THE LAW COMMISSION

TRANSFER OF LAND
INTERIM REPORT ON ROOT OF TITLE TO FREEHOLD LAND

Laid before Parliament by the Lord High Chancellor pursuant to section 3 (2) of the Law Commissions Act 1965

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LAW COM. No. 9

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Commissioners are—

The Honourable Mr. Justice Scarman, O.B.E., *Chairman.*
Mr. L. C. B. Gower, M.B.E.
Mr. Neil Lawson, Q.C.
Mr. N. S. Marsh.
Mr. Andrew Martin, Q.C.

Mr. Arthur Stapleton Cotton is a special consultant to the Commission. The Secretary of the Commission is Mr. H. Boggis-Rolfe, C.B.E., and its offices are at Lacon House, Theobald's Road, London, W.C.1.

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LAW COMMISSION

Item IX of First Programme

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To the Right Honourable the Lord Gardiner,
Lord High Chancellor of Great Britain

MY LORD,

A. Introduction

Under Item IX of its First Programme the Law Commission recommended that the system of conveying unregistered land should be examined with a view to its modernisation and simplification; and the Commission welcomed the initiative of the Non-Contentious Business Committee of the Law Society, whose Report on Conveyancing Practice had been published in June 1965. That Report contained, in addition to the principal recommendation of a Title Certificate Scheme, a number of other proposals designed to simplify the transfer of unregistered land. Among these was a proposal that "the statutory minimum period for investigation of title to any unregistered land back to a good root of title should be reduced from thirty to fifteen years". The statutory minimum period is that which applies, under section 44 of the Law of Property Act 1925, unless a contrary intention is expressed in the contract.

2. From the discussion on that Report which took place within the legal profession during the second half of 1965 (much of which was published in the legal press) it became clear that there was considerable support, in principle, for a reduction in the period of investigation of title, although opinions differed as to what the period should be. Moreover it was recognised by those who put forward the proposition, and by those who supported it, that there were attendant difficulties which would have to be considered. These difficulties relate to the periods of limitation prescribed by the Limitation Act 1939 and to certain deficiencies in the system for discovering third party rights.

3. Having read the comments which had been published, we decided that this was a suitable topic for a special study in the course of our work on transfer of land. Our reasons were three: first, while no topic in this complicated branch of the law can be looked at in total isolation this seemed a comparatively independent subject, capable of separate treatment: secondly, the profession had already been given cause to think about the subject, so that the process of consultation would be much facilitated: thirdly, this proposal, if found to be practicable, was likely to make a substantial and

immediate contribution towards simplifying unregistered conveyancing. We further decided that the scope of the study should be to ascertain—

(i) what, if any, should be the minimum period prescribed by statute, in present day conditions, for the commencement of title on the sale of unregistered land:

(ii) whether it is desirable that there should be a statutory definition of what, in the absence of special provision in the contract, constitutes " a good root of title ":

(iii) whether an alteration in the minimum period prescribed by statute would necessitate any other alterations in the law.

4. Before considering what is the appropriate period for investigation of title we found it necessary to consider why title should be investigated at all beyond the last transaction ; for the practice of so doing had recently been criticised in the interests of the ordinary house purchaser. It had been suggested that the solicitor's work in this respect was to a large extent a mere repetition of that which his predecessor had done on the previous sale, and that, at any rate in the case of dwelling-houses, a purchaser would be adequately protected by seeing the conveyance or other instrument vesting the property in his vendor and, if he so wished, taking out a policy of insurance against defects in title.

5. We started, therefore, by examining the reasons for investigation of title and the history of the legislation relating to the statutory minimum period.

B. Investigation of Title

6. In the absence of express provisions as to title, there is an implied condition in every contract for the sale of land that the vendor must show a good title to the land. If he fails to do so the purchaser may repudiate the contract. On completion of the sale, however, the purchaser is taken to have accepted the vendor's title and if that title should subsequently prove defective his remedy, if any, will be in damages, on such covenants for title as are incorporated in the conveyance.

7. The qualified nature of those covenants is well known and is regarded by some as a serious defect in this branch of the law. It is not, however, relevant to the present study because, whether the covenant is absolute or qualified, the remedy lies in damages. The purpose of investigating title before completion is to ensure, so far as is reasonably possible, that the purchaser will be able (*a*) to remain in undisturbed possession of the land, (*b*) to use it for the purpose for which he bought it and (*c*) to pass on a good title when he comes to sell it.

8. The fact that the title was investigated on the previous sale, which may have been quite recent, is not necessarily a sufficient safeguard to the purchaser. The vendor may have accepted the title although it was defective in certain respects which were immaterial to him but may be important to someone else. Mistakes may have been made, or risks accepted, in earlier investigations which a purchaser is concerned to find out. The work of investigation is, to some extent, a repetition of the previous work in the sense that it covers much of the same ground. It is in our view, however, a mis-

conception to suppose that the practice is unnecessary for that reason. The main object of investigating title in each transaction is to see whether the vendor has a good title in accordance with the terms of his contract with the purchaser and whether he can prove the title as abstracted. Another object is to enable the purchaser to enquire about the existence of equitable interests by which, if he made no enquiries, he would nevertheless be bound.

9. The procedure of deducing and investigating title over a conventional period has no place in the transfer of land of which the proprietor is registered with an absolute title at the Land Registry. The extension of the areas of compulsory registration which is now in progress will, therefore, progressively reduce the number of cases in which the procedure is to be followed, although it will be many years before unregistered conveyancing becomes a rarity.

10. In the light of all these considerations it would, in our view, be inappropriate to recommend, in the interests of simplified conveyancing, any change in the law which materially reduced the protection against disturbance which the present procedure provides. Nor would it be desirable to make any change which would create difficulties for the Chief Land Registrar in accepting titles on first registration.

11. It would be possible to dispense with investigation of title only if the purchaser could be adequately and more simply protected in some other way. It was suggested to us that the process of conveyancing could be greatly simplified if investigation of title further back than the conveyance to the vendor were forbidden and the risk to the purchaser were covered by a compulsory insurance scheme. The suggested scheme was different from that widely adopted in the United States of America under which, in effect, the title insurance company is substituted for the purchaser's solicitor for the purpose of carrying out the investigation of title. That practice is not without its critics and we found no evidence to suggest that it would reduce either the work or the expense of conveyancing. The scheme put to us was, on the contrary, designed to avoid any investigation of title by anyone beyond the conveyance to the vendor and dealings by him. Instead, all risks in respect of defects not revealed by scrutiny of the conveyance to the vendor and proper searches against him and his vendor would be covered by compulsory single-premium insurance. This insurance would cover the purchaser and his successors in title, and would continue until the land was registered with an absolute title. If the claim made against the purchaser (or his successors) was a monetary one (for example under a mortgage) the insurers would discharge it; if it resulted in his being deprived of the land the insurers would pay the amount of the insurance; if it resulted in his being deprived of part of the land or if the user of it was curtailed by unrevealed restrictive covenants, he would have the option of recovering from the insurers either (*a*) compensation, or (*b*) the total amount of the insurance, the insurers taking over the property. The amount of the cover could be increased by payment of an additional premium if the value of the property rose.

12. The disadvantage of such a scheme would be that it might result in the purchaser being left with monetary compensation, whereas what he

wants, as pointed out above, is his property and the right to use it for the purposes for which he bought it. On the other hand it was argued that in practice the risk of actually being dispossessed would not be great: the real risks would be in respect of undiscovered charges, restrictive covenants or boundary adjustments. So far as these were concerned, it was suggested that a purchaser might well be prepared to accept the alternative of monetary compensation if thereby he could save costs on the acquisition of the property.

13. Whether this would, in fact, be acceptable is a question which we should have had to explore further if our preliminary enquiries had indicated that a scheme of that nature could be operated at a reasonable cost. However, the insurance interests which we consulted did not feel able to participate in such a scheme. In the circumstances we have not thought it worthwhile to explore the proposal further.

14. We therefore concluded that the procedure of title investigation must be retained; and we next examined the possibility of reducing the statutory minimum period for such investigation. The history of the law, which we will now describe in outline, shows that successive reductions in the investigation period have been found to be practicable in view of other changing factors, both in the general law and in the habits of the community. It would not be surprising if the period of thirty years, fixed in 1925, were found to be excessive forty years later.

C. Commencement of Title

15. The rule that a vendor, in an open contract, must deduce a good title for a minimum period has its origin in the practice of conveyancers, which was endorsed by the courts of equity. In an action for specific performance of a contract for the sale of land which contained no special provision as to title the question was whether the vendor had shown a good or "marketable" title, for it was recognised that a title could rarely be shown to be perfect. In practice conveyancers were satisfied with a sixty-year title, and the courts accepted that rule. In the 5th edition of his Introduction to Conveyancing, published in 1840, William Hayes said, at page 282—

> "There can be no mathematical certainty of a good title, but there may be a strong moral probability, and it was thought that the favourable result of a scrutiny prosecuted through the *res gestae* of the last sixty years afforded that probability. The more extended the period of research the greater is the assurance of safety: but convenience required, and practice has established, a conventional limit."

His description of the limit as "conventional" accords with the views of one side in an argument, which was then being conducted among conveyancers, as to whether the period should be reduced as a result of the Real Property Limitation Act 1833.

16. A period of sixty years had never been sufficient to ensure that all prior interests had been extinguished, for the rights of a person entitled in remainder after an estate for life or in tail were not barred until at least twenty years after the determination of that limited interest: nor, before the Crown Suits Act 1769, was there any limitation on actions by the Crown.

Sixty years was, however, normally the extreme limit of time allowed for bringing a real action. Some conveyancers argued that the period for deducing title had been fixed by reference to that limitation period and should be reduced now that actions to recover land were normally barred after twenty years, (with an extension up to forty years where the plaintiff had been under a disability), and the dangers resulting from an estate tail had been diminished since remaindermen were now also barred when a tenant in tail had lost his right to recover (Real Property Limitation Act 1833, section 21). Others, including Hayes, contended that the limitation period had been only one factor leading to the adoption of sixty years as the length of title and that, in view of the continuing risks of prior claims by a remainderman after a life interest, and by the Crown and spiritual and eleemosynary corporations sole (which by section 29 of the 1833 Act were allowed a maximum of sixty years in which to bring an action), the period should remain unchanged.

17. No change was, in fact, introduced until 1874 when it was provided by section 1 of the Vendor and Purchaser Act that—

> "In the completion of any contract of sale of land made after the [31st December 1874] and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement: nevertheless, earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required."

It seems that this alteration may have been prompted, at any rate in part, by the practice of conveyancers; indeed it was stated in Williams' Law of Real Property, 14th Edition (1882) that "the recent shortening of the period from sixty to forty years appears justifiable only from the fact that in practice purchasers are generally found willing to accept a forty years' title". The alteration was, no doubt, facilitated by the contemporaneous alteration in the periods of limitation introduced in the Real Property Limitation Act of the same year. This Act reduced the normal limit on actions to recover land from twenty years to twelve, with a maximum extension up to thirty years in cases of disability.

18. The cases in which earlier title could still be required were (*a*) advowsons, for which the period was 100 years (*b*) Crown grant, (*c*) leaseholds, and (*d*) reversions. In the last three cases it was necessary to produce respectively the grant, the instrument creating the term, and the instrument whereby the reversionary interest arose; but investigation of subsequent dealings with the property was subject to the ordinary rule as to commencement from a good root at least sixty years old.

19. Evidence submitted between 1908 and 1911 to the Royal Commission on the Land Transfer Acts led that Commission to say in its Report (1911 Cd. 5483) that "the general practice in the matter of investigation of title has materially altered since the [Land Titles and Transfer] Act of 1875 was passed. Titles extending back to anything like forty years are hardly ever conceded on contracts for sale or insisted upon on mortgages". That Royal Commission's concern with this matter was mainly as to the length of title which should be shown on applications for registration with an absolute

title. It recommended that the period should be reduced from forty to twenty years, both for that purpose and in the general law between vendor and purchaser—paragraphs 58–59 of the Report.

20. This recommendation was not adopted: but the statutory minimum period was reduced to thirty years by section 44(1) of the Law of Property Act 1925, which reads as follows—

> " After the commencement of this Act thirty years shall be substituted for forty years as the period of commencement of title which a purchaser of land may require: nevertheless earlier title than thirty years may be required in cases similar to those in which earlier title than forty years might immediately before the commencement of this Act be required."

By subsection (11) this section applies " only if and so far as the contrary intention is not expressed in the contract ".

21. In view of the connection which has been traced between the length of title period and the periods of limitation, it may be noted that this change was not immediately accompanied by any alteration in the limitation periods. It was not until 1939 that the time allowed to the Crown and spiritual and eleemosynary corporations sole, for actions to recover land, was reduced from sixty to thirty years.

D. The Purchaser's Protection under the Present Law

22. The present statutory minimum period for commencement of title under an open contract does not provide absolute protection to a purchaser against prior rights. As a result of the Property Legislation of 1925 and the Limitation Act 1939, however, the position of a purchaser who investigates title for the full thirty years is more secure than it generally has been in the past. The main reasons for this are—

(i) The period of thirty years is well in excess of the normal limit of twelve years for actions to recover land, and is the same as the extended period allowed to the Crown (save in respect of the foreshore), and to spiritual and eleemosynary corporations sole, and the maximum period available to persons under a disability when the right of action accrued—Limitation Act 1939, sections 4 and 22.

(ii) Under the Law of Property Act 1925 the only legal estate capable of subsisting in freehold land is the fee simple absolute in possession. Other estates, such as estates for life or in tail, take effect as equitable interests and are overreached by a conveyance to a purchaser. A purchaser need not normally concern himself with future interests or with the rights of beneficiaries under subsisting settlements and trusts.

(iii) In respect of matters which are binding on him if he has notice (actual, constructive or imputed) a purchaser is protected against those not discoverable by investigation for the statutory minimum period by section 44(8) of the Law of Property Act, which provides that—

> " A purchaser shall not be deemed to be or ever to have been affected with notice of any matter or thing of which, if he had

investigated the title or made enquiries in regard to matters prior to the period of commencement of title fixed by this Act, or by any other statute, or by any rule of law, he might have had notice, unless he actually makes such investigation or enquiries."

23. Nevertheless there are still some possible defects which may not be revealed by a thorough investigation back to a good root of title at least thirty years old. These can arise in the following circumstances—

(*a*) By section 6(1) of the Limitation Act 1939 the limitation period does not run against the owner of an interest in remainder or reversion or other future interest (including a reversion on a lease—*St. Marylebone Property Co. Ltd.* v. *Fairweather* [1963] A.C.510) until that interest falls into possession by the determination of the preceding interest. Land held on a long lease may have been dealt with for more than thirty years as if it were freehold, but the purchaser will be liable to dispossession at the suit of the reversioner at the expiration of the term.

(*b*) By section 7(2)–(4) of the Limitation Act 1939 the legal estate of the tenant for life or statutory owner of settled land, or of the trustees of land held on trust for sale, cannot be barred so long as the right of any person entitled to a beneficial interest in the land has not been barred. Therefore, although the estate owner or the trustees may have been dispossessed more than thirty years ago, they may still be able to bring an action to recover the land when a future interest falls into possession: but this may not appear from perusal of the title for the statutory minimum period.

(*c*) By section 198 of the Law of Property Act the registration of any instrument or matter under the Land Charges Act 1925 is "deemed to constitute actual notice of such instrument or matter, and of the fact of registration, to all persons and for all purposes connected with the land affected". Registration in the Land Charges Registry is made by reference to the name of the estate owner of the burdened land at the time of registration, so that it is necessary to know the names of all previous owners of the land since 31st December 1925 in order to make a complete search for the land charges affecting any piece of land. A thirty-year investigation of title may, however, fail to reveal all the previous owners since 1925 and the land may be affected by land charges which the purchaser is unable to discover because he does not know the names against which to search. On the assumption, which is generally thought to be correct, that the provisions of section 198 override the terms of section 44(8) of the same Act (see paragraph 22(iii) above) this has been, since 1st January 1956, a defect in the purchaser's right of obtaining assurance of a clear title. In practice, however, as is explained in paragraph 24(iii), below, it is not known so far to have caused actual hardship.

E. Consequences of Reducing the Statutory Minimum Period

24. The reduced period should not be greater than twenty years (for there would be little point in reducing it by less than ten years), nor less than twelve, since it would, in our opinion, be generally accepted that the period

should not be shorter than the normal limitation period for actions to recover land. Assuming, therefore, that the new period would be somewhere between twenty and twelve years and that the limitation periods would remain as they now are, the purchaser's position would be affected in the following ways—

(i) There would be a greater risk that his investigation of title might fail to reveal rights enforceable by the Crown, a spiritual or eleemosynary corporation sole, or a person who had been under a disability when his cause of action arose, for all of whom the Limitation Act 1939 provides an extended period of up to thirty years in which to bring an action to recover land. In assessing the gravity of these risks, however, it will be remembered that the first two do not differ in kind from those which necessarily existed between 1875 and 1939: and the risks arising from persons who have been under disability appear to be minimal. For practical purposes it is only necessary to consider under this head persons of unsound mind and infants. In the case of the former there will normally be a receiver, acting under the supervision of the Court of Protection, to watch their interests. In the case of infants, the legal estate will be vested in trustees since an infant can now hold only an equitable interest. In neither case does it seem likely that a receiver or trustee will often have been dispossessed of land more than fifteen years before and have taken no steps to recover it. Moreover, in the case of infants the possibility of an unbarred claim is made more remote by the fact that, unless the dispossession of the trustee took place during his early infancy, the infant beneficiary will have come of age within the period of title investigation. Unless he brings an action within six years of that date his right will be finally barred.

(ii) The risk that the investigation will fail to reveal the rights of a reversioner or an estate owner or trustees, which are referred to in paragraph 23(*a*) and (*b*) above, will be proportionately increased. The suggestion has been made, and will be considered later in this Report, that a purchaser for value should be freed of these risks by a provision analogous to that in section 26 of the Limitation Act 1939, which frees a purchaser for value from risks arising out of fraud or mistake of which he has no notice. If that were done it would also cover the case of the infant referred to above.

(iii) The difficulty of discovering the names of the previous owners of the land, against whom land charges might have been registered in the Land Charges Registry, would be increased. The problems which were going to arise after 1st January 1956, from section 198 of the Law of Property Act 1925 and the system of registering land charges were fully examined by the Roxburgh Committee on Land Charges, which concluded that the defects were inherent in the system and could only be cured by the rapid expansion of registration of title.

In paragraph 5 of its Report (1956 Cmd. 9825) that Committee pointed out, however, that those risks were accepted in practice by very many purchasers who were willing to accept by contract less

than a thirty-year title, and yet no case had come to the Committee's notice where any registered charge had afterwards come to light which had not been referred to in the documents of title. Ten years later, the practical impact of this problem has been described in similar terms by the Council of the Law Society. In paragraph 36 of the Council's Second Memorandum on Conveyancing Reform, which was submitted to the Law Commission in November 1966, it is said that "the difficulties resulting from this problem have been few in practice since 1st January 1956 and the Council is not aware of any hardship which has been caused". The Council adds, in paragraph 37, that "hardship is perhaps more likely to arise if the statutory period for deduction of title is shortened."

The Roxburgh Committee also said, in paragraph 11 of its Report, that restrictive covenants, which form the largest and most enduring class of land charges, "are almost always created as part of the terms of a disposition of the land affected and are, therefore, shown in the Abstract of Title". On this point our information is that, although restrictive covenants necessarily appear in the document of title which created them, the practice of referring to them in the intermediate documents is not universal throughout the country. On the other hand, restrictive covenants, though registered, are not always enforceable, and this may be a factor which reduces the risk of hardship to a purchaser who is unable to make a full search under the present system.

The hardship referred to in this context arises only when, after completion, a purchaser discovers the existence of a land charge which is—

(*a*) valid and enforceable against him ;

(*b*) not referred to in the documents of title which were available for his perusal ; and

(*c*) registered under the Land Charges Act 1925 against a previous estate owner whose name was not discoverable by proper investigation of title for the statutory minimum period.

Although a reduction in the statutory minimum period would necessarily increase the risk to some extent, it seems reasonable to predict that cases of such hardship would still be rare.

25. In respect of the matters referred to in paragraph 24 a purchaser would be subject to somewhat greater risks than he is now. In one respect, however, his position might be improved. It may sometimes happen that a trustee disposes of property in breach of trust (as, for example, where he buys it himself). It is a well-established rule of equity that a purchaser for value from him takes a good title provided that he has no notice of the breach of trust. A reduction in the investigation period would reduce the likelihood of a purchaser receiving notice, and thus might operate to his advantage in some cases, but to the disadvantage of the beneficiaries under the trust.

F. The Case for a Reduction

26. The argument in favour of reducing the statutory period is stated by the Law Society's Working Party on Conveyancing (Second Interim Report,

paragraphs 45–47) to be that the volume of repetitive work in dealing with unregistered titles prior to compulsory registration would in most cases be reduced, while leaving the purchaser sufficiently protected. We understand that this argument is supported by the practice of conveyancers, which has been in many cases to accept a shorter period than the statutory minimum, thus repeating the historical pattern whereby a move to reduce the period has been preceded by the voluntary adoption of a shorter period.

27. The statement that work would be reduced in most cases acknowledges that there will be some cases in which the reduction will make no difference. Since a title " cannot commence *in nubibus* at the exact point of time which is represented by 365 days multiplied by 40 " (per North J. in *Re Cox and Neve's Contract* [1891] 2 Ch. 109) investigation under an open contract must go back to the first good root beyond the minimum period. If, therefore, land is sold in 1966 which has previously been conveyed on sale in 1956 and 1935, the 1935 transaction will be the root of title under an open contract whether the statutory minimum period is fifteen or thirty years. It must also be acknowledged that the extent of the saving of work, in those cases where work is saved, must be variable, depending on the facts of each particular case.

28. In view of these variable factors, we think that guidance as to the advantages flowing from a reduction in the period can best be obtained from the general impression derived by conveyancers from their day-to-day work: and we appreciate that, on a question such as this, it is easier for experts to know the answer than to prove it. Our attention has, however, been drawn to one significant fact. A reduction to fifteen years would remove from many abstracts of title transactions carried out between 1940 and 1946 which, owing to the generally disorganised conditions then prevailing and the destruction of many documents, can be unusually troublesome.

G. Consultation

29. When we embarked on this study, at the beginning of 1966, we knew that a reduction was favoured by the Non-Contentious Business Committee of the Law Society, by the Institute of Legal Executives, by certain local Law Societies whose resolutions on this point had been published in the press, and by a number of individual solicitors and legal executives who had written to us or to the legal periodicals. Suggestions as to the length of the period varied from twenty years to ten, with a majority in favour of fifteen. A dissentient view had been published in the *Conveyancer and Real Property Lawyer* for September/October 1965 (Vol. 29 No. 5 page 330, Conveyancer's Notebook).

30. We held a preliminary discussion, in the course of which Mr. V. G. H. Hallett, a member of the Chancery Bar, and Mr. E. G. Nugee, who represented the Law Reform Committee of the Bar Council at the discussion, expressed doubt as to whether a reduction was justifiable in view of the risks involved and the comparatively small saving in work which they would expect to result from it. In order to provoke discussion it was, therefore, arranged that Mr. Hallett and Mr. Nugee should jointly publish their views and that we should circulate a working paper putting forward a provisional view in favour of reduction.

31. Their article was published in the *Solicitors' Journal* on 11th and 18th March 1966, and our working paper, in addition to being circulated within the legal profession, was published as an article in the *New Law Journal* on 7th April 1966. It was also sent to the Building Societies Association. Each of the articles stated that the Law Commission would welcome comments on this subject.

32. We consider that these two published articles effectively displayed the arguments for and against the proposal, since the former stressed the risks which might be involved in some cases while the latter emphasised the advantages to be derived in general conveyancing practice. There was little difference, however, in the assessment of the present practice. Each suggested that a root of title considerably less than thirty years old is now frequently accepted in the ordinary, lower-priced, house purchase, whereas estate developers and others with a special need of a secure title generally insist upon at least twenty-five years. We have received no comments on that assessment of the prevailing practice and we regard this as confirmation that it is correct.

33. In response to the circulation of our working paper we obtained the views of the Chief Land Registrar, the Building Societies Association and some members of the Chancery Bar. We also received helpful memoranda from the Law Society's Working Party on Conveyancing, the Society of Public Teachers of Law, the Institute of Legal Executives and the conveyancing divisions of the Treasury Solicitor's Office and of the Legal Department of the Ministry of Agriculture, Fisheries and Food. The majority of these (including, as we noted with particular interest, the Building Societies Association) supported the proposal for a reduction to fifteen years. Some doubts were expressed, however, as to the feasibility of reducing the extended limitation periods, which had also been suggested in our working paper. Our attention was drawn to the special factors relating to Crown land and ecclesiastical land, and the need to protect beneficiaries under settlements and trusts.

H. Conclusion as to the Period of Title

34. From all the information which we have obtained, both from our own consultations and from the valuable discussion provoked by the Report of the Law Society's Non-Contentious Business Committee, we consider that a clear picture has emerged. Among those who conduct the majority of the conveyancing transactions throughout the country there seems to be general support for a reduction in the statutory minimum period, provided that the period continues to be applicable only where the contract does not otherwise provide. A reduced period is already being adopted in many cases, without apparent disadvantage to purchasers, and experience shows that a substantial saving in work is thereby achieved. A reduction would be acceptable both to the Building Societies and to the Chief Land Registrar, who has a wide discretion under the Land Registration Rules 1925 as to the examination of title on application for first registration.

35. It is acknowledged that a reduction would increase the risks that, in certain circumstances, defects in title might not come to light. Those who support the proposal, having assessed the gravity of such risks, regard them

as acceptable in most transactions. They think it a sufficient safeguard that when a purchaser has particular need of the assurance of a clear title—as for example when he proposes to embark on costly development—he is free to negotiate a special provision in the contract as to the length of title which the vendor must show. They suggest that objections on similar grounds have probably been put forward in the past, but progressive reductions in the period of title investigation have nevertheless been introduced with success.

36. It seems to us that a reduction in the statutory minimum period would be a useful step towards the simplification of conveyancing and we agree with those who think that the risks should be accepted. We accordingly conclude that the period mentioned in section 44(1) of the Law of Property Act 1925 should be reduced to fifteen years. This would allow a reasonable margin over the normal limitation period of twelve years and would accord with what we believe to be the trend in conveyancing practice. It also accords with the provision in section 77(3)(*b*) of the Land Registration Act 1925 that where freehold land has been registered with a possessory title for fifteen years the title shall be entered as absolute if the proprietor is in possession.

I. Characteristics of a Good Root of Title

37. A good root of title is not defined by statute. In cases of dispute it is, as a rule, for the Court to decide whether, on the evidence which is produced at the hearing of the action for specific performance, the objection to title is good or bad. The precise characteristics of a good root may thus vary according to the circumstances but, in the absence of any stipulation to the contrary, it will probably fall within the description contained in Williams on Vendor and Purchaser, 4th Edition at page 124, as—

> " an instrument of disposition dealing with or proving on the face of it, without the aid of extrinsic evidence, the ownership of the whole legal and equitable estate in the property sold, containing a description by which the property can be identified and showing nothing to cast any doubt on the title of the disposing parties."

38. The occasion of a reduction in the statutory period for investigation would be a suitable time at which to provide a statutory definition of the root from which the investigation should begin, if this would be a useful innovation. We accordingly invited comments in our working paper.

39. It has been suggested to us that a good root of title should be defined—

(*a*) so as to include a clear requirement that the document concerned effects a disposition for value; the judgment of Cotton L.J. in *Re Marsh and the Earl of Granville's Contract* (1884) 24 Ch. D. 11 leaves it in doubt whether a conveyance by way of gift is sufficient;

(*b*) to include dispositions under overreaching powers, e.g. by mortgagees, trustees for sale, etc., as to which there may be some doubt;

(*c*) to deal with problems arising from dispositions drawn without words of limitation, in reliance on section 60 of the Law of Property

Act 1925, by accepting such a disposition as a good root if it was for value and contained a recital of the grantor's interest.

40. However, the general opinion amongst practitioners was that these doubts seldom arose in practice and that to attempt to resolve them by a statutory definition might do more harm than good by introducing an undesirable rigidity. Under the normal procedure the draft contract or the auction conditions contain a description of the instrument with which the title is to commence and the purchaser decides whether that is acceptable to him in the circumstances. Thus in a very large number of cases the transaction proceeds on the basis of an agreed root of title. Only under an open contract does the vendor have an obligation, at large, to produce a " good root ". It is important to practitioners that there should be complete freedom to negotiate according to the particular circumstances of each case. Hence they prefer to leave the requirements of a " good root " to be decided on the facts in the rare cases in which a dispute arises.

41. We accept this view and we recommend that no statutory definition be enacted.

J. Accuracy of Recitals

42. We also invited comments as to whether a reduction in the title investigation period should be accompanied by an alteration to section 45(6) of the Law of Property Act 1925 which provides that—

> " Recitals, statements and descriptions of facts, matters, and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations twenty years old at the date of the contract shall, unless and except so far as they may be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions."

43. If the root of title period is only fifteen years, documents more than twenty years old will less frequently be included in the abstract. For this reason reduction to twelve years is favoured by the Law Society's Working Party, the Institute of Legal Executives and some others.

44. It has, however, been pointed out that this statutory provision owes its origin in 1874 to the fact that, before the 1925 legislation, it was often necessary to investigate facts (such as pedigree) which were not readily ascertainable from the records kept in earlier times. These conditions no longer exist. There is little difficulty in obtaining proof of the facts relevant to investigation of title and there is no obvious justice in providing a statutory presumption (which may be incorrect) as to the accuracy of statements made as recently as twelve years ago. A provision of this kind would not be introduced in modern conditions if it did not already exist: there is much to be said for abolishing it altogether.

45. We find ourselves more in sympathy with the latter view, but we do not think it necessary to abolish the provision. If it is left as it now stands, while the period in section 44(1) is reduced, its importance will be diminished, but it may be of some use still. That is the course which we recommend.

K. Consideration of Consequential Proposals

46. Having concluded that the period for investigation of title should be reduced in spite of the possible disadvantages which have been pointed out, we must next consider suggestions for mitigating all or some of those disadvantages.

(1) *Section* 198, *Law of Property Act* 1925

The Roxburgh Committee considered and rejected, in paragraph 21 of its Report, a suggestion that land charges registered at a date earlier than the root of title should not bind a purchaser of the land. We agree with the Committee's view for the reason which it gives: "We do not know why the chargee, who has done all that is required of him by the Act of 1925 to acquire his vested right, rather than the purchaser, should pay the price of a fault in the system". While we agree that the registered charge must bind a purchaser, we do not think, however, it necessarily follows that the "price" should ultimately be paid by him, for the fault arises from a defect which is inherent in the system provided by the Property Legislation of 1925 for the registration of land charges.

The Council of the Law Society, in paragraphs 46–50 of its Second Memorandum, recommends as the solution to this problem that an Indemnity Fund should be established from which a purchaser of land could claim compensation if he had suffered loss through the existence of a valid and subsisting land charge, "registered prior to the statutory root of title," of which he had no notice and which he did not discover on search. The Council further suggests that the Fund should have recourse against the vendor in certain circumstances.

We agree that the establishment of an Indemnity Fund would be the just solution and we hope that it will be adopted. But, for the reasons given in paragraph 24 above, we think that claims would be few and that the potential liability of the Fund can be regarded as small in amount. Although the existence of such a Fund would, in our view, meet the requirements of justice in those few cases where a purchaser would otherwise suffer loss through no fault of his own, we do not think that reform need await its establishment. The risk to purchasers has shown itself to be slight, while the need for the saving of time and work in conveyancing, which our recommendation is designed to achieve, is a matter of immediate importance. Accordingly we think that our recommendation should be implemented without delay, even though it may not be possible to introduce at the same time arrangements for compensation in accordance with the Council of the Law Society's recommendation.

(2) *Section* 26, *Limitation Act* 1939

A suggestion has been put to us for protecting purchasers for value of a legal estate by applying to the situations covered by sections 4, 6, 7, 22 and 23 of the Limitation Act 1939 a provision analagous to the proviso to section 26 of that Act.

The effect of this proviso is, in brief, that the extended time limit which normally applies where a cause of action is based on fraud or mistake does not run against a purchaser for value who has bought

without notice of the fraud or mistake. The suggested extension of this proviso would presumably mean that a purchaser for value would take the land free of any claims by the Crown and spiritual and eleemosynary corporations sole (s. 4), remaindermen and reversioners (s. 6), beneficiaries under trusts (s. 7), persons who have been under a disability (s. 22) and persons in whose favour an acknowledgement of title has been made within the last twelve years (s. 23), where such rights have not been revealed by a proper investigation of title over the statutory minimum period.

It seems to us that so comprehensive an extension of the proviso would not be possible. If the special time limits provided by sections 4(1) and (2) and 22 were not to be effective against a purchaser for value there would be little point in keeping them at all, unless they could support an action for damages against the vendor. It would be simpler to abolish them and leave the normal twelve year period of limitation in force. Nor would it be right, in our opinion, to permit a purchaser for value to override the rights of a remainderman or reversioner under section 6(1), e.g. where the owner of a term of years has, at some previous date, purported to convey the fee simple.

We see some force in the suggestion, however, in relation to the rights of beneficiaries under trusts, including infants. It does seem anomalous that although an action by the person in whom the legal estate is vested under the 1925 legislation has, *prima facie*, become barred by lapse of time, that person should be able to sue indefinitely so long as there are beneficiaries whose rights have not become time-barred. The position will be aggravated by a reduction in the investigation of title period, because the danger of such rights not coming to the notice of a purchaser arises mainly when there has been dispossession of a trustee before the root of title. The shorter the investigation the greater will be the risk that outstanding rights of beneficiaries have not been revealed. The question whether, in such circumstances, the loss should fall on the purchaser or on the beneficiaries under the trust is a matter of policy. The present extent of our consultation on this study does not enable us at this stage to suggest the solution.

The situation which may arise under section 23 when the land has been sold does not, in our opinion, call for amendment. A purchaser will be affected only where he accepts a title based on adverse possessior. In such a case he is entitled to satisfy himself that prior rights have been extinguished and he should be able to do so, or else to insure against the possibility that there has been an acknowledgement which may keep prior rights alive. Where a purchaser is taking a title which he knows to be based on adverse possession, insurance may be regarded as an adequate safeguard.

(3) *Special limitation periods: section* 4, *Limitation Act* 1939

Historically we understand the justification for the special limitation periods applicable to the Crown and spiritual and eleemosynary corporations sole to be that the land would be in the occupation of a person (e.g. Crown servant or incumbent for the time being) who had no personal interest in preserving the land against encroachments. Experience, no doubt, showed that there was a real difference between the

beneficial owner in possession and the representative occupier in their alertness in this respect. Moreover, the land itself would often tend to be less well-defined than the ordinary building plot.

We doubt whether these considerations now have the same force that they had in previous centuries, and we note that the limitation period was halved in 1939. The risks to a purchaser which result when these special limitation periods exceed the root of title period have been accepted in the past and, as we have said in paragraph 36 above, we consider that they could be accepted again. We would, however, be in favour of reducing such periods to fifteen years if this were regarded as practicable by those concerned with the interests in Crown and ecclesiastical lands.

L. Summary and Recommendations

47. To summarise our conclusions, therefore—

(1) We recommend—

(*a*) that the statutory minimum period for commencement of title should be reduced to fifteen years in relation to contracts made after the coming into operation of amending legislation (paragraph 36);

(*b*) that no statutory definition of a good root of title should be enacted (paragraph 41);

(*c*) that no alteration should be made to section 45(6) of the Law of Property Act 1925 (paragraph 45).

(2) We support the Council of the Law Society's recommendation for the establishment of an Indemnity Fund from which compensation could be paid to a purchaser of land who finds that his land is affected by a land charge, registered in the Land Charges Registry, which he could not reasonably have discovered and who can show that he has thereby suffered loss (paragraph 46(1)).

(3) We consider that our recommendation in (1)(*a*) above necessitates no other changes in the law and could be put into effect forthwith by means of the draft clause which is set out in the Appendix to this Report.

(4) We suggest that at some future date it will be necessary to consider whether any changes should be made in the limitation period applicable to actions for recovery of land by the Crown and by spiritual and eleemosynary corporations sole under section 4(1) and (2) of the Limitation Act 1939, or in the provisions of section 7 of that Act relating to tenants for life, statutory owners and trustees (paragraph 46(2) and (3)).

LESLIE SCARMAN, *Chairman.*
L. C. B. GOWER.
NEIL LAWSON.
NORMAN S. MARSH.
ANDREW MARTIN.

HUME BOGGIS-ROLFE, *Secretary.*

15*th December* 1966.

APPENDIX

Draft Clause

Reduction of statutory period of title.

Section 44(1) of the Law of Property Act 1925 (under which the period of commencement of title which may be required under a contract expressing no contrary intention is thirty years except in certain cases) shall have effect, in its application to contracts made after the coming into operation of this section, as if it specified fifteen years instead of thirty years as the period of commencement of title which may be so required.

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