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

LONDON
HER MAJESTY'S STATIONERY OFFICE
PRICE 2*s.* 6*d.* NET

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.

CONTENTS

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

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

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

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.

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.

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.

Printed in England for HER MAJESTY'S STATIONERY OFFICE
by Galliard Ltd., Gt. Yarmouth, Norfolk

Dd. 151994 K3 4/69

Published by
HER MAJESTY'S STATIONERY OFFICE

To be purchased from
49 High Holborn, London W.C.1
13A Castle Street, Edinburgh EH2 3AR
109 St. Mary Street, Cardiff CF1 1JW
Brazennose Street, Manchester M60 8AS
50 Fairfax Street, Bristol BS1 3DE
258 Broad Street, Birmingham 1
7 Linenhall Street, Belfast BT2 8AY
or through any bookseller

SBN 11 390069 4