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DEEDS REGISTRATION IN ENGLAND: A COMPLETE FAILURE?

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I. Introduction

The Property legislation of 1925 marked the end of a hundred years of reform of land law. The several statutes which were enacted in 1925 were seen as a cohesive whole and, as a body of law, the legislation has worked remarkably well. As is perhaps inevitable, any retrospect of the period suggests an inexorability in the progress of reform. Although commentators have shown that reform was by no means a seamless whole,[1] it is difficult to imagine a radically different system in place.[2] Indeed, there seem to have been no serious proposals for any changes to the underlying structure of land law.[3] The main thrust of the reforms was to improve the system of transfer of land:[4] the pinnacle was the successful establishment of a register of title.

Understandably, writing on the reforms tends to emphasise the progress of title registration. There is in general little discussion of another option which was widely advocated: a general register of deeds.[5] Two local Deeds registers were already established in Yorkshire and Middlesex,[6] and they operated successfully for over 200 years. As

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[1] See, in particular, S. Anderson, *Lawyers and the Making of English Land Law, 1832–1940* (Oxford 1992), (hereafter, "Anderson, *Lawyers and the Making of English Land Law*"); also, A. Offer, *Property and Politics, 1870–1914: Land Ownership, Law, Ideology and Urban Development in England* (Oxford 1981; reprint 1992), (hereafter, "Offer, *Property and Politics*").

[2] The Law Commission has in recent years instigated a number of amendments to the land law, none of which change the fundamentals of the law or the structure of the 1925 legislation.

[3] Although one commentator did propose the replacement of freehold by a system of leaseholds: Arthur Underhill, a Conveyancing Counsel, in his pamphlet, "The Line of Least Resistance", published as an appendix to the Fourth Report of the Committee on the Acquisition and Valuation of Land on the Transfer of Land in England and Wales; 1919 Cmd. 424, xxix.

[4] This is a legacy of the conclusion of the Real Property Commissioners in their First Report in 1829 that although the law relating to transfer of land was very defective, the *substantive law* was perfect in every important respect: First Report of the Real Property Commissioners; 1829 (263) x.

[5] Anderson, *Lawyers and the Making of English Land Law,* gives an excellent, although brief, account of the progress and eventual demise of the proposals for deeds registration in the middle of the nineteenth century but does not consider deeds registration more generally. Offer, *Property and Politics*, gives only a brief resume of the nineteenth century proposals. In a critique of Anderson's book, Offer suggests that work on the deeds registers is needed: A. Offer, "Lawyers and Land Law Revisited" (1994) 14 O.J.L.S. 269, 277.

[6] The first register of deeds was established in the West Riding of Yorkshire by an Act of 1703. This was followed by legislation in 1707 and 1708 to establish registers in the East Riding and

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it transpired, these were the only deeds registers that were established in England. On the final closure of the local deeds registers in 1974, the comment was made that "so ends an experiment in deeds registration which appears to have been a complete failure".[7] It is doubtful whether a system which existed for over two centuries can legitimately be described as "an experiment", nor is it fair to describe the local deeds registers as a "complete failure". It is true that there were difficulties with the local registers and those difficulties were in part responsible for the failure of the system to be widely adopted. On the other hand, the adoption of a nationwide deeds register was very seriously considered during the nineteenth century and was only finally abandoned after 1911.[8] A dismissal of the proposals for deeds registration generally denies both its own merits and its place in the development of the system of registration of title.

II. The Need for a Register

A. The Problems of transferring Title to Land

From the publication of the First Report of the Real Property Commissioners in 1829 throughout the rest of the nineteenth and the early part of the twentieth centuries, numerous Committees and Commissions put forward proposals which culminated in the 1925 property reforms.[9] The dominant theme throughout the reform period was the necessity for improving the existing system of the transfer of title to land. The Real Property Commissioners recognised the rules governing the transfer of land as being complex and illogical in the extreme. The most important consequence of this, the Commissioners concluded, was a lack of *security* of title for persons dealing with land. There was a "constant danger from secret transfers and secret

Kingston upon Hull, and in the county of Middlesex. An Act of 1735 extended registration to the North Riding of Yorkshire.

[7] "Closure of East Riding Deeds Registry" (1974) 38 Conv. N.S. 76.

[8] In that year, deeds registration was considered as a precursor to title registration but was finally rejected: Second Report of the Royal Commission on the Land Transfer Acts, Summary of Recommendations, p. 56, para. 33; 1911 Cd. 5483, xxx.

[9] Although the reports of the various bodies are available for study, there is very little evidence of background to the earlier reports. Until the Lord Chancellor's Office was created in 1885 no official records were kept of matters dealt with by Chancery. Papers were treated as the private property of the individuals who received or sent them. Some documents have been preserved where an individual's papers have been kept as a collection. Remarkably, at least two Lord Chancellors in office from 1829 to 1880 have left no substantial deposit of documents: no surviving collections of Lord Cottenham's or Lord Cranworth's papers have been found. (Lord Cottenham was Lord Chancellor in 1836 and 1841 and from 1846–50: Lord Cranworth was Lord Chancellor from 1853–1859 and from 1865–1866.) Lord Lyndhurst (1827–1830) destroyed most of his papers before his death, considering that they would be of interest to no one. See *Guide to the Sources of British History: Papers of Cabinet Ministers 1782–1900,* HMSO 1982.

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charges", to guard against which conveyancers devised schemes which made tracing title very onerous and which even then did not guarantee a watertight title for the purchaser. Often this lack of security was perceived rather than actual, but was nevertheless, they thought, a real problem; many of the proposals made in their four reports were designed to improve that security.[10] By 1857, however, the perception had changed;[11] according to the Report of the Commission on Registration of Title,[12] it was the *complications* of title which caused the most problems on transfer of land. Although the overall aim was still to simplify the processes of transfer of land, simplification of title was seen as the way to achieve that aim. Whatever the emphasis, however, there was agreement that some sort of register was necessary.

One of the main problems of land law was to find an effective means of regulating the priority of successive dealings with the same piece of land. The rules relating to the priority of interests over land are complex. Historically, rights took priority in order of creation, although that priority could be disturbed when the first interest was equitable and the later legal. In that case, the rule was that the bona fide purchaser of a legal estate who had no notice of the prior equitable interest took free of it, the so called "doctrine of notice".[13] Although the principles were clear, application of those principles was less straightforward. On a dealing with the land, a prior legal interest might be concealed, either deliberately or accidentally,[14] and the doctrine of notice placed a strict duty of enquiry on the purchaser which he might not be able to satisfy. A register of dealings with the land would ensure that nothing was concealed from a subsequent purchaser and, at the same time, that prior interests were protected. In the nineteenth century, two separate proposals for registration were put forward: a register of deeds and a register of title.

B. The Distinction between "Deeds" and "Title" Registration

In the early proposals, there is no clear perception of a distinct difference between the two systems: "title" and "deeds" registers are referred to without any suggestion that they might be radically different ideas. For example, in its Report of 1846 the Select

[10] Following the four reports of the Real Property Commissioners (Reports of the Real Property Commissioners: 1829 (263) x; 1830 (575) xi; 1831–32 (484) xxiii; 1833 (226) xxii), many useful changes were made to the rules relating to the transfer of land. For a review, see A.W.B. Simpson, *A History of the Land Law*, 2nd ed., (Oxford 1986), pp. 274ff.

[11] See p. 391 for an explanation for the change.

[12] Report of the Commission on Registration of Title, pp. 10ff; 1857 Session 2 (2215) xxi.

[13] For a full explanation of the priority rules, R. Megarry and H.W.R. Wade, *The Law of Real Property*, 5th ed., (London 1984), p. 144.

[14] Many legal interests could subsist in the same piece of land at the same time, for example, legal life estates and entails.

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Committee on the Burdens on Land on the same page expresses an opinion that a registry of *title* is essential, and then recommends a register of *deeds*.[15] This failure to keep separate the two ideas is understandable. The way in which title to land was shown was by the documents, "deeds", which traced each transaction and transfer—one could not prove title without deeds. Similarly, the idea of *relativity* of title, that there is no absolute title but only better title, is central to land law. No one "owns" land: each merely has an entitlement to an interest in land, each of which has a place in a hierarchy of interests. It requires a fundamental change in point of view to accept that a single person may be shown in a public register as the "owner" of property. On the other hand, it is important not to make too much of the differences. Although Sir Hugh Cairns, the Solicitor-General, in introducing into the House of Commons a proposal for a register of title, asserted that a register of title had "nothing on earth in common" with registration of deeds,[16] the two do in fact have much in common. Both systems are concerned to provide an effective record of the dealings with, and thus the ownership of, land and in the early stages of the development of registration of title there were many similarities between the two systems.[17]

Under a system of deeds registration,[18] documents relating to transactions with a piece of the land are registered in a public register.[19] A person wishing to deal with a piece of land would search the register[20] under the name of the owner and would find

[15] Select Committee on the Burdens on Land, p. xiii; 1846 (411) vi.

[16] HC Deb. vol. clii, 3rd Series, col. 298 (11 February 1859).

[17] Pottage notes that the ability of interests to be noted and indexed on the title register, leaving the extent of the interest to be verified by examining the interest itself, suggests a confusion of elements of deeds and title registration. The distinction between the two is found in the difference between the schemes of indexation: title registration is "tabular", deeds registration, "dynastic": A. Pottage, "The Originality of Registration" (1995) 15 O.J.L.S 370, 391.

[18] What is described here is a "composite" picture of deeds registration: there were variations between the Register Acts already in force, and later proposals also differed in detail.

[19] The transaction did not have to be "by deed": this was simply a shorthand expression embracing all those matters within the scope of the register. Only transactions where some document was used could be entered. Thus mortgages by deposit of title deeds, a very common method of securing a loan, could not be registered unless there was some accompanying memorandum: *Kettlewell* v. *Watson* (1884) 26 Ch.D. 501. The Yorkshire Registries Act 1884, which made several amendments to the earlier Register Acts, was held in *Battison* v. *Hobson* [1896] 2 Ch. 403 to include mortgages by deposit.

[20] A hypothetical example may help to show the practical working of the West Riding register. Suppose that, in 1865, A wished to buy a freehold property from B, which B had bought in 1840. A would find B's name in the name index which covered the year when B bought the property. This would show the number of the volume which contained the deed, reference to which would give a description of the property and its precise location, and the names of the parties. Having confirmed that he was dealing with the correct property, A would then need to trace back the title to a good root, at that time normally 60 years, using the name of the vendor to B as a starting point. Then to check that there had been no dealings with the property since B bought the property, A would search forward under B's name up till 1865. The obvious difficulties with this were where the name was a common one or where B in fact owned several pieces of land in the same area (where he was, for example, a builder). These difficulties apart, the alphabetical index allowed a swift search: six volumes cover the nineteenth century, "as easy to use as a telephone directory", according to a leaflet currently issued by the West Yorkshire

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memorials[21] of prior registrable dealings with that land. He must then work out for himself the effect of the various dealings and thus the actual state of the title to the land. Within the class of registrable interests, no distinction was made between the various dealings with the land: a transfer of the legal fee simple, the creation of a lease, or the grant of an option over the same piece of land would be recorded without any attempt to distinguish their relative importance or to connect the various dealings, other than by the often rudimentary indexes.

By contrast, under a system of registration of title, documents relating to the land are also submitted to a public registry but the substantive effect of the documents is deduced by the person controlling the register. He records on the register the net effect of his findings and the purchaser is presented with that summary. The effectiveness of title registration depends on concealment of as many matters as possible from the purchaser and seeks to prohibit any enquiry by him into matters behind the register. Successful deeds registration, on the other hand, depends on the full disclosure of matters affecting title and demands retrospective enquiry on each transaction.[22]

Perhaps the most important difference is that a register of deeds gives no guarantee of title to the land—it has simply a recording, information-gathering function. Title registration, on the other hand, provides a state guarantee that the title is as represented by the register.[23] An important point, and one which is often not recognised by either the reformers or commentators, is that the *number and type*

Archive Service which has charge of the records of the West Riding register. Although the register did not provide a complete picture (not all dealings with the land could be registered, and in *Le Neve* v. *Le Neve* (1748) 3 Atk. 646 it was decided that actual notice of a prior registerable, but unregistered interest affected a later dealing), nevertheless A could usually in fact safely take his title from the 1840 conveyance to B. Although this would be a possessory rather than an absolute title, in practice the limitation period, at that time 20 years, would bar a prior title if B had been in possession.

[21] The form of registration in the early register Acts was by a "memorial" of the document, in other words, there was recorded a short note of the existence and general effect of the document. The person searching the register still had to refer to the full document to find the exact effect of the prior transaction. Under the North Riding Act of 1735 and the Real Property Commissioners' proposals of 1830, provision was made for registration of the full document: Real Property Commissioners, Second Report (1830), p. 31 (n. 10 above).

[22] Pottage describes the difference between the approaches as favouring "direct incorporation", in other words, the existence of competing interests is shown clearly on the deeds register, as against "indirect incorporation" in title registration, where the existence is signalled by the non-committal caution: (1995) 15 O.J.L.S. 370, 391.

[23] Although such may not in fact be the case. The provision for rectification of the register and the availability of an insurance fund to compensate those who suffer loss through inaccuracies on the title play an important part in the registration of title system. The class of "overriding" interests, now enumerated in section 70 of the Land Registration Act 1925, continues to cause considerable difficulty; see, K. Gray, *Elements of Land Law*, 2nd ed., (London 1993), p. 167 for examples.

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of interests registrable under either system is not a fundamental difference.

Although the deeds registers that existed in England allowed registration of a wide number of interests, not all dealings could be recorded.[24] Equally, although the present title registration system is concerned mainly with the legal fee simple, which is the principal[25] registrable interest, other interests being registered adjectivally, a register of title need not be so confined. Indeed, the first title registration legislation, the Land Transfer Act 1862, provided for registration of *all* interests affecting land. It was argued that this necessity to register all interests had created a register of deeds, not title, and this was said to be a main cause of the failure of the Land Transfer Act 1862. The argument, however, is misconceived. It is the *legitimising* effect of the register of title which is the most important distinction between the two systems.

C. The attempts to establish a Register

Registers of dealings with land have a long history, although early registers tended to deal with a particular problem rather than to provide a comprehensive system for all matters relating to land. The Statute of Enrolments of 1535, for example, provided only for the enrolment of a bargain and sale of freehold land. Conveyances of copyhold land were recorded in the court rolls of the manor, and fines and recoveries of land were enrolled in court records.[26] There were also registers of matters which affected private land but were of public interest, for example, judgments and satisfaction of judgments and bankruptcy matters.[27]

The first attempts to establish a comprehensive register were made in the seventeenth century,[28] although it was not always clear what was being advocated, a register of deeds or of title; there was simply

[24] The registers did not extend to copyhold land, to leases under 21 years taking effect in possession or to leases at a rackrent. There was a proposal for a deeds register which would have effectively confined substantive registration to the fee simple: First Report of the Registration and Conveyancing Commission, p. 30; 1850 (1261) xxxii.

[25] Leases for over 21 years can also be registered substantively and have their own subsidiary interests registered against them: Land Registration Act 1925, s. 8.

[26] The Fines and Recoveries Act 1833 amended the law relating to the use of fines and recoveries but required the enrolment of the "disentailing assurance" in the Court of Chancery: Fines and Recoveries Act 1833, section 41. For a detailed explanation see, *e.g.*, Megarry and Wade, *The Law of Real Property*, p. 83 or Simpson, *A History of the Land Law*, pp. 123ff. Often ordinary private conveyances were registered in courts of record, notably in Chancery.

[27] Provision for registration of judgments affecting land was first made in 1692: 4 & 5 W. and M., c. 20; and for registration of bankruptcy matters in 1542: 34 Hen. 8, c. 4.

[28] In 1617 Francis Bacon proposed the setting up of an Office of General Remembrancer, but this was to be little more than a centralisation of the existing registers for enrolments under the Statute of Enrolments. A valuable historical account of the progress of deeds registration in England can be found as an appendix to the First Report of the Registration and Conveyancing Commission (1850), Appendix 6 (n. 24 above).

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a sense of feeling the way to a better system.[29] Although few of the Commonwealth proposals survived the Restoration,[30] bills for registration were presented virtually every year from 1649 to 1659. In 1669, a Committee appointed to "inquire into the decrease in rents and decay in trade", led by the Earl of Essex, concluded that one reason was the uncertainty of titles, and consequently a bill to establish a register was presented to the House of Lords in 1676 and again in succeeding years. The proposals varied but in general provided for registration of only those interests not otherwise easily susceptible of proof on a later dealing with the land.[31]

It was not until 1703 that the first register of deeds was established in the West Riding of Yorkshire.[32] The preamble stated the reason for its establishment: the West Riding was

> the principal place in the north for the cloth manufacture and most of the traders therein are freeholders, and have frequent occasions to borrow money upon their estates for managing their said trade, but for want of a register find it difficult to give security to the satisfaction of the money lenders, (although the security they offer be really good).

In consequence, trade was "very much obstructed and many families ruined".[33] Legislation followed in 1707 and 1735 to establish registers in the East and North Ridings, and in 1708 for the county of Middlesex.[34] Although the legislation differed in some detail, the purpose of all the Deeds Register Acts was the same: to encourage trade by providing potential lenders with security against fraud through the existence of prior, undisclosed incumbrances on the title. None of the local registers of deeds was entirely successful but their inadequacies did not prevent continued attempts to establish a more general register of deeds.

[29] D. Veal, *The Popular movement for land reform: 1640–1666* (Oxford 1970). Veal suggests that had there been thorough-going reform of land law during the Commonwealth, the new property-owning classes would not have supported the Restoration. One of the earliest advocates, John Cook, introduced bills in 1650–52 which would have established a limited register of deeds. The Hale Commission, set up in 1652, produced 16 bills, including a proposal for a register: G. Hurst, "Sir Matthew Hale" (1954) 70 L.Q.R. 342.

[30] The most significant survivor, re-enacted in 1660, abolished feudal dues: Statute of Tenures, 12 Car. 11, c. 24.

[31] Estates in fee in possession, for example, were not included, since there was sufficient evidence of ownership through deeds and, where appropriate, by enrolment under the Statute of Enrolments 1535.

[32] 2 & 3 Anne, c. 4 (1703).

[33] Although the possibility of the existence of prior concealed interests was a danger on any dealing with the land, it was a particular problem when the land was mortgaged. Although the mortgagee would typically take the title deeds as security, which should have effectively prevented later secret dealings with the property, the title deeds might not be available or have been lost or destroyed. Also deeds could be duplicated or fraudulently retained by the landowner.

[34] Neither the City of York nor the City of London was within the ambit of the registers. There was in addition a register which had been established in the Fens in 1663, the purpose of which was different from that of the later deeds registers: see generally S. Wells, *The History of the Drainage of the Great Level of the Fens called the Bedford Level*, 2 vols., (London 1830).

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The question of deeds registration was considered by Jeremy Bentham[35] and his ideas were taken up in 1826 by James Humphreys. His code for real property, inspired by the *Code Napoleon*, suggested, among other things, a register of deeds.[36] The whole subject of law reform was very much a live one and in 1828 the Real Property Commission, headed by John Campbell, later Lord Chancellor, was set up to consider the question of land law reform.[37] Although Humphreys was not a member of the Commission, the Second Report of the Real Property Commissioners in 1830 itself recommended a register of deeds.[38] The Commissioners were convinced that the establishment of a *general* register of deeds was absolutely necessary; the acknowledged difficulties of the existing registers, were, the Commissioners considered, more of expense and difficulty of detail than attributable to any cause affecting the merit of a register. However, all attempts to establish such a general register failed, despite the efforts of Campbell.[39]

Part of the reason for this failure[40] was that there were many who argued that a register was simply unnecessary, that the problems which the Commissioners felt to be so profound were non-existent or in practice easily overcome.[41] The Commissioners had identified as the main problem affecting real property, the loss or concealment of documents affecting title. Whether through fraud, accident or mistake, incomplete documentation could have a devastating effect and lead to loss of the estate. But it was, they suggested, less *actual* loss than the *possibility* of loss, and the consequent methods devised by conveyancers to protect against such a possibility, which caused the problems. All these difficulties, opponents of deeds registration claimed, were illusory: the majority of land transactions were carried out with no problems. In practice, conditions of sale got round many

[35] J. Bentham, *Of Laws in general*, ed. by H.A. Hart (1970), Appendix B and pp. 176–182; cited by Offer, *Property and Politics*, p. 27.

[36] J. Humphreys, *Observations on the actual state of the English laws of real property with the outline of a code* (1826).

[37] A.R. Buck, "Property, Aristocracy and the Reform of the Land Law in Early Nineteenth Century England" (1995) 16 J.L.H. pp. 62, 65 and 70 argues cogently that the reform of land law was not a "Benthamite" project; reform of the law was initiated by "the very un-Benthamite Tories of 1827". There were already proposals for reform even before Brougham's celebrated speech in the House of Commons in 1828 calling for a general law reform. Although Brougham and the Real Property Commissioners acknowledged their debt to Humphreys, his Benthamite utilitarian approach to law was in stark opposition to the ideas of the reformers whose interests were those of the landowners.

[38] Second Report of the Real Property Commissioners (1830) (n. 10 above).

[39] Bills to establish a general register in 1830 and again in 1831 and 1832 all failed, as did the three bills put forward in 1834.

[40] Another was the complexity of the proposed register itself. For other possible reasons, p. 379 below.

[41] Opposition to the Real Property Commissioners' proposals in 1830 was immediate and came mainly from solicitors. As Anderson shows, their arguments were manifold and kept pace with each changing proposal: Anderson, *Lawyers and the Making of English Land Law*, p. 44.

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of the problems the Commissioners identified.[42] It was the rarefied atmosphere in which the Real Property Commissioners moved which made them see the whole land transfer business as fraught with difficulty. The people whom the Commissioners consulted were conveyancing counsel, the elite body who dealt with the small number of cases where things actually went wrong.[43] This exclusivity blinded them to the fact of everyday practice.

This view is rather difficult to reconcile with the concerns of those in Yorkshire and Middlesex whose registers had been set up because of their concerns over loss caused through fraud.[44] Either the inhabitants of these counties were particularly timid or the greater amount of commercial business did in fact lead to a higher than average rate of loss.[45]

A fresh impetus was given to proposals for a register by the concern over the general state of agriculture in the middle of the nineteenth century. A Select Committee appointed to consider the burdens on land proposed the establishment of an effective system of registration of deeds[46] and, following this, the Registration and Conveyancing Commission was appointed to consider once again the question of deeds registration. It reported in 1850[47] and its conclusions were almost wholly in agreement with the recommendation of 1830 that a general register of deeds was necessary, although its own proposals sought to remedy some of the faults of the earlier scheme, in particular the complexity of its proposed indexes.

Following this Report, a Select Committee was appointed to consider a Bill for registration of deeds introduced by Lord Cranworth in 1852. The Committee reported in 1853[48] and, in a

[42] Pottage describes the task of the purchaser's solicitor as being in practice to secure a title for his client which could be sold on by special contract: "The Measure of Land" (1994) 57 M.L.R. 361, 383.

[43] The Real Property Commissioners acknowledged their debt to the Conveyancing counsel, saying that they had proved themselves free of prejudice and self interest. The Commissioners derived "considerable confidence from the reflection that we have the sanction of a large majority of that body for all the propositions which we have now to bring forward": First Report of the Real Property Commissioners (1829), p. 5 (n. 10 above).

[44] Buck notes the importance of the availability of mortgage funds for landowners whose land was in strict settlement: one and half million pounds was lent by the Bank of England in the 1820s but the difficulty of ensuring against fraud "vitiated the attractiveness of mortgages in the early nineteenth century": "Property, Aristocracy and Land Law Reform", p. 72. Settlements required no registration and the resultant secrecy allowed easy fraud by the suppression of deeds.

[45] It is interesting to note that as late as 1879 when title registration had been established and the idea of deeds registration had been effectively dead for 20 years, there was a new proposal for a deeds register in the wake of the Dimsdale fraud scandal. A Committee on Land Titles and Transfer, headed by George Osborne Morgan, recommended a deeds register as a better safeguard against fraud than title registration: Report of the Select Committee on Land Titles and Transfer, p. xiv; 1878–79 (244) xi.

[46] Report of the Select Committee on the Burdens on Land (1846) (n. 15 above).

[47] First Report of the Registration and Conveyancing Commission (1850) (n. 24 above).

[48] Report of the Select Committee on the Registration of Assurances Bill (1852–53), (889) xxxvi. "Assurances" and "deeds" are for this purpose synonymous.

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complete *volte-face*, recommended that the bill for the "Registration of Assurances" should be abandoned and a proposed scheme for registration of title be examined instead. The Report gave only a brief explanation for this quite dramatic change. The Committee had considered the Bill and had found that it contained two distinct principles of registration: the first, the registration of all assurances and the legal and equitable estates therein, the second, a proposal for registration of legal title alone, with no necessity to enter the instruments which dealt with equitable ownership. The Committee had before it also two other bills, a Bill to faciliate sale and purchase of land and a Bill to facilitate the transfer of title to land in Ireland, both of which adopted the principle of keeping registered "legal" ownership separate from equitable title.

The Committee had also had brought to its attention a scheme for registration of title which, if developed, "appeared to fulfil most of the important conditions of registration and to afford a means of ensuring great facility for the transfer of land, combined with great simplicity and security of title".[49] With the end of the Parliamentary Session very near, the Committee felt unable to look into the matter further but recommended the appointment of a Commission to examine the whole question of title registration. The Commission (which included as its members Vincent Scully, John Denison, both of whom were members of the 1853 Select Committee, and Strickland Cookson who had recommended to the Committee a register of title) reported in 1857.[50] Thereafter title registration advanced rapidly: the first legislation for title registration, the Land Transfer Act, was passed in 1862. The system soon ran into considerable difficulty[51] and, following a Report in 1870,[52] the Land Transfer of 1875 attempted a fresh start. This too was a failure and after another report by another Select Committee in 1895,[53] the Land Transfer Act of 1897 was passed. Although more successful than its predecessors, the system was still almost moribund. There were two further inquiries in the next decades into the workings of title registers: in 1911 by the St. Aldwyn Commission,[54] and in 1919 by the Scott

[49] Report of the Select Committee on the Registration of Assurances Bill (1852–53), p. iv., (*ibid.*). Attached to the six-page Report are 180 pages of minutes of evidence.

[50] Report of the Commission on Registration of Title (1857) (n. 12 above).

[51] Very few titles were registered, partly because the legislation required all boundaries to be exactly determined. See, generally, Offer, *Property and Politics*, and Anderson, *Lawyers and the Making of English Land Law*.

[52] Report of the Commission on the Operation of the Land Transfer Act 1862 and the Registry of Deeds for the County of Middlesex; 1870 (C.20) xvii.

[53] Report of the Select Committee on the Land Transfer Bill; 1895 (364) xi. There had been an important report in 1879 (Report of the Select Committee on Land Titles and Transfer (1878–79)) and several abortive bills were introduced before the 1897 Act was passed.

[54] Second and Final Report of the Royal Commission on the Land Transfer Acts (1911) (n. 8 above).

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Committee.[55] The present legislation, the Land Registration Act 1925, is largely the result of the recommendations made in these reports.

The early failure of title registration inspired fresh attempts to revive the idea of deeds registration. In a paper written immediately after the passing of the Land Transfer Act in 1862, Joshua Williams, a well known conveyancer, had put a strong case for registration of deeds.[56] In 1878 there was again a proposal for a deeds register,[57] and in 1911 the St. Aldwyn Commission suggested that registration of deeds was a necessary precursor to registration of title.[58] There were, however, never any deeds registers established in England other than those in Middlesex and Yorkshire. Although the early legislation was considerably flawed, title registration eclipsed deeds registration almost immediately and entirely. The existing deeds registers nevertheless continued to function for many years. The Middlesex register was gradually run down until it was closed completely in 1940.[59] Both the North and West Riding registers were closed in 1972, and the East Riding Register in 1976.[60]

D. The Foreign Experience

The failure to establish a deeds register in England can be contrasted with the experience of various other countries, virtually all of which had, in the nineteenth century, a register which can be classified as a

[55] Fourth Report of the Acquisition and Valuation of Land Committee on the Transfer of Land in England and Wales (1919) (n. 3 above).

[56] Joshua Williams, "On the true remedies for the evils which affect the transfer of land", *Papers read before the Juridical Society,* 1858–63, vol. II, p. 589. Williams had apparently changed his mind; Anderson cites Williams' *Principles of Law of Real Property* in its third edition of 1852 in which he questions the efficacy of deeds registration, apparently resiling from the opinion expressed in the second edition in 1849. He supported deeds registration in 1877: Anderson, *Lawyers and the Making of English Land Law*, pp. 81 and 141.

[57] Report of the Select Committee on Land Titles and Transfer (1878–1879) (n. 45 above).

[58] Second and Final Report of the Royal Commission on the Land Transfer Acts (1911) (n. 8 above).

[59] In 1870 it was agreed that the Middlesex register should be discontinued, although it in fact continued in operation for some purposes until 1940: Report of the Commission on the Operation of the Land Transfer Act 1862 (1870) (n. 52 above). In 1891, the Land Registry (Middlesex Deeds) Act transferred control of the Middlesex deeds register to the Land Registry. The introduction in 1899 of compulsory registration of title on some dealings in the north part of the new County of London (all of which was within the Middlesex deeds registry) reduced the number of registrations at the deeds registry significantly. Compulsory registration of title was introduced in the remaining part of Middlesex in 1937 and the deeds registry was finally closed in 1940. In 1941 there was a proposal that the registry records should be made available to solicitors to help replace title deeds lost in the bombing of London but this was not taken up: PRO LCO2/1491, letter from Reynolds & Co. (Solicitors) to the Lord Chancellor, 28 May 1941.

[60] Compulsory registration of title was introduced in Huddersfield in 1962 and the Law of Property Act 1969 provided for the closure of the three Yorkshire registers for registration of deeds as soon as an Order was made extending compulsory registration in any part of the register areas. Orders were made for the North and West Riding in 1970 and for the East Riding in 1974. Two years after these dates, the registries were closed for all purposes. The Bedford Level register was closed in 1920, when the Bedford Level Corporation was abolished.

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register of deeds, rather than of title.[61] As the Real Property Commissioners commented in 1830, "there does not appear to us to be any peculiarity in the laws of this country, or in the habits of the people, which should necessarily prevent or lessen the benefits of a general register".[62]

Ireland has a deeds register established in 1707. In Scotland, the register of sasines is even older, having started in 1554. Both still exist, although both are being superseded by registration of title. These registers were, it is true, established for different purposes and have different histories but they were very similar in effect. In England, the deeds registers in Yorkshire and Middlesex were established primarily to prevent fraud against mortgagees. In Ireland, the register had an overtly political role, being designed to supplement the penal laws against Catholics.[63] It may have been this political purpose which ensured that, in Ireland, the deeds registers were made to work: there seems to have been no inherent superiority in the system. The register of deeds in Scotland was markedly different from those in England or Ireland. The register was established not by statute but by the practice of litigants filing documents in the Court of Session in support of claims.

This register of "sasines"[64] is still simply one of the registers of Court of Session. Although registration was voluntary, within a short time it became the rule rather than the exception and flaws in the system were put right by practice.[65] The Committee of the Faculty of Advocates commented in 1850 that the system of registration was "brought to maturity and perfection by vigilant supervision of the public officers".[66]

Perhaps the most interesting comparison is with the United States of America which has a system of deeds registration (called a "recording" system) which has been in operation in the original states since the seventeenth century, thus predating the English registers.[67]

[61] Appendices III and V of the Report of the Registration and Conveyancing Commission of 1850 give details of registers in European countries, all of which can be classified as registers of deeds rather than title.

[62] Second Report of the Real Property Commissioner, (1830) p. 19 (n. 10).

[63] For a discussion of the Irish deeds register, see P. Roebuck, "The Irish Registry of Deeds: a comparative study" (1972–73) 18 Irish Historical Studies 61.

[64] Corresponding to the English "seisin", the medieval concept which can be loosely interpreted as denoting possession. For an excellent introduction to registration in Scotland, see *The Laws of Scotland*, Stair Memorial Encyclopaedia, 26 vols., vol. 6, (Edinburgh 1988), pp. 122ff.

[65] In particular, extra-statutory indexes were established by the deputy registrars who controlled the registers. These indexes remained their private property: Appendix IV to the First Report of the Registration and Conveyancing Commission (1850), p. 167 (n. 24 above).

[66] Appendix IV to the First Report of the Registration and Conveyancing Commission (1850), p. 203 (n. 24 above).

[67] For a description of the beginnings of the system in Massachusetts, see G.L. Haskins, "The Beginnings of the Recording System in Massachusetts" (1942) 21 Boston University Law Review 281–304, reproduced in *The Land Law and Real Property in American History, Major Historical Interpretations*, ed. by Kermit L. Hall (New York 1987), p. 143.

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In 1895, a system of registration of title was introduced in Illinois but was unpopular, being expensive and slow, and the system, having been tried elsewhere, has now been virtually disbanded.[68]

III. Deeds and Title Registration: A Comparision

It is clear that there was nothing inherently wrong with the concept of deeds registration. Although the registers in existence in England in the nineteenth century were defective, they could have been improved and even defective systems could be made to work, as the Scottish and Irish experiences showed. Nevertheless, the change from a proposed register of deeds to an established register of title was swift and complete. It was not until 1857 that registration of title was seriously proposed, yet within five years the proposal had passed into legislation. Although it took another 60 years before there was anything like a workable system, the rout of the deeds registers was absolute: the rival to registration of title became a reformed system of traditional conveyancing, rather than deeds registration.[69]

The reason for this cannot simply be explained by retrospective analysis, by comparing the present day, workable system of registration of title with the admittedly defective nineteenth century deeds registers. Although it was said in 1859 that objections to a general deeds register were so manifest that no one could recommend it, many did in fact do so. Nor was it the case that the title registration system was immediately so superior in its working that its own merits ensured its acceptance. There was little in the early years to show that a register of title had any advantage.

There were, of course, problems with the existing deeds registers and the 1857 Report of the Commission on Registration of Title identified a number of objections to a general register of deeds which, by implication, would not affect a title register.[70] Yet in many cases the objections were either surmountable or were in fact found also in a title register. Moreover, although limited in scope and admittedly imperfect, there were in existence working registers which provided a valuable model for an extension of the system. Title registration on the other hand was everywhere in its infancy. It was very much an untried system[71] and there was no guarantee that it would prove a success.

[68] For the American system generally, see Cunningham, Stoebuck and Whitman, *The Law of Property* (Minnesota 1993).

[69] Many commentators were unconvinced of the merits of register of title or indeed of any register at all, preferring instead a reformed system of traditional conveyancing. See, generally, Offer, *Property and Politics*, and Anderson, *Lawyers and the Making of English Land Law*.

[70] Report of the Commission on Registration of Title (1857), p. 11 (n. 12 above).

[71] The first title registration scheme was introduced by Robert Torrens (a native of Cork) in Australia in 1858. The system there seems to have worked well from the start, largely because

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Why, then, did title registration succeed and deeds registration fail? Since the title registration system was untried, it must, one assumes, have been faults inherent in the existing and proposed deeds registration system which caused its failure. Analysis suggests, however, that this was not necessarily the case.

A. The Problem of Notice

A problem generally seen as one of the prime faults of the existing deeds registers was the admission of "notice", that is, the principle that where a person later dealing with the land had some knowledge, whether directly or by imputation, of an early dealing, he was bound by the earlier interest. Under the existing deeds registers, priority between successive rights in land was regulated by the order of entry on the register. Any registrable deed was deemed "fraudulent and void" against any subsequent purchaser, unless the first transaction was registered before the registration of the later deed. This should have ensured that priority of *any* registrable interest was regulated by registration, rather than by common law principles of notice. In fact this regime was largely undermined by decisions in the courts that the register did not exclude the equitable doctrine of notice; cases such as *Le Neve* v. *Le Neve*[72] established that *actual* notice of a prior unregistered interest prevented the later purchaser from claiming priority for his interest.

The introduction of notice is considered inimical to any system of registration and the Real Property Commissioners in 1830 had recommended that notice of every sort be excluded from their proposed register.[73] The Report of 1850 came to the same conclusion[74] and the later proposals for registration of title also excluded notice.[75] Thus both systems excluded notice in principle, although it has proved more difficult to exclude in practice.[76] Moreover, although

the land law had had no time to acquire complexity. Most roots of title started from a recent Crown grant, with clearly defined boundaries. Ireland was considering adopting the Torrens system but against a very different background to that in England. England in the nineteenth century may have had a "Land Question" but it was a radically different one from that in Ireland.

[72] (1748) 3 Atk. 646. The court based its decision on a case on the Irish deeds register, *Forbes* v. *Deniston* (1722) 4 Bro. P.C. 189.

[73] They debated at considerable length whether *all* notice, actual and constructive, should be excluded and came to the conclusion that it should: see Second Report of Real Property Commissioners (1830), p. 36ff (n. 10 above).

[74] Report of the Registration and Conveyancing Commission (1850), p. 31 (n. 24 above).

[75] The Land Transfer Act 1862 in fact said nothing about notice but since it required the registration of *all* interests, there would seem to have been no room for the doctrine. The Land Registration Act 1875 excluded notice of beneficial interests and the 1897 Act excluded notice of all kinds, as does the present legislation, the Land Registration Act 1925.

[76] For an examination of the history of the doctrine of notice under a registration system, see J. Howell, "The Doctrine of Notice: An Historical Perspective" [1997] Conv. 431. For the present difficulties with notice, see G. Battersby, "Informal Transactions in Land, Estoppel and Registration" (1995) 58 M.L.R. 637 and J. Howell, "Notice: a Broad view and a Narrow view" [1996] Conv. 34.

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notice was always said to be a primary fault of the existing registers, it is doubtful whether it was so in practice: deeds were apparently registered as a matter of course and only on a rare occasion would there be difficult questions of priority.[77]

B. Difficulties of Search

One problem identified by the 1857 Committee with the existing registers was the difficulty of searching the registers, a problem caused by the poor system of indexing. There was no single or wholly satisfactory system of indexing, different methods being adopted in each register district.[78] Under a deeds register, comprehensive indexes are vital to enable all matters affecting a piece of land to be traced on a later dealing. The sheer volume of registered memorials could make search even with good indexes very time consuming. In the index for Middlesex for one year, 1830, the names under one letter of the alphabet filled nearly 50 pages containing 39 names each. The Real Property Commissioners said:

> We have been told that a search is rarely made at the present offices except from the time of the last purchase or mortgage; that such a limited and inadequate search for one title has occupied a solicitor or his clerk more than ten days; that the search has cost upwards of £200; and that in some cases, where the estate has belonged to persons of very common names or to speculative builders, the search had been considered to be impracticable.[79]

The Commissioners recognised that the real problem was that since there was no personal connection between the owner of land and rights in the land, the only means of connecting them must be some description of land, prescribed as a common standard of reference. The Commissioners proposed a system of classification of deeds under separate heads with reference to title to the land. This system

[77] Dibb, who was Deputy Registrar in Yorkshire in 1859, said that although the lack of compulsion to register made the register "irregular", it was proper to add that "the practice is with few exceptions, to register a memorial within a brief period of the date of a deed": J.E. Dibb, "The Yorkshire Registries of Deeds" (1859) Transactions of the National Association for the Promotion of Social Science 202. For the working of the deeds registers generally, see F. Sheppard and V. Belcher, "The Deeds Registries of Yorkshire and Middlesex" (1978–81) 6 Journal of the Society of Archivists 274.

[78] In the West Riding of Yorkshire, for example, there was an index of personal names which covered the whole period of the register, although until 1794 the list was not strictly alphabetical. There was also an incomplete places index; although begun in 1704 in accordance with the legislation, it lapsed between 1787 and 1885, was then resumed but was discontinued from 1923. The indexes in the Middlesex register were considerably defective: although the legislation provided for an index of names and places, the places index was not maintained after 1718. Sheppard and Belcher, *op. cit.*

[79] Second Report of the Real Property Commissioners, (1830) p. 25 (n. 10 above). Certainly a register without a complete index would be difficult to search. The writer has herself conducted a search in the West Riding register, where the indexes are well kept. Although time consuming, repetition would, however, bring expertise.

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they themselves recognised as imperfect. They would have preferred an index based on a map, by which every registered document would be directly connected with the property affected by it, which would remove the necessity for the search against names. What was needed was a cadastral map, that is, a map of properties, the essential feature being that it identified property owners, usually by linking properties on the map to a written register in which details of the property were recorded.

In 1830, however, there existed nothing at all resembling a comprehensive map of any sort for even part of the country.[80] Some private maps were in use but they were inaccurate and expensive to produce, and did not show the relationship of the land to other features by which the land could be identified but were merely ground plans of the particular piece of land. The cost of producing an adequate map for the whole of England and Wales for the purpose of the deeds register would, it was recognised, be prohibitively expensive. The 1850 Report of the Registration and Conveyancing Commission[81] also recognised the utility of a map index and in fact by 1850 there was nearing completion a map of the greater part of England. This map was produced not for the purpose of registration of ownership of land, but for assessing the value of tithes; the Tithe Commutation Act of 1836 provided for the compilation of an accurate map of all parishes. Although these maps were not intended to show title to land as such, it was recognised in 1846 by the Report on Burdens on Land[82] that the First Class tithe maps could be used for the register of deeds which the Report itself recommended. In the event the mapping was not completed.[83] Also under completion were Ordnance Survey maps[84] but these maps, although often referred to as "cadastral", were not, and were not intended to be, cadastral maps in the true sense.[85]

[80] There was a map of the Bedford Level made expressly for the purpose of the register, where each estate was identified and referred to by numbers marked on a map.

[81] Report of the Registration and Conveyancing Commission (1850), p. 15 (n. 24 above).

[82] Report on the Burdens on Land (1846), p. 446 (n. 15 above).

[83] These First Class maps, of 26·7 inches to the mile, were guaranteed accurate by the Tithe Commissioners. Second Class maps were sufficient for tithe purposes to show the land subject to apportionment, but were less accurate than First Class maps and were not guaranteed. It had been intended by the Tithe Commissioners that all the maps would be First Class but the cost of producing them and the acknowledgement by the Commissioners that maps were not strictly necessary at all for commutation (a quarter of tithes having been commuted in England without a map before 1836), led to the repeal of the clauses in the 1836 Act which required accurate mapping. There were also maps drawn up under the various Enclosure Acts but for many enclosures there were no maps at all. Maps only became necessary after the 1801 General Enclosure Act, although they were widely used in practice before then. For the history of the mapping of enclosures and under the Tithe Commutation legislation, see Kain and Baigent, *The Cadastral Map in the Service of the State* (London 1984), p. 236ff.

[84] For the history of the mapping of the country, see Arden-Close, *The Early Years of the Ordnance Survey* (New York 1969). The Ordnance Survey was much further advanced in Ireland, which may be one of the reasons why deeds registration worked better there.

[85] Although England and Wales are now well mapped, the full cadastral map is still a considerable

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The Bill of 1851 which followed the 1850 Report on deeds registration originally included a proposal for a map index,[86] but in Committee all the map clauses were struck out and an alphabetical index was substituted: it was considered that the existing maps were inaccurate and full mapping would be too expensive. Although by 1857 the position was better than in 1830 and advances in cartography from the 1850s made it possible to "ground" land, as Pottage describes it[87] (in other words, to allow ownership and identity to be assessed and calibrated by a public standard, rather than through "a set of idiomatic contractual horizons"), it was recognised that there was still no map sufficient for all purposes of registration and it was agreed that the formation of a general map would not be compulsory in the proposed system of registration of title.[88] Such a conclusion seems extraordinary, since registration of title relies largely for its effectiveness on accurate identification of the land to be registered. The first title registration legislation, the Land Transfer Act of 1862, showed clearly the necessity for an accurate map. The Act allowed only registration of indefeasible title, which in practice meant that exact boundaries had to be determined. The representation of such detail required a large scale map. Without an accurate map, the landowner was put to considerable expense and this necessity for accurate mapping proved to be one of the major difficulties of the legislation. Pottage notes the difficulty of constructing a property map on a built environment: "on a piece of moor a matter of several feet, or yards even, may be unimportant, but when you come to the City of London feet and inches are important".[89]

Yet, despite the obvious utility of a map, evidence of the working of the Yorkshire registers shows that they functioned well even without a map: the Yorkshire system was said to work with "almost absolute perfection".[90]

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way from completion. The first and only comprehensive mapped cadastral survey was that done for the purpose of the Finance Act 1910, which introduced increment value land duty. The legislation was repealed in 1920. Cadastral maps had existed in many parts of Europe for many years. They were compiled, not for registering ownership of land, but for the cadaster land taxes, although they were and are used to a limited extent to show title to land: Kain and Baignet, *op. cit.* (n. 83 above).

[86] Two members of the Committee, Humphry and Broderip, issued a dissenting paper disagreeing with the proposal for a map index: Report of the Registration and Conveyancing Commission (1850), p. 39 (n. 24 above).

[87] Pottage, "The Measure of Land", p. 375.

[88] Report of the Commission on Registration of Title (1857), p. 21 (n. 12 above).

[89] Pottage, "The Measure of Land", p. 378. Pottage concludes that the consolidation of registration of title was dependent in part on the physical reduction of land to a map. He argues that the rise of registration—which he sees as a codification of land transfer practices—depended on a prior codification of property in terms of topography: Pottage, p. 384.

[90] Second Report of the Royal Commission on the Land Transfer Acts (1911), p. 49 (n. 8 above). The Yorkshire Registries Act of 1884 repealed the three Yorkshire Registries Acts and instituted a more efficient method of indexing and registering. The system continued in force till the closure of the East Riding Registry in 1976 and was much admired by those who used it.

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C. The Cost of Registration

It was claimed by the opponents of the system that the cost of a general deeds register would be much greater than a register of title, since all deeds would have to be submitted for registration.[91] The same was true, however, of the register established under the Land Transfer Act 1862. The register under that Act was to be a comprehensive "mirror" of title and it was necessary that all deeds relating to the land came to the registry in order for their effect to be assessed by the registrar. Also, a register of deeds is simpler to operate and establish than a register of title, since all the clerk does is copy out the memorial of the deed on to the register—there is no question of establishing the effect of a deed.

Indeed, the cost to the owner of registering his title under the 1862 Act was considerable, since he had to establish the exact extent of his boundaries before his title would be accepted for registration, even though parties themselves were willing to accept some inexactness. The necessity for establishing exact boundaries was not expressed in the legislation but was a necessary result of the inability of the land owner to register anything other than absolute title. (Later title registration legislation provided only for the substantive registration of the fee simple and for the registration of a "possessory" title, which required less documentation to be submitted to the registrar.)

An aspect of cost which was of particular concern to country solicitors was the proposal for a central metropolitan register of deeds. The 1850 Commission had agreed with the 1830 Real Property Commissioners that a central register was preferable. They dismissed objections of delay and expense in communication, feeling that the greater security and efficiency of the central register were of more importance.[92] Solicitors in Yorkshire and Middlesex objected to their local accessible registers being replaced by a metropolitan register.[93]

[91] It was argued also that the essentially pure recording function of a register of deeds would inevitably mean that there was an increasing number of deeds to be stored, since all must remain available to be consulted on a later dealing with the land. One distinct advantage of a register which purports to deduce title is that once the effect of a dealing has been assessed and its import noted on the register, the documents can be returned or discarded. The West Riding deeds registry, which was established in 1704 and closed for registration in 1970, had an average of 13,000 documents registered each year by the late 1860s. The original buildings at Wakefield were enlarged several times until the registry business was moved in 1932 to premises where the records are still kept. The Real Property Commissioners, having looked at the space occupied by the existing registries, calculated as a conservative estimate that a building the size of Lincoln's Inn Hall, 71 feet by 32 feet and three storeys high, would be sufficient to serve the whole of England and Wales for 120 years: Second Report of the Real Property Commissioners (1830), p. 75 (n. 10 above).

[92] Report of the Registration and Conveyancing Commission (1850), p. 7 (n. 24 above). The Commissioners noted the great increase in the efficiency of technology since 1830.

[93] See the Appendix to the Report of the Select Committee on the Registration of Assurances Bill (1852–53) (n. 48 above). See, for example, Appendix No. 2, p. 112: petition by the Mayor and Aldermen of Sheffield.

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Dibb, the Deputy Registrar of the West Riding Register, strongly urged the necessity for local registers to keep down the cost of conveyancing which, he said, was cheaper in the West Riding than anywhere else in the kingdom.[94] Allowing for a certain hyperbole, it does seem axiomatic that conveyancing costs would be increased by a centralised register. The register established under the Land Transfer Act 1862 was also a central one. This was seen, by the 1870 Commission at least, as one of the main grounds for the delay and expense of the 1862 register although it is doubtful whether it was any more than a contributing factor.[95] District registries of title were later strongly urged by local law societies.

There was also a strong argument that deeds registration, whether centralised or not, would be more expensive than traditional conveyancing. The Real Property Commissioners of 1830 had been confident that the other reforms they proposed would reduce overall costs, and during the period after 1830 many practices which increased the cost of conveyancing were amended. It must though be the case that *any* registration system causes extra expense since it requires start-up costs and procedures which invariably necessitate the services of a lawyer.

A distinct improvement which the proposed register of title had over the existing deeds registers was that the appointment and remuneration of the registry officials would be on a more satisfactory basis. The position of Registrar of Deeds in Yorkshire was an elected one and was much sought after, since the Registrar took all the fees after paying the modest administrative expenses: the average net amount of fees paid to the Registrar in the West Riding each year from 1875 to 1882 was £3,622. The election was conducted as if it were a political campaign and costs were correspondingly high; the expense could vary from £7,000 to £20,000. A description of Polling Day in 1842 in the West Riding, where officers experienced great difficulty in resisting the pressures of the voters endeavouring to reach the poll-booths and the election was carried on amid scenes of violence, is distinctly Dickensian.[96]

In Middlesex, there were originally four joint Registrars, all of whom were officials at one of the courts in Westminster, the actual work being done a deputy. In 1830, three-quarters of the fees from the Middlesex registry were taken by the four Registrars.[97] The system

[94] Dibb, *The Yorkshire Registries of Deeds*, p. 205.

[95] Report of the Commission on the Operation of the Land Transfer Act 1862 (1870) (n. 52 above).

[96] W.E. Tate, "The Five English Statutory Registries of Deeds" (1943–1945) vol. xx, Bulletin of the Institute of Historical Research, 97.

[97] Second Report of the Real Property Commissioners (1830) p. 76 (n. 10 above). By 1867 the number was reduced to three. Of these, two were absentees yet all received £2,400 in that year. The one "active" Registrar, appointed in 1851, was the second Baron Truro (the son of the first

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of appointment in Yorkshire was recognised as inadequate and the Yorkshire Registries Act 1884 provided for the appointment of salaried registrars by justices of the peace. The Middlesex register, however, remained unreformed.[98] Under the register of title, the Principal Registrar was to be appointed by letters patent rather than by election and would be paid a salary rather than receive fees.[99]

In fact, it is almost impossible to assess the comparative cost of deeds and title registration. By 1897, when there was some possibility that there might be a workable system of title registration, the idea of a general deeds register had been abandoned, so that there is no possibility of a proper comparison between the two systems. Certainly, title registration has never proved as inexpensive a system as its advocates suggested. Although claims were made that the costs of the register of title would be very low, in the early years it could hardly be seen to be paying its way. By 1868, only nine titles had been registered and the fees received were £180. Out of this had to be paid £2,500 for the Registrar and £1,500 for his deputy, considerable sums at that time. Indeed in 1870 the Registrar admitted that title registration inevitably increased expense.[100]

D. Lack of Security for Possessory Title

One of the strongest objections to a general register of deeds was that, far from providing security of title as it purported to do, it would in fact make "possessory" titles very unsafe. Very often a title lacked a full documentary history (because, for example, documents had been lost) but the fact of long, uncontested possession and the relativity of title to land made this in general unimportant. Purchasers were happy (or at least prepared), under the terms of a special contract, to accept a title with gaps in its documentary history. Requiring every deed relating to land to be exposed on the register would make unsafe many possessory titles of long standing which might have continued undisturbed if the possessor had been allowed to keep his deeds in his box.[101] In fact the Land Transfer Act 1862 put possessory title at considerable risk. A title would be accepted

Baron Truro who was Lord Chancellor from 1850–52); he held the office for 40 years: Sheppard and Belcher, "The Deeds Registers of Yorkshire and Middlesex", p. 274.

[98] Following the Report of the Select Committee of 1879, there were proposals to reform the Middlesex registry but they were defeated by the question of compensation for the existing registrars: Sheppard and Belcher, *ibid.,* p. 281.

[99] Although the Real Property Commissioners expressed concern over the method used in the existing registries, they did not articulate the basis upon which the officials who would run their register were to be appointed.

[100] R.J. Abraham, *A Popular Explanation of the system of Land Registration under Lord Westbury's Act* (London 1864) and the Report of the Commission on the Land Transfer Act 1862 (1870) p. xviii (n. 52 above).

[101] Report of the Commission on Registration of Title (1857) p. 13 (n. 12 above).

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for registration only if it had been declared indefeasible by the Court of Chancery under the Declaration of Title Act 1862[102] or was such as a court of equity would accept as a good marketable title. Registration would typically be sought by a land owner already in possession of the land. If the registrar found flaws in the title, the owner was left with an unmarketable title, where previously he had a perfectly good holding title.[103]

It was acknowledged that one of the reasons for the failure of the 1862 register was the insistence on indefeasible title[104] and the Land Transfer Act 1875 allowed registration of possessory title with the minimum of enquiry.[105] Whilst solving one problem, this considerably reduced the effectiveness of the register of title as a conclusive record of the title to land.

E. No Simplification or Guarantee of Title

It was also argued that deeds registration did nothing to simplify either title to land or the processes of transfer of land or to give any guarantee of title.

(i) Simplification

The desired aim of all the reformers was to simplify the processes of transfer of land. Although until 1857 emphasis had been on security of title, thereafter simplification of the title itself was seen as the way to achieve this. It is doubtful whether any registration system can be

[102] The Declaration of Title Act 1862 permitted a landowner to obtain a declaration of indefeasible title from the Court of Chancery, but there was no incentive for a landowner to apply to the Court for such a declaration. Where a title was considered safe by the landowner, a declaration was unnecessary; where he thought it unsafe he would not wish to put it to the test. The Act was a complete failure, no titles being declared under it.

[103] It was possible under the 1862 Act to apply for registration without indefeasible title but even in this case, the registrar had to make the same enquiries as to boundaries, etc. as for indefeasible title. According to the Report of the 1870 Land Transfer Commission, the enquiry this entailed was as burdensome as for registration of indefeasible title and in fact no applications had been made under the provision: Report of the Commission on the Operation of the Land Transfer Act 1862 (1870) p. xiv (n. 51 above).

[104] It had not originally been the intention that only absolute title should be registered. The 1857 Report which recommended a register of title had suggested two options; registration with "warranted" or "unwarranted" title. Registration with immediate warranted or statutory title would give secure title as to the future and prevent past title being disturbed. Where an owner was seeking warranted title, title had to be fully investigated by the registrar and would be rejected if poor. As an alternative, the owner could register an unwarranted title which would be subject to the rights existing before registration and which would need to be investigated on subsequent transfer. A Bill based on the recommendations had passed the Lords but had failed on a change of Government. The Land Transfer Act 1862 allowed only the first option.

[105] The Report of the Commission of 1870 on the Land Transfer Act 1862 recommended the registration of possessory title. Lapse of time, it was said, would confer title increasing in validity. "It is as if a filter were placed athwart a muddy stream; the water above remains muddy, but below it is clear, and when you get so far down the stream as never to have occasion to ascend above the filter, it is the same thing as though the stream was clear from its source.": Report of the Commission on the Operation of the Land Transfer Act 1862 (1870) p. xxviii (n. 52 above).

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said to "simplify" title. If one means by simplifying title that the number and form of interests that can exist in land are reduced and the procedures for their creation are amended, neither deeds nor title registration has that effect. Since deeds registration had first been mooted, there had, by the 1850s, been considerable changes in the law relating to transfer of land, many the direct result of the Real Property Commissioners' four Reports. When it became clear that title registration was not a success, there was a call to simplify the substantive law, rather than merely the forms of transfer, the Report of the Select Committee of 1879 on Land Title and Transfer coming to the conclusion that to legislate for registration of title without first simplifying title was to start at the wrong end.[106]

It may be argued that such simplification was not strictly necessary: a title registration scheme was established in Ireland without any change in the substantive law. But even if it was unnecessary in order to facilitate registration of title, a general simplification was argued for by many commentators, not just those in favour of a register of title, as a desired end in itself. Edward Wolstenholme, a strong opponent of any register, thought that simplification would remove the need for a register altogether.[107]

(ii) Investigation of title

More substantial was the charge that a register of deeds in itself did nothing to simplify investigation of title. A purchaser was still required to assess for himself the effect of the registered documents, for the whole of the requisite period.[108] The purpose of a register of title was to remove the necessity for such an investigation. The register was itself proof of entitlement and the purchaser need not and indeed could not enquire into past title.

However, under a register of deeds, although the purchaser still had to investigate title, the most important documents were to hand in the deeds register and the further away one moved from the start of the register, the more complete would be the information it contained. Since under the proposal for a general deeds register, all documents were to be registered in full, the whole history of the title would be before the purchaser. It was obvious that a properly kept deeds register must have the effect of reducing the investigation necessary by the purchaser since in practice he would only need to search from the time of the last conveyance.

[106] Report of the Select Committee on Land Titles and Transfer (1878–79) p. iv (n. 45 above).
[107] Edward Wolstenholme, "Simplification better than novel modes of assurance", *Papers given before the Juridical Society*, (1858–62) vol. II, 533.
[108] Until the Vendor and Purchaser Act 1874, the period for a good "root" of title was 60 years, unless, as was often the case, a shorter period was adopted by agreement of the parties.

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The Land Transfer Act of 1862 very effectively removed any necessity for retrospective enquiry, offering as it did only registration of indefeasible titles. The later title registration legislation, however, by allowing registration of less than indefeasible title, itself necessitated enquiry into past title.

(iii) Guarantee of title

The most serious limitation of a register of deeds was that it could not in itself provide any guarantee of title, but relied for its efficacy on its transparency. Registration of title, on the other hand, whether of the fee simple only or all interests in land, would bring with it a state guarantee of title. This guarantee was based on the bare fact of registration and of the presence of an insurance fund. In fact, as Pottage puts it, in the early days of registration of title the "anchor which was supposed to secure title was not as securely lodged as it might have been"; there were doubts over the accuracy and authority of the register which were accentuated by concerns over the scope of the insurance fund.[109] And after the fiasco of the Land Transfer Act 1862 the register of title no longer required precise boundary mapping, an inevitable consequence of the inability of any system adequately to convey in a documentary or cartographical form the exact placement of a narrow boundary fence, but a fruitful source of disagreements ever since.[110] The present title registration system still puts heavy emphasis on the principle of *caveat emptor* in its liberal use of "overriding interests".[111]

F. Opposition by Interested Parties

There was early and sustained criticism from solicitors and attorneys to deeds registration.[112] This mirrors the later opposition to title registration[113] and can be seen as a feature of law reform in all ages.

[109] Pottage, "The Originality of Registration", p. 387.

[110] For a recent example, see *Wibberley* v. *Insley* [1998] 2 All E.R. 82.

[111] These are matters which affect the title to registered land but are not mentioned on the register and which a purchaser must find out for himself, often by investigation of the land. They are detailed in section 70 of the Land Registration Act 1925.

[112] A General Registry Bill introduced in 1832 by Sir John Campbell, the Solicitor-General, was supported by the Select Committee but was "defeated by a combination of country attorneys who thought erroneously that the measure would diminish their business and profit. They are the most influential class in the country . . . they frighten more Members by their threats than they persuade by their arguments": Hon. M. Hardcastle, *Life of Lord Campbell* (London 1881), vol. I, p. 12.

[113] Lord Westbury blamed solicitors for the failure of the Land Transfer 1862, calling them the old men of the sea "sitting on shoulders of every landed property". Offer and Anderson disagree over the extent to which solicitors' resistance was economic. Anderson would absolve them from, or find excuses for charges of self interest: Anderson, *Lawyers and the Making of English Land Law*, pp. 184 and 306–307. Offer finds the evidence that professional policy (that is, opposition to title registration) was motivated by economic self interest overwhelming: Offer, "Lawyers and Land Law Revisited", p. 274.

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The seeds of opposition by those involved in administering law were sown in 1535 when the Statute of Enrolments appointed clerks to enrol bargain and sales of land in the King's Courts of Record at Westminster and paid them fees for doing so. There is opposition recorded to proposals to the establishment of the North Riding Registry in 1735 from clerks of enrolment in Chancery and this opposition was so sustained and influential that it seems to have been at least in part responsible for a failure to bring any proposals for deeds registers from 1740 until 1815.[114]

This opposition seems quite clearly to have been motivated by fear of loss of fees. There were those who would have attributed the later opposition by solicitors purely to economic self interest but the matter was more complicated than that.[115] It is not surprising or necessarily unreasonable that professionals should seek to safeguard their livelihoods. They had a vested interest in maintaining the *status quo*. Offer describes the history of land law reform as essentially the history of a small service industry and its attempt to maintain a measure of control over its markets.[116] The question of remuneration for solicitors was a fraught one but there seems no evidence that solicitors felt particularly threatened financially by deeds registration. Even if they did oppose it, and opposition to both the 1830 and 1850 proposals was at least in part responsible for their defeat, some opposition was less against the principle of deeds registers than their centralisation.[117] Indeed from the point of view of the practitioner, deeds registration seems preferable to title registration, since it gives a lesser degree of control to the state. Under a deeds register all the processes of conveyancing remain in the professional's hands; under a title registration scheme, the registrar is central and the conveyancer peripheral.

There was also opposition to deeds registration from land owners, who found themselves in a quandary. On the one hand, much of the expense and delay in land transfer came from the difficulty in finding the true state of the title to land and the particular encumbrances over it: a register would overcome this problem. On the other hand,

[114] See Appendix VI to the Report of the Registration and Conveyancing Commission (1850) p. 239 (n. 24 above).

[115] Anderson notes that Lord Brougham in particular attributed solicitors' opposition to self interest: *Lawyers and the Making of English Land Law*, p. 51. Strickland Cookson, a solicitor who gave evidence to the 1852 Select Committee on the Registration of Assurances Bill, was particularly incensed by the accusations of pursuit of self interest. He thought that "no body of men have been more zealous or disinterested in advocating and pressing reforms": W.S. Cookson, "Transfer of land: registration of title deeds and registration of title" Transactions of the National Association for the Promotion of Social Science (1859) p. 192.

[116] Offer, "Lawyers and Land Law Revisited", p. 277. Pottage, in both "The Originality of Registration" and "The Measure of Land", notes the "expropriation" of the land transfer process by the state under title registration.

[117] See p. 383 above at n. 93.

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apart from the inherent and historic degree of secrecy demanded by landowners in their dealings with their land,[118] the very disclosure of private affairs could be dangerous to credit. The Real Property Commissioners had been aware of this objection and had conceded that their register need not be open to the general public but could be restricted to those who could show a reason for a search. They came to the conclusion however that the register should be open, as the Yorkshire and Middlesex registers were; the information that could be acquired by a person who had only a casual interest was limited.[119] It is indeed true that a person untrained in searches of the registers in Yorkshire and Middlesex would have gained little from a casual perusal; the inaccessibility of the existing registers and of that proposed by the Real Property Commissioners was one of the major difficulties.

IV. Title Registration in the Ascendancy

Thus the objections, practical, legal and ideological, to a deeds register are at least ambivalent. None seems so overwhelming as to make the idea wholly unacceptable or unworkable. An observer in the middle of the nineteenth century not gifted with prescience would not have discounted deeds registration as a viable alternative to a register of title, or indeed, as the primary system governing conveyancing. Nevertheless, title registration succeeded whilst deeds registration failed.

A. A Better System

It may be argued that a register which assesses and guarantees title is simply better than a register which merely records dealings with the land. It was for that reason right that efforts were made to overcome early problems. When the first title registration legislation was castigated as a failure only two years after its inception, Lord Westbury observed with a great deal of truth that any legislation of this type took time to be accepted. He compared it to legislation permitting enfranchisement of copyhold land. The Copyhold Enfranchisement Act 1841 was by 1864 one of the most utilised measures on the statute book, but in the first year of its passing, there was only one application under it.[120]

However, whether one system is "better" than another depends

[118] Many of the complications of English land law stem from an almost pathological desire for secrecy. Fines and recoveries, the conveyance by lease and release, and the complications of the Statute of Uses of 1535 are all evidence of this urge for secrecy.
[119] Second Report of the Real Property Commissioners (1830) p. 21 (n. 10 above).
[120] Abrahams, *A Popular Explanation of the System of Land Registration*, p. 22.

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on the purpose that it hopes to achieve. It has been seen that the perception of the role of a register changed in the middle of the nineteenth century: it was not security of title that was the problem but the complications of transfer which had to be overcome. If what is wanted is a system which primarily facilitates transfer of land, a register of title, and one which concerns itself only or mainly with legal title and which offers a state guarantee of that title, is "better" than a deeds register. If what is wanted is a system whose primary purpose is to prevent fraud and mistake by recording all interests affecting the land, a deeds register is better. The 1870 Report on the Land Transfer Acts was quite clear what was wanted: the purpose of the registry was to allow easy transfer, not to give security of title. Title was in fact mostly secure and in general purchasers did not want indefeasible title; they were prepared to overlook blots on the title and there was no axiom sounder than to give people what they wanted.[121] Anderson has argued that a main reason for the failure of deeds registration was that it was devised by elite conveyancers to do their sort of work.[122] This does not explain the success of the existing deeds registers, which for all their faults worked well. It is, though, true that deeds registration is a Rolls-Royce system, designed to offer absolute security of title. Title registration is a much more down-market system, where security comes from break-down insurance rather than good workmanship.

B. Extra-Legal Influences

This change in perception of what was wanted did not, however, come from a sense of what "the public" wanted. (Indeed, there was little evidence that the wishes of the majority of the population were either sought, or thought of relevance.)[123] Rather, the move away from security to simplicity was part of a wider design. Buck[124] notes that the Real Property Commissioners' proposals reflected very accurately the importance of land in English society in the nineteenth century; the landed elite was predominantly an aristocratic one, and the aristocracy was a landed one. Land was power, socially, politically and economically. The legislation which followed in the early years after the Commissioners' four Reports increased the landowner's control over his property.[125] By the 1840s, however, the unquestioned

[121] Report on the Operation of the Land Transfer Act 1862 (1870) pp. xxvi ff (n. 52 above).
[122] Anderson, *Lawyers and the Making of English Land Law*, p. 81.
[123] The public was expected to believe what it was told. In the early 1840s, the Law Amendment Society publicly urged deeds registration but privately supported title registration. By 1846 the Society was publicly supporting title registration; Anderson, *Lawyers and the Making of English Land Law*, pp. 60 and 90.
[124] See Buck, "Property, Aristocracy and Reform", generally and in particular pp. 67, 87 and 88.
[125] Lord Campbell, who had headed the Real Property Commission, said in a letter to his brother that "I stick up for the aristocracy of England to whom this country at every period is indebted for its liberties.": Hardcastle, *Life of Lord Campbell*, Vol. I, p. 493.

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superiority of the land-owning aristocracy was under threat. There was pressure in the country for reform of every kind, which increased throughout the nineteenth century and which had a significant effect on the direction of the reform of land law. From the mid-nineteenth century, land law reform was positively anti-aristocratic. The power of the landowners was to be undermined, a necessary step in the reform of Parliament which was itself seen as an essential precursor to any wider social reforms. Ownership of land gave political power; removing the monopoly of land ownership would result in a reduction of that power.[126] Anything which enabled an owner to deal more easily with his land was encouraged.[127] In terms of ease of sale of land, registration of title, with its concentration on the legal title and guarantee of security, is better than deeds registration. Whilst it would be a mistake to give too great an emphasis to this aspect (and it is in any case impossible to assess its impact[128]), it is undoubted that the general atmosphere exerted an oblique pressure which favoured a more radical approach to reform.

C. Powerful Advocates of Title Registration

The advocates of title gained a considerable advantage by their ability to pass their proposal into legislation. It was largely a matter of luck that title rather than deeds registration was successful in the legislative race, but the presence of the legislation on the statute book then gave title registration legitimacy and respectability. Once established the system could take advantage of subsequent developments: general conveyancing procedures were simplified by the Conveyancing Acts 1881 and 1882 and rapid improvements were made in technology and communication, developments which would, of course, have been equally available to a deeds register. Those in favour of title

[126] Although it was not until the latter half of the century that any legislation was passed which could have significantly affected the distribution of land, the agitation for reform had started much earlier: the first bill to abolish primogeniture, a prime target of the reformers, was introduced in 1836. There seems to be little evidence that these stratagems had much influence on the spread of land ownership: none of the legislation compelled sale, and the changes in land ownership were due to other factors: F.M.L. Thompson, *English Landed Society in the Nineteenth Century* (London 1963).

[127] For example, the Settled Estates Acts 1856 and 1877, and especially the Settled Land Act 1882 made it easier for the owner of settled land to deal with his estate. Some would have liked to go further and compel sale or allow forfeiture. A.R. Wallace, better known for his theory of evolution, proposed a land nationalisation scheme: R. Douglas, *Land, People and Politics: a history of the land question in the United Kingdom, 1878–1952* (London 1976). For the various aspects of the move for "Free Trade in land", see, for example, Joseph Kay, *Free Trade in Land* (London 1877); George Morgan, *Land Law Reform in England* (London 1880). For an excellent account of the land reform movement from 1880 to 1919, see A. Peacock, *A Study of the Activities of the English Land Restoration Leagues and the Land Nationalisation Society*, Unpublished M.A.Thesis, University of Southampton, 1961.

[128] Offer and Anderson disagree about the importance of title registration in the land reform question, Offer seeing it as having a more important role than does Anderson: Anderson, *Lawyers and the Making of English Land Law,* p. 166; Offer, *Property and Politics*, ch. 2 generally.

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registration were fortunate in having a number of powerful advocates who were able first to pass the proposals into legislation and then to ensure the survival of the system. Indeed, Anderson suggests that much of the reason for the failure of deeds registration was due to personalities.[129]

A particularly strong advocate of title registration was Lord Westbury, who, as Lord Chancellor, oversaw the successful passage of the Land Transfer Act 1862. As Richard Bethell, he had sat on the 1857 Commission which had been appointed to look into title registration. He was an enthusiastic supporter of law reform in general. He had a particular dislike of the then existing system of conveyancing and is reported to have said that when he came to deal with the question of the transfer of real property, he would make the position of the conveyancer such that he should not be able to earn his salt.[130] His own conveyancing was done on a sheet of note paper, settlements were "concisely framed in clear untechnical language."[131] It was perhaps this rather cavalier approach which prevented him from seeing the problems of his Land Transfer Act.[132]

In the early days, deeds registration had powerful advocates in Brougham and Campbell, and many of the members of the various Commission and Committees from 1830 to 1850 were prominent lawyers.[133] There was Government backing for a general register in 1830 and Brougham had said that ministers would support a bill, but there was never sufficient Government interest to overcome apathy and the concern that this might be a bad thing. A bill was favourably

[129] Anderson, *Lawyers and the Making of English Land Law*, p. 77, 80. Lord Truro was Lord Chancellor when the 1851 Deeds Registration Bill was introduced by Lord Campbell. According to Anderson, Campbell apparently treated Truro "as something of a joke", and Truro made wrecking amendments in retaliation. Certainly Campbell saw Truro as "almost as great an anti-reformer as Lord Eldon": Eldon as Lord Chancellor had opposed all the Real Property Commissioners' Bills. Campbell described Truro's opposition to the 1851 Bill as "the most amusing topic about town": Hardcastle, *Life*, Vol. I, p. 291. Lord Cranworth, Chancellor in 1852, supported Campbell's bill, but Bethel (the new Solicitor-General, later Lord Westbury) was opposed to Cranworth and voted against the bill. Campbell and the other "veterans" of the 1830s were overtaken by young men who were intent on by-passing them by espousing title registration.

[130] Thomas Nash, *The Life of Lord Westbury* (London 1888), Vol. II, p. 17.

[131] Nash, *The Life of Lord Westbury*, p. 18.

[132] One commentator giving evidence to a Committee on Title Registration in 1895, when asked about the credentials of the earlier advocates of registration of title, said that it was common knowledge that Lord Westbury's experience of conveyancing was limited to 12 months as a pupil: Report of the Select Committee on the Land Transfer Bill (1895), Minutes of Evidence, p. 62 (n. 53 above). But equally, John Campbell who was appointed head of the Real Property Commission, was a common lawyer, who "rejoiced in the opportunity to be trained in Real property in which I have been rather deficient": Hardcastle, *Life of Lord Campbell*, Vol. I, p. 457. Campbell's particular brief was prescription and the Statutes of Limitation and he wrote the section on prescription in the Real Property Commissioners' First Report. Perhaps it is partly for that reason that the Prescription Act 1832 has been described as the worst drafted on the Statute Book.

[133] The Real Property Commissioners included Brodie, Tyrrell, Hodgson, Duckworth, Duval and Sanders, all well known Chancery lawyers. Duval devised the scheme for the general register and Brodie drafted the much praised Fines and Recoveries Act 1833.

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received in 1832 by members of the Select Committee but they were persuaded against it by attorneys.[134] Peel had spoken strongly in its favour and condemned the Government for its want of vigour and good faith in a measure so necessary and important.[135] Perhaps it was simply that the timing was wrong. All efforts were concentrated on the reform of Parliament and the franchise which culminated in the Reform Act 1832; there was little energy or enthusiasm for anything else.[136]

A Deeds Registry Bill was introduced in 1851 by Campbell as a Government measure and was carried through the Lords. Lord Russell supported it but it was dropped by the "paralysis which seized him and his colleagues". According to Campbell no Government after that was strong enough to deal with it.[137] Certainly after the Report of the Select Committee in 1853 had rejected deeds registration, the system never seems to have found a powerful voice.

Another factor was the extreme enthusiasm of the early registrars of title. The first Registrar, Follett, although finding the system introduced by the Land Transfer Act 1862 wholly unsatisfactory, was completely convinced of the desirability of title registration. Holt, who was Assistant Registrar from 1862 and Registrar from 1891, was equally committed, and Charles Fortescue-Brickdale, first as assistant and then as Registrar from 1898 to 1925 was perhaps the best and most partisan advocate the system could have had. In every report and enquiry into the working of the system, he was in the forefront laying the blame for the failure of the system squarely on everyone but the system itself.[138] It would certainly have helped the cause of deeds registration if the existing registers had had committed and innovative officials at their head. The title register was made to work by its officials;[139] there seems to have been no similar desire to make the existing deeds registers work. As has been seen, in Scotland and Ireland, the systems worked largely through the initiative of the officials. Although Dibb, the Deputy Registrar in West Yorkshire in the middle of the nineteenth century, did much to improve the system, the hierarchy of control in the deeds registries was not conducive to innovation or initiative. One can only speculate as to

[134] Note 112 above.
[135] Hardcastle, *Life of Lord Campbell*, Vol. II, p. 6.
[136] In 1833 bills abolishing fines and recoveries passed quietly through both Houses without any amendments being made. Campbell commented that "this was the only way of legislating on such a subject.": Hardcastle, *Life*, Vol. I, p. 29.
[137] Hardcastle, *Life*, Vol. I, p. 31.
[138] See Offer, *Property and Politics*, p. 71 and Anderson, *Lawyers and the Making of English Land Law*, p. 200.
[139] Even now the title registration system only works as well as it does through the expertise of the registry officials.

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the possible success of a general deeds register with a committed official at its head.

D. The Element of Compulsion

An important factor in the survival of title registration once it was established was the element of compulsion introduced by the Land Transfer Act 1897. Registration was made compulsory on sale of land in the new administrative County of London in 1899 and in the City of London in 1902. The registry thereafter was sure of customers, even if unwilling ones.[140] This factor, of compulsory registration of title, is of primary importance; no scheme for registration of title has been successful without it.[141] Deeds registers, on the other hand, were all voluntary yet registration seems to have been universal. *Voluntary* registration of title had been available within both the Yorkshire and the Middlesex registry areas since 1862 but very few titles had been registered; until 1962 the amount of land registered in Yorkshire was negligible.[142] It required compulsion to persuade the register counties to abandon their registers and the registers in Middlesex and Yorkshire remained in active use for many years. Although the Middlesex register was much criticised, deeds continued to be registered in accordance with the legislation until the register closed for registrations in 1937. Deeds were being registered in the North and West Ridings until 1970 and in the East Riding until 1974, and all were in constant use for reference until their final closure in 1972 and 1976. Indeed the Yorkshire registers are still in use by solicitors, especially in relation to first registration of title.

V. The Legacy of Deeds Registration

Deeds registration ceased to be an effective rival to title registration after 1853. However, as the 1879 Report which had again advocated deeds registration commented,[143] registration of deeds in England had

[140] In 1925 the provision for compulsory registration was extended and although it was agreed that compulsory registration should not be enforced for 10 years, at the end of that period, in 1935, it was decided, with a nice irony, that the first compulsory registration should be in Middlesex: Report of the Land Transfer Committee; 1934–35 Cmd. 4776, x. The Report is only a few pages long.

[141] Registration of title was introduced into Ireland in 1865 by the Record of Title Act but fared no better than in England; it was not until the Registration of Title Act 1891 that title registration started to be a success. A significant reason for this was that where land was bought under the Land Purchase Acts 1891, registration of title was compulsory. For the history of registration of title in Ireland, see A. Dowling, "Of Ships and Sealing Wax: The Introduction of Land Registration in Ireland" (1993) 44 N.I.L.Q. 360. Registration of title was introduced into Scotland in 1979 by the Land Registration (Scotland) Act. It will render the deeds register largely obsolete, although it will still be retained for gratuitous transactions.

[142] Sheppard and Belcher, "The Deeds Registries of Yorkshire and Middlesex", p. 283.

[143] Report of the Select Committee on Land Titles and Transfer (1878–1879) (n. 45 above).

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never had fair play, since not "a single statute had been passed to amend an admittedly defective system". The changes made by the Yorkshire Registries Act 1884 in fact resulted in a very efficient system; what worked on a local scale could work at a national level. It must not be forgotten that the registers in Yorkshire and Middlesex continued to function well into the twentieth century. They were not perfect but very little effort could have resolved the problems. Certainly, if perfection in detail and operation were a necessity for a system of registration, compulsory registration of title would still not be in force.

Perhaps the most convincing case for deeds registration is its continued existence in the United States, where title registration has been tried and abandoned and there are no plans to reintroduce it. It cannot be the case that land transfer in America is on so small a scale and so uncomplicated that an inferior system will suffice.[144] However, although often where America leads, England follows, it is unlikely that such will be the case here, nor is it suggested that the title registration system should now be abandoned. It would, however, be wrong to dismiss the proposals for deeds registration as of no importance. There is a very real sense in which the nineteenth century proposals had a profound, although often unquantifiable, influence on the whole period of reform.

It has been the thesis of this paper that deeds and title registration are separate ideas but there is a sense in which title registration grew out of deeds registration. Although those in favour of title registration professed to see no good at all in deeds registration and to deny that the two systems had anything to do with each other, the deeds registration proposals were arguably a necessary groundwork for the later system. Deeds registration, both existing and proposed, had a long history and was the system favoured in other common law jurisdictions and in Europe. The idea of a national deeds register was already, therefore, a feasible one. Title registration, on the other hand, had no pedigree. As has been seen, the first real drive for title registration followed directly from a proposal for deeds registration in 1853.[145] It is doubtful whether title registration could have got so easily off the ground from a standing start.

Also some details of the deeds register proposals were adopted or adapted in the title registration scheme. The proposal in the 1830 Report for using the root of title as the principle for organising the

[144] It is true that there is widespread title insurance in America, which to an extent replaces the state guarantee here. There was a proposal for a similar scheme here which came to nothing. Anderson, *Lawyers and the Making of English Land Law*, p. 136.

[145] There was an idea for a title register of sorts put to the Real Property Commissioners in 1830. Second Report of the Real Property Commissioners (1830) p. 52 (n. 10 above).

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registers has echoes in the principles which underlie title registration. One aspect of deeds registration which was directly adopted in a title register was that registration of a later dealing was necessary before it could take priority over an earlier unregistered dealing. This was the case in the existing deeds registers and was the system advocated in the proposed general register.[146] It would however be wrong to credit the deeds registration proposals with a greater role than they actually played. Title registration developed after 1862 without any significant input from deeds registration. Nor did it have a direct input into the proposals which developed after 1862 for a reformed system of unregistered conveyancing. Indeed the extent to which late-nineteenth century reformers had forgotten or were unaware of the proposals for deeds registers can be seen in the adoption of a register of names for registration under the Land Charges Act 1925. As has been seen, the use of a name index was seen as one of the major drawbacks of the deeds registration system. It is interesting to note that the theoretical problems posed by such an index never in practice caused any real problem either under the deeds registers themselves or under the Land Charges Act.[147]

VI. Conclusion

The question posed at the beginning of this paper was whether deeds registration in England was a complete failure. The conclusion is perhaps that it was a failure but an heroic one. It has been seen that it was the victim of political fashion and expediency. The failure of the proposals of the 1830s can be seen as being, in part at least, the unfortunate coincidence of Parliamentary concentration on its own reform. Similarly, the reaction in the middle decades of the nineteenth century against landed power prejudiced reformers against a system which seemed to support aristocratic supremacy. Yet there were many positive advantages to a deeds registers. Not the least of these was that, in retrospect at least, it can be seen as providing a vital intermediate step between a system of private conveyancing and a state system.

Thompson[148] has commented that the agitation for land reform, in particular, the abolition of primogeniture and the nationalisation of land, had no lasting monument in the form of legislation but that

[146] Second Report of the Real Property Commissioners (1830) p. 35 (n. 10 above). The Commissioners considered recommending that registration be made a requirement for the *validity* of the deed (as sealing was) but came to the conclusion that this should not be done.

[147] Report of the Committee on Land Charges; 1956 Cmnd. 982. See comment by H.W.R. Wade [1956] C.L.J. 215.

[148] F.M.L. Thompson, "Land and Politics in England in the Nineteenth Century" (1965) 15 Trans. R.H.S. 15th series, p. 23.

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it was a worthy movement in its day; there was lack of dramatic reform yet its influence pervaded the nineteenth century. Deeds registration similarly has no memorial, yet it played an important although unquantifiable role in the general development of the reform of land law.

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