflis, Effective Land Transfer, supra note 24.

141 This statement is based on interviews of several solicitors. The Law Society and several local law societies now favor extension of compulsory registration. E.g., Report by the Non-Contentious Business Committee, Transfer of Title to Unregistered Freehold Land in a Non-Compulsory Registration Area—Pre-Contract Work and Some Incidental Matters ¶ 10, at 8 (1965); Report of the West London Law Society Committee, The Report of the Non-Contentious Business Committee (1966). Many solicitors oppose extension of registration largely on the ground that its defects first should be ironed out. E.g., Ryder, Registration of Title and Law Reform, 19 Current Legal Prob. 26 (1966).

The major problems seem to be the large number of interests (called overriding interests) which need not be registered, and the complexity of registering lease and mortgage transactions. In addition, the “general boundaries rule,” unavailability of the registration certificate to the public and general bureaucracy of the registry staff all have been criticized from time to time. See Review of Land Law ¶ 41-46 (1967) (memorandum distributed to participants in the Law Commission’s Seminar held at St. John’s College in Cambridge, April 7-8, 1967), on file in the Hastings Law Library.

From interviews with solicitors it became clear that most of the defects are not considered to be very serious.

142 G. Curtiss & T. Ruoff, supra note 106, at 223.

but at the hearings on the matter their representatives were unable to make a case.\textsuperscript{144}

That failure seems to have marked a turning point. At the hearing, opponents of title registration seem to have convinced themselves and the solicitors' profession that they were wrong, for since then, there has been no organized opposition.\textsuperscript{145} Some additional evidence of this changed attitude is that the volume of registrations voluntarily applied for from non-compulsory areas became so heavy that it was necessary to enact legislation permitting the registrar to discontinue processing new applications.\textsuperscript{146}

Extension of compulsory registration is now proceeding as rapidly as the registry can accommodate new areas. It is the announced intention of the government that, by 1973, compulsory registration will be required in areas including 80 percent of the population.\textsuperscript{147} By 1980, compulsory registration will be in effect throughout the country.\textsuperscript{148}

A. Reasons for Extension of Compulsory Registration

What are the reasons for the present receptiveness of solicitors to compulsory registration? Some believe that the reason is a "built-in time bomb" in the Land Charges Act of 1925. That act provided that after its effective date on January 1, 1926, all land charges—statutory charges, mortgages, equitable charges, executory contracts, tax liens, restrictive covenants, etc.\textsuperscript{149}—may be filed in the land charges register and indexed by the name of the landowner. In addi-

\textsuperscript{144} J. Gray, Report on the Advisability of Extending Compulsory Registration of Title on Sale to the County of Surrey 1 (1951).

\textsuperscript{145} Counsel for one of the three local law societies opposing extension was Professor (now Judge) Megarry. \textit{Id.} Judge Megarry now says: "Registration of title is a great improvement on the old-fashioned system of private conveyancing, and is destined to supplant it in England as it has done in many other countries." His chief witness in that hearing was Mr. Arthur Stapleton Cotton, of the Mid-Surrey Law Society, now special consultant to the new Law Commission. Mr. Cotton is now very much in favor of title registration because he feels that the defects he found with it in 1951 have been obviated. Interview in London, England, June 30, 1967.

\textsuperscript{146} Land Registration Act, 14-15 Eliz. 2, c. 39 (1966). For explanation see Ruoff, \textit{The Suspension of Voluntary Registration of Title}, 31 \textit{Convey.} (n.s.) 7 (1967).

\textsuperscript{147} Letter from the Lord Chancellor to the President of the Law Society, reported in \textit{The Times} (London), Jan. 7, 1966, at 13, col. 1.


\textsuperscript{148} The Times, \textit{supra} note 147.

\textsuperscript{149} Land Charges Act, 15 & 16 Geo. 5, c. 22, § 10(1)-(2), at 876-78 (1925).
tion, it was provided by statute that such registration would constitute notice to purchasers. Since, under the English system of private conveyancing, documents to establish evidence of title in the grantor need go back only 30 years, it could be expected that a land charge might be perfected by registration after January 1, 1926, but more than 30 years prior to the current transaction, and thus would not be required to be produced with the title documents. In addition, the vendee could not conduct a search in the registry since he did not have the names of vendees prior to 30 years before. Foreseeing this problem, the government in 1954 appointed a committee to determine how the problem might best be avoided. Although numerous solutions were proposed, the committee determined that the only practicable one was to extend compulsory registration to the entire country as rapidly as possible.

Some have argued that the problem caused by the Land Charges Act made extension of compulsory registration inevitable. But this contention does not stand up under close scrutiny.

First, extension of registration was not the only solution. It would seem that after January 1, 1956, an intending purchaser, concerned about this problem could, in his offer to purchase, insert a requirement that title deeds be produced from January 1, 1926, although it is possible that the vendor might be unable to produce such documents. Secondly, the Law Commission is now working on a plan whereby the state will indemnify a purchaser who is injured by this “time bomb.”

Finally, even if there is a risk of loss for some landowners, it became quite clear from interviews of solicitors that the so-called “time bomb” was a dud. It merely provided a basis for intellectual exercise in discussions of law reform. Although about two-thirds of all transactions, even as late as 1966, were not in registered land,

150 Law of Property Act, 15 & 16 Geo. 5, c. 20, § 198(1), at 713 (1925).
151 Id. § 44(1), at 589.
154 The problem was said to be “insoluble until it solves itself upon completion of the registration of all titles to land.” Roxburgh Report, supra note 152, at 4. This view is representative of that expressed in several interviews in England, in the Summer of 1967.
156 Chief Land Registrar, supra note 143, at 2.
no cases in which such an undiscoverable land charge later came to
light have been brought to the attention of the profession in the 11
years from 1956 to 1967. In addition, the "time bomb" seems to
have had a slow burning fuse for, despite the urging of the Roxburgh
Committee in 1954, the extension of registration, although proceed-
ing well until 1965, was accelerated rapidly only after 1965 for rea-
sions having nothing to do with land charges.

As we shall see, the real reasons for the extension of compulsory
registration were the public pressure for reducing the costs of
conveyancing and the solicitors' pressure to reduce the workload re-
sulting from a shortage of manpower in the profession. Beginning in
about 1963, the press and radio discovered that there was great latent
dissatisfaction with the cost of conveyancing and that the public was
willing to place the blame on solicitors. The swelling tide of indig-
nation incited by a few newspaper articles mounted until the mun-
dane subject came to merit feature articles and front page coverage.

It was not long before several Members of Parliament began to
direct questions to the government. They found that calling for
solicitors' scalps on the floor of Parliament aroused satisfactory
voter reaction. And although the government, through the Lord
Chancellor, at first minimized the problem, it finally was forced to
take action. According to the rumor prevalent among solicitors, in
late 1965 the Secretary-General (executive secretary) of the Law Soci-
ety was summoned to Number 10 Downing Street and was told that
unless something was done soon to reduce conveyancing costs, the
government would introduce some form of bargain-basement convey-

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157 INTERIM REPORT, supra note 153, at 12-13; WORKING PAPER No. 10, supra
note 153, at 3.
158 See text accompanying note 153 supra.
159 See text accompanying notes 160-66 infra. From fiscal 1951 to 1961,
the population included in compulsory areas increased by 5 million. From
1961 to 1966, it increased by 5.5 million. But 1.9 million of the increase came
in 1964 and 2 million more were covered in fiscal 1965 as compared with a
rate of about one-half million per year for fiscal 1961 through fiscal 1963.
See CHIEF LAND REGISTRAR, supra note 143, at 2.
160 For a description of the press campaign from the point of view of the
Law Society, see Lund, The Title Certificate Book Scheme, 62 LAW SOC. GAZ.
688 (1965). For the viewpoint of the outside observer, see B. ABEL-SMITH &
R. STEVENS, LAWYERS AND THE COURTS 385-92 (1967), containing an excellent
detailed history of the campaign.
Most American lawyers probably would be shocked to hear or read the bla-
tant attacks made on the solicitors' profession by the press, television, radio
and Members of Parliament.
162 E.g., The Times (London) April 8, 1964, at 18, col. 4.
ancing. This led to the development of a technique which allegedly would cheapen conveyancing greatly.

Basically, the title certificate scheme, as the Law Society's proposal was called, was a system whereby on the first sale after the introduction of the scheme, the solicitor's opinion of title (bolstered by a certificate from the vendor's solicitor) would be insured by the Law Society so that on a subsequent conveyance there would be no need to investigate title prior to the earlier examination. The simplified procedure thus made possible would be used for each successive transaction. Each attorney's opinion would be entered in a "log book" which would pass with the title deeds upon a conveyance. In this way, duplication of searches would be avoided. Needless to say, many members of the profession opposed it for various reasons, and apparently the Lord Chancellor concluded that it was undesirable; for early in 1966, he throttled it by announcing that the government would embark upon the eight-year program to extend compulsory registration. The title certificate scheme died instantly and was quickly laid to rest.

One may conclude that because of the existing shortage of solicitors and managing clerks, the profession concluded that the extension of compulsory registration could solve its problems of appeasing the public clamor for cheaper conveyancing and alleviating the profession's workload. Under registration, the time consumed in examining documents is minimized, and statutorily regulated solicitors' fees are one-third less than under private conveyancing. Thus, the profession came to embrace its former enemy.

163 See B. Abel-Smith & R. Stevens, Lawyers and the Courts 393, 394 n.7 (1967).
164 For a description of the scheme, see Report by the Non-Contentious Business Committee, Transfer of Title to Unregistered Freehold Land in a Non-Compulsory Registration Area—Pre-Contract Work and Some Incidental Matters (1965).
166 The epitaph to the scheme was printed in 110 Sol. J. 57 (1966): T.C.B.: R.I.P.
   Epitaph
   (Found recently in St. Stephen's Churchyard)
   Here lies a celebrated Scheme,
   Ah! weep not for its pain:
   Howe'er conceived, 't' would certain seem
   It was most nobly slain.
167 The shortage is common knowledge. See B. Abel-Smith & R. Stevens, Lawyers and the Courts 366-400 (1967).
168 H. M. Land Registry, Registration of Title to Land 7 (1965); Fiflis, Effective Land Transfer, supra note 24, at 498. Registered land fees are set by [1959] 2 Stat. Instr. 2505 (No. 2028). Unregistered land fees are set by
This move, however, merely whetted the public appetite. Thus, two investigations were initiated by the government—one by the Prices and Incomes Board to examine all relevant factors affecting the professional earnings of solicitors, and the other by the Monopolies Commission to investigate, among other things, restrictions on entry into the profession, fees for professional services and rendering of professional services by corporations and partnerships.

The Prices and Incomes Board, as a result of its study, concluded that conveyancing charges on parcels priced at £4000 or more were too high, and recommended a 6 percent reduction in fees for parcels priced up to £20,000. The Board recommended that for higher priced parcels, fees should be negotiated. Perhaps the most significant aspect of the report is the recommendation that the solicitors' fee schedules should be taken as maximum and not minimum limits, so that solicitors could be free to compete with respect to fees.

One lesson to be learned from this experience is that even vested interests cannot withstand intense political pressure. It appears that, but for the pressure from without, solicitors might have been content with the status quo. Perhaps if the American public were made sufficiently aware of the unnecessary expense and the insecurity of titles caused by retention of the recording system and by title insurance, reform could be brought about in the United States as well.

B. Another Potential Means to Reduce the High Cost of Conveyancing

From the viewpoint of an outsider, it appears that extension of compulsory registration in England will not be sufficient to assuage the public demand for cheaper conveyancing. Something more is re-

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169 See the reference by Lord High Chancellor and First Secretary of State to Prices and Incomes Board on Feb. 9, 1967, in The Times (London), Feb. 9, 1967, at 9, cols. 6-7; Current Topics, 111 Sol. J. 121 (1967).

170 See the reference by Board of Trade to Monopolies Commission on January 30, 1967, in Current Topics, 111 Sol. J. 81 (1967). The author's research has disclosed no report of the results of this investigation as of Aug. 9, 1968.


quired. Before attempting to determine a possible solution, let us first examine the steps in an ordinary real estate transaction in England.

1. English Conveyancing Practices

Typically, when a person has found a piece of real estate he wishes to purchase, he will deposit some earnest money, "subject to agreement" (i.e., subject to vendor and vendee entering into a binding contract) with the estate agent (broker) and then will contact a solicitor. Solicitors are consulted in almost all transactions. The solicitor will thereupon recommend hiring a surveyor (i.e., a person who examines the structure for defects and needed repairs), who will make his inspection before the contract is drafted. Very often this survey report will result in a readjustment of the purchase price or, perhaps, may cause the purchaser to decide against completing the transaction. Meanwhile, since contracts are not usually made conditional upon obtaining a mortgage, the solicitor or his client will attempt to obtain a letter of intent from some lender to the effect that a loan of the necessary funds will be forthcoming if certain conditions are fulfilled. Also, a local land charge search will be requested; i.e., the local government will be requested to inform the solicitor of any eminent domain proceedings, preservation orders and the like. In addition, an inquiry will be directed to the same authority asking numerous questions regarding such matters as public maintenance of abutting highways, existence of sewers, etc. One standard form lists 27 such questions.

In the meantime the vendor's solicitor will have drafted a tentative contract and sent it to the vendee's solicitor, who then will make "preliminary inquiries" of the vendor's solicitor concerning such matters as the existence of easements, covenants or leases, the present possessor, the rateable value (assessed value for tax purpose), pending action, etc. One standard form lists 39 such questions. If all problems are resolved satisfactorily, a contract will be executed. Thereafter, the transaction is closed similarly to an American closing.173

Thus, the structural survey, the check for local and central land charges and the preliminary inquiries result in the touching of all

bases as a matter of routine—contrary to the typical American transaction, where in some places the purchaser may find that no one has performed any of these functions. In very few cases in the United States does an ordinary house purchaser get sound, thorough representation for all of these matters.

2. Use of Laymen in the Solicitor's Office

One striking fact concerning English conveyancing suggests a remedy for the high cost of conveyancing. Although solicitors are retained for almost all real estate transactions, in fact they employ lay clerks ("managing clerks" or "legal executives"), who generally handle the entire transaction. And the clerk, indeed, very seldom needs or seeks advice from the solicitor. As evidence of this fact, it should be noted that many downtown London solicitors maintain branch offices staffed and operated solely by these lay clerks.

Solicitors are understandably sensitive on this point, since they must justify their exclusive right to conveyancing work on the basis that their skill and knowledge is necessary. For example, the British Legal Association, in its submission to the Prices and Incomes Board during its recent investigation, stated:

Although a large proportion of the practice of conveyancing is such as can be carried out by senior legal executives, and in many cases the actual work is straightforward, the law of property is a vast subject requiring at least five years study and experience before the practitioner can even begin to feel competent to deal with the problems that may arise.

The Law Society was less careful when discussing registered conveyancing. In a pamphlet, it stated:

Some of the work is simple enough to be carried out by the junior clerk. Some of it, however, will need to be done by, or under the close supervision of, the senior clerk. [Emphasis added.] But it is always necessary to remember that no matter who does this work it is essential in all cases that a practicing solicitor should sign the form of application . . . .

Regardless of the accuracy of the statement that if the junior clerk cannot handle the matter, the senior clerk can, it is generally known that lay clerks (junior or senior) do handle most conveyancing, and

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174 Of course, there is no local or central land charges registry in the United States. But the information available through these offices in England is equally available in the United States. For example, zoning and subdivision regulations, fire and building regulations, imminent condemnation, etc., are all matters of fact which are publicly available in building, fire and zoning departments.

175 BRITISH LEGAL Ass'N, supra note 171, at 23.

176 See text accompanying notes 169-72 supra.

the above quotation indicates that the Law Society sees no objection to this practice.

The clerk performs the same functions a solicitor would, and if the problem is sufficiently complex, he consults with his solicitor-employer. In addition, through daily rubbing of shoulders with solicitors, he undoubtedly gains a greater education than he would if his office were divorced from that of the solicitor. Thus, the house buyer gets adequate representation even though a layman performs most of the services involved in the transaction.

3. Lay Conveyancing Practices in the United States

On the other hand, in the United States, laymen have become involved in the conveyancing process in a different way. Because of the use of title insurance, real estate brokers and title insurers have come to handle the mechanics of conveyancing, with the result that the lawyer is excluded from the transaction. However, instead of taking over the lawyer's functions, the broker or title insurer ignores these functions, with the consequence that no one checks for such matters as zoning regulations, tax matters, proper insurance coverage, condition of the building, building code violations, recent construction which might evidence mechanic's lien claims, easements not of record, and illegal conversions to unpermitted uses. Most important of all, the parties receive no competent legal advice concerning the many potentially important contract terms. This type of lay conveyancing must be rejected as an unacceptable substitute for conveyancing by lawyers.

4. The Challenge of Independent Lay Conveyancing

In England, however, a third kind of lay conveyancing has begun to develop, in which solicitors play no part. A Mr. George Carter, several years ago, handled the closing of a real estate transaction for a fellow employee of a dairy by which they were both employed. Other employees sought Carter's advice in their own purchases. Soon he established a reputation which demanded that he devote more attention to these matters, and he therefore decided to resign from the dairy and establish the Harrow House Owners' Society (now the National House Owners' Society). For one pound ($2.40) a person may become a member of the Society for two years, entitling him to representation in the closing of a transaction. For handling a purchase, the Society's fees are £20 to £30 less than if a solicitor is used. The result has been a steadily increasing volume of business until the Society handles at present about 200 transactions per month.

178 Fiflis, Land Transfer Improvement, supra note 3, at 446-47.
The solicitors' profession successfully prosecuted Carter for illegally holding himself out as a solicitor.\textsuperscript{180} But the court also held that a non-solicitor may apply for and receive office copies and official searches from the Land Registry (a \textit{sine qua non} for representation of purchasers of registered land), but that such persons could not prepare instruments of transfer for a fee. Because Carter failed to deny that he obtained a fee, his conviction was upheld.

After Carter's conviction, the Society continued in business as usual except that it no longer purported to act as a solicitor. The activity of preparing instruments of transfer for a fee was also continued because Carter believed that, since the Society was a non-profit organization, the court's holding did not apply and that the profession feared that, if his activities were disallowed, then the activities of solicitors' managing clerks also might be held illegal. This belief proved to be erroneous, and Carter was convicted a second time, although his conviction is currently on appeal.\textsuperscript{181} Whether or not Carter ultimately will be proved correct, the current climate of opinion in England is such that Carter is well protected from legislative action against him and may well receive legislative support. Parliament is in no mood to amend the solicitors' acts to put Carter out of business. And if the second conviction is upheld, public indignation may be sufficiently aroused to cause a change in the law similar to that in Arizona a few years ago.\textsuperscript{182}

5. The Feasability of Lay Conveyancing in England and the United States

Regardless of the right of a layman to engage in conveyancing, the desirability of Carter's operation from the point of view of the public must be considered. First, it seems clear that in the vast majority of conveyances of registered land, where the property includes an already constructed residence, the need for advice beyond that of a managing clerk is nil. However, in those cases where further expertise is required, Carter's organization has no qualified person to whom the clerk can turn for advice.

Second, one way in which the Society has been able to cut charges is to provide only a cursory structural survey. In this way a charge

\textsuperscript{180} Carter v. Butcher, [1965] 2 W.L.R. 1073.
\textsuperscript{181} Law Guardian, Nov. 1967, at 3.
\textsuperscript{182} After a decision outlawing certain aspects of lay conveyancing, State Bar v. Arizona Land Title & Trust Co., 91 Ariz. 293, 371 P.2d 1020 (1962), \textit{modifying} 90 Ariz. 76, 366 P.2d 1 (1961), a constitutional amendment was enacted by referendum, permitting this activity. Ariz. Const. art. 26, § 1.
of £15 to £20 is cut to £5. But the result of this practice is that a purchaser gets reduced protection, while being misled to believe that he is getting the same standard of protection as that provided by solicitors.

Finally, there is no assurance that, in the event of loss, the Society will be held to the same standard of care as a solicitor. The Society, however, rebuts this charge by advertising:

The Society represents itself as employing fully skilled and highly experienced conveyancing clerks and is responsible therefore, for their actions. Although solicitors have to enlarge on the dangers, risks and difficulties of the system that they themselves have produced and are responsible for, these are in fact minimal with our qualified staff, but the Society is covered by a professional indemnity insurance policy for £10,000 per transaction, which guards against our errors or omissions. Both policies are with British Insurance Association companies. Our members are thus given protection at least equal to that offered by solicitors.

Our experience covers nearly 2,000 transactions over four years, which only the biggest firms of solicitors can claim.\textsuperscript{183}

The Society may have succeeded by this advertisement in imposing upon itself a standard of care equivalent to that of a solicitor under the theory that one who claims to be an expert is held to a higher standard of care than the non-expert.\textsuperscript{184}

On the other hand, the economies of operation achieved by large scale specialization are apparent even at this stage in the Society’s development. A set of standard forms has been formulated whereby a secretary may request items of information quickly, notify a client of a particular fact, request action, etc. Further, standard procedures have been devised so that even poorly qualified personnel may perform various tasks. It is noteworthy that in the United States, the use of standardized procedures has been carried even further by the title insurance firms and has resulted in even greater economies.\textsuperscript{185}

\textsuperscript{183} National House Owners’ Society Brochure.

\textsuperscript{184} E.g., Whipple v. Grandchamp, 261 Mass. 40, 158 N.E. 270 (1927). Perhaps a more accurate description of the legal consequences of claiming no need for the skill of a solicitor without claiming to be as skilled as the solicitor is found in Lord Devlin’s language in Hedley Byrne & Co. v. Heller, [1964] A.C. 465, 531. “If a defendant says to a plaintiff: ‘Let me do this for you; do not waste your money in employing a professional, I will do it for nothing and you can rely on me,’ I do not think he could escape liability simply because he belonged to no profession or calling, had no qualifications or special skill and did not hold himself out as having any. The relevance of these factors is to show the unlikelihood of a defendant in such circumstances assuming a legal responsibility, and as such they may often be decisive. But they are not theoretically conclusive and so cannot be the subject of definition. It would be unfortunate if they were. . . .”

\textsuperscript{185} See Q. Johnston & D. Hopson, Lawyers and Their Work 278-305 (1967). Mr. Carter stated that he was conferring with U.S. title insurers about their interest in participating in the English conveyancing market. See also 1967 National House Owner’s Society Ann. Rep. (item 14).
The foregoing discussion suggests that since there is a clear demand for lay conveyancing in small transactions, and since laymen obviously can perform competently for most of these transactions, it remains only to: (1) make lay conveyancing legitimate, (2) define the areas where laymen shall be permitted to operate so that complex transactions may remain in the hands of solicitors, and (3) license and regulate lay conveyancers to protect the interests of purchasers and sellers. But no one can claim that at the present stage of development of English land law a person trained in the law is unnecessary in all transactions. For transactions raising questions arising under the Land Commission Act, income and estate tax matters, insurance, and the like, a high degree of legal competence is necessary even to recognize that there is a problem.

The need then, under any system of lay conveyancing, is to provide competent legal advice in those occasional cases where special problems exist. The English have satisfied this need by the use of managing clerks in the solicitor's office. And in the United States, lawyers' title guaranty funds similarly have the retention of lawyers in real estate transactions as their most important purpose. Although

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186 The author of Wickenden, Reform Conveyancers Too, 109 Sol. J. 654 (1965), was compelled also by the logic of the situation to recommend the first of these points. He went further in suggesting that the lay specialist might better perform the functions not only of the lawyer but also of the structure surveyor, real estate agent and mortgage broker.

The first point is also implicit in the statement in Q. Johnstone & D. Hoerson, Lawyers and Their Work 312-13 (1967), that the large title insurance company does a superior job in conveyancing. They fail to consider, however, the need for imposing a duty on lay conveyancers to do the whole job. Since in the United States the net effect of the title insurance takeover is to leave some jobs undone, this is a serious omission. See also Farrand, Conveyancing Without Conveyances or Conveyancers, 30 Convex. (n.s.) 8 (1966).

187 Land Commission Act, 15 & 16 Eliz. 2, c. 1 (1967). Briefly, the act provides that when land is sold for development at a higher use, the seller will pay a portion of the sale price to the state. This payment is presently 40 percent of the difference between the value of the land for its current use and the value for a use for which planning permission has been obtained. If the land is developed by the current owner, he will also pay 40 percent of the difference in values.


Buffs of the estates-in-land calculus will be pleased to learn that the England which eliminated all but 2 estates by its 1925 legislation has now introduced a new one—“Crownhold.” This is an estate held by a grantee from the crown on terms prohibiting specified uses of the land. See G. Cheshire, supra at 901.
these systems have this advantage, both fail to take advantage of economies of large scale operations, both involve no competitive activity with its obvious advantages, and most important, in actual operation, both fail to cut costs.

Another method of conveyancing which both might preserve the availability of competent legal advice and achieve the economies possible with lay clerks would be the use of large corporate title insurance companies, which can employ the best real estate lawyers. The difficulty with this solution is that in actual practice in the United States, the large title insurer has not provided legal advice in any area other than that of validity of title. All the other complex matters involved in a land transfer are left unattended by the insurance companies. How much this abdication is caused by restrictions on practice of law and how much is caused by the title insurer's own unwillingness to venture beyond the realm of questions of title is not readily ascertainable. But even if title insurance companies were to be permitted to engage in this area, there would be numerous objections. First, and most important, the title insurance industry must, if it is to survive in the United States, preserve the recording system with its consequent waste. Since there is no recording system in England, there is no place for title insurance there. Secondly, the recording system itself fosters monopolization in title insurance because of the difficulty of entry into the industry. Unregulated monopoly is manifestly undesirable.

Perhaps a better system, which could be implemented in both the United States and England, would be to allow any layman to enter the business of conveyancing, provided (1) that he meets appropriate standards of ability and financial responsibility, and (2) that a duty is imposed on all conveyancers (layman or not) to provide competent advice in all aspects of a transaction. If the standard of care required of a lawyer is imposed on the lay conveyancer, this should provide sufficient stimulus to encourage him to seek competent legal advice in areas in which he is not qualified. This would lead naturally to some lay conveyancing organizations hiring lawyers

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189 For example, most title insurers refuse to get involved in questions of zoning law.
190 Title Insurance and Trust Company, Los Angeles, allegedly has spent six million dollars to gain a foothold in Chicago where Chicago Title and Trust Company, itself a large title company, though smaller than Title Insurance and Trust, had a head start. Lawyers Title Insurance Corporation, Virginia, also larger than Chicago Title, has failed to gain a significant foothold there despite 15 years of effort. Interview with Thomas Fillmore, Vice President, Chicago Title and Trust Co., in Chicago, Ill., June 8, 1967.
191 See note 182 supra.
as employees. Consequently the usual protests against this demeaning of the profession may be expected.

However, the United States Supreme Court seems to have lit the way for some serious rethinking about the exclusive nature of the practice of law in our modern society, and it is hoped that this lead will be followed. Although it may be a decade or two hence, it may well be that if the states do not see fit to permit greater lay participation in areas traditionally served by the legal profession, the Court will find constitutional bases for voiding strict restrictions.

Thus far, the debate over lay representation has centered about the problems of the poor, or has involved the right of special groups of people to retain attorneys to represent one of their number. However, the basis for some of these opinions and articles has been the realization that, if group legal representation is not afforded the poor, they will in fact be denied legal representation by reason of the high cost of, or other practical inaccessibility of, legal services. With legal costs as high as they now are, it might be that a persuasive case could be made that the middle class person is also effectively denied legal representation.

Under the authority of United Mine Workers v. Illinois State Bar Association, in which the court held that a state could not prohibit the retention of an attorney by a labor union to represent its members in workmen’s compensation cases, could not a non-profit society be formed to provide low cost legal services by a salaried attorney in real estate transactions by its members? And if the answer to this question is, or becomes, yes, will the ultimate result be that these

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194 The Illinois Supreme Court, in Illinois State Bar Ass’n v. United Mine Workers, Dist. 12, 35 Ill. 2d 112, 219 N.E.2d 503 (1966), thought that if the union activities were upheld, “[i]t would seem possible, and even likely, that any group of individuals with a similarity of interests would be allowed to associate for the purpose of hiring salaried attorneys to represent its individual members . . . .” Id. at 125, 219 N.E.2d at 510.

same services be supplied by a layman, as is presaged (quite remotely) by Mr. Justice Douglas’s dissent in *Hackin v. Arizona*? Affirmative answers to these questions with respect to lay conveyancing might be more likely than in other fields, since the very real danger of diminution in the quality of representation, noted by Justice Harlan in his dissent in the *Mine Workers* case, is not present in the field of lay conveyancing. If anything, the quality of representation should improve, due to the economies of scale, specialization, etc.

In addition, high quality representation could be assured by the imposition of the same high standard of care and competence as is imposed upon lawyers. The common techniques of requiring licensing and bonding, plus personal liability (perhaps coupled with a client’s security fund) for failure to observe a high standard of care and competence, would appear sufficient to assure the feasibility of such a system. The dangers of incompetence and inefficiency associated with small-scale operations presumably would be minimized through competition. In addition, laymen in the conveyancing business should be prevented, if possible, from gaining a vested interest in the recording system. Perhaps they could be prohibited from engaging in title examination.

Numerous changes in existing substantive law could improve the lay operation of the real estate market still further. For example, the elimination of the doctrine of merger of the contract in the deed, of *caveat emptor*, of the complicated estates in land calculus, and the adoption of other improvements which have been suggested in this article and by land law reformers for years, could all make lay conveyancing even cheaper.

**IV. Conclusion**

Most of the relevant factors seem to point to the conclusion that some form of title registration will and should ultimately be the basis for conveyancing in the United States, although recording acts, in concert with title insurance, will remain predominant for several years. Such factors include the Scottish and English experiences, which show that these countries, having a legal heritage close to our own, have concluded that title registration is a superior system. A study of conveyancing in these countries also reveals many worth-

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198 In the past, officially sanctioned separation of functions has been utilized successfully to serve some proper purpose. For example, the divorcing of commercial and investment banking, and the divorcing of title insurance and mortgage insurance, both in the 1930’s.
while ideas for implementing and operating a title registration system not having the drawbacks of Torrens. In addition, the existing Scottish recording system suggests numerous innovations which would improve the current American recording system.

Regardless of the extent of improvement in conveyancing legislation, the English experience indicates that conveyancing by lawyers is still too expensive. This experience also shows that lawyers are unnecessary for most transactions, except perhaps to oversee generally the lay clerks, who in fact do almost all the work. In the United States, title insurers and other laymen also have been able to handle some limited aspects of conveyancing very efficiently.

These circumstances raise the question whether there is a role to be played by laymen. Mr. Carter's experiment in England shows that economies can be obtained by lay conveyancing, but it also shows the need for regulation to protect the public. Perhaps the United States Supreme Court has given a clue to the solution of the conveyancing problem in its decisions dealing with retention of attorneys to provide group legal services by the UMW and the NAACP. In addition, the dissent of Mr. Justice Douglas in *Hackin* seems to suggest that lay representation, where necessary to avoid non-representation, is permissible. Thus, associations of prospective house buyers might be formed to provide group legal services, with professional advice available, and laymen might be hired to perform the bulk of the conveyancing work, with oversight by a lawyer.

Another significant, but disappointing, result of this study is the finding that a very important, and perhaps indispensable, factor in achieving conveyancing reform in both Scotland and England has been the current shortage of solicitors. This shortage has eliminated the solicitors' selfish interest in preserving a make-work conveyancing system. If we must preserve a costly and wasteful conveyancing system so long as lawyers (or some other group such as title insurers) need the work, it may be a long time before we can adequately reform American conveyancing.