Working Paper No. 1

LAW COMMISSION FIRST PROGRAMME

ITEM IX – TRANSFER OF LAND

B – ROOT OF TITLE TO FREEHOLD LAND

1. Paragraph 63 of the Report made in June 1965 to the Council of the Law Society by its Non-Contentious Business Committee recommended that the statutory minimum period for investigation of title to any unregistered land should be reduced from thirty to fifteen years. A similar proposal has been made by the Institute of Legal Executives (Sol. J. Oct. 1965 Vol. 109 p. 844). This proposal appears to command wide support amongst the solicitors' profession.

2. The statutory minimum period of investigation of title has been progressively reduced over the last 100 years, from 60 years (pre 1874) to 40 years (Vendor and Purchaser Act 1874) and finally to 30 years (s. 44(1) Law of Property Act 1925). A Royal Commission in 1911 (Cmd. 5843 para. 59) in fact recommended its reduction to 20 years.

3. Investigation of title over the minimum statutory period has, of course, no place in registered conveyancing. But when applications for first registration are made, the Chief Land Registrar in investigating the relevant title exercises a discretion as to the extent in time of his inquiry. This is affected by the class of registration applied for (absolutely or possessory) but is uninfluenced by

adherence to rigid time limits. This investigation is the more necessary because registered title is back by a state guarantee.

4. The contrast between the nature and purpose of title investigation in the case of unregistered and registered land respectively leads to posing certain basic questions:

(a) whether investigation of title in the former case is necessary;

(b) if so, whether a minimum period should be prescribed?

(c) if so, what should the minimum period be?

Is title investigation of unregistered land necessary?

5. The purchaser of land who subsequently discovers that his title is defective or that his land is subject to third party rights, for reasons unknown to him at the time of his purchase sometimes has rights of recourse against his vendor. These rights could be enhanced by an extension of the vendor's obligations on sale, e.g. a duty of full disclosure, substitution of absolute covenants for those at present qualified and clarification of the meaning of s.76(1) of the Law of Property Act 1925. But remedies sounding in money are not, from the viewpoint of the vast majority of purchasers, a satisfactory substitute for having a good title to his land free from third party rights unknown to him at the time of his purchase. This is the main reason why a purchaser needs to have his vendor's title investigated prior to completion. The other reason is that the acid test of whether or not a title is good is, in the end, whether the Court will force the title offered by the vendor upon the purchaser in specific performance proceedings as conforming to the vendor's

contractual obligations. Purchasers are virtually compelled for their own protection against such a claim to investigate the vendor's title. It is therefore concluded that title investigation is a necessary activity in unregistered conveyancing.

Is a minimum period of investigation necessary?

6. At present, in the case of unregistered land, title is investigated over a period of time starting (in the absence of contrary agreement) with a good root of title at least 30 years old. The reason for insisting on a good root of title (e.g. a conveyance on sale) is that it can be assumed that on such conveyance the purchaser investigated the earlier title for an equivalent period. The vendor or his predecessors may however have contracted to accept a defective title or mistakes may have been made or known risks accepted in earlier title investigations which may put the purchaser at risk. It is sometimes said that investigations of title behind the last conveyance on sale involve repetitive work; but this is only true in the sense that from time to time, as land changes hands, purchasers and their solicitors are engaged in investigating what is basically the same title. It is the duty of any solicitor, where he is employed for this purpose, to conduct his own investigation and not to rely on the results of investigations undertaken for prior purchasers.

7. Accepting that title investigation behind the last conveyance on sale even though this is of comparatively recent date is necessary, it is expedient to provide a statutory period past which such investigation is not required unless a longer title is expressly contracted for. Two factors dictate this: firstly, the longer that land ownership has been enjoyed the less likely it is to be disturbed; secondly,

practical considerations of time and cost dictate that there should be some point at which investigation stops. The provision of a statutory period serves two purposes:

(a) to confer a reasonable measure of protection upon a purchaser (special contract terms apart) against the risk of undisclosed title defects and third party rights.

(b) to protect a purchaser who has investigated title over the statutory period from being affected by adverse claims which his investigation has not revealed, (s. 44(B) L.P.A. 1925)

As will be later shown, however, the protection afforded by the present 30 year (or any other) statutory period is in fact defective in a number of important respects.

What should the minimum period be?

8. The present 30 year period corresponds with those provisions of the Limitation Act 1939 which specify 30 years as the period of limitation of actions to recover land where the claim is made by the Crown or by spiritual or eleemosynary corporations sole (s.4 (2)) or by or on behalf of persons under disability (s. 22 (1)(c)). The normal period of limitation for recovery of land is 12 years from the accrual of the right to sue. In each case adverse possession for the statutory period extinguishes the rightful owner's title, but does not operate to transfer his estate to the adverse possessor.

Claims over-riding the 30 years period

9. Important, however, are the other exceptions to the statutory periods mentioned in para.8 (above). Even the 30 year period (where it applies) does not protect a purchaser where land is held under a settlement or on trust for sale or is subject to an unexpired lease – (ss. 6 and 7 of the 1939 Act). All that can be said is that investigation for 30 years by reference to the mere time factor is more likely to expose the risk of claims of these kinds than would be the case with a less lengthy investigation.

10. A more serious deficiency in the protection obtained by investigation of title for 30 years is the position which arises from the fact that registration of land charges under s.10 of the L.C.A. 1925 is against names and that under s. 198 of the L.P.A. 1925 a purchaser is bound by registered land charges whether or not he had or could have had notice of their existence. Assuming a good root of title 30 years old, the position since January 1st 1956 has been that a purchaser who has properly investigated title for the statutory period will be bound by land charges registered after 1925 and prior to good root of title, though he may have had no means of ascertaining their existence. This serious deficiency was highlighted by the Roxburgh Committee Report (1956 Cmd. 9825) but remains unremedied. Whilst admitting that any reduction of the statutory period would aggravate this deficiency, however, it is proposed that this problem arising under s. 198 should be the subject of independent study since it is not directly related to the provision of a statutory period, but exists despite it.

The majority of land charges registered under the Land Charges Act 1925 consist of restrictive covenants and puisne mortgages. As regards restrictive covenants, it is thought that the occasions on which a reference to such covenants does not appear in the abstract of a vendor's title must be rare. The Roxburgh Committee in their Report (supra) stated that no case had come to their notice where any charge registered before the commencement of the title and not referred to in the later documents of title had afterwards come to light. It has not been overlooked that there may be exceptional cases (such as restrictions created in favour of the National Trust) where the covenants are contained in a deed collateral, but as the Roxburgh Committee pointed out, such cases could be dealt with by means of an endorsement on the appropriate deed of disposition of the land affected.

With regard to puisne mortgages these are being dealt with in a separate paper.

Reduction of the Statutory minimum period

11. No purpose is served by reducing the 30 year period unless this would produce a tangible saving and simplification in the work involved in unregistered conveyancing. Assuming this, it would also be realistic to propose a reduction only if it would be acceptable generally to the public and to those in the legal profession on whom the public normally rely for guidance in land purchase. An important test of such acceptability is furnished by appraising the risks which would flow from a reduction of the

present 30 year period. Another test is to look at current practice to form a view of the extent to which the statutory minimum period is insisted upon.

Risks of Reduction

12. Accepting the problem posed by Paragraph 10 above as one requiring separate treatment, it seems that the risks which would flow from a reduction of the present 30 year period would be:

(a) claims protected for 30 years under s.4(2) and s.22 (1)(c) of the Limitation Act 1939. In practice such risks are believed to be minimal, but there seems to be no reason why these 30 year limits should not be curtailed to one corresponding with any proposed reduced period.

(b) claims protected by ss. 6 and 7 of the Limitation Act 1939. For a number of reasons such claims are in practice rare. Assuming that it is necessary to retain special protection (and so far as settlements and trusts for sale are concerned it is not easy to understand why this should be so) a reduction in the statutory period would, obviously, increase the risk of their incidence.

(c) claims arising from breaches of trust where a trustee has sold to himself. A reduction of the statutory period would, in fact, reduce the risk to purchasers of such claims, the benefit to the purchaser in such case being balanced by the corresponding disadvantage to the beneficiaries. But it is considered that the

whole trend of the 1925 legislation was to favour purchasers at the expense of beneficiaries and in the case of a sale by a trustee to himself, this principle is strikingly illustrated in the case of registered land by s. 74 of the Land Registration Act 1925. Although sales by trustees to themselves are not unknown and appear to be increasing, it is thought that in the present context the balance of convenience lies in favour of purchasers. The beneficiaries in such cases in fact retain their claims against the trustee concerned.

13. On the above assessment of the risks of reduction of the statutory period, the proper conclusion seems to be that the risks do not outweigh the tangible saving in work and complexity which reduction should produce.

Modern Practice

14. It is now increasingly common for purchasers to accept, normally on advice, roots of title less than 30 years old and thus to curtail by agreement the present statutory period of title investigation. It is understood that in the case of dwelling houses in the lower and medium price ranges bought for owner-occupation, and particularly when such houses form part of a recent or new development, resulting from the sale of an old title to a developer, it is very common for purchasers to accept a good root of far more recent origin than 30 years. In some cases the solicitor advising a purchaser

will himself know the old title history and will advise acceptance of a recent root of title on this basis; in other cases the purchaser, by his inspection, will form a view that he is obviously going to get his house and curtilage from the previous owner who has himself occupied it as his home for a number of years.

In practice the same view is taken by those who commonly provide purchase finance, building societies, insurance companies and local authorities.

15. In the case of purchases other than of dwelling houses for owner-occupation, particularly in the case of developers, modern practice presents a rather different picture. Owing to the size of the outlay and the dimensions of the aspirations of the developer, he is concerned to get as full a title investigation as is possible. He is reluctant to accept a root of title less than 25 years old and who can blame him? The same observation is probably true of institutional and investment purchasers.

16. It seems therefore right to conclude that in the majority of purchases of unregistered land for owner-occupation (cases covered by Paragraph 14) the public and those professionally advising and financing them are content generally to accept a root of title considerably less than 30 years old and thus to curtail the period of investigation. If this conclusion is right then the test of acceptability is positive, in favour of a reduction of the statutory period: but one must not overlook the different considerations which

apply to the type of case dealt with in Paragraph 15. It is felt that this would be met by permitting "contracting out" of the statutory period, in either direction, as is allowed at the present time under s. 44 (11) of the L.P.A. 1925. It is felt that contracting for a longer period than the statutory one would continue to be, as it is now, exceptional though it might become somewhat more common than at present.

What should the reduced statutory period be?

17. It seems clear that title investigation should not (in the absence of special terms) cover a lesser period than the normal 12 years applicable to barring claims for recovery of land; but it seems wise to allow a little margin over this time and it is therefore thought than 15 years is appropriate. This corresponds with the views referred to in Paragraph 1 and has the neatness of dividing the present period by two and roughly reducing the work involved in proof and investigation of title by a similar proportion. Fifteen years is also the period after which a registered possessory title to freehold land can be converted into an absolute title under s.77(3) of the Land Registration Act 1925, subject to certain formalities, where the proprietor is in possession.

What is a good root of title?

18. 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 case any doubt on the title of the disposing parties."

The occasion of a reduction in the statutory period of title investigation would be an appropriate time at which to provide a statutory definition of a good root if, as has been suggested to the Law Commission, this would be a feasible and useful innovation. Comments are invited on this suggestion.

Accuracy of recitals

19. The question of reducing the statutory period necessarily involves looking at s.45 (6) of the L.P.A. 1925 which is a purely evidentiary provision. It appears useful, for saving some time and expense, to have a provision of this kind, but if the statutory minimum is to be reduced to 15 years, there is little purpose in retaining s. 45 (6) in its present form. The matters with which this section deals no longer present serious difficulties of

proper proof but bearing in mind its marginal utility, it is therefore thought that the period should be reduced to 12 years.

Provisional conclusions

20. Assuming that this will result in a tangible saving of work in the deduction and investigation of title, the present 30 year period should be reduced to 15 years, subject to the right to "contract out" in either direction. Such reduction should be accompanied by lowering the 30 year periods provided in ss. 4 and 22 of the Limitation Act 1939. Ideally it should also be accompanied by a solution of the problem arising under s. 198 of the L.P.A. 1925 (to be the subject of separate proposals) and by other changes in the law of Limitation and Conveyancing which fall to be and will be examined under this Programme Item.

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Law Commission

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