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Criticism of Professor Richard R. Powell's Book Entitled Registration of Title to Land in the State of New York

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A CRITICISM OF PROFESSOR RICHARD R. POWELL'S BOOK ENTITLED REGISTRATION OF TITLE TO LAND IN THE STATE OF NEW YORK

WALTER FAIRCHILD AND WILLIAM SPRINGER

The New York Law Society recently published a survey, entitled "Registration of Title to Land in the State of New York", prepared by Professor Richard R. Powell of Columbia University.[1] The publication was made under a grant from the Carnegie Corporation of New York and the New York Law Society assumed responsibility for its preparation. The survey includes a report of title registration experience in jurisdictions outside of New York together with the author's conclusions based on the entire survey. The members of the New York Law Society, incidentally, are not in agreement among themselves as to Professor Powell's conclusions.[2]

The conclusions of the professor, of which there are five,[3] can be stated briefly as follows: It would be more advantageous to amend the present recording acts in New York with state supervision over title company policies and rates than to amend the present registration law, which, incidentally, should be repealed.

The professor, in arriving at his conclusions states that:

> "The conclusions represent merely an honest effort of a person who has no interest save that of public weal to weigh conflicting pulls and to put before those who may be interested his considered judgment."[4]

He also states that:

> "The writer claims no monopoly upon the ability to draw conclusions from a mass of data, but it is inevitably true that he has a greater familiarity with *this* mass of data than any casual reader thereof."[5]

It is the purpose of this article to analyze the survey generally and the professor's conclusions particularly, to show that his observations are not well founded. In so doing no reflection is intended upon the honesty or integrity of the professor in arriving at his conclusions.

The professor admits that he has no monopoly on the ability to draw conclusions. Mr. Fairchild, one of the authors of this article, is not "a casual reader" of the "mass of data" contained in the survey.[6] He is at least

[1] REGISTRATION OF THE TITLE TO LAND IN THE STATE OF NEW YORK, with Supplements as to Experience Elsewhere, prepared by Richard R. Powell for the New York Law Society under grant from the Carnegie Corporation. Copyright 1938 by the New York Law Society.

[2] *Id.* at p. V.

[3] *Id.* at 74, 75.

[4] *Id.* at 3.

[5] *Id.* at 74.

[6] Mr. Fairchild, a member of the New York Bar, has handled registration proceedings in

as familiar as the professor with the material contained therein. Furthermore, much of the material contained in the survey was gleaned from the files of Project No. 46 of the U. S. Works Progress Administration,[7] which Mr. Fairchild organized and supervised, and from his personal files.[8] In our opinion, the professor's conclusions are misleading and tend to portray unfairly the Torrens system. The following is a discussion of the entire survey with a view to correcting the professor's errors of fact and misleading conclusions.

Litigation Under Title Registration Law

The professor, referring to the State of New York, states that:

> "An abundance of litigation, quite out of proportion to the frequency of applications to registered titles, was an unavoidable consequence of, first, the newness of the idea of title registration; and second, the detailed provisions of this rather lengthy statute."[9]

This statement, which is incorrect in substance, also tends to convey the misleading impression that a property owner would always become involved in litigation if he desired to register his property.

The professor indicates that 40 New York cases have been decided between 1908 and 1937 involving questions relating to land registration.[10] Actually only 37 New York cases appear in the reports, but the professor's figure of 40 cases will be accepted for the purpose of this article.

From 1908 to 1918 in order to register a title it was necessary to secure an order for permission to commence an action by the service of a summons and complaint. During this period there were 20 litigated matters. After 1918 an order to commence an action by the service of a summons and complaint was no longer required. Registration proceedings were thereafter commenced by a petition to the Supreme Court and from that time on there have been only 20 litigated matters according to the professor's figures (17 litigated matters according to our figures).

The professor calls this a "plethora of litigation".[11] A glance at the record will show that he is indulging in sheer hyperbole.

Professor Powell includes in his survey, two charts which set forth the number of initial registrations in New York State. The first, Chart No. 1,[12] lists 13 initial registrations in 9 counties which have made slight use of title

New York for more than 20 years. He is a former Special Deputy Register of New York County, President of the New York Torrens Title League and Consultant of Project No. 46, U. S. Works Progress Administration, engaged in an Analysis of All Laws Affecting Real Estate.

[7] Powell Report 17, 35, 76, 77, 81, 82, 106, 112, 125, 126, 183, 233, 248, 257, 266, 267, 268.

[8] *Id.* at 48, 50.

[9] *Id.* at 24.

[10] *Id.* at 24.

[11] *Ibid.*

[12] *Id.* at 36.

registration, but does not include the years when the registrations were made. The second Chart No. 2,[13] lists the number of registrations in the five New York City counties and four other counties from 1908 to 1937 and includes 69 registrations "undistributed as to date".

Based on these charts, there were approximately 95 initial registrations before 1918 and 490 initial registrations after the change in the law in 1918. In arriving at these figures, it is assumed that the 13 initial registrations in Chart No. 1 were all made before 1918 because the professor states that "most of these were made many years ago".[14] It is further assumed that one-half of the 69 registrations "undistributed as to date" in Chart No. 2 were made before 1918 and one-half were made after1918.

Therefore, from 95 initial registrations before 1918, the 20 litigations resulting would indicate 21 per cent of litigation before the statute was perfected. From 490 initial registrations after 1918, the 20 litigations resulting would indicate 4.1 per cent of litigation. There have been a total of 585 initial registrations in New York State, since the registration law was enacted in 1918. Thus, the percentage of litigation for the entire period is 6.8 per cent.

Even if the statute were new, and assuming as Professor Powell does that the title companies were hostile to registration[15] and desired to create the impression that it was beset with delays, 6.8 per cent would hardly seem to be a "plethora of litigation".

So it appears that the contention that there was an abundance of litigation, quite out of proportion to the frequency of applications to register titles is not justified by the facts.

In passing, it is interesting to note the conclusions the professor has derived from the litigation in question. He states that:

> "It is clear from them (the decisions) that the operation of title registration requires rather frequent adjudication of controversies between the applicant and owners of adjoining properties."[16]

Yet he cites only *four* cases in support of his contention.[17] Without amplifying these decisions at this time, we point out that from the professor's own citations, adjudications involving adjoining properties appear to be infrequent rather than frequent. All these cases relate to initial proceedings in which all abutting owners are notified because boundary lines are finally adjudicated. Boundary disputes after registration are rare.

The professor further states that:

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[13] *Id.* at 37.
[14] *Id.* at 35.
[15] *Id.* at 24.
[16] *Id.* at 26.
[17] Duffy v. Sheridan, 139 App. Div. 755, 124 N.. Y Supp. 529 (1910); Hawes v. U. S. Tr. Co., 142 App. Div. 789, 127 N. Y. Supp. 632 (1911); Sunderman v. People, 148 App. Div. 124, 132 N. Y. Supp. 68(1911); Matter of Tremont Housing Co., 137 Misc. 141, 242 N. Y. Supp. 128 (1930).

"The courts of this State (New York) are not likely to grant judgments of registration without being thoroughly satisfied as to the validity of the petitioner's claims."[18]

With this statement, the writers are thoroughly in accord. However, its inclusion herein is absolutely unnecessary and confusing. Did the professor, before reading the decisions, believe any court would grant a judgment of registration, if it were not satisfied as to the validity of the petitioner's claims? Certainly no court would grant a judgment unless the petitioner or the plaintiff had successfully carried and established the burden of proof required by law. The statement makes it appear to the reader that this particular duty of the court with regard to judgments is exercised only in cases involving land registration, and in this respect is misleading.

Comparison of Initial Registration Costs with Title Insurance

Professor Powell in his survey concludes that:

"The cost of an initial registration is approximately twice the cost of an original policy of title insurance and approximately three times the cost of a re-issued policy."[19]

The professor relies on figures presented in two charts in his survey. They are Chart No. 5, entitled "Title Insurance Rates"[20] and Chart No. 10, entitled "Estimated Costs of Initial Registration in the City of New York".[21]

Let us analyze these charts. Chart No. 5 gives title insurance rates for original and re-issued policies in amounts of from $1,000 to $1,000,000. Chart No. 10 gives initial registration costs and property assessed at $5,000, $10,000, $20,000, $50,000 and $100,000.

Taking a parcel of property assessed at $5,000 as the medium of comparison, the cost of initial registration pursuant to the professor's figures would be:

1.	Assurance Fund	$ 5.00
2.	Fee of Examiner of Title	25.00
3.	Miscellaneous Fees	74.27
4.	Survey	25.00
5.	Lawyer	75.00
	Total	$204.27

A title policy in the sum of $5,000 would cost $105.00 in the City of New York in the Boroughs of Manhattan and the Bronx. The professor, therefore, would have us believe that the cost of an initial registration proceeding

[18] Powell Report 27.
[19] *Id.* at 49 and 50.
[20] *Id.* at 41.
[21] *Id.* at 49.

is $99.27 more expensive than the cost of an original title insurance policy.

These figures are misleading. The professor's charts are inaccurate for the purpose of comparison and consequently his conclusions therefrom are erroneous. The following is submitted in support of these contentions:

1. A substantial item of expense in the table of registration costs, is the lawyer's fee. However, in 12 of 50 investigated cases, the professor discovered that no lawyer had been employed.[22] Nevertheless, he concluded that:

> "I should feel that any owner seeking to register his title in New York State without placing the supervision in the hands of a competent attorney would not only be foolhardy but might well constitute a menace to the interests of those owning property."[23]

Accepting the necessity of a lawyer in title registration proceedings for the purpose of this article, it is interesting to note that the question of a lawyer's fee is not discussed in connection with the title insurance chart.

The reader would naturally infer that no attorney is needed when a title company is employed. The professor must know, however, that it is common practice for both the purchaser and seller to be represented by attorneys at title closings.

The contract of sale, as well as the deed and other closing instruments are usually prepared by the seller's attorney and the closing is usually at his office. The purchaser attends the signing of the contract and the closing of the title with his attorney who examines and passes on the contract and all closing instruments. If the title is closed at a title company's office, the purchaser's attorney nevertheless is present to protect his client's interests and insist on his rights. An examination of the real estate sales in the daily papers will show that both buyer and seller are almost invariably represented by counsel. In short, if as the professor states, a buyer under a title registration proceeding would be foolhardy in failing to be represented by counsel, he would be no less foolhardy in being unrepresented when title is closed with the assistance of a title insurance company.

The professor, probably as an afterthought, and realizing the inaccuracy of the charts in question, appended a footnote wherein he states that:

> "If the transaction is put through by title insurance there will also be a charge for legal services in many instances."[24]

However, in spite of this observation, the professor made no effort to include a lawyer's fee in his title insurance chart, and *chose to base his conclusions solely on the figures in the charts without taking into consideration his own footnote.*

2. Another item of expense in the title registration chart is the survey.

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[22] *Id.* at 48.
[23] *Id.* at 47.
[24] *Id.* at 49, n. 149.

Here, again, the professor neglects to lay the foundation for a proper comparison by failing to discuss the cost of a survey in connection with title companies. The omission of this item from the title insurance chart conveys the misleading inference to the reader that no survey is needed when a title company is employed.

The professor knows that all title insurance companies insist on a survey otherwise the policy is "subject to any state of facts which an accurate survey would show".

As a matter of fact, he includes a footnote which states that:

> "A survey, and the expenditure thereby occasioned, is commonly necessary alike to title insurance and to title registration. Hence this item must be excluded in comparing the costs of the two systems."[25]

But contrary to his own footnote, *the cost of a survey is included in the title registration chart and omitted either inadvertently or otherwise from the title insurance chart.* Thus the comparison of the costs under the two systems is unfairly and inaccurately portrayed. Since the professor has excluded the cost of the survey from one chart and not from the other, his conclusions as to costs based on these charts must likewise be branded unfair and inaccurate.

3. A third item of expense in the title registration survey is miscellaneous fees. Miscellaneous fees include all filing costs under the title registration system. The professor, however, neglects to discuss recording and filing fees in connection with title insurance. Naturally, after title is closed with the assistance of a title company and to protect the purchaser, the deed and other papers must be filed or recorded in the register's or county clerk's office. The recording fee is based on the number of folios in the deed. The form of warranty deed commonly used in real estate transactions, costs approximately $3.00 to record; a mortgage about $6.00. Besides these, there are usually satisfactions of mortgages, judgments, *etc.,* for all of which filing fees are charged.

Altogether, the filing and recording of closing instruments would average $10.00 to $15.00 for each transaction.

Every item of expense must be discussed in order to make a true comparison of the costs of title registration and title insurance. The professor, therefore, has erred in failing to include recording and filing costs on the title insurance chart.

4. Title registration examination and assurance rates are based on the *assessed* value of the propery. Title insurance fees are based on the amount of the policy, which is usually the contract price and often exceeds the assessed value of the property. Thus, to take a parcel of property assessed at $5,000 and compare the cost of registration with the cost of a $5,000 title policy, does not provide fair comparison.

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[25] *Id.* at 46, n. 146a.

If the assessed value is more or less than the amount of the property policy, this will reflect itself in a variation of the cost of registration in the event the property is registered. The professor neglects to take this fact into consideration and accordingly it affects the accuracy of his comparison.

Now, let us compare the costs of title registration and title insurance in the light of the four items discussed above. For the purpose of this comparison, a parcel of property assessed at $5,000 is compared with a $5,000 title policy representing a parcel of property assessed at $5,000. Thus:

TITLE REGISTRATION COSTS		TITLE INSURANCE COSTS	
1. Assurance Fund	$ 5.00	1. Title Policy	$105.00
2. Fee of Examiner of Title	25.00	2. Survey	25.00
3. Miscellaneous Fees	74.27	3. Lawyer	75.00
4. Survey	25.00	4. Filing and recording fees	10.00
5. Lawyer	75.00		
TOTAL	$204.27	TOTAL	$215.00

Thus, it can be seen at a glance that Professor Powell's contention that "the cost of an initial registration is approximately twice the cost of an original policy in title insurance", is incorrect and not substantiated by a proper comparison. As a matter of fact, *title insurance is more expensive than initial title registration.* The conclusion of the professor, therefore, as to comparative costs must be discarded.

COST OF CONVEYANCING UNDER TITLE REGISTRATION AND TITLE INSURANCE SYSTEMS

Professor Powell states in his survey that:

> "No definite data as to the cost of a subsequent sale or mortgage of registered land is available for New York."[26]

This would convey to the reader the mistaken impression that there were no conveyances of registered land in New York. As a matter of fact, a chart in the survey indicates that there were 1,874 conveyances of registered land in Bronx, Kings, New York and Suffolk Counties in the years from 1926 to 1936, inclusive.[27] Of these conveyances, 457 were made in the years 1935 and 1936.

In view of the fact that the professor has figures for original registrations back as far as 1922,[28] it should have been a simple matter to secure data as to conveyance costs at least for 1935 and 1936. Therefore, the professor's statement as to the paucity of data has no basis in fact. Rather it should be said that no attempt was made to secure this information.

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[26] *Id.* at 50.
[27] *Id.* at 39, Chart No. 3.
[28] *Id.* at 44, Chart No. 6; 47, Chart No. 8; 48, Chart No. 9.

The professor elected, for some reason best known to himself, to analyze more carefully the conveyance costs in Massachusetts. He concludes that the cost in New York would be the same as in Massachusetts, *i.e.*, "from two-thirds to three-quarters the cost of a like transfer of unregistered land".[29] Without challenging the accuracy of the costs in Massachusetts at this time, let us look to New York.

The only *statutory* fee in New York for transferring a registered title is $5.00, regardless of the assessed value of the land.[30] This includes the filing of the deed. On the other hand, the cost of a "re-issued" title policy in Manhattan and the Bronx, varies from $60.20 for a $1,000 policy to $1,397 for a $1,000,000 policy.[31]

Thus the transfer of a parcel of property assessed at $1,000,000 would cost but *$5.00* under the title registration system, whereas a title policy for only $1,000 representing a parcel of property assessed at $1,000, would cost *$60.20* under the title insurance system. In addition to the latter figure must be added the cost of recording and filing the deed and other papers in the register's or county clerk's office. Consequently it stands as an uncontroverted fact that a purchaser of registered property would effect a tremendous saving.

Apropos of the above comparison it is interesting to note that the professor cites the following from a Torrens Title League publication:

> "Subsequent transfers are made for $5.00 which includes the filing of the deed. The title companies charge half rates although they do not have to re-examine."[32]

He contends that "this hardly gives a fair picture of the facts",[33] because a vendee or mortgagee must investigate to determine the significance of memorials entered on the certificate of title and must also investigate any possible exceptions to the REAL PROPERTY LAW § 400.[34] It will be noted that the professor takes no issue with the cost of a transfer under the title registration system at this point, but bases his objections on the grounds stated above. He concludes, therefore, that "thus a transfer of registered land involves more than turning in an old certificate and receiving back a new certificate".[35]

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[29] *Id.* at 52, 192.
[30] NEW YORK REAL PROPERTY LAW § 432, d.
[31] POWELL REPORT 41, Chart No. 5.
[32] *Id.* at 50, quoting from "The Devil Was Sick," page 3.
[33] *Id.* at 50.
[34] N. Y. REAL PROP. LAW § 400 lists four items as to which the certificate is not binding. These are:
"First. Liens, claims, or rights arising or existing under the laws or constitution of the United States, which the statutes of this state do not require to appear of record;
"Second. Any tax, water rate, or assessment which becomes a lien on the property after initial registration and for which a sale has not been made;
"Third. Any lease or agreement for a lease, made after or pending registration, for a period not exceeding one year, where there is actual occupation of the land under the lease or agreement;
"Fourth. Easements of servitudes which accrue against the property after initial registration in such manner as not to require their registration."
[35] POWELL REPORT 52.

In answering the professor's objections and conclusion, it must be borne in mind that we have accepted the necessity of an attorney in initial title registration proceedings.[36] A deed must be drawn and possibly a mortgage. It would be the attorney's duty to undertake the various investigations referred to. If a purchaser undertook to do these things himself, he might be "foolhardy", to quote the professor.

However, it must also be borne in mind that an attorney must represent the purchaser where a title company is employed. The arguments heretofore advanced for the presence of an attorney when an original title policy is issued[37] are equally as cogent when a policy is "re-issued".

It is reasonable to assume that the attorney's fee would be the same under both the title registration and the title insurance systems. Hence, it may be excluded in reckoning the conveyance costs. Consequently, if we eliminate the attorney's fee, the figures set forth at length above, must be the guiding factors in determining the relative costs of transfers under the two systems.

The conclusion of the professor that the cost of transfers in New York would be the same as in Massachusetts, is incorrect. In New York, the figures prove that the cost of a transfer of unregistered property far exceeds the cost of a transfer of registered property.

Registration Experiences in Other Jurisdictions

Professor Powell concludes that title registration experience in the British Empire and Europe have no relevance to the problems presented in New York. The writers agree that experiences on the continent of Europe, namely in Germany, Austria and Hungary, are irrelevant because the systems have a different origin and mode of operation than the systems in use in the British Empire and the United States. But the present systems in the British Empire and the United States can be traced directly to the original land registration act in South Australia, promulgated by Sir Robert Torrens in 1858 when he was the Register General of that province. Because of the common origin the writers are of the opinion that experiences throughout the British Empire, where title registration is decidedly successful, cannot be lightly regarded.

The professor cites six factors which lead him to the conclusion mentioned above. They will be discussed in the order in which they are presented in the survey.

1. The first of these factors "may be described, perhaps, as the wide gulf between the governing body and the governed. When such a gulf exists, the governing body can be dictatorial, and can effectively tell the subjects what is good for them and can see that they accept it. Herein lies the possibility of the greater efficiency of a dictatorship over the looser organiza-

[36] *Supra* p. 561.
[37] *Ibid.*

tion of a democracy. Often what is thus imposed is good but the fact remains, that its acceptance was largely involuntary."[38]

In short, the professor would have us believe that the registration system must fail, unless there is a dictator. Yet neither Great Britain nor any of its dominions are controlled by a dictator. The representative system of government has existed in Great Britain for centuries in spite of the fact that the king is the nominal ruler. The same form of government exists in the Dominions of Australia and Canada, which are self-governing. Moreover, in world events of the last few years, Great Britain has constantly been bracketed with the United States and France as a "democracy". Futhermore the professor infers that the acceptance of the registration system was involuntary and states that "there can be no denial that this factor has been present in a large measure in the English administration of Australia, New Zealand, Tasmania, Papua, Fiji, . . . "[39]

The history of title registration in English-speaking countries shows that far from being involuntarily imposed by the Mother Country on Australia, it *originated* there in the province of South Australia.[40] The virtues of the system having been noticed, it was introduced into England by Lord Westbury's Act in 1862.[41] With reference to New Zealand, Tasmania, Papua (formerly British New Guinea) and Fiji, the system was introduced by acts of the provincial legislatures.[42]

Neither in England, nor in any of the provinces above referred to has there been a central dictatorial power to involuntarily foist a law upon the people, without their consent through their duly appointed or elected representatives. The conclusion of the professor, therefore, that the title registration system in England and its possessions is successful only because of a dictatorship, must be discarded.

2. The professor contends that there was no recording system to be displaced in the countries referred to above. Thus:

> "It was not necessary to disturb the 'vested interests' of office holders, of lawyers, of abstract companies or of title insurance companies."[43]

This is to a degree true in Canada and other British possessions where the title registration system was introduced soon after the opening up of the country. But in Great Britain, the system of accumulating deeds and other evidence of title which were retained by each succeeding property owner, had

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[38]POWELL REPORT 56, 57.
[39]*Id.* at 57.
[40]South Australia, No. 15, Acts of 1857.
[41]Transfer of Land Act, 25 & 26 Vict. c. 53 (1862).
[42]New Zealand Land Registry Act of 1860 (24 Vict. c. 27); Tasmania, No. 16, Acts of 1862; British New Guinea, No. 11; Ordinances of 1889; Fiji Ordinance of 1876, No. 34.
[43]POWELL REPORT 57.

existed for centuries and must be regarded in the nature of a "recording system". This system did not yield easily to the new order of things.

This, as the professor himself points out in his survey, brought about an inquiry into the workings of the registration system.[44] A Royal Commission on Land Transfer Acts was created and after tracing the history of legislation and its operation the Commission said:

> "This shows much reluctance on the part of the landowners to avail themselves of the advantages of the Registry. This reluctance, in the opinion of the Registrar, is mainly due to what he describes as the 'unfortunately hostile attitude of the legal profession,' who are, he states, unaccustomed to the new procedure and disinclined to assist it or to recommend it to their clients. It is no doubt true that solicitors, as a body, are opposed to the Registration of Title; and landowners, as a body, are naturally disposed to accept the opinion of their legal advisers on the merits of a system which they themselves do not understand. . . . But the opposition of solicitors, and the reluctance of landowners to register, are not without other grounds *than the solicitors' dislike of change, inexperience of a new and complicated procedure, or fear of losing business by it.*"[45] (italics supplied)

Thus it can be seen that the opposition encountered in this country, had its counterpart in Great Britain. A "recording system" actually was displaced, although the system was not an official one. Moreover, there were lawyers in Great Britain who, like lawyers in the United States, regarded the system then in vogue as ideal and felt that they had a "vested interest" in this type of practice. In this respect then, the experiences in Great Britain are parallel with those in the United States.

3. The third factor, pursuant to Professor Powell, differentiating the United States from other countries, is the constitutional requirement in the United States that registration be preceded by a judicial determination.[46] It will be noted, however, that this objection refers only to initial registration proceedings. Once the proceeding is before the proper judicial officer, the procedure in England is substantially the same as it is in New York and other states in this country. Furthermore, this constitutional objection has no application to the method of transfer of registered land, form and entry of the certificate of title, entry of liens and encumbrances on the certificate of title. Therefore, the systems of registering outside of the initial registration proceeding is substantially the same in England and in the United States.

It is appropriate at this time to point out that a judicial proceeding to determine registration is not absolutely necessary *even under our constitutional form of government.* Every registration statute could contain an alternative method of registration giving the petitioner or applieant the right, if he so

[44] *Id.* at 279.
[45] *Id.* at 280.
[46] *Id.* at 57.

desired, to waive the judicial proceedings and make application for registration directly to the registrar of the county where the land is situated. He would then be the possessor of a presumptive title to the land in question which would be subject to a statute of limitation say of two years. If no claim were made within the period of the statute, title would become absolute. If adverse claims were presented, then and only in that event, would judicial intervention be necessary.

If this suggestion were adopted, then registration proceedings in the United States and other English-speaking countries would be basically the same.

4. Another factor rendering foreign experience unhelpful, according to Professor Powell, is the fact that:

> "There is a substantial difference in both skill and efficiency between a staff of career governmental servants (in England) and the personnel encountered in the typical office of a county clerk or register of deeds in the United States."[47]

This statement is false and misleading and is not substantiated by a single example of incompetence in this country. Mr. Fairchild was Special Deputy Register in the New York County Register's office for seven years. The personnel in that office is composed of capable and honest men and women who are thoroughly conversant with their duties. The public title plant maintained in the Register's office is posted to each lot within *three hours* after a deed is offered for record. This plant is a model for the whole world and is superior to that of any title company. Furthermore, neither the activities of the Register's office nor the employees therein have ever been involved in corrupt proceedings. It is important to note that at no point in the professor's survey throughout the United States have any registration difficulties been traced directly to the lack of skill or efficiency of any of the administrative personnel. As a matter of fact, in Massachusetts, Minnesota and Illinois, where there are substantial registration proceedings, the registration system has the full confidence and respect of lawyers and laymen, alike. This fact is recognized by Professor Powell as indicated by the following excerpts from the survey:

In Massachusetts:

> "All persons encountered by this writer in Massachusetts who were conversant with the workings of the Land Court had a good word to say for it. As to the land registration, there was also large unanimity of praise. . . ."[48]

In Minnesota:

> "In general, title registration has been favorably received by the local attorneys."[49]

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[47] *Id.* at 58.
[48] *Id.* at 195.
[49] *Id.* at 224.

In Illinois:

"Attorneys and realtors in Chicago and its vicinity have been generous in their praise of the registration systems. The Torrens Division of the Chicago Real Estate Board is at present seeking to encourage resort to title registration by soliciting its members to pledge the registration of at least one parcel in the near future."[50]

"Although unstinting praise was everywhere accorded to the present chief examiner and the present registrar, as well as their predecessors, severe criticism was directed at the manner of selection of the personnel of the Torrens Office, in general."[51]

However, in connection with the last quotation, it is worthy of note that no person availing himself of the provisions of the title registration law has sustained a loss due to the inefficiency or unskillfulness of the personnel. It is possible that the criticism is advanced by critics of the system for purely political reasons, it being a peculiar element of politics in this country for the "outs" to criticize the "ins".

The above excerpts indicate that the administrative personnel is efficient, otherwise, the registration systems would hardly elicit this praise. In the absence of any tangible evidence of inefficiency or corruption (and the professor offers none) it must be assumed that the officials and administrative personnel in Canada and England are no more skillful or efficient than the officials and administrative personnel in the United States.

5. The professor goes on to point out that a fifth factor lessening the helpfulness of foreign title registration experience is that the certificate of title "leaves very many problems unsettled".[52]

The mere fact that the certificates of title in foreign jurisdictions include more exceptions than certificates in the United States does not infer that registration experiences in the former are not helpful. Obviously, the ideal registration statute would be one which would establish an absolute title in every conceivable case or would settle every problem which might arise with respect to land conveyancing. However, at no time have the proponents of title registration advanced the claim that the system is or can ever be made so conclusive. The practical registration system assures title in *almost* every case and includes an assurance fund to cover those cases where a loss is sustained.

The purpose of title registration is to establish the fact that once and for all the property owner has title. In his respect both the English and American systems are identical. Therefore, experiences under the former system, successful in operation, cannot be overlooked.

6. Professor Powell claims that his sixth widely perversive factor, the

[50] *Id.* at 46, 47.
[51] *Id.* at 163.
[52] *Id.* at 59.

English Law of Property Act of 1925, and the English Land Registration Act of 1925, completely eliminates the English experience as being helpful in solving the problem in the United States and in New York. This law, he says, has so changed the underlying procedure in England that we could not hope to reap the advantages of registration unless we enacted a law which permitted no legal estates in land except an estate in fee simple absolute and an estate for years; and unless we had a provision of law requiring that for each parcel of land there must always be one person with the complete power over its conveyance and unless our registration of title were thereby restricted to the registration of the interest of this one person.

Here the professor has created what to him is a new Herculean labor but in reality it is only another scarecrow quite as mythical as any of the labors of Hercnles. He warns us that there is no reason to believe that we are about to make that change or even to be sure that that change would be desirable.

The English Law of Property Act of 1925 provides that the only estates in land which are capable of subsisting or of being conveyed or created at law are:

a. An estate in fee simple absolute in possession.
b. A term of years absolute.

And that the only interests or charges in or over land which are capable of subsisting or of being conveyed or created at law are:

a. An easement, right or privilege in or over land.
b. A rent charge.
c. A mortgage.
d. Land tax title, *etc.*
e. Rights of entry.

And that all other estates, interests and charges in or over land take effect as equitable interests.

What England accomplished by the Real Property Act of 1925, New York State accomplished more than one hundred years ago by its constitution and by the Real Property Act and its amendments.[53]

The English Land Registration Act of 1925 provides that estates capable of subsisting as legal estates shall be the only interest in land in respect of which a proprietor can be registered and all other interests in registered land (except overriding interests entered on the register at or before the commencement of the act) shall take effect in equity as minor interests.

This land Registration Act of 1925 provided for the registration of an absolute title and also for the registration of a possessory title, the latter being a historical survival.

The English Registration Act of 1925 was merely a consolidation of the

[53]Real Estate Board Report.

existing law relating to registration with such amendments as were found necessary from a half century of experience.[54] The act was new chiefly in that it clearly set forth and defined the law of registration and its aim was to accomplish the registration of an absolute title and also to give the registrar the right to register a possessory title as an absolute one if in his judgment it should be done.

Mr. J. S. Stewart-Wallace, Chief Land Registrar, H. M. Land Registry, London, W.C.2, points out the distinction between the English Real Property Act of 1925 and the Registration Act of 1925. The purpose of the Real Property Act was to determine legal estates. The purpose of the Registration Act is to give an authoritative record page on which those estates may be registered. This distinction is given in parallel columns in the official report of the Land Registrar as follows:[55]

LAW OF PROPERTY ACT, 1925, AND REGISTRATION OF TITLE

17. The position regarding both registered and unregistered land was materially altered by the Law of Property legislation of 1925. Such amendments in the Land Transfer Acts, as the experience of a generation had found to be necessary, were made. The advantages offered by registration of title were materially increased.

18. At the same time the system of unregistered Conveyancing was fundamentally modified and in certain respects simplified. So great (some urge) was the simplification made, that opponents of registration claim that the amended system of private Conveyancing gives a system so simple, cheap, and expeditious that registration of title is not required.

19. This is an argument of vital importance which advocates of the immediate extension of compulsory registration must fully answer.

20. If it is suggested that the simplified system of Conveyancing under the Law of Property Act, 1925, is an alternative to registration of title, it can be shown in the clearest way that it is NOT an alternative. Registration of title gives IMMEDIATELY far more than that system can give, even after the lapse of a generation, and when in full operation. This is no way to belittle the beneficial revolution which the Law of Property Act makes in the Law of Real Property. It is rather to say that even when that beneficial revolution has been achieved, registration of title will continue to give its characteristic advantages over any system of private Conveyancing however perfect.

21. The following table comparing the two systems demonstrates this:

AN ABSOLUTE REGISTERED TITLE AT ONCE	THE AMENDED NON-REGISTRATION SYSTEM
1. Eliminates examination of the past title in ALL cases.	1. Simplifies without eliminating examination of the past title in SOME cases.
2. Frees purchaser from Notice of Trusts.	2. Frees purchasers from Notice of Trusts.
3. Gives a State Guarantee of	

[54] J. S. Wallace, Chief Land Registrar, July 11, 1938.
[55] State-Guaranteed Title to Land, p. 9.

safety of holding and provides indemnity for mistakes by the Registry.
4. Provides simple forms without recitals as to past title.
5. Prevents fraud by duplication or suppression of deeds.
6. Provides a scientific plan identifying the land.
7. Frees solicitors from responsibility for the past title.
8. Reduces cost of land transfer.
9. Reduces litigation in regard to title.
10. Increases the value of land and its attractiveness as a form of security.

N.B. All these advantages are given *immediately* on registration.

N.B. These two advantages over conveyancing prior to 1925 are only given completely *after the lapse of a generation from 1925.*

All of the advantages of the English Registration Act of 1925 can be found in the NEW YORK REAL PROPERTY LAW art. 12.

Professor Powell admits that the failure of the New York Title Companies left metropolitan landowners and mortgagees with a scrap of paper instead of valuable policies of title insurance;[56] that re-issue charges of title companies have caused irritation and that public confidence in title companies has been destroyed.[57]

The Homeowners Loan Corporation has found that in States where the Torrens system is in operation the cost of proving clear title is approximately half of what it is in New York State. The recent failure of the New Jersey Title Guaranty and Trust Company has left many landowners and mortgage holders with many thousands of dollars of worthless title insurance policies on their hands.

Such scandals did not occur in England, Canada, Ireland nor Australia. The English Chief Land Registrar, Mr. Stewart-Wallace, lays particular emphasis on the financial stability of the Land Registry in England.

To get down to bed rock the question is not shall New York give up the land registration system because of mythical and imaginary perversive factors of differentiation set up as scarecrows, but the question is rather shall New York make this system, so obviously excellent, work.

It appears, therefore, that Professor Powell has unfairly disregarded registration experiences in foreign jurisdictions, particularly in England and its possessions. The system, for the most part, has operated most successfully in the English-speaking countries and if successful there, there is reason to

[56] POWELL REPORT 8.
[57] *Id.* at 9.

believe that it will be equally as successful in this country, if given a fair opportunity to assert itself.

NEGLECT TO USE TITLE REGISTRATION SYSTEM WHERE AVAILABLE

Professor Powell points out that although the states of Nebraska, North Dakota, South Dakota, Virginia, Colorado, Georgia, North Carolina, Oregon and Washington enacted land registration laws, yet practically no use has ever been made of these laws. He also notes that the states of Tennessee, Utah, South Carolina and Mississippi have also enacted similar law, but these were subsequently repealed by failing to include them in new codes. The professor referring to these states concludes that, "As to them, the sole fact which stands out is 'disinclination' to utilize this system. This disinclination . . . might be due to a failure to appreciate the available blessings of a good innovation. On the other hand, it might be due to an awareness of the demerits of the available procedure."[58]

This "disinclination" is also due to a third reason which apparently has escaped Professor Powell's attention. It is due to a complete lack of knowledge on the part of property owners that such a system ever existed. Apparently this was the case in England. An optional registration law has existed in Great Britain for about 75 years and was scarcely used until 1897 when it was made mandatory in the County of London. Professor Powell observes that from 1862 to 1897 ouly one-third of 1 per cent of all the land in England and Wales has been registered.[59] Although the voluntary system of land registration in England was considerably simpler than that in this country, after it had been in existence about as long as our method of registration has been operative, the registry officials felt obliged to conclude that "no system can be devised which will be voluntarily adopted".[60] Nevertheless, as Professor Powell's figures indicate, there was a slow but gradual increase in the registration of land and after 1897, when land registration became mandatory in the County of London, voluntary registration elsewhere increased rapidly. Evidently, as more property was registered more property owners became aware that there was such a system, and, accordingly used it. In the states mentioned by Professor Powell, where this system is not used, it is doubtful whether one person in one thousand is aware that there has been such a law on the books, and it is questionable whether 1 per cent of those who know of the statute are familiar with the provisions of the law.

The professor further states that in the entire United States there were registered an aggregate of only 70,000 parcels during the 40 years following the enactment of the first law in Illinois. This includes registrations in Cook

[58] *Id.* at 55-56.
[59] *Id.* at 278.
[60] *Id.* at 277.

County (Illinois), Massachusetts, Minnesota, Ohio and California, so he concludes: "These figures demonstrate inescapably that persons handling land registration transactions throughout this country have not regarded title registration as sufficiently attractive or meritorious to cause them to register their titles."[61]

This conclusion like so many others of the professor's is incorrect and misleading. The "persons handling land transactions" (principally lawyers) are not necessarily interested in whether or not the system is more meritorious. It is the general belief among the legal profession (as it was in England before 1900) that the system is not so attractive to lawyers because it will enable property owners to convey their property without consulting a lawyer. Moreover, some consideration should be given to the handicap to land registration in jurisdictions, like Chicago and New York, where title companies pay attorneys a commission of from 10 to 25 per cent for getting their clients to use the title company system and obtain a title policy, or where abstract companies pay a commission to attorneys and real estate men for furnishing business.

Consideration also should be given to the opposition of registrars in rural communities to the use of the system, for it will be noted that practically all the states mentioned by Professor Powell are agricultural states. Under the existing voluntary system, the officials in rural sections are unfamiliar with the new system because they do not get enough cases to educate them in the procedure for registration.

Assurance Funds

"One error and its resultant claim can wipe out a fund of many thousand dollars, as has occurred in California," says Professor Powell, discussing the various types of funds provided for by existing registration laws.[62]

This case, when compared with the success of the funds in other jurisdictions, indicates that the state should set up a fund to begin with, or should extend its credit to guarantee against losses until the fund is of adequate size, as was done by the Federal Government in the insurance of mortgages. The loss in California was approximately $48,000 and the fund contained only $40,000, which was paid to the claimant. With the fund exhausted in California, the Professor seeks to discredit the entire registration system. But if all existing state and county assurance funds in the United States were added together, they would total well over $1,000,000 and losses against them for more than forty years total less than $100,000.

Practically all of the funds are made up of payments of one-tenth of 1 per cent of the assessed value of the property, paid upon original registration.

[61] *Id.* at 62.
[62] *Id.* at 72.

As Professor Powell indicates, a large proportion of the properties which are registered involve cases where there is a question of title.[63] In other words, the registration system obtains the more doubtful cases. It is to presume, therefore, that if all properties were registered, the losses borne by the funds would be proportionately less. It has been intimated that, possibly, there are *bona fide* claims which do not obtain compensation from the assurance funds. Except for the case referred to above in California, and a similar Nebraska case where the county fund was temporarily insufficient, Professor Powell's report indicates that *bona fide* claims have generally been paid without recourse to court action.[64] Even in California and Nebraska the shortage was temporary only and claimants were fully paid out of moneys subsequently coming into the fund.

Compare this record with the millions lost by the collapse of the title companies whom Professor Powell would again foist upon a long suffering public.

Because the public became used to title insurance, the belief arose that the assurance fund is similar to a title policy and that if the registered owner loses his property, he will be compensated from the fund. This is completely contrary to the fact and law of the registration system. The court decree of registration and the title certificates which follow are the assurance provided to the registered owner. He keeps the property. It is the third party claimant who is compensated from the fund, for any loss which may occur. These claimants commonly would have an action against the state for the loss sustained from the negligent acts of the officials, and the fund is resorted to instead. Thus, the assurance fund is more to protect the state against ultimate loss than it is to protect the registered owner of the property whose title is made indefeasible.

CONCLUSION

Professor Powell draws five conclusions from the facts collected by him in his study of title registration of land in New York.

His third conclusion is that the registration of land should cease and an act putting an end to it should be passed by the state. Having made that conclusion, his fourth and fifth conclusions state that the recording act of the State of New York should be remodeled and the rates of title insurance companies, and the exceptions in their policies, should be brought under the supervision of the State Insurance Department. It is obvious that these three conclusions have nothing to do with the merits of land title registration. So, only two, the first and second, if any, of his conclusions are of interest concerning land title registration.

In the first conclusion, Professor Powell says: "No change in the registra-

[63] *Id.* at 62.
[64] *Id.* at 224.

tion law of the State of New York which can reasonably be made but which leaves the registration of title as a voluntary proceeding to be done or not, according to the desire of the owner, is likely to cause any substantial increase in the number of title registrations in the state."[65]

This is a negative and hypothetical conclusion.

His second conclusion tells what he means by "change". It is that "the enactment of any law making registration compulsory is not justified. Such a law can be justified ouly by the existence of a reasonable probability that title registration would work better than recordation. Such a reasonable probability does not exist. In fact, the collective evidence indicates that title registration involves difficulties, expenses, and personal problems more troublesome and more irremediable than those encountered in recordation."[66]

Boiled down, both of these conclusions say only that no change in the New York registration act is likely to increase registration and a change in that act making it compulsory is not justified because it is not certain that it would work any better.

England tried for a longer period of time than New York to make registration work. It went through the same experience, *i.e.*, lack of use of the act, expense of registration proceedings, opposition of the lawyers and objections made to compulsory registration. Sir Charles Fortescue Brickdale fought for and got a limited compulsory act in England. It was compulsory as to London, at first. The original Torrens act in South Australia was compulsory as far as Crown lands were concerned. A limited compulsion has been found by these countries to work well because it gets the work started and on a sustaining basis. Without it the public is kept in ignorance of the title registration system and its benefits. The lawyers and title companies can successfully fight its use so long as its use can not get a good start. Professor Powell admits that compulsion would be justified if it made title registration work better. It had done just that in England. Why would it not do the same here?

Professor Powell, throughout his book, completely disregards the chief advantage of the Torrens system of title registration. His discussion relates entirely to the possible difficulties of the initial registration. The purpose of registration is not that the proceeding should be a substitute for an action to clear clouds from title but rather to provide a simple, safe and economical method of transferring titles by certificate after registration. This phase of title transfer, which its author, Sir Robert Torrens, emphasizes and which Professor Powell ignores, is the cornerstone of the system.

The transfer of titles by certificate is similar to the transfer of stock in

[65] *Id.* at 74.
[66] *Id.* at 74.

corporations by a registrar. It is characterized by Sir Robert Torrens in the following quotation taken from his essay:

> "The mode of registration is so simple and so analogous to the system of bookkeeping as used in banks, that all the transactions relating to a certain title necessarily appear upon the same folio, and therefore it is not necessary to search either against a man's name or in any other book whatever."