Land Transfer Improvement: The Basic Facts and Two Hypotheses for Reform

Ted J. Fiflis

University of Colorado Law School

Follow this and additional works at: https://scholar.law.colorado.edu/articles

Part of the Comparative and Foreign Law Commons, Insurance Law Commons, Legislation Commons, Property Law and Real Estate Commons, and the State and Local Government Law Commons

Citation Information

Copyright Statement
Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact jane.thompson@colorado.edu.
LAND TRANSFER IMPROVEMENT:
THE BASIC FACTS AND TWO HYPOTHESES
FOR REFORM

TED J. FIFLIS*

The inadequacy of existing systems of title protection and the resultant delay and expense of conveyancing have become increasingly apparent,¹ and popular dissatisfaction has reached a point at which it can no longer be ignored. Since no revolution in the substantive law of real property appears imminent, the greatest hope for improvement probably lies in the area of the mechanics of conveyancing.

Since the first step toward improvement is the collection of data on which appropriate action may be based,² the primary purpose of this paper is to report the facts gathered from questionnaires and personal interviews with practitioners, title insurance executives, and abstractors, and gathered from analysis of annual reports to stockholders, advertising leaflets, trade magazines, bar association fee schedules, and other sources. It is the author's hope that this information will be supplemented by the efforts of others interested in the field. The second purpose of this article is to suggest two hypotheses for reform, based on the collected data and on a study of existing legislation.

TWO HYPOTHESES FOR REFORM

Conveyancing in the United States is based on recording and title registration acts.³ However, the title registration acts have been largely ignored and the recording acts are inadequate and unnecessarily clumsy.

An investigation and study of conveyancing statutes leads inexorably to the conclusion that while the recording system, with or without title insurance, is both economically wasteful and the basic cause for public discontent, the title registration system, after the title is once registered, removes most of the defects of conveyancing and is therefore more desirable. However it also is quite clear that title registration as it presently exists in the United States is unsuccessful due to the high costs and great

---

*Assistant Professor of Law, University of Colorado School of Law.

This is a second paper resulting from a study sponsored by the Joint Center for Urban Studies of the Massachusetts Institute of Technology and Harvard University. Its predecessor is Fiflis, English Registered Conveyancing: A Study in Effective Land Transfer, 59 Nw. U.L. Rev. 468 (1964).


2. See, e.g., Payne, In Search of Title (Part II), 14 Ala. L. Rev. 278, 282-83 (1962).

3. Because of their derivation from the Australian title registration act, initiated by Sir Robert Torrens, title registration acts are often referred to as "Torrens" acts.

431
time delay of initial registration. One additional fact, which must be understood before a program of reform can be initiated, became clear after investigation: title insurance and abstracting industries, if they are to survive, must oppose any reform which through elimination of conveyancing defects will diminish or abrogate the need for the services of insurers and abstractors. Furthermore, in many areas the bar is equally opposed to constructive reform.

An historical fact of which some readers will be quick to remind me is the Torrens battle of the 1930's in which a strong movement to adopt the then existing title registration acts was soundly defeated on many fronts. As a result, although earlier writers advocated scrapping the recording system and adopting title registration, the more recent writers have merely recommended a revision of recording techniques and have ignored title registration.

The result of the early Torrens battle raises three questions:

1. If the battle for adoption of title registration in the U. S. has already been fought and lost, what is the merit in fighting it again?
2. If one concludes that the battle should be fought, are the chances for overcoming the opposition of the title insurers and abstractors great enough to merit the effort?
3. Even if the battle should be refought and the opposition can be overcome, can the great drawbacks of high cost and great time delay in initial registration be eliminated?

It is believed that careful consideration of each of these questions will lead to the conclusion that the battle must be fought, that it could be won, and that there is a probability that the defects of initial registration can be eliminated.

There are several reasons for reconsidering title registration.

First, in the battle of the 1930's it was assumed by all concerned that there was but one immutable title registration system—the Torrens Acts as they then existed in this country. No thought was given to improving the initial registration process to cure the defects noted by the opposition.

Second, the battle culminated in New York where Professor Powell delivered the death blow with his book, Registration of the Title to Land

5. E.g., Simes & Taylor, The Improvement of Conveyancing by Legislation (1960). Many recent reports of committees of the ABA Section of Real Property, Probate and Trust Law, Real Property Division wistfully refer to title registration before going on to consider some revision of the recording acts. See, e.g., ABA, Section of Real Property, Probate & Trust Law, Part II, 94, Report of Committee on Improvement of Land Records (1964).
But that book is not determinative of the question today for the reasons herein stated and for two further reasons:

(a) One reading the book today cannot help but conclude that many of Professor Powell's conclusions, based on the facts he collected, are extremely tenuous, if not wrong; and

(b) Professor Powell himself has more recently advocated registration of title by use of the English technique of registering possessory title (whereby title "as is" is registered subject to all existing infirmities, but thereafter the registration process operates to avoid additional defects\(^7\)) coupled with a short statute of limitations to terminate preexisting infirmities.

The recent work of Professor Simes imparts even greater utility to Professor Powell's suggestion, since marketable title acts are even more compatible with registration of possessory title than are statutes of limitation.\(^8\)

Third, since World War II, in addition to our own boom in marketable title legislation, there has been a great deal written concerning the English practical experience with title registration so that there is now adequate research material available on the workings of that system.\(^9\)

Fourth, the constitutional climate has also changed since the thirties, so that a system whereby registration rather than recording is required to protect the purchaser's title would probably pass constitutional tests.\(^10\)

Fifth, advances in technology since those years now make feasible certain suggested changes in title registration acts. For example, aerial surveying would aid greatly in preparation of maps; automatic data processing and retrieval would facilitate searches so that administration of the system as well as initial registration could be made swift and easy.\(^11\)

Sixth, only recently, as will appear later in this article,\(^12\) has the organizational bias of the Section of Real Property, Probate and Trust Law of the American Bar Association been exposed so that this stumbling block to adequate conveyancing reform is now recognized and can be avoided.

\(^6\) Published in 1938.
\(^8\) 6 Powell, Real Property 319 (1965); Simes & Taylor, *op. cit. supra* note 5.
\(^9\) E.g., Curtis & Ruoff, *The Law and Practice of Registered Conveyancing* (1958); Dowson & Shephard, Land Registration (2d ed. 1956); Fiflis, *supra* note 7.
\(^12\) See pp. 444-46 *infra*. 
The organizational bias of the Real Property, Probate and Trust Law Section also throws some light on the second question of whether the opposition of the title insurance and abstracting industries can be overcome. As we shall see, up until now, a disproportionate number of title company employees and related counsel have consistently held important positions in the Section. They generally constitute about one-third of the officers and council members. Naturally, the power of this small but vocal minority in the only national organization of real property lawyers appears Great to other members of the Section.

In addition, several factors indicate that it is probable that the power of the title insurance and abstract companies has been over-estimated. In the first place, the title insurance industry itself is none too confident of its position. In addition, human nature is such that few people have the determination to fight very hard and very consistently for an archaic and wasteful system, such as the present recording system as supplemented by title insurance. Also, as evidence of their weakness, it may be noted that the title insurance companies have been unsuccessful in thwarting the lawyer’s title guaranty funds which have been cropping up about the country. Finally, in many states and in large areas of other states, the title insurance industry is not yet so sufficiently well established that a prolonged campaign can be sustained by its members.

Moreover, if the battle takes place outside of the ABA Section, the organizational bias of the Section will be ineffective to prevent reform except on some meritorious basis, if any.

The third question is whether the defects of initial registration can be eliminated. Consideration of title registration acts in other countries and of some of the literature concerning these acts, leads one to realize that the terms “recording system” and “title registration system” denote two broad groups on a single continuum; the systems shade one into the other. Just as there is no single recording system, so there is no single registration system. As we shall see later, the more simple and conclusive

13. This insecurity is exemplified by the following from a title company executive:

The situation appears to have worsened to the point where sober, responsible, and competent observers have expressed the fear that the increased dissatisfaction with our conveyancing system will, unless checked, bring about ultimately a breakdown of present procedures and a revolutionary change therein. If this change takes place, it will have a serious effect on the welfare of the public and the economic position of the bar. It is my impression that the revolutionary change referred to is not to embrace title insurance as a cure-all. The revolutionary change referred to is some sort of government controlled modified Torrens System which would affect the economic position of persons other than the practicing attorney.


15. See Hogg, Registration of the Title to Land Throughout the Empire 2 (1920).
the record becomes, the more nearly a title protection system approaches the title registration end of the continuum.

This discussion suggests two hypotheses:

1. Improvements may be made in the recording system by studying and borrowing from the registration act portion of the continuum;
2. The difficulties in existing techniques for converting a recorded title to a registered title may be overcome without disruptive revision of existing institutions.

As can be gathered from two previously cited studies in this field, the reformers for the most part have failed to take into account the stated propositions and to utilize the suggested hypotheses. Thus, in his book, Professor Powell described the two systems as unrelated, and compared the then existing recording systems, as supplemented by title insurance, with the then existing title registration systems, as if they were irreconcilable. Professor Simes, in his more recent study, totally ignored title registration acts.

However, hypothesis number one has been followed to some extent by others. Professor Cribbet, who sees little practical hope for the registration acts, would adopt a tract index and require recording all interests on a single index. Another writer is concerned with establishing a suitable root of title. He recommends a quiet title action as a means of establishing a good root of title, and on finding numerous inadequacies in existing quiet title procedures, borrows freely from existing Torrens legislation.

Most of the more efficiently operated title insurance companies themselves are run on title registration principles. For example, where possible, they: adopt private tract indexes; check over instruments delivered at the closing and request corrections of defects, or if their representative is not then present, request correction and re-recording before issuing their policy; refuse insurance where the grantor is not in the proper position in the chain of title. Thus like the registrars of title, they too, adopt preventive techniques.

The approach of hypothesis number one, which has as its objective the improvement of recording acts without questioning whether recording acts are the best basis for a conveyancing system, is presumably based, not

---

16. Powell, Registration of the Title to Land in the State of New York (1938).
20. Ibid. E.g., it is recommended in that note: (1) that possession in plaintiff as a prerequisite to bringing suit to quiet title be abolished (at 1279); (2) the period of limitations for direct attack be shortened (at 1258); (3) an indemnity fund be established (at 1294); and (4) that service by publication and by registered mail be utilized (at 1298). Each of these features exists in most title registration acts.
on principle, but on politics;\textsuperscript{21} \textit{i.e.} the generally held opinion that conveyancing reform without the support of the title insurance and abstracting industries and the bar, could not succeed. If this is actually the case, the reform movement should proceed on the basis of hypothesis one. But if our previous conclusions that changed conditions require reconsideration of title registration and that the power of the title insurance and abstracting industries has been overestimated are correct, reform should proceed on the basis of hypothesis number two.

The remaining portions of this paper set out the findings of fact on which these conclusions rest. Even if the reader, after considering the facts, determines that our conclusions are not well founded, it is believed that the paper may have some value in providing additional data concerning the practical workings of the conveyancing systems used in the United States.

**FACTUAL DATA ON TITLE PROTECTION IN THE UNITED STATES**

**STRUCTURE OF CONVEYANCING PRACTICE**

**Title Registration**

The two types of title protection statutes enjoy widely disproportionate use in the United States. Although recording acts exist in all states but Louisiana, title registration exists in only twelve states today.\textsuperscript{22} The first act was passed in Illinois in 1895,\textsuperscript{23} but is was held to be unconstitutional under the state constitution.\textsuperscript{24} A new Illinois act was passed in 1897.\textsuperscript{25} All of the others were enacted within the next twenty years.\textsuperscript{26}

---

\textsuperscript{21} See Note, \textit{supra} note 19, at 1316.


\textsuperscript{23} Ill. Laws 1895, at 107.

\textsuperscript{24} People \textit{ex rel.} Kern v. Chase, 165 Ill. 527, 46 N.E. 454 (1897) (judicial powers improperly vested in an administrative officer). The first Ohio act was also held to be unconstitutional for the same reason. \textit{State ex rel. Monet v. Guilbert}, 56 Ohio St. 575, 47 N.E. 551 (1897). This difficulty was solved by amending the constitution. Ohio Const. art. II, § 40.

\textsuperscript{25} Ill. Laws 1897, at 139.

\textsuperscript{26} Illinois, 1895 (declared unconstitutional; second act passed in 1897); Ohio, 1896 (declared unconstitutional; second act passed in 1913); California, 1897; Massachusetts, 1898; Minnesota, 1901; Oregon, 1901; Colorado, 1903; Hawaii, 1903; Washington, 1907; New York, 1908; North Carolina, 1913; Mississippi, 1914; Nebraska, 1915; Virginia, 1916; South Carolina, 1916; Tennessee, 1917; Utah, 1917; Georgia, 1917; North Dakota, 1917; South Dakota, 1917.
Title registration acts were never used to any great extent in any state but Hawaii. In 1937, 31% of Home Owners Loan Corporation loans in Hawaii were placed on lands having registered titles. And in other states, percentages were as follows:

<table>
<thead>
<tr>
<th>State</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minnesota</td>
<td>12.5%</td>
</tr>
<tr>
<td>Illinois</td>
<td>8.0%</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>6.0%</td>
</tr>
<tr>
<td>Ohio</td>
<td>3.0%</td>
</tr>
<tr>
<td>Washington</td>
<td>0.2%</td>
</tr>
<tr>
<td>Colorado</td>
<td>0.1%</td>
</tr>
<tr>
<td>South Dakota</td>
<td>0.03%</td>
</tr>
</tbody>
</table>

Today, other than in Hawaii, Minnesota, Illinois, Massachusetts and possibly Ohio, the system is virtually dead.

Within each of these states, the title registration system is likely to be more popular in some areas than in others. In Massachusetts, it is most extensively used in Boston and suburbs. In New York, it is used more in Suffolk County than elsewhere. In Minnesota, it is used quite extensively in Minneapolis, St. Paul and Duluth. In Illinois, due to crippling legislation, it is available only in Cook County. Furthermore, in each of the states where title registration is utilized, it is used principally to assure titles to large subdivisions, to clear faulty titles, and to prevent loss of title through adverse possession.

Prevention of loss by adverse possession or prescription is often the purpose of registering timber and mining lands where squatters are a constant problem. But this feature of title registration is also useful in urban centers where open plazas are now being constructed. Thus, title registration acts prevent the running of Statutes of Limitations to recover possession, but this is not an inherent feature of the system. The English act contains no such feature. See Land Registration Act, 1925, 15 Geo. 5, c. 21, § 75(1) (registered owner deemed to hold the estate in trust for the adverse possessor). In Ontario, an adverse possession of registered land by an adjoining owner may ripen into title. Ont. Rev. Stat., c. 204, § 51(1)(3) (1960). See Hogg, op. cit. supra note 15, at 74-93.
to the Prudential Center in Boston was registered, one of the reasons being protection against loss by adverse possession or prescription.

In the jurisdictions where title registration acts are still in wide use, the system may have passed its peak. There has been some agitation in Illinois and in Massachusetts to allow owners of registered land to withdraw it from registration; and the Colorado and Minnesota legislatures have enacted withdrawal statutes. The opponents of the system have found this to be a desirable piece of legislation. Although there may be legitimate reasons for withdrawing from registration, withdrawal is often the result of lack of familiarity with the system, even on the part of lawyers and registrars. Those who withdraw for legitimate reasons are often followed by those ignorant of reasons for withdrawal.

**Recording—Generally**

Recording acts were adopted by most of the states in the nineteenth century. The system used in the United States is probably indigenous to this country and probably originated from an act adopted by Plymouth Colony in 1640. The similarity between the 1640 act and the “modern” recording acts illustrates the lack of progress in improving this method. The 1640 act reads:

> No mortgage, bargain, sale, or grant hereafter to be made of any houses, lands, rents, or other hereditaments, shall be of force against any other person except the grantor & his heirs, unless the same be recorded, as is hereafter expressed.

Recording is utilized in almost one hundred per cent of all transactions in registered land in every state but Louisiana.

There are four major types of practice which utilize the title protection of the recording acts. These might be designated the attorney opinion method, the abstractor-attorney method, the certificate method, and the title insurance method. The “title insurance method” is a broad category including several different types, some of which cut across the other three categories.

The attorney’s opinion, the abstract, the certificate, and the title insurance policy are based on documents of title covering some period of time ending with the present. The period varies from place to place. In the Middle West and West, the search may start from the federal patent. In the East, where the patents are old, or, where, as in most places, there

---

34. Quoted in Hassam, *Land Transfer Reform*, 4 Harv. L. Rev. 271, 272 (1890).
are none, the search almost never exceeds sixty years for residential real estate or one hundred years for valuable commercial real estate. Most careful examiners search a period of forty to sixty years; many examiners search for only twenty years.

Under the attorney opinion method, the attorney searches the records or causes a search to be made and then makes up an abstract and renders an opinion. This traditional method is practiced only in rural areas and in small towns today except for New England where it is used even in large urban areas.

Under the abstractor-attorney method, a professional abstractor or abstract company searches the records, makes up the abstract and an attorney then examines the abstract and gives his opinion. This is the most widely used technique, probably accounting for fifty percent of conveyancing transactions.

Under the certificate method, which is used in only a few locales, an abstractor will furnish a certificate setting forth the state of the title. Typically the abstract is kept by the abstractor and no attorney's opinion is obtained.

*Recording—The Title Insurance Method*

In this category are numerous patterns resulting from the fact that the functions of examining title, providing, advice, and closing the transaction, may be performed in any combination of modes between the title insurer and its agents or subcontractors, other lay agencies, or the attorneys of the parties.

Even where the buyer consults his own attorney, and that attorney closes the transaction, there are at least seven types of practices with respect to the title examination function. Examination may be by: (1) an attorney selected by the buyer without limitation of choice, (2) an attorney selected by the buyer from a wide list of approved attorneys selected by the title insurer, (3) an attorney selected by the buyer from a very limited list of approved attorneys selected by the title insurer, (4) an attorney in private practice selected by the title insurer, (5) an attorney employed by the title insurer, (6) laymen employed by the title insurer, or (7) no one, (i.e. no title examination is made and an insurance policy is issued on a casualty basis).

Under modes (4) through (7), in some areas, the title insurer also handles the closing of the transaction.

35. The original thirteen colonies and the States of Hawaii, Kentucky, Maine, Tennessee, Texas, Vermont and West Virginia were never part of the national public domain, and their public lands and records have been administered by the States. Gumm, *The Foundation of Land Records*, 7 Bureau of Land Management, Our Public Lands, No. 2, p. 4 (1957).

36. See page 447 infra
Note that under the certificate method and modes (4) through (7) an independent attorney is not utilized to give an opinion of the title. An attorney nevertheless should be retained for such matters as: drafting or examining the contract, the deed and the mortgage instruments; considering zoning, subdivision and building laws, tax effects and casualty insurance matters; checking for matters not covered by the certificate or insurance policy and for title defects arising in the interim between initial search and the closing; explaining the significance of the exceptions from, and limitations on, the title certificate or title insurance policy; advising the parties with respect to curing title defects; and checking title insurance policies for correctness. However, where an independent attorney is not retained for the title examination, the tendency is to dispense entirely with these services.37

Where employees of the insurer examine the title, the records searched may be in the title insurer's title plant or they may be in the public records. Companies with a title plant may employ staffs which copy entries daily from the public records for transmittal to the company's records, or the recorder of deeds may take microfilm pictures, photostats or electrostatic pictures of all documents being recorded for the use of the company. When an application for insurance is received by a title plant company, a search of the company's own duplicate set of records is made, and a title report is issued. Under a second type of practice, the company maintains no daily take-off system, but utilizes the public records to fill individual orders, searching either from the date of its own title report on the same parcel, or if the company had not previously issued a policy on that parcel, for the conventional period. Some few small companies operate without use of the records on a casualty basis.

There are presently about 150 title insurance companies in the United States.38 Of this number, in 1958 three had aggregate capital, surplus and reserve fund gross totals of 60, 50, and 20 million dollars, respectively; three others had between 8 and 10 million; eight between 4 and 8 million; eighteen between 2 and 4 million; fifty-two between ½ and 2 million; and sixty-four under ½ million.39 At the end of 1965 the three largest had grown to have 132, 75 and 32 million respectively. Premium income for the industry in 1957 was estimated at 115 million, and the rate of growth (in premiums) for 1958 and 1959 was estimated at about five or six percent.40 According to a complaint drafted by at-

37. See page 446 infra.
39. Chart published by the Public Relations Division of Chicago Title and Trust Company.
torneys for the Department of Justice, premium income was 130 million dollars in 1960.\textsuperscript{41} For the same year, one knowledgeable writer estimated 150 million dollars.\textsuperscript{42} In 1965 the annual reports of the three largest companies alone showed gross income of $126 million. (For one of the three companies, premium income is not separately shown. Therefore, some miscellaneous income is included in this figure.)

It has been estimated that currently forty percent of all real estate transactions carry title insurance.\textsuperscript{43} New England and the State of Iowa are the only large areas where title insurance is uncommon although its use has been increasing in the Boston area. The greatest volume of title insurance is written in urban areas, notably Los Angeles, San Francisco, Chicago, New York, Philadelphia, and Washington, D.C.

The Federal Government's various housing agencies have greatly aided the industry.\textsuperscript{44} FHA and VA, although purporting to follow local practice, have generally required title insurance. For example, in Massachusetts, FHA will guarantee loans on rental housing only if the lender is protected by title insurance; at the time this requirement was first imposed title insurance was written on only one percent of the real estate in that state. FNMA indiscriminately requires mortgages which it purchases to be protected by title insurance with the result that title insurance is now being written in some areas solely on FNMA mortgages.\textsuperscript{45}

In 1961, forty-two states had specific legislation for the regulation of title insurance companies, and the other eight had none.\textsuperscript{46} In most states, regulation is minimal and is sometimes even paternalistic toward established companies.\textsuperscript{47} Only four states regulate premiums to any extent. Texas is the only one of these setting rates directly. Missouri, North Dakota, and Virginia have general standards like "reasonable rates." Mary-

\begin{itemize}
\item \textsuperscript{41} Complaint in United States v. Chicago Title & Trust Co., 242 F. Supp. 56 (N.D. Ill. 1965).
\item \textsuperscript{43} Weekley, \textit{Lawyers Title Leads Field in World}, Lawyers Title News, Dec. 1960, p. 2, 6; reprinted from Commonwealth Magazine, \textit{The Magazine of Virginia}.
\item \textsuperscript{44} See Weekley, \textit{supra} note 43, at pp. 5-6.
\item \textsuperscript{45} See Baughman, "FNMA" and the Title Insurance Industry, Title News, Jan. 1964, p. 112, 113; and Gretz, \textit{The Importance of Title Insurance to FNMA}, Title News, Sept. 1963, p. 5, 6.
\item \textsuperscript{46} According to Mendel, Title Insurance, Tranquilizer or Boon to the National Lender? 19-20 (1957), in 1957, 37 states had some restrictions on title insurers. And the author of Comment, \textit{Title Insurance}, 13 Ala. L. Rev. 381, 386-87 (1961) would add 5 more. The other 8 states were: Connecticut, Hawaii, Iowa, New Hampshire, North Dakota, Rhode Island, South Carolina, and South Dakota. Iowa prohibits title insurers from doing business in the state. Iowa Code Ann. § 515.48 (Supp. 1963).
\item \textsuperscript{47} In Illinois, "any . . . corporation guaranteeing or insuring titles to real estate in counties having a population of 500,000 or more persons (Cook County) shall deposit with the Department [of Insurance] the sum of $500,000 in securities. . . ." Ill. Rev. Stat. ch. 73, § 479 (1963).
\end{itemize}
land, Michigan, Minnesota, Nevada, New York, Ohio, Oregon, Pennsylvania, Vermont, Washington, Wisconsin, and Wyoming merely require rate schedules to be filed for approval.48

The practice varies with respect to who, among seller, lender, and purchaser, bears the costs. In Illinois, the seller bears most of the costs, although the purchaser pays a portion plus the mortgagee's title charges, which usually runs thirty dollars to forty dollars for a residential transaction. In New York and most of the eastern states, the purchaser pays the entire cost. In northern California the purchaser pays whereas in southern California the seller does. In many areas, a hidden charge is the commission paid to the person who procures the order for the policy.

A perusal of the income statements of title insurance companies will indicate that their major function is not to spread loss. In 1957, title companies in New York state paid claims of only $538,913 on premium income of $14,127,993 or at the rate of 3.8% of premiums. Losses for Lawyers' Title Insurance Company, the third largest company in the country, generally average 2% to 3% of gross premiums.49 Title Insurance and Trust Company (Los Angeles) which accounts for almost one-half of the industry's premiums, established loss reserves of 3.3% in 1963 and 3.7% in 1964, and 4.4% in 1965. Other companies have typical losses of from 1% to 10% of gross income.50 One writer reported a national loss premium ratio of 1.69% for 1954,51 but the American Land Title Association disputes this figure placing "average" losses in a range of 2% to 5%.52 These figures cannot be taken at face value since accounting for losses and premiums varies from company to company.

There is limited information available as to the types of losses. According to the American Land Title Association:

Categories of losses are not reported, but certain classes of defects have a greater occurrence rate. Tax and special assessment matters are fairly common sources of claims. Clerical

48. American Land Title Ass'n, supra note 40, at 3-4.
49. Weekley, supra note 43, at 3. The December 31, 1963, Annual Report of Lawyers Title Ins. Corp., indicates losses incurred of 2.9% and 3.1% of premiums earned for 1962 and 1963 respectively. Most of the increase in losses from 1962 to 1963 was due to actions of one agent during a prior year. The 1965 Annual Report indicated losses of 2.4% and 8.8% for 1964 and 1965, respectively. The 1965 losses were described by the company as being abnormally larger.

Although the industry's trade association, the American Land Title Association, has compiled statistics on this and other aspects of the industry, they have been kept confidential. McConville, Report of All-Industry Statistics Committee Final Report, Title News, Jan. 1964, p. 98, 99.

50. The Title Guarantee Company (New York) according to its 1964 Annual Report showed losses and provisions for claims, less recoveries, of 2% of gross income for 1963 and 2.1% for 1964.

Home Title Guaranty Company (New York) according to its 1957 and 1959 Annual Reports showed losses of 1.4% of gross income in 1959, 1.5% for 1958 and 1.5% in 1957. The company was acquired by Chicago Title and Trust Company in 1960.

52. American Land Title Ass'n, supra note 40, at 3.
and title examination errors also cover a large proportion of the risks which develop into losses. Fraud, forgery, along with hidden defects not disclosed by a competent examination of public records, or physical examination of the premises, make up the bulk of relatively unavoidable losses.

Experience indicates greater risk in areas relatively new to title insurance. Competitive factors often influence where a title company enters into heretofore untouched regions. More of the questionable titles are submitted for examination in these areas, and also "risk problems" are assumed more readily in the pioneering stages in non-metropolitan areas as possible sales features, with a resulting slightly higher rate of loss incidence.

It is unlikely that any correlated relationship between the type of defect and the proportion of losses attributable to any one category exists. In this respect, each company has its own method of handling allocation of expenses between cost of claims and overhead costs, and accurate estimates of expenditures for specific losses are nigh impossible to get.53

The following, published by the Association shows the loss and claim experience of one large title insurance company:

<table>
<thead>
<tr>
<th>Claims Category</th>
<th>Per cent of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Avoidable:</strong></td>
<td></td>
</tr>
<tr>
<td>Tax and Special Assessment, Judgment Searches</td>
<td>23.7</td>
</tr>
<tr>
<td>Clerical Errors (Chain, Typing, Description)</td>
<td>9.5</td>
</tr>
<tr>
<td>Examination</td>
<td>15.8</td>
</tr>
<tr>
<td>Title Clearance</td>
<td>4.1</td>
</tr>
<tr>
<td><strong>Sub Total</strong></td>
<td><strong>53.1</strong></td>
</tr>
<tr>
<td><strong>Relatively Unavoidable:</strong></td>
<td></td>
</tr>
<tr>
<td>Easements, Vacations, Encroachments, Possession Questions, Plat Restrictions,</td>
<td></td>
</tr>
<tr>
<td>Overlapping Descriptions</td>
<td>8.1</td>
</tr>
<tr>
<td>Fraud, Forgery, False Affidavits</td>
<td>12.9</td>
</tr>
<tr>
<td>Collateral Attacks, Unrecorded and Lost Instruments, Mistaken Identity, Dower,</td>
<td></td>
</tr>
<tr>
<td>Contract Claims, Reform Deed, Incapacity of Grantor,</td>
<td></td>
</tr>
<tr>
<td>Suit to Set Aside Redemption</td>
<td>7.9</td>
</tr>
<tr>
<td>Alteration Tax Collection, Back Tax</td>
<td>3.2</td>
</tr>
</tbody>
</table>

53. Id. at 4.
Unfounded Lien and Default of Surety Claims 12.9
Mechanic Lien Claims 1.7
Error in Abstract .2

Sub Total 46.9

Grand Total 100.05

The title insurance industry has had a profound influence on conveyancing. For example standardized practices have been effected by the requirements, advertising, or services of title insurers; in many urban areas in California, Illinois, New Jersey, New York, Pennsylvania, and Washington, insurability has been adopted as a basis for determining acceptability of title in lieu of marketability. Transactions are expedited by this change, but it may mean that a judicial decision is made by a private agency without right of appeal. A purchaser may thus be required to accept a title which may be exposed to risks of litigation. Although the insurer must usually indemnify the owner and defend the title, there are obvious limitations to this protection—which become very real in an era of rising prices.

Even more important is the negative influence of the industry. It becomes quite clear, to anyone who has spent an appreciable amount of time interviewing practitioners, title insurance executives, members of bar association committees, and public officials, that the industry is determined to use all the forces at its command to fight reform which might decrease the need for title insurance. It has joined with the abstract industry and with many attorneys in a massive conspiracy to block any move to improve conveyancing in a way which would diminish or eliminate the need for abstracts and title insurance policies.

A case in point is the history of the American Bar Association Section of Real Property Probate and Trust Law—the only national organization of real estate lawyers. Soon after its inception the title insurance industry recognized the Section as a threat and succeeded in obtaining so powerful a voice in it that actions inimical to the industry could be prevented. Although the Section was initiated in 1934 as a real property section, with R. G. Patton, a lawyer intensely devoted to improving conveyancing, as its first chairman, within two years, Harold Reeve, counsel to Chicago Title

54. Id. at 5. See also Smith, Title Insurance Claims Show Mysterious Picture, Lawyers Title News, Dec. 1963, p. 11; Comment, Title Insurance, 13 Ala. L. Rev. 381, 401-02 (1961).
56. See pp. 455-56 infra.
57. Payne, In Search of Title (Part II), 14 Ala. L. Rev. 278, 285-86 (1962). Professor Payne, speaking from first hand knowledge, states the Section is dominated by the lawyer's economic competitors, the most important of which are the title insurers, and that they exercise practical control over the work of the Section.
and Trust Company, became chairman and succeeded in diluting the Section's objectives by adding the related probate and trust law activities. That a major purpose of the changes was to prevent the Section from being used to promote the Torrens system seems apparent. Since that time the title insurance and abstracting industries have maintained a strong influence in the Section by having the industries' men always in important offices. In most of the intervening years since Reeve's time an employee or counsel of Chicago Title has held the post of Secretary or Assistant Secretary of the Section; tenure in these posts has not been limited as it has in most others. A substantial number of other persons interested in title insurance companies have consistently held other key posts within the Section. It has apparently been a policy of the Section to have chairmen and members of committees of the Real Property Law Division drawn about one-third from the ranks of the title insurance and abstracting industries.

With this knowledge of the history of the Section it becomes easy to see why it has not become a stronger force for reform. A pregnant example of the way in which the Section has acted is the following: In 1954, Professor Payne, as chairman of the Section's Committee on Improvement of Conveyancing and Recording Practices, led the Committee in first, pointing out that the conveyancing system was so defective that needed change might take effect in an undesirable way unless the organized bar led the way; second, that the Section should stop dissipating its resources on minutiae of no substantial significance; third, that to do the job adequately, the Committee membership should be selected so as to give it some continuity and the Committee's functions should be clarified; fourth, the Section should cooperate closely in the reform movement with state and local bar associations and should authorize the committee to actively encourage the formation of state and local real property committees where they do not exist; and fifth, that the Section should implement a long range plan of action for improving immediate operational practices of conveyancers by establishing model title standards and to limit the period of duration of interests in real estate. Characteristically, the Section Council, in an unprecedented move, threw cold water on the report by preceding it in the printed report with a statement that the Council was sympathetic with maintaining continuity of membership in the Committee, but that to do so would be unfair to other Section members aspiring to serve on the Committee; that the House of Delegates must first approve approaches to state and local bar associations, and the Council would not seek this approval until the Committee "first detailed the matters in respect of which such approaches would be made;" and that before funds can be sought for the suggested long range project of the Committee, the relative merits of research projects of other committees must be considered.

58. Anonymous source. Most of the information in this segment relating to the ABA Section was obtained from the same anonymous source.
The Council’s statement indicates that the Committee’s report was not accepted in the spirit in which it was offered. Nevertheless, shortly thereafter, the research project on Improvement of Conveyancing sponsored jointly by the Section and the University of Michigan Law School was launched and succeeded in achieving a part of the literal goals of the Committee Report. But even this limited action nearly failed at inception. Of the total budget of $32,000, the University supplied about $17,500, title insurance companies about $2,500, Section members, personally, and foundations of which they were members, about $9,500, and the Section about $2,000. At the critical time the American Title Association (now the American Land Title Association) indicated no further financial support from it or its members was likely, and individual officers and Council members then personally contributed more than the whole title insurance industry. Mr. Potter and others made it clear that the industry provided this token support on the basis that unless something was done to alleviate the pressure for reform, more drastic changes might ensue.

Although there are increasing indications of a broader approach by the Section, it seems so far to have been, at best, ineffectual, and at worst, a deterrent factor in conveyancing reform. Since there is no other national body of lawyers interested in real estate, if the reform movement is to secure widely based support, some other impetus must be found.

A major problem caused by the increasing growth of title insurance companies is the tendency toward elimination of independent legal advice for lenders and purchasers. In most of California, attorneys no longer participate in the average real estate transaction, and to a large extent the same is true in St. Louis, Philadelphia, and Chicago; in these areas title insurance companies, together with brokers and lenders, handle residential real estate matters almost exclusively from the signing of the contract through the closing. Since 1946, there has been an increasing tendency of national lenders to substitute the services of title insurance companies for those of independent attorneys. The lack of independent advice may be dangerous. For example, in Colorado, a title insurance company recently insured a title to a subdivision, and although it knew that the land had been mined and that there was no cap rock over the mines, thereby making an unsafe condition, the insurance policies did not mention this fact. Presumably the insurer felt that the lack of cap rock was not a title

---

59. See Payne, supra note 57, at 286-87. But the ATLA has made good use of the project. In the summer of 1962, the presidents of the three largest companies attended a Round Table of different organizations concerned with high closing costs. They "pointed out that the title industry was mindful of the desirability of simplifying . . . conveying . . . and presented as evidence the recent publication . . . by Simes & Taylor . . . to which project ATA made a substantial contribution. . . ." Rawlings, Report of the National President, Title News, Jan. 1962, p. 5, 7.

60. ABA Special Committee on Economics of Law Practice, Rep. 11, Aug. 1958; Payne, In Search of Title (Part I), 14 Ala. L. Rev. 11, 50 (1961).

61. For the California practice, see Mendel, supra note 46, at 22.

62. Id. at 3.
defect. This may be correct, but the buyer's risk of loss is just as great whether it is or is not a title risk. A lawyer, on discovering this fact, would certainly have disclosed it to his client.

A related, and perhaps resultant, problem to that of loss of independent legal advice, is the trend toward unauthorized practice of law by title insurers.

As part of this trend, there is a change in the services performed, as well as in the performer. For example, it is well known in the industry, although generally suppressed, that several title insurers have, on occasion, written insurance entirely on a casualty basis without having examined the title. And there is reason to believe that much insurance is written on a semi-casualty basis whereby certain risks are insured without investigation.63

A final major problem caused by the current growth of the title insurance business is the emergence of the giant company and monopoly. Local monopolies are already established in many places,64 and some writers have expressed concern.65 The ultimate results in higher rates, less complete protection of title, longer delays, and other detrimental effects, cannot be foretold. Chicago Title and Trust Company began in 1954 to consolidate its Illinois business by acquiring abstract companies outside of Cook County. In addition to its wholly owned facilities and subsidiaries, the company has agency arrangements with sixty-three of the sixty-seven independent abstractors who act as agents for title insurers in Illinois. As a result, it writes about ninety-five percent of the insurance in the state.

In 1957, the company embarked on a nationwide expansion program whereby it acquired substantial control of Title Insurance Corporation of St. Louis, Title Guaranty Company of Wisconsin, Home Title Guaranty Company (New York), and Kansas City Title Insurance Company. Efforts to acquire a Detroit company failed. A few smaller companies have also been acquired.

In 1962 the Department of Justice initiated an antitrust suit in the United States District Court in Kansas City, Missouri, alleging monopolization by the company and seeking separation of Chicago Title from Kansas City Title.66 The action was removed to the Northern District of Illinois.

---

63. See Mendel, supra note 46, at 6-7, where the question is raised as to whether national lenders are merely getting indemnity insurance as opposed to a proper examination with respect to the extra coverage under the LIC and ALTA forms. (These forms are described briefly at page 454 infra.)
64. See Payne, In Search of Title (Part I), supra note 60, at 37-38.
65. Cribbet, supra note 18, at 1306; Johnstone, supra note 29, at 517-18; Payne, supra note 64.
66. United States v. Chicago Title & Trust Co., 242 F. Supp. 56 (N.D. Ill. 1965). As this article was about to go to press, a tentative consent decree was filed whereby Chicago Title agreed to dispose of its interests in several subsidiaries within a period of eighteen months, and on failure to do so, it would be required to dispose of Kansas City Title Insurance Company. In addition
The Department of Justice alleged that the St. Louis company controls 20% of the Missouri business, the Wisconsin company controls over 50% of the Wisconsin business, and the Kansas City company controls over 50% of the Missouri business. Evidence of the company's slight competition is the fact that net consolidated profits in 1965 after taxes were 16.2% of total income and 9.7% of capital. Before taxes, these figures were 28.7% and 17.3% respectively. In this connection, it should be noted that the company follows a practice of paying a 10% commission "for prompt payment" to the person ordering the policy. This prompt payment commission is apparently available only to customers who regularly refer business. But since most business is referred business, and since most customers make no refund of the 10% to the property owner, the portion of the premium dollar going toward profits and commissions before taxes approximates the figure of 40%. The company made two acquisitions in 1960, seven in 1961, three in 1962, six in 1963 and one in 1964. Another major acquisition fell through in 1965, probably because of the Justice Department. The company more than doubled its net assets between 1958 and 1964.

Because of the non-existence of appreciable regulation by many states, it is thought by leaders of the industry that the McCarran-Ferguson Act's exemptions from the federal anti-trust laws may not apply. In United States v. Chicago Title & Trust Co., the court ruled, on plaintiff's motion, that the McCarran-Ferguson Act was no bar to suit on the ground that none of the statutes of Illinois, Missouri or Wisconsin were of the same nature as the Clayton Act provisions there sought to be enforced, and that therefore state regulations did not displace the Clayton Act.

It is arguable that the title insurance business as conducted by the title plant companies is not "insurance" within the meaning of the McCarran-Ferguson Act. Since almost all of the income of the title plant company is attributable to non-risk-taking activity, it may very well be that such companies are not protected by that umbrella.

A development which may help to counteract some of these problems was initiated in 1948 in Florida and is spreading to other states. Bar organizations in several states have embarked on programs for the purpose of preserving attorneys' title practices and the availability of independent legal advice to purchasers and sellers, while at the same time providing title insurance features. Under these programs lawyers may provide title insurance by a bar organized company to clients for whom Chicago Title must forego acquisition of title insurance companies for ten years unless it first notifies the government and obtains approval of the court. 1966 Trade Cas. ¶ 71, 745.

68. 242 F. Supp. 56 (N.D. Ill. 1965).
they have examined a title. In addition to Florida, bar groups in Arkansas,
Colorado, Connecticut, Illinois, Indiana, Kansas, Kentucky, Minnesota,
Nebraska, Ohio, Utah, and Wisconsin are operating similar organizations.
Other groups are in the planning stage in Michigan, Missouri, Nebraska,
North Carolina, Pennsylvania, and Texas. An interesting development in
Colorado is a movement to develop a regional fund including Arizona,
New Mexico, South Dakota, Utah, Wyoming, and possibly Nebraska.

In Florida, The Lawyers' Title Guaranty Fund, a business trust,
works in this way: Lawyers may become members upon approval by
a committee and payment of $200 into the Fund. A member is thereafter
authorized to issue a title insurance policy for the Fund of a face value
up to $100,000 on a title which he has examined. Policies in excess of
this amount require special approval. The lawyer proceeds with the
transaction as he would without title insurance, but prior to the closing
and after his examination of the title, he issues a document to the pur-
chaser containing both his opinion and a title commitment. Up to this
point, he has not made any contact with the Fund. After the closing, a
title policy is issued and a carbon copy is sent to the Fund along with the
premium. No abstract is examined by Fund staff personnel, except for
transactions involving over $100,000, or where a peculiar legal problem
exists. When a member issues a Fund guarantee policy, he makes a con-
tribution to the Fund of approximately $1.80 per $1,000 of the amount
of the policy for either an owner's or a mortgagee's policy. All of that
lawyer's contributions are credited to his account, together with his share
of income from Fund investments. His account is charged with his share
of expenses and losses. Losses arising from negligence, fraud, or in-
competency of a member are charged directly to that member's account.
Other losses are shared by all Fund members. After seven years, a portion
of the credit balances are returned to members. The Florida Fund
earned $703,000 in premiums in 1963.

Minnesota has also adopted a business trust form of organization,
while in the other states a corporate form is utilized.

Each of the organizations has taken precautions to avoid losing con-
trol of the organization to non-lawyers or to any limited group of lawyers.

The movement gathered such momentum that the House of Delegates
of the American Bar Association in February, 1962 authorized a pre-

69. For a more thorough discussion, see Carter, Lawyers' Title Guaranty
Fund, 8 Fla. L. Rev. 480 (1955) and Yelen, Lawyers' Title Guaranty Funds: The
70. Letter from Hewen A. Lasseter to the author, April 15, 1964.
71. On Lawyers' Title Insurance organizations generally, see Carter, A
New Role for Lawyers: The Florida Lawyers' Title Guaranty Fund, 45 A.B.A.J.
803 (1959); Herring & Cummings, The Case of the Disappearing Abstract and
Lawyers' Title Guaranty, 49 Ill. B.J. 454 (1961); Report of Special Committee
on Missouri Title Insurance, 15 Mo. B.J. 470 (1959); Sponsoring a Lawyers'
Title Guaranty Fund, 1 ABA 1960 Award of Merit Entry 7 (Fla., 1960). See also
citations at Payne, In Search of Title (Part I), supra note 60, at 61 n.132.
viously appointed Special Committee on Lawyers' Title Guaranty Funds to cooperate with state and local bar associations interested in such organizations.

Of late, according to unpublished trade talk, lawyers' funds have become the object of what may be illegal refusals by commercial title insurers to reinsure risks. It is probable that this will result in litigation shortly.

One problem in the development of these organizations is in formulating their basic purpose. If the basic purpose of the organization is to increase the lawyers' income, it would seem that it is doomed to failure for lack of sentiment among the public and probably among lawyers. The basic purpose should rather be to aid the public through providing independent legal advice and preserving competition in conveyancing. One danger of a profit seeking motive is what some people have called a conflict of interest problem. If premiums are originally charged to a client, it would seem to be highly improper for the lawyer to retain the seven year refund. However, the Committee on Professional Ethics of the American Bar Association has found that "the financial interest in such a transaction is so remote as not to be a violation of the Canons of Ethics."72

Nevertheless, because of the possible ethical problem and the desire to avoid the profit seeking motive, the President of the Florida Fund has advocated a single charge for the lawyer's services in closing a transaction and for the title insurance policy, with the fee being identical whether or not title insurance is obtained; i.e., the lawyer is to absorb the cost of the title insurance as part of his overhead, in the same way that he absorbs premiums for errors and omissions insurance. One must expect that this approach will require a great deal of education of attorneys. However, any other course is bound to cause the lawyers' title fund system to degenerate into a commercial venture, probably decreasing the chances for success.

**Efficacy of the Systems of Title Protection**

Under title registration, once title is registered, conveyancing is quicker and cheaper, and the title is safer than under recording. Some writers feel that although title registration is better than recording, with or without title insurance, the superiority is so slight as to be inconsequential.73 Others assert that once title is registered, the superiority of title registration over recording is indisputable.74 All would agree that the expense and time delay of transition from recording to title registration

---

73. Dunham, Modern Real Estate Transactions 777-79 (1952).
LAND TRANSFER IMPROVEMENT

(initial registration) is the major difficulty with the system. Let us briefly determine for ourselves whether existing title registration systems are superior to recording as supplemented by title insurance. This study will use the criteria of security of title, speed, and costs of conveyancing, as well as a miscellaneous category of criteria we shall discuss under the title, "Other Shortcomings in the Systems."

Title Risks

Risks Under Title Registration Acts. Under the title registration system, with some exceptions, matters affecting title to the registered parcel must appear on the certificate of title in order to be valid against a bona fide purchaser. One can readily see that title registration must afford better protection than recording, since most instruments not registered are given no effect against a bona fide purchaser under the registration system, whereas many matters may remain unrecorded under the recording system and, nevertheless, be fully effective. Title registration gives additional protection in that all matters, with a few exceptions, which appear on the records, are given conclusive effect.

The few items which, even though not noted on the certificate of title, are still good against a bona fide purchaser, generally fall within the following categories:

(a) Rights arising under the laws of the United States which are not required by federal law to be registered in order to be valid against subsequent purchasers or encumbrancers;
(b) Certain general and special tax assessments;
(c) Leasehold interests of less than a certain term under which the tenant is in actual occupation;
(d) Public highways;
(e) Interests of persons deprived of their rights by the decree of initial registration, for a certain period varying from thirty days to two years;
(f) Rights of appeal from the decree of initial registration.75

Other less common statutory exceptions are subsisting easements and rights of parties in possession under deed or contract for deed. Several other interests have been held by judicial decision to retain their validity even though not noted on the certificate of title. For example, rights of parties in possession at the time of transfer, who were also in possession at the time of initial registration, are generally not cut off unless these parties were given proper notice on initial registration.76 Another defect not specifically excepted is that caused when there are two unrelated

75. See 2 Patton, Titles § 685 (2d ed. 1957).
76. E.g., Couey v. Talalah Estates Corp., 183 Ga. 442, 188 S.E. 822 (1936); Chicago Title & Trust Co. v. Darley, 363 Ill. 197, 1 N.E.2d 846 (1936); Sheaff v. Spindler, 339 Ill. 540, 171 N.E. 632 (1930). See also Kirk v. Mullen, 100 Ore. 563, 197 Pac. 300 (1921) and State ex rel. Douglas v. Westfall, 85 Minn. 437, 445, 89 N.W. 175, 178 (1902).
registered owners of interests in the same land.\textsuperscript{77} Also, the purchaser under a registered conveyance describing land which was never registered may not be protected.\textsuperscript{78}

This is not to say that these are risks to be assumed by a purchaser. These exceptions are the items not fully protected against by examination of the certificate of title. Of the specified exceptions, most of them can be determined conclusively by further action, such as examination of additional records, inspection of the premises, and inquiry of occupiers. Thus, federal tax liens which would be good against purchasers, general taxes, and special assessments, are a matter of record in most states. Short term leasehold interests where the tenant is an occupier, and other possessory interests, may be determined by inquiry of persons occupying the premises. And for other exceptions, although loss may result, it may be that indemnity will be provided from the indemnity fund.

\textit{Risks Under Recording Acts.} The basic recording acts do not make instruments valid; they merely make some unrecorded instruments invalid. One may record an instrument purporting to affect real estate and the recording, contrary to appearances, may have no legal effect. As a result of this approach to title protection, the record is not only inconclusive, but also may be deceptive.

The basic acts have been greatly altered so that the above statements are not unqualifiedly true. For example, many states have established presumptions of validity of recorded instruments. However, even with the many improvements in the recording acts, among the numerous matters typically not protected against under the acts are the following:

(a) Inaccurate record of marital status;  
(b) Incapacity;  
(c) Lack of delivery;  
(d) Forgery;  
(e) Possessory interests antagonistic to the record;  
(f) Documents referring to two or more people with similar names treated as referring to the same person;

\textsuperscript{77} See, e.g., Minnetonka State Bank v. Minnesota State Sunshine Soc'y, 189 Minn. 560, 250 N.W. 561 (1933) (previously registered easement holder prevails over registered owner of servient tenement).  
\textsuperscript{78} Patton, Manual of Torrens Procedure 18 (1936). In Illinois, easements reserved by implication on severance of the dominant and servient tenements are valid at least against the original grantee of the servient tenement even though the easement is not registered. Carter v. Michel, 403 Ill. 610, 87 N.E.2d 759 (1949). Unregistered dedications have been held good against a purchaser of registered land at a sale on execution of a judgment. Hooper v. Haas, 332 Ill. 561, 164 N.E. 23 (1928).

The official position of the registrar is that rights of a trustee in bankruptcy must be registered to be valid, but many writers question this. \textit{E.g.}, Powell, Registration of the Title to Land in the State of New York 51 (1938); Comment, 45 Ill. L. Rev. 500, 504 (1950). In Ohio a federal court search is made to minimize the danger of loss due to a bankruptcy; Maher, \textit{Registered Lands Revisited}, 8 W. Res. L. Rev. 162, (1957). The question apparently has never arisen in a reported case.
(g) Defective or absent acknowledgments;
(h) Void judgments;
(i) Mechanics' and materialmen's liens (and other unrecorded liens);
(j) Invalid powers of attorney;
(k) Matters of heirship;
(l) Lost wills produced for probate after conveyance by heirs;
(m) Overruled legal precedent on which a title is based;
(n) Invalid trusteeships;
(o) Interests recorded prior to the period searched;
(p) Recorders' errors and errors of other public officials in recording judgments, tax liens, etc.;
(q) Scriveners' errors;
(r) Inaccurate local record of United States patent;
(s) Abstractors' errors.

Risks Under Recording Acts Supplemented by Title Insurance. In many areas, for a fee, one may acquire a title insurance policy providing for indemnification from, and defense against, losses due to most of these risks.

Originally, title insurance policies were little more than a contract to indemnify and defend against loss due to an improper search or incorrect opinion; they guaranteed only that the policy holder had a record title as shown on the policy. And in some places this is still the effect of the policy. But most companies insure against more risks, and in a few areas, one may choose a policy providing either the limited or the more comprehensive coverage.

In most areas, there are at least two distinct forms of title insurance policies: (1) an owner's policy, and (2) a lender's policy. Most owners' policies insure against such unknowable defects as forgery, lack of delivery, incapacity, marital status, rights of heirship, void judgments, and errors by public officials. In addition, most owners' policies insure marketability of the title. Several companies, for an additional premium, will insure owners against some known but immaterial or unimportant risks or some defects which might be discovered upon a search of the records for a longer period. The ALTA has recently adopted several standard forms of owners' policies, each providing different coverage.

Risks usually not covered by an owner's policy are defects disclosed by the title examination and listed as additions to the standard exceptions on the policy, questions of survey, rights of parties in possession, defects created subsequent to the date of the policy, defects of which the insured was aware or which he assumed prior to the date of the policy, governmental regulations, title to "personal property, even when affixed to the

79. See, e.g., Bothin v. California Title Ins. & Trust Co., 153 Cal. 718, 96 Pac. 500 (1908).
80. See Reeve, Guaranteeing Marketability of Titles to Real Estate (1951), opposing the insuring of marketability.
81. See Johnstone, Title Insurance, 66 Yale L.J. 492, 495 (1957).
Lenders, because they are generally in a better bargaining position than owners, have been able to persuade the title insurance companies to give them greater coverage under standard forms. The two forms most widely used are the Life Insurance Company Standard Mortgagee's Policy (LIC form) and the American Land Title Association Standard Loan Policy of Mortgagee's Title Insurance (ALTA form). However, in most areas, other less inclusive policies are utilized by local lenders due to the high cost of the ALTA and LIC policies or the extra services required of them by the insurer.

ALTA and LIC lenders' policies insure against all defects, except those discovered by the examination, those created subsequently to the date of the policy, and those created by governmental regulations. The policies do not cover title to "personal property, even when affixed to the realty." These policies differ from other lenders' policies in that they protect against unrecorded mechanics' liens, rights of parties in possession, and questions of survey.

**Other Shortcomings in the Systems**

Title insurers argue that they undertake to defend a title against attack, whereas under title registration, or recording without insurance, the injured party must prosecute or defend himself. Insurers claim that under registration, generally, a lawsuit must be brought to recover from the indemnity fund, whereas informal settlements may be made with insurers.

On the other hand, proponents of title registration assert that under their system, the *bona fide* purchaser keeps title, whereas under title insurance, he must be content with a money recovery. They also state that the amount of the money recovery may be inadequate for many reasons. Or, if the title policy has been assigned, no indemnity may be had.

They also argue that in situations where proof of title is required, as in actions for specific performance, ejectment, partition, or condemnation, a title insurance policy is no proof of title, whereas a certificate of registration is conclusive evidence of title.

The title registration partisans suggest the problems of title insurers' sufficiency to sustain a particular loss. But in answer, title insurers point out that many title registration indemnity funds are inadequate.

A few illustrations may be used to test some of these assertions. Assume that Oliver Owner acquired two parcels of land, one having a

82. *Id.* at 496-97.
83. For the history of the development of these forms to 1957, see Mendel, *op. cit. supra* note 46, at 9-15.
registered title and the other having an insured, recorded title, and that he procured a certificate of title and a title insurance policy to cover the respective parcels. Also assume that later, Sam Slick, using Owner’s name, fraudulently executes a contract of sale of the registered parcel to Reginald Registered and of the insured parcel to Iam Insured.

At this point, the first important difference between the two systems becomes apparent. Unless Slick has somehow procured Owner’s duplicate certificate of title for the registered parcel, Slick cannot close the sale to Registered since Registered will not accept a deed without this certificate. On the other hand, Insured, not knowing Slick’s deed is forged, will accept it, and order a title insurance policy which presumably will be issued. Slick, of course, absconds, or else dissipates the proceeds. If and when the forgery is discovered, and Oliver Owner asserts his claim, Insured will be entitled to have his title defended by the insurer. In theory, Insured should lose his case and be indemnified to the extent of the policy amount, and Owner should retain his title. Or a settlement may be worked out, as is usually the case, whereby Owner is paid money in return for a deed to Insured, thus resulting in a loss only to the insurer.\[8.4\]

But note these important consequences. Under these facts, no one sustained any loss with respect to the registered parcel. Any loss caused by Insured or Registered entrusting Slick with an earnest money deposit is not due to the shortcomings of the title assurance method used, but is rather due to bad practice. But even in this respect, Registered has the advantage in that he can request Slick to exhibit the owner’s duplicate certificate of title before paying over any earnest money.

With respect to the insured parcel, the insurer sustained a loss represented by the settlement paid to Owner or to Insured, plus the expenses of adjusting the loss. This loss and expense is spread among all the purchasers of title insurance by premium charges.

In addition, Owner will have been put to the expense and trouble of proving his title. And, of course, his own title insurance policy will avail him nothing since it insures title as of the date of the policy only. More important, despite Owner’s perfect theoretical title, he runs the very real risk that he will not successfully prove the forgery—thus losing title through a forgery.\[8.5\]

And finally, Insured, during adjustment of the matter, is put in the unfortunate position of not knowing whether he will soon be dispossessed. If he has not yet improved the parcel, he must withhold improving it until the matter is adjusted. In the case where an improvement has been made without obtaining additional insurance coverage, Insured will

\[8.4\] The Lawyers Title Insurance Corporation states that no homeowner insured by it has ever lost his home because of a title defect. Weekly, supra note 43, at 4.

\[8.5\] See Patton, op. cit. supra note 78, at 19-20.
possibly sustain loss since his indemnity is limited to the policy amount (unless recovery can be had against the insurer *ex contractu*). In such a case, he may be forced to contribute to the settlement paid to Owner if Owner insists on his rights to the title and is not somehow estopped from asserting these rights.

At least under the facts of these particular situations, it appears that protection afforded by title registration is substantially better than that afforded by title insurance. The most important distinction is that title registration is preventive rather than remedial.

Assume that in the prior situation, Sam Slick had obtained the title certificate for the registered parcel from Owner so that this safeguard was not available. In most jurisdictions, an additional safeguard is available to prevent any wrong from occurring in the first instance. Generally, at the time of closing the sale, the registrar will check the signature of the grantor against the signature of Owner which he has on file.

But assuming that Slick passes this second obstacle and Registered receives a certificate of title, what are the consequences to Owner and to Registered as compared with the consequences to Owner and to Insured on the insured parcel?

It is expected that, in most states, Registered will retain title to the parcel, and Owner will be remitted to his claims against Slick and the indemnity fund. In many jurisdictions, Owner’s right to recover from the fund in such a case is doubtful. In Illinois, recovery could probably be had. In Massachusetts, if Owner was negligent, he probably could not recover. Quaere what would be the result if the fraud were discovered after the closing but before the new owner’s certificate is issued.

It appears that if Sam Slick has successfully hurdled the two safeguards by obtaining possession of the Owner’s duplicate certificate and deceiving the registrar as to genuineness of the signature, Owner may be in a worse position with respect to the registered parcel than he is in with

---

89. In Massachusetts, Owner need not pursue his remedy against any party prior to seeking indemnity from the funds unless he is entitled to recover the land. Mass. Ann. Laws ch. 185, § 101 (1955). If Owner initiates an action against Slick, he must complete it, and the action against the fund will be continued “to await the result of the action in tort.” Mass. Ann. Laws ch. 185, § 101 (1955).
respect to the insured parcel. Of course, the infrequency of losses because of the safeguards must be considered in weighing this factor. In addition to differences illustrated by this example, it should be noted that a public official, unlike a title insurer, probably has no authority to cause a payment to be made out of the indemnity fund solely as a matter of good business. However, such payments are known to have been made on occasion in Massachusetts. In Illinois, the County Board is given authority to allow claims without suit.92

The fallacy of the title insurers' first claim that they will defend an injured party, whereas under title registration the injured party must defend his own title, is readily apparent. Owner, although insured, was required to protect his insured title himself. In the first example, Reginald Registered's deal was never closed, and inconvenience to Owner and to Registered was avoided. In the second example, if Registered got title under the prevailing law, he could keep it without the need of a suit. Only in the jurisdiction where Registered would not get title, or where the law is unclear, is he in a worse position than Insured.

In the second example, for the registered parcel, Owner must make his claim against the indemnity fund. For the insured parcel, he must prove the forgery in a claim against Insured, who will be defended by his insurer. And since title insurers do not, as a matter of business practice, make settlement easy, Owner may well expend large sums in his claim against Insured.

Obviously, these examples represent but a few of numerous situations which might arise. They are set forth not to illustrate the superiority of title registration over title insurance, a fact which is not proven by these few cases, but to expose the half-truth of the claim of insurers that under insurance the insurer will defend title, whereas under title registration a registered owner must defend his title himself.

Concerning the second claim of title insurance partisans, that it is difficult to recover from the title registration indemnity fund when a recoverable loss is sustained, it is difficult to determine the truth of this statement due in part to the infrequency of claims. As has been said, in practice, a suit is not always necessary.

The proponents of title registration are correct in asserting that the bona fide purchaser generally keeps title rather than a money claim, that the insured owner's money recovery may be inadequate to cover the value of the property, and that a title insurance policy generally is not proof of title for specific performance, ejectment, partition, or eminent domain proceedings.93

93. But in Idaho a title policy is prima facie evidence of title for purposes of proving existence of the record of "deeds, mortgages and other instruments, conveyances or liens affecting the real estate mentioned" in the policy, if the policy is countersigned by a registered abstractor. Idaho Laws 1963, ch. 202 at
The usual problems as to the insurer's solvency or sufficiency to sustain a particular loss will always remain. It is common for title insurers to compare their own resources with the amount in the indemnity fund, but this is another attempt to compare unlike things. Because risks of loss are largely eliminated under title registration, the fund is only an occasional source of relief for losses, whereas under title insurance the insurer's resources are the only source of relief. Presumably, a properly drafted statute could put the state's general credit behind the title registration assurance fund without violating the "public purpose" provisions found in state constitutions.94

It is worth noting that, although the duration of an owner's insurance policy may be perpetual, in areas where it is customary for a seller to assign his policy on sale of the real estate, or to submit it for credit to the insurer, it is probable that under the terms of the policy all contractual rights in the original holder are assigned or cancelled. If for some reason, the assigned policy does not provide adequate protection, Owner, who has conveyed by a deed containing covenants for title, may find that he must make good for title defects against which he thought he was insured.95

Numerous practical defects in title registration and recording, which do not always affect the security of titles, at least when a careful job is done, but which do affect the costs involved in determining the status of a title, are discussed in the following section.

Costs of Conveyancing

There is no reliable, current analysis of the comparative out-of-pocket costs under the title registration, recording, and title insurance systems.96

Available statistics are old. The chart below illustrates findings of a 1938 study of closing costs for properties on which the Home Owners' Loan Corporation placed loans.97


94. But see Jones v. York County, 26 F.2d 623 (8th Cir. 1928). The court indicates that the result may be different under universal registration, i.e., where the only system in effect is title registration. Id. at 628.


96. The FHA has compiled aggregate closing costs for residential real estate without distinguishing registered from recorded titles. See House Comm. on Banking and Currency, Housing Subcommittee, Review of Federal Housing Programs, S. Rep. No. 1448, 84th Cong., 2d Sess. 6-14 (1956).

This chart shows clearly that, from the sample taken, closings in Illinois, Massachusetts, and Minnesota were substantially cheaper under title registration than under competing systems in the same state at that time.

However, because of changes since 1938, these figures perhaps are no longer reliable. The limitations of this article do not permit a similarly comprehensive study, but we can attempt to induce the probable relative costs in a rough way.

The many items of costs which must be paid on a sale might include:

(a) Attorney's fees;
(b) Abstractor's fees (for unregistered lands);
(c) Title insurance (for unregistered lands);
(d) Recording or registration fees;
(e) Costs of clearing title;
(f) Surveyor's fees;
(g) Mortgagee's fees (including appraiser's fee, credit report and service charges, but excluding title examination and title insurance);
(h) Stamp taxes.
Of these, mortgagee's fees and stamp taxes apply equally to real estate transactions utilizing any of the three types of protection and, therefore, will not be considered here.

In some areas certain of these items of costs are inapplicable, or overlap, or are mutually exclusive; for example, as has been noted, attorneys in some areas do not participate in transactions and the examination of title is performed by some other person; in Massachusetts, attorney's fees include the title search costs; in Chicago and New York City, title search costs are included in title insurance charges. Therefore, a comparison of costs between one area and another cannot be made. Such data will have validity only for purposes of comparing costs within each area. Since some items of costs, peculiar to some areas, may have been overlooked, the figures are reliable only for the particular element of cost and not in the aggregate. And for most of the items of costs we shall be concerned only with relative costs and not with absolute figures.

**Attorney’s Fees.** Although bar association fee schedules may not be followed by most attorneys, the relationships between the fees stated and those charged are likely to be consistent.

Most of the fee schedules in representative cities in the twelve states having title registration acts make no mention of transactions in registered land. Of the five states where title registration is common, Hawaii has no fee schedule; in Illinois, Massachusetts and Minnesota, fee schedules in the cities where registration is common specifically fix fees for both registered and unregistered titles; the fee schedules for the Ohio cities checked did not specify charges for registered titles.

In Massachusetts, attorneys’ fees for handling the seller’s work are identical for both registered and unregistered titles, but the fee for handling the buyer's work involving a registered title in Boston and vicinity is set at two-thirds of the fee for unregistered titles, and in Springfield at one-half.

In Cook County, Illinois, the fee schedule for recorded land expressly excludes examination of an abstract. The title services include only examination of the title insurer's report of title. Presumably because this service requires almost precisely the same skill and effort needed in examining a certificate of title of registered land, the fee schedule shows no difference in fees for insured and registered titles.

In Hennepin County, Minnesota, fee schedules for recorded and registered titles are also identical. Here the attorney examines an abstract prepared by an abstractor. The work of examining the abstract is apparently not considered more burdensome than examining a certificate of title.

**Abstractor's Fees.** The charge for an abstract sometimes depends on the nature and number of entries. The cost of an abstract, in areas where this
is a separate item of expense, may run from $5 to $500 for an ordinary residential lot.

The difficulties in compiling abstract charges would probably not be justified by the limited reliability of the compilation. Suffice it to say that they are usually appreciable, and they represent a cost of conveyancing under recording but not under title registration.

**Title Insurance Fees.** This item, too, is a cost not applicable to the title registration system. Usually there is one charge for an owner's policy and a different charge for a mortgagee's policy. In most areas there is a combination rate when both policies are ordered.

Charges for title insurance in some areas include the charges for title search, whereas in other areas they include only the underwriting premium. In Chicago, Cleveland, and areas of Hawaii, where the insurer searches title, and charges a single fee for both underwriting premium and search charges, a $15,000 owner's policy will cost $155, $125, and $94 in those places, respectively. A $7,500 mortgagee's policy will cost $104.50, $68.75, and $61.50, and a combination of the two policies will cost $160, $143.75, and $106.50.

In areas of Massachusetts, Minnesota and Ohio, where an attorney examines title and the insurer charges only the underwriting premium, a $15,000 owner's policy will cost $56.25, $77.50, and $75.00 in those states, respectively. A $7,500 mortgagee's policy will cost $18.75, $43.75, and $22.50, and a combination of the two policies will cost $68.75, $85.00 and $97.50.

From these figures it seems clear that the $3.50 to $3.75 per $1,000 rate which is generally quoted as representative is more mythical than real, and that the rate is actually much higher. In only one of the five states mentioned was the real rate $3.75 per $1,000. And where the company also performs the title search, the charge is much higher.

Some companies give a credit to a purchaser upon surrender of the title policy of the seller; others give a credit only to a person who surrenders his own policy and purchases a new one; still others give no credit whatsoever. Some companies charge a lower “reissue” rate where they have previously issued a policy on the same parcel. Some will give the same lower rate where a different company has previously issued a policy. Some companies decrease the charge for an owner's policy if a mortgagee's policy is ordered simultaneously, while others will decrease the charge for the mortgagee's policy; some companies give no reduction in such case. Some companies pay a commission to the attorney, lender, or real estate broker who orders the policy. Some companies charge varying rates to builders, lenders, or others. Hence, for this element of cost, it is similarly impossible to state a valid generalization.

The generally lower rates for mortgagees' policies reflect the lesser
risks. The mortgagee's policy expires on release of the mortgage, and the extent of risk decreases as the loan is reduced. In addition, the mortgagee is not likely to be damaged by minor title defects. For example, an undiscovered easement may decrease the value of the land in an amount less than the amount of the owner's equity.

The lower, and sometimes nominal, fee for a mortgagee's policy simultaneously ordered with an owner's policy also reflects the fact that one search or abstract examination will do for both policies. Why the saving accrues to the mortgagee rather than the fee owner in most areas is a matter for speculation. But one fact is clear: the cost of title insurance is a major element of conveyancing costs.

Recording and Title Registration Fees. Official fees are so slight as to be nearly immaterial. We have set forth below the fees charged under recording and title registration, in the jurisdictions where title registration is common, for a transaction involving a one-page deed from the seller and a one-page mortgage to secure a note.

OFFICIAL FEES FOR RECORDING AND TITLE REGISTRATION

<table>
<thead>
<tr>
<th>Registration</th>
<th>Illinois</th>
<th>Massachusetts</th>
<th>Hawaii</th>
<th>Minnesota</th>
<th>Ohio</th>
</tr>
</thead>
<tbody>
<tr>
<td>Registration of transfer</td>
<td>$5.00</td>
<td>$2.00</td>
<td>$2.50</td>
<td>)</td>
<td>)</td>
</tr>
<tr>
<td>Issuance of owner's duplicate certificate</td>
<td>5.00</td>
<td>5.00</td>
<td>10.00</td>
<td>$5.00</td>
<td>$5.00</td>
</tr>
<tr>
<td>Filing and registering mortgage.</td>
<td>5.00</td>
<td>7.00</td>
<td>2.50</td>
<td>2.00</td>
<td>2.00</td>
</tr>
<tr>
<td>Issuance of mortgagee's duplicate certificate</td>
<td>5.00</td>
<td>)</td>
<td>)</td>
<td>2.00</td>
<td>1.50</td>
</tr>
<tr>
<td>Total</td>
<td>$20.00</td>
<td>$14.00</td>
<td>$15.00</td>
<td>$9.00</td>
<td>$8.50</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Recording</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Deed</td>
<td>$3.25</td>
<td>$7.00</td>
<td>$5.00</td>
</tr>
<tr>
<td>Mortgage</td>
<td>3.25</td>
<td>7.00</td>
<td>12.00</td>
</tr>
<tr>
<td>Total</td>
<td>$6.50</td>
<td>$14.00</td>
<td>$17.00</td>
</tr>
</tbody>
</table>

From these figures, it appears that in Illinois title registration fees are $13.50 higher than recording fees, and in the other states the difference is less. In Hawaii recording fees are $2.00 greater than the corresponding registration fees.

Frequently Occurring Costs of Clearing Title Defects. Such matters as breaks in the chain of title, indefinite references, defective acknowledg-
LAND TRANSFER IMPROVEMENT

ments, failure to probate a will, titles obtained by adverse possession, and prescriptive rights, require additional work to clear title.

It is not feasible within the limitations of this study to determine the frequency of these problems. The most that can be done is to indicate some of the problems and provide available estimates by practitioners of frequency of occurrence.

Registered Titles. The most common complaint concerning registered titles is that once an encumbrance or other exception is registered, it is difficult to remove it from the register because of lack of authority in the registrar to cancel such interests without a court order, though the defect is no longer in existence or applicable to the parcel. Expired leases are one example. Another is where part of a registered parcel subject to an easement is sold, the portion sold being free of the easement.

Similarly, existing burdens on registered lands are not automatically removed from the certificate when the dominant and the servient tenements are acquired by the same owner. In most jurisdictions a petition to the registrar or the court, notice, and production of evidence is necessary to clear up the title. But this is an irksome and expensive process.

Many problems arise when a registered parcel is bordered by unregistered lands. It may be necessary to search the recorded interests of the neighboring land to determine interests appurtenant to the registered parcel. And, frequently, cross references from one system to the other add to the time delay. But it is fair to say that these are difficulties caused by the use of two systems rather than by the registration system itself.

Similar difficulties may arise when part of a single parcel is registered and part is recorded. Here, of course, both sets of records must be examined and title papers must be filed in both the recording office and the office of the registrar of titles.

Another troublesome matter concerning registered titles occurs when a landowner loses his duplicate certificate. In most states the procedure for replacing a lost certificate is to petition a court for replacement and to give notice to neighboring owners and other interested parties. In some states the petition is directed to the registrar.

A person will sometimes err in recording a document which should be registered. For example, an owner of a recorded parcel who receives a grant of an easement over registered land may record it rather than register it.


It has been said that the cost of foreclosure of a mortgage, foreclosure of other types of liens, partition, spreading a judgment of record, and completing passage of title by descent is much greater for registered than for unregistered titles. However, conveyancers in Massachusetts were asked whether each of these types of transaction was more expensive for registered than for unregistered land. All agreed that the first four categories were equally expensive for registered and unregistered titles, and that the last category was only slightly more expensive for registered titles.

On the death of a registered owner, it is necessary to obtain a new certificate in the names of the heirs or devisees. This may require, as in Illinois, a petition to the court by the heirs or devisees, notice and service on interested parties, an investigation of the title and a hearing.101 Or the statute, as in Georgia, may merely require the executor to present a copy of his letters testamentary to the registrar.102 In Massachusetts, heirs or devisees present a certified copy of the decree of distribution of the Probate Court and a copy of the will to the Land Court, notice is given to the executor or administrator and to all other interested parties, and a hearing is held.103 In Minnesota, for testate estates, a certified copy of the will, the order admitting it to probate, the final decree of distribution and the owner's duplicate certificate are filed with the registrar.104 For intestate estates the certified copy of the final decree of distribution or, if there is no probate, a table of descent and the owner's duplicate certificate are filed with the registrar.105 But a new certificate will not be issued without an order of court.106 In all states a small fee is paid into the assurance fund for transmission at death, usually in the same amount as for initial registration.

In order for a purchaser after a mortgage foreclosure to obtain a new certificate, a court hearing is necessary;107 however, in Illinois no hearing is necessary if the owner's certificate is voluntarily surrendered for cancellation.108

If registered land is held in trust, on condition, or upon some limitation, in many states a court order is necessary to transfer title in order to make sure the transfer is in compliance with such terms. But in Illinois the statute permits transfer on the written opinion of two official title examiners109—usually a routine matter.

105. Ibid.
Judgment creditors, attachment or execution creditors, receivers, and lien claimants may be required to take some extra steps to validate their interests.¹¹⁰

Tax deed holders have additional problems.¹¹¹

In Massachusetts, where demanding surveying standards for registered land have been imposed and have steadily been made more stringent, resubdivision of a registered parcel may require a new survey of the entire original subdivision.

An incompetent registry staff may cause serious problems because of the conclusive effect of the certificate. Thus, if a wrong description appears in a certificate, or a title exception is unintentionally dropped on issuance of a new certificate, a purchaser may not receive what his certificate indicates he is receiving, or vested rights may be lost.

However, from our interviews and questionnaires completed by attorneys in the five states where title registration is utilized, it appears that these troublesome matters, although impressive when catalogued, are not sufficiently frequent to call for a repeal of the title registration acts, although a need for study of the problems is apparent.

Recorded Titles. The costs of conveyancing under the recording acts include the costs of clearing indefinite references, name variations, problems of inheritance, description and numerous similar matters. These are best protected against under the recording acts not by the usual title search but by other additional work. The methods used include the obtaining of affidavits, searching records beyond the usual period or outside the chain of title, making special surveys and other physical examinations and inquiries, and institution of judicial proceedings to quiet title.

Estimates of the frequency of use of these methods were collected in 1958 by the American Bar Association Section of Real Property, Probate and Trust Law, Committee on Improvement of Conveyancing and Recording Practices. The results are listed at page 466; answers are categorized according to the state where the member giving the answer practices. These figures cannot be considered statistically accurate but are here reported to indicate the opinions of a handful of skilled conveyancing attorneys.

We addressed questions similar to Question #1 below to six active conveyancers in Boston, Springfield and Worcester, Massachusetts and

---

¹¹⁰ In Illinois for liens arising by execution, attachment or other process, it is the duty of the officer to register the lien. Ill. Rev. Stat. ch. 30, § 123 (1961). Copies of judgments, decrees or orders must be filed before becoming valid. § 122. The receiver must file a copy of the court order. §§ 117, 118. Mechanics' liens must be filed. §§ 126, 127.

Estimate of Proportions of Title Examinations on Which Work Beyond Examination of Abstract is Required

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Please estimate as nearly as you can for your locality and from your experience, the proportion of titles to be passed for purchase or mortgage which are found to have defects requiring work beyond normal title examination. And among these, those requiring:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) further search of records</td>
<td>20%</td>
<td>10%</td>
<td>10%</td>
<td>10%</td>
<td>75%</td>
<td>25%</td>
<td>50%</td>
<td>n.r.*</td>
<td>5%</td>
</tr>
<tr>
<td>(b) investigation outside the records</td>
<td>14%</td>
<td>n.r.</td>
<td>5%</td>
<td>2%</td>
<td>10%</td>
<td>10%</td>
<td>5%</td>
<td>1%</td>
<td></td>
</tr>
<tr>
<td>(c) obtaining of affidavits, releases, confirmatory instruments or the like</td>
<td>1%</td>
<td>n.r.</td>
<td>5%</td>
<td>1%</td>
<td>10%</td>
<td>6%</td>
<td>20%</td>
<td>8%</td>
<td>½%</td>
</tr>
<tr>
<td>(d) quiet title or other corrective proceeding**</td>
<td>3%</td>
<td>8%</td>
<td>5%</td>
<td>8%</td>
<td>50%</td>
<td>8%</td>
<td>20%</td>
<td>6%</td>
<td>3%</td>
</tr>
<tr>
<td>2. Please similarly the proportions, among the titles having defects requiring work beyond normal title examination, of the following types of defects:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) recitals as to instruments not found in the chain</td>
<td>n.r.</td>
<td>50%</td>
<td>50%</td>
<td>50%</td>
<td>10%</td>
<td>10%</td>
<td>5%</td>
<td>6%</td>
<td>5%</td>
</tr>
<tr>
<td>(1) specific</td>
<td>30%</td>
<td>10%</td>
<td>30%</td>
<td>3½%</td>
<td>4%</td>
<td>3%</td>
<td>1%</td>
<td>1%</td>
<td></td>
</tr>
<tr>
<td>(2) general</td>
<td>10%</td>
<td>40%</td>
<td>0%</td>
<td>2½%</td>
<td>3%</td>
<td>1%</td>
<td>1%</td>
<td>1%</td>
<td></td>
</tr>
<tr>
<td>(3) obviously uncertain</td>
<td>10%</td>
<td>0%</td>
<td>20%</td>
<td>5%</td>
<td>3%</td>
<td>1%</td>
<td>4%</td>
<td>3%</td>
<td></td>
</tr>
<tr>
<td>(b) recitals indicating existence of trust</td>
<td>n.r.</td>
<td>20%</td>
<td>10%</td>
<td>20%</td>
<td>5%</td>
<td>10%</td>
<td>5%</td>
<td>1%</td>
<td>5%</td>
</tr>
<tr>
<td>(c) failure to comply with formal requisites such as seals, witnesses, and acknowledgments</td>
<td>40%</td>
<td>40%</td>
<td>10%</td>
<td>20%</td>
<td>60%</td>
<td>10%</td>
<td>5%</td>
<td>5%</td>
<td>80%</td>
</tr>
<tr>
<td>(d) other defects</td>
<td>60%</td>
<td>n.r.</td>
<td>30%</td>
<td>n.r.</td>
<td>25%</td>
<td>70%</td>
<td>20%</td>
<td>5%</td>
<td>10%</td>
</tr>
</tbody>
</table>

*n.r. means "no reply."

**An Oklahoma attorney in a letter to the Chairman of the committee estimated that 10% of all civil actions filed in the state, excluding divorce cases, are quiet title actions.

A Kansas attorney has stated that 15% of all suits in Kansas are quiet title actions.
to house counsel for a New York title insurance company. Following is a tabulation of the results:

<table>
<thead>
<tr>
<th></th>
<th>#1</th>
<th>#2</th>
<th>#3</th>
<th>#4</th>
<th>#5</th>
<th>#6</th>
<th>N.Y. House Council</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) Further search of the records:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>20% not</td>
<td>50-60%</td>
<td>25%</td>
<td>5%</td>
<td>35%</td>
<td>n.r.</td>
<td></td>
</tr>
<tr>
<td>(b) Investigation outside the record:</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>20% rarely</td>
<td>1%</td>
<td>100%</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(c) Obtaining of affidavits, releases, confirmatory instruments or the like:</td>
<td>10%</td>
<td>2-3%</td>
<td>10%</td>
<td>75%</td>
<td>5%</td>
<td>5%</td>
<td>50%</td>
</tr>
<tr>
<td>(d) Quiet title or other corrective proceedings:</td>
<td>5%</td>
<td>1%</td>
<td>5%</td>
<td>10%</td>
<td>2-3%</td>
<td>1%</td>
<td>½%</td>
</tr>
</tbody>
</table>

Even allowing for misinterpretation and ambiguity of these questions, it appears that in a significant percentage of title transactions under the recording system, work in addition to examination of the records is necessary. This extra work may vary from obtaining a simple affidavit to prosecution of a quiet title action.

The use of title insurance alleviates this extra work to some extent if the title insurer has previously obtained documents for its files.

It seems that these extra costs under the recording system at least balance the extra costs previously noted under the title registration system.

Surveyor’s Fees. The costs of survey are probably similar for recorded and registered lands. The only differences might arise from some difference in the need for a survey, or because the standards established by the registrar of titles may be more strict than those of attorneys, as in Massachusetts.

Summary of Costs. In brief, we have seen that in Massachusetts, under the attorney-opinion method for recorded titles, the buyer's attorney's fees are one-third to one-half less for registered titles. As we might expect, there is no difference in attorneys' fees in Minnesota, which has the abstractor-attorney method, or in Cook County, Illinois, which uses a title insurance method under which the title insurer performs the title search and examination. It is probable that in other areas using the attorney-opinion system, attorneys' fees could be reduced under title registration because less work and risk of error are involved.

Abstractors' fees, of course, are applicable only to the recording system, and, therefore, they represent an added appreciable cost of that system.
Similarly, title insurance costs are not incurred under title registration. We have seen that for a $15,000 purchase with a $7,500 mortgage, title insurance premium charges in certain areas may run from $68.75 to $97.50. And where the insurer also performs the title search, the charges may vary from $106.50 to $160 for the same coverage.

Recording fees are generally nominal; official fees for registered transfers are generally slightly higher.

The items catalogued under "Frequently Occurring Costs of Clearing Title Defects" are probably no more frequent and costly under title registration than under recording, although they differ in nature.

Survey costs are probably identical under either system although the need for a survey may be greater in certain circumstances under either system.

All in all, it seems that transfers of registered titles are likely to be much less costly than transfers of recorded titles, especially when the cost of title insurance is included. The difference in cost is the major practical advantage of title registration and the major practical defect of the recording system. When one considers that one element of this extra cost (title insurance premiums) is currently about 150 million dollars annually, the significance of these facts becomes clear.

Time Delay

The ranges of replies to a questionnaire received from title insurance companies, abstractors, and attorneys in the five jurisdictions having both an active title registration system and a recording system are listed below:

<table>
<thead>
<tr>
<th>State &amp; City</th>
<th>Typical No. of Days from Signing of Contract to Closing of Transaction: Range of replies</th>
<th>Typical No. of Days for Determining Status of Title: Range of replies</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Title Insurance</td>
<td>Registration</td>
</tr>
<tr>
<td>Hawaii: Honolulu</td>
<td>30-60</td>
<td>30-60</td>
</tr>
<tr>
<td>Hilo</td>
<td>14-21</td>
<td>21</td>
</tr>
<tr>
<td>Illinois, Chicago</td>
<td>21-30</td>
<td>30</td>
</tr>
<tr>
<td>Massachusetts:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Boston</td>
<td>30-45</td>
<td>30-45</td>
</tr>
<tr>
<td>Springfield</td>
<td>30-45</td>
<td>30-45</td>
</tr>
<tr>
<td>Minnesota: Rochester</td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>Minneapolis</td>
<td>15-30</td>
<td>15-30</td>
</tr>
<tr>
<td>Ohio: Cleveland</td>
<td>15</td>
<td>30</td>
</tr>
<tr>
<td>Dayton</td>
<td>15</td>
<td>21</td>
</tr>
</tbody>
</table>

112. See note 42 supra.
It appears that in each of the states checked the typical length of time from the signing of a real estate purchase and sale agreement to the closing of the transaction varies from two to four weeks under both systems and is usually the same in each jurisdiction for both systems. The delay is generally caused by the accumulation of time required for the title search, clearing of title defects, making a survey, shopping for a mortgage, and convenience of the parties, attorneys, and lenders. Ordinarily this delay is satisfactory to all concerned.

However, upon many occasions, it is desirable to close a transaction in a shorter time—or at least to be ready to close at an earlier date. And much more often it is desirable to be able to determine the status of a title in as short a time as possible, and with as little effort as possible for purposes other than a conveyance. Let us, therefore, consider the average time required for a careful title search in various places under the registration and recording acts.

Wherever the title registration system is running efficiently, the time necessary to search for all but a few matters is the time it takes to find and read the proper folio and volume in the Registrar's Office, and, in accordance with the better practice, to check original documents evidencing any noted defects. In most jurisdictions, an additional search is made for certain matters. For example, in Cook County, Illinois, a general tax lien search is customary. It takes about four days to receive a search result after the order is placed. In Boston, most careful attorneys search for possible bankruptcies since 1898, federal estate tax liens, local taxes for two years, and liens for unpaid water bills. For vacant land or new construction, zoning variances and subdivision controls are generally checked. The time required for these matters varies, but is usually a matter of hours.

Under the recording system, it appears that in most jurisdictions the typical time period from the time a search is ordered from an abstractor until it is received is somewhat greater than the time period for determining the status of registered titles. Thus, the time for a search is typically three to nine days shorter under title registration in Hawaii, eleven days shorter in Chicago, two to thirteen days shorter in Massachusetts, zero to six days shorter in Minnesota, and zero to twelve days shorter in Ohio. None of the estimates fixed a longer period for a search of registered titles than for recorded titles.

**Conversion from Recording to Title Registration**

Upon consideration of the four factors: title risks, remedies and other non-substantive matters, expense, and time delay, for the typical transaction, it seems that conveying a registered title is safer, less expensive and quicker, than conveying a recorded title, or a recorded title with title insurance. Hence, it seems that the general assumption must be
correct that the materially significant drawbacks to the registration system must be in the process of converting from recording to registration, i.e., initial registration.

The Problems of Initial Registration

So far we have assumed, in considering the problems of title registration, that the land being dealt with has been put on the register at some prior time. Now we consider the problems arising from the processes necessary to initially register the land.

The typical registration proceeding in the United States consists of a judicial determination of the state of the title to the parcel, and then, placing the property on the register. The proceeding is initiated by the filing of a petition by the intending registrant, payment of a statutory fee, payment of additional fees for examination, publication, and other miscellaneous matters, and the giving of notice to specified classes of persons. In many states the notice consists of publication plus service by mail. The minimum notice period varies; in Illinois, it is thirty days. The requisite parties to the proceeding usually consist of adjoining owners and persons having or claiming an interest in the land. These parties may be persons in possession or persons having some form of record interest. Typically, the statute provides that the judge hearing the matter may appoint a title examiner and require the parties to present the examiner with an abstract of title. The repealed California act did not require an abstract when title was claimed by adverse possession, and a title insurance policy or a decree of a court fixing title was an acceptable starting point for an abstract. In New York, until 1929, a title insurance policy inuring to the benefit of the county could be used in lieu of an abstract.

Under the former California Act, and in Minnesota, Illinois and Oregon, no survey is required if a plat of subdivision is on file with the county recorder. In Illinois, an inspector is employed by the registrar to examine the premises for encroachments and occupiers. He reports to the title examiner. In Massachusetts, the petitioner must supply a

---


117. Ibid.


survey, complying with very strict standards, to the engineering department of the Land Court. Surveyors must make a plan of the lot, tying it to specific markers on the ground, which in turn are related to control points.

Contesting parties present their evidence to the examiner. The examiner may indicate what defects should be cured and what persons should be made additional parties. After any necessary actions are taken, the examiner reports his findings and conclusions as to the ownership and state of the title to the judge who may accept or revise them as he sees fit. If the judge determines that the petitioner is the owner, he will enter a decree so indicating, and giving the state of the title. Thereafter, the administrator of the registration system takes over. He will usually prepare the certificate of title which goes into the public records, and the duplicate certificate which is delivered to the petitioner.

For initial registration, the important factors to consider are costs and time delay. We shall consider these factors only for the five states having active title registration systems.

Costs

As one would imagine, the initial registration process is costly and time consuming. The major elements of cost on initial registration are:

(a) Official fees (docket fee, examiner's fee, indemnity fund contribution, cost of first certificate and sheriff's service fee)
(b) Publication costs
(c) Title data fees
   (i) Abstract
   (ii) Survey (where required)
(d) Attorney's fees

The data summarized here are based on the replies to a questionnaire sent to practitioners and public officials in each of the five states.

Official Fees. In Hawaii, official fees for docketing the petition, the examiner's fee, indemnity fund contribution, cost of first certificate and sheriff's service fees are about 3/10 of 1% of the assessed value of the parcel being registered, plus $200. In Illinois, these fees are about 1/10 of 1% of assessed value of the parcel plus about $75. Massachusetts official fees are 35% of 1% of the assessed value of the parcel plus about $100. For Minnesota, these fees are $28 plus 1/10 of 1% of the assessed valuation. In Ohio, the fees are 6/10 of 1% of the assessed value plus about $60.

It should be made clear, however, that such items as examiner's fees and sheriff's fees may vary considerably depending on circumstances.
And, of course, assessed valuations may bear varying relationships to actual value from county to county and even within a single county.

But it is clear that these fees may be of a significant amount and probably vary from $50 to $250 for a parcel with an assessed valuation of $10,000.

Publication Costs. Publication costs in each of the five states vary greatly depending on factors such as the length of the legal description of the parcel. In all states but Hawaii these costs vary from $15 to $50, but in Hawaii the estimate of the Registrar of Titles for Honolulu was $200 and up.

Title Data Costs. Abstract. In Hawaii, the costs of an abstract were estimated at $200 and up for a typical residential parcel. In Illinois, where the Registrar of Titles is empowered to provide abstracts for a fee, his charge for such a parcel is about $200. For Massachusetts, estimates ranged from $65 to $150, while in Minnesota they were $10 to $25 and up. No information was obtained for Ohio.

Survey Costs. Only in Hawaii and Massachusetts are surveys required on initial registration. In other states they are seldom necessary, unless the land had not been previously platted.

In all states the cost of the survey is dependent on the nature of the terrain, the size, location and other factors. But when forced to give an estimate, practitioners gave replies approximating the following:

- Hawaii: $250 and up
- Illinois: $35-$50
- Massachusetts: $175 and up
- Minnesota: $50-$75
- Ohio: no reply

Attorney's Fees. In Hawaii, attorney's fees for an uncontested initial registration of a residential parcel will vary from a minimum of $250. Most estimates were $400 to $500.

For Minnesota, typical minimum attorney's fees were quoted at $200 to $350 for such a registration proceeding.

Based on personal interviews of attorneys and Land Court officials in Massachusetts, the typical attorney's fee could be expected to vary from $300 to $500 for a residential parcel.

For Ohio and Illinois, very few attorneys were able to provide help. In both states educated guesses varied from $300 to $500. But in Illinois, an attorney is often not employed to conduct the registration proceeding. It is supervised by the registrar in such cases.

Of course, it must be realized that these figures constitute minimum fees and that in any case presenting unusual difficulties, the fee is likely
to be much greater. In addition, these estimates were necessarily based on "typical residential lots." Undoubtedly, the individual attorney's estimates would vary depending on his clientele, the value of the parcel, and other factors. The only valid generalization that can be made is that in all five states attorney's fees for an initial uncontested registration of a residential parcel are significant in amount and probably vary from $250 to $500 in most cases.

These costs of initial registration constitute a significant expenditure for a residential parcel. Thus, the minimum costs, based on the foregoing rough estimates, could be expected to be as follows for a parcel having an assessed valuation of $10,000:

<table>
<thead>
<tr>
<th>State</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hawaii</td>
<td>$945</td>
</tr>
<tr>
<td>Illinois</td>
<td>$600</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>$690</td>
</tr>
<tr>
<td>Minnesota</td>
<td>$465</td>
</tr>
<tr>
<td>Ohio</td>
<td>$435 (plus the cost of an abstract)</td>
</tr>
</tbody>
</table>

Again, it must be emphasized that these figures, either separately or in the aggregate, have little reliability except insofar as they indicate in a rough way that the costs which might be incurred on an uncontested initial registration of a residential parcel of land are substantial. These costs are discouragingly high and undoubtedly constitute the most important reason for the limited use of title registration.

Time Delay

Likewise, the time delay for the typical initial registration in these five states is so great that it is not feasible to register land after a contract of sale is signed and before the conveyance. The time delay also often causes title insurance to be purchased even when registration would be cheaper and provide other greater benefits.

The typical time required for initial registration varied in the areas studied, from two months to one year.

In Hawaii, the typical time delay for initial registration was stated to be two months to one year, with most estimates being about six months. In Minnesota, the answers were two to four months in all cases. Based on personal interviews of lawyers and Land Court officials in Massachusetts, the typical time period for an initial registration was found to be nine months to one year. In Illinois, the typical time period for an uncontested registration was at least three months. No estimates could be given by most of the Ohio attorneys questioned, although one ventured a guess of three months.

With this long time delay, and the great expense on initial registra-

120. But see Comment, 45 Ill. L. Rev. 500, 506 (1950) (two to three months).
tion, it is obvious why title registration has not been regularly used as a mode of establishing a good title upon the occasion of a conveyance. Few purchasers or sellers would wait so long, or pay so much, for assuring a normal title. Since there is generally no incentive for assuring a normal title at any time other than on a sale, few titles are registered, despite the fact that once registered, titles are safer and can be more quickly and inexpensively transferred.

CONCLUSIONS

Our conclusions were stated for the most part at the beginning of this article. As was stated there, it appears that once title is registered a title registration system enables quick, inexpensive and safe conveyancing but that initial registration is prohibitively expensive and too lengthy a process. Moreover, the evils surrounding title insurance, that is, high cost, elimination of independent legal advice, eventual monopoly and other attendant abuses, require that a title registration system be devised which will overcome the two defects in initial registration.

It would seem that research based on the second hypothesis and thereby aimed at development of an inexpensive technique of initial registration would be fruitful. We already have two ready-made examples of quick and inexpensive initial registration in the English system. Thus the suggestion that "possesory" title registration coupled with a marketable title act (Powell had suggested a statute of limitations) utilizing a short period for re-recording seems quite feasible, especially since Professor Simes' work on marketable title legislation. Equally practicable is the utilization of the English system of initial registration of absolute title (which does not require a conjunctive marketable title act), a technique which I have described in a prior article. Other better techniques may be developed.

The only remaining problem, and one which is quite difficult, is the political problem of how to implement these suggestions. It would seem that the first step would be research aimed at development of a quick and inexpensive initial registration process, and the drafting of model legislation based on that process. The research and drafting must be under the direction of a knowledgeable person fully aware of the practical and theoretical problems, and he must have adequate time and assistance. A small grant of something under $50,000 would seem adequate.

Since the Real Property, Probate and Trust Law Section as presently constituted cannot be expected to perform objectively in sponsoring such a project, there is little sense in attempting to work through the Section


In England, initial registration of a parcel sold for $14,000 costs about $34 and takes from two weeks to two months. Id. at 483-84.
unless its reorganization is completed soon. But because the project should have a wide basis of support among practitioners, and because the project would be a necessary and worthwhile public service, the ABA should sponsor the project, perhaps through a special committee established for this purpose. If funds to support the project were provided by the American Bar Foundation, the project would command the greatest respect while at the same time informing the public that the bar is in fact concerned for the public interest.

If the ABA is unwilling to support the project, a state bar association, the real property section of which is not controlled by the title insurance or abstracting industries, could initiate a pilot project. The American Bar Foundation, or another foundation, may be a source of funds to finance preliminary studies.

In the meantime, it is necessary that every effort be made to encourage competition among title insurers so as to mitigate the naturally attendant evils. One important step in this direction is to encourage Lawyers Title Funds, which present the strongest competition.

The federal government should continue its efforts to prevent violation of the anti-trust laws by the title companies. Even if the title insurance industry is a “business of insurance” within the meaning of the McCarran-Ferguson Act, it is clear that the states have not regulated that industry sufficiently so as to cause them to come within the protection of the Act. The purpose of the Act, to avoid federal interference and consequent disruption where the states are closely regulating an industry, does not apply to the title insurance industry.

State regulation of rates, policy forms, and practices is unlikely to be beneficial since any regulatory commission is likely to soon become a captive of its charges. However, state statutes requiring public disclosure of rates, losses, categories of losses, and sources of revenues would provide data for persons looking after the public interest.

122. No adequate study of title insurance regulation has been made. Concerning rate regulation, see Leary, Rate Regulation and Title Insurance, 1953 Ins. L.J. 613. See also Roberts, et al., Public Regulation of Title Insurance Companies and Abstractors (1961).