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Traditionally land transfers in this country are a slow, expensive and uncertain matter. They require a degree of professional supervision frequently disproportionate to the economic interests created and have become increasingly complicated and form ridden. It is more and more apparent that the system employed is clumsy, wasteful, inefficient and out of keeping with our demands for social institutions of reasonable effectiveness,¹ and there is general agreement among competent, dis-

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1. Conventional methods have been referred to as "cumbersome, awkward and expensive," Aigler, *Title Problems in Land Transfers*, 24 MICH. BAR J. 202, 213 (1945); as "cumbersome, costly, time-consuming and often unnecessary procedure," Russell and Bridewell, *Systems of Land Title Examination*, 14 J. LAND & P. U. ECON. 133 (1938); as "well-nigh intolerable," Aigler, *Clearance of Land Titles—Statutory Steps*, PROC. A. B. A. SEC. OF REAL PROP. PROB. & TRUST L. 19, 29 (1946); and as "a burden urgently requiring simplification," BASYE, *CLEARING LAND TITLES*, v (1953). In 1953 the Committee on Acceptable Title to Real Property reported to the American Bar Association's Section of Real Property, Probate and Trust Law: "In a report to this Section in 1948 it was said, 'That the present system fails to meet adequately the needs of present-day society permits of little argument.' In 1942 we were told of the necessity of restoring the effectiveness of the recording system and were warned that widespread discontent with excessive burdens on conveyancing made it imperative that the burdens be removed if the bar is to continue to enjoy public confidence and retain the business of transferring titles. The dissatisfaction with the general system of transfer has been mounting for more than half a century." PROC. A. B. A. SEC. OF REAL PROP. PROB. & TRUST L. 43 (1953). The State Lands Commission's REPORT ON LAND TITLE LAW OF THE STATE OF CALIFORNIA (1953) characterizes the present system as "lengthy, cumbersome and archaic" (p. 15); as "outmoded and insufficient to meet the needs of a large community where there are so many and such rapid transfers of land" (p. 90); and as "archaic, primitive and unable to achieve the purpose for which it [the Recording System] was originally adopted" (p. 95). Another commentator has said rather dryly, "While this system has provided a living for a legion of attorneys, abstractors and title insurers, it is less satisfactory to sellers and buyers of real estate." COLEMAN, *IMPACT OF GOVERNMENT ON REAL ESTATE FINANCE IN THE UNITED STATES* 4 (1950). Likewise it has been pointed out that "the public or that portion of the public which owns and deals in real property is becoming increasingly impatient at this cost, and these delays, and with the apparent inability of the members of the bar to afford relief in improved practices and procedures." Bicknell, *Standards of Title Examination and Curative Acts to Supplement Such Standards*, 15 S. D. B. J. 13, 13-14 (1947). In a neighboring common law jurisdiction a leading exponent of land law reform, after setting out many of the deficiencies of the traditional system of transferring land, has said, "... I have been led to inquire why it is that real estate is burdened with a method of transfer so costly, dilatory, cumbersome and uncertain, as compared with other kinds of property. That question has been asked in England, in every British colony, in every state of the neighboring Republic, in fact wherever the English Law prevails, and has failed to elicit a satisfactory answer. In default of other reason, in view of the antiquity of the system, and the immense amount of learned labor bestowed upon it, the conclusion generally accepted was that it must be one of the natural and unavoidable evils of life that had to be patiently endured; as inevitable as

interested observers that conventional procedures, if left unmodified, will soon break down of their own weight. In the course of the last several decades we have been brought to an ever-increasing awareness that some reform is imperative and the failure to translate this dissatisfaction into effective action has produced a steadily deepening crisis. The crux of this crisis is whether the traditional order may be amended to allow the minimum efficiency demanded by society or whether it must be swept aside in toto in favor of some radical innovation. In either event the question will rise as to the role of the legal practitioner in the transfer process. Any solution of these problems will not only have considerable economic and social significance² to the public at large but will vitally effect the financial status of the bar, as, outside the larger

the flow of time, or the tides, or the payment of taxes. Modern inquiry, which has irreverently laid bare so many time honored delusions, refuses to accept this theory, claiming that the system is of human invention, a relic of feudal and unenlightened times, and bears the impress of the comparatively absurd practices of those days. High legal authorities now admit that the system is indefensible. As well might we imitate the social customs of centuries ago, instead of rejoicing in the superior civilization, culture and refinement of the present day." J. Herbert Mason, quoted in THOM, *THE CANADIAN TORRENS SYSTEM* 10-11 (1912). It has been suggested that "This backwardness of the various states in this country in devising a more inexpensive and expeditious system is all the more surprising when it is remembered that this country has reduced the price of cars, radios and other luxuries and essentials to a minimum, has provided the most economic and expeditious method of transportation, communication and business technique and in practically all other ways is the most progressive of all nations." Russell and Bridewell, *supra*, at p. 136. Cf. Sir Frederick Pollock's statement that the English conveyance system in the 19th century would have been called intolerable "but for the fact that landowners have so long tolerated it." LAND LAWS 105 (2d ed. 1887).

2. No accurate information is available as to the cost of land transfers. The best available estimates in the case of individual transactions are non-conclusive. See generally, POWELL, *REGISTRATION OF TITLE TO LAND IN THE STATE OF NEW YORK* (1938). There have been numerous "guesstimates" as to the cost in gross. For example, see LAND TITLE REGISTRATION BY CERTIFICATE (Federal Farm Loan Bureau) 40-41 (1918); Bicknell, *Title Practices and the Use of Standards for Title Examination*, 14 S. D. B. J. 13 (1945); Fairchild, *Economic Aspects of Land Titles*, 22 CORN. L. Q. 229 (1937). None of them appear to be based upon anything more than conjecture. Some general idea of the magnitude of the problem can be obtained, however, when we remember that the total outstanding real estate mortgage indebtedness in the United States in 1952 was \$1.9 billion dollars. Bonnell and Gorman, *Changes in Public and Private Debts*, 33 SURVEY OF CURRENT BUSINESS 13 (Sept. 1953). One investigator of considerable experience has estimated recently that the legal costs attendant upon the transfer of urban residential property is between two and three per cent of the purchase price. COLEMAN, *op. cit.* n. 1, p. 4. It is probable that costs in the case of urban non-residential property are somewhat lower than this figure and those in the case of farm property somewhat higher. If we accept the estimate made as typical of all transactions the legal costs attendant upon the financing of existing mortgages was between 1.6 and 2.5 billion dollars. This does not take into consideration the cost of non-mortgage transfers, the cost of transfer of equities in excess of the amount of the contemporaneous mortgage nor the indirect cost of maintaining the various institutions dependent upon the present conveyancing system. The social effects of the restrictions upon land transfers occasioned by high costs can only be conjectured.

metropolitan areas, a major share of professional income has generally been derived from title practice.³

The most important criticisms of the existing system of conveyancing are not centered upon the rules of law governing the formal transfer transaction but upon the operational requirements created by other apparently disassociated legal norms.

Technically all that is required to effect a conveyance *inter vivos* is the delivery to the grantee of a deed having requirements of so minimal a nature as generally to permit the employment of printed forms. These forms must be completed by the insertion of a description of the property, the names of the parties and the like but the process is so stereotyped that in most offices it is carried out by clerical help. The cause of the principal delay, expense and uncertainty in title practice is the preliminary determination as to whether the grantor is capable of conveying the interest which he has agreed to sell.⁴ Normally the requisite "proof" is obtained by an examination of the public records, or an abstract thereof, for evidence of transactions which have in any way effected the title since its inception. Although the completion of this process in no way effects the validity of the conveyance it is an act of prudence which no reasonable purchaser will forego. A properly conducted search will carry the chain of title back to the state, or at least for a period in excess of 60 years, and must extend through innumerable sets of records.⁵ The inordinate volume of these records, their primitive arrangement and indexing and the non-conclusive character of the transactions which they purport to evidence make this search excessively burdensome, costly and uncertain. Moreover, the examination must be repeated upon each subsequent transfer.⁶ The opinion of one examiner as to the legal effect of

3. Bicknell, *supra* n. 1, p. 14; see Hoyt, *An Outsider Views His Former Industry*, 22 TITLE NEWS, No. 1, 9 (1942).

4. Report of the Committee on Acceptable Title to Real Property, PROC. A. B. A. SEC. OF REAL PROP. PROB. & TRUST L. 43 (1953).

5. As an extreme example of the proliferation of records, in one community it is necessary to search through 14 different offices to obtain tax information alone. Cushman, *Torrens Titles and Title Insurance*, 85 U. OF PA. L. REV. 589, 611 (1937), and it has been said of the records offices that, "These offices are so numerous and so scattered that the usual examination of title cannot possibly cover them all." LAND TITLE LAW OF THE STATE OF CALIFORNIA, p. 262.

6. One of the paradoxes of modern title practice in areas where commercial abstracts are employed is that, on each successive transfer, the abstract need merely be brought up to date, whereas all earlier attorneys' certificates as to the sufficiency of the abstract are ignored and a complete reexamination *de novo* takes place. The justification for re-examination is that the earlier attorneys' certificates do not "run with the land," but it must be kept in mind that the same is true of the certificates of earlier abstractors.

the record before him and the assumptions which he has made as to the facts supporting the record are not binding upon a subsequent examiner of the same title⁷ and, in any event, the opinion of title is given to the examiner's client personally and does not run with the land. All major efforts at reform have, of necessity, therefore, centered upon devices which will eliminate the need for extended search or which will reduce its burdens to tolerable proportions.

SUGGESTED REFORMS

In general, proposals for the alteration of existing practices fall into three major categories. The most sweeping of the suggested reforms is the elimination of the recording system in favor of the system of registered titles. The essential element of a registered title is that it is conclusively established by the state in a given person. This fact is entered in an official register. The title is thereafter indefeasible, without reference to any antecedent transaction, and new interests in the same land can be created only by additional notations in the register. Normally all claims against a particular tract are entered on a single page and it is possible to determine the exact status of all outstanding rights by an examination of that sheet alone. This system prevails throughout most of the British Empire⁸ and possesses obvious merits. However, it has never been able to attract sufficient popular support to ensure its adoption in a workable form in this country except in a few limited areas.⁹

Of more significance has been the increasing use of title insurance.¹⁰ Title insurance companies are of two general kinds. What may be called

7. For a detailed analysis of the title examination process, see Payne, *Increasing Land Marketability Through Uniform Title Standards*, 39 VA. L. REV. 1 (1953).

8. HOGG, *THE AUSTRALIAN TORRENS SYSTEM* (1905); HOGG, *REGISTRATION OF TITLE TO LAND THROUGHOUT THE EMPIRE* (1920); KERR, *THE PRINCIPLES OF THE AUSTRALIAN LAND TITLES (TORRENS) SYSTEM* (1927). In England, at the present time, the system of registered title, created by a series of acts culminating in the Land Registration Act of 1925, 15 GEO. V, c. 21, is applicable on a compulsory basis only to certain named localities in the London metropolitan area. REPORT OF THE LORD CHANCELLOR ON H. M. LAND REGISTRY, 1952-53, p. 1. For a description of similar systems prevailing on the Continent of Europe, see BRICKDALE, *METHODS OF LAND TRANSFER* (1914); DUMAS, *REGISTERING TITLE TO LAND* (1900); Olmstead, *Land Transfer Reform*, 13 A.B.A. REP. 265 (1890); Brickdale, *Land Transfer by Registration of Title in Germany and Austria-Hungary*, 31 AM. L. REV. 827 (1897); Schley, *The Australian System of Land Transfer*, 32 CENT. L. J. 160 (1891); DOWSON AND SHEPPARD, *LAND REGISTRATION* (1925).

9. BASYE, *op. cit.* n. 1, pp. x, 547, and authorities cited in Payne, *supra*, n. 7, at n. 3.

10. Title insurance had its origin in Philadelphia in 1875 with the incorporation of the Real Estate Title Insurance Company, FOWLER, *HISTORY OF INSURANCE IN*

lawyer-title companies are operated on a statewide, regional or national basis. They make no examination of the records and issue policies on the application of practicing attorneys, who carry out their own independent search. The policy, when issued, is in support of, rather than in lieu of, the attorney's certificate. Extra protection is afforded the assured at considerable extra cost but no fundamental alteration is made in pre-existing procedures.¹¹ On the other hand, what may be called title-plant companies operate on a local basis.¹² They maintain efficiently indexed duplicate sets of all public records affecting land titles within the com-

PHILADELPHIA FOR TWO CENTURIES pp. 859-60; Cowrick, *Origin and Growth of Title Insurance in Philadelphia*, 5 TITLE NEWS, No. 11, 14 (1925). (For a concise history of title insurance prior to 1937, see GAGE, LAND TITLE ASSURING AGENCIES, CHAP. IX.) Prior to World War I it spread to New York, Chicago, Minneapolis, San Francisco and Los Angeles but its growth was slow until the 1920's. In that decade a rapid expansion occurred but a violent check to such development was occasioned by the Depression of the early thirties. The most serious set back was the loss of public confidence attendant upon the failure of the New York title and mortgage guarantee companies. POWELL, *op. cit.*, n. 2, pp. 8 *et seq.* Although the title insurance departments of these companies were highly profitable, ALGER, REPORT TO HIS EXCELLANCY, GOV. LEHMAN, p. 9 (1934); POWELL, *op. cit.*, no. 2, p. 7; GAGE, *supra* pp. 118-9, and claims of title guarantee certificate holders were so insubstantial as to be virtually ignored. VAN SCHAIK, THE ADMINISTRATION OF THE DELINQUENT TITLE AND MORTGAGE GUARANTY COMPANIES BY NEW YORK INSURANCE DEPARTMENT (1935); Rodwin, *Reorganization of Guaranteed Mortgages under Sec. 77B*, 70 U. S. L. REV. 245 (1936); Note, *Reorganization of Unguaranteed Mortgage Investments in the State Courts*, 34 COL. L. REV. 706 (1934); Note, *New York Guaranteed Mortgages: The Second Phase*, 35 COL. L. REV. 874 (1935); Cramp, *Guaranteed Mortgage Companies In Review—A Program For the Future*, N.Y.U. CONTEMP. LAW PAM. SER. 4, No. 6 (1941), the public understandably failed to distinguish between the two types of enterprises. GAGE, *supra* pp. 118-9. This was particularly true because only accrued claims could be proved in bankruptcy, all other protection being eliminated. Deneen, *Increased Protection to Holders of Title Insurance Policies*, 17 N. Y. STATE BAR BULL. 239 (1945). (For a non-technical description of the rise and fall of the New York mortgage guarantee companies, see Posner, *The Lesson of Guaranteed Mortgage Certificates*, 26 HARV. BUS. REV. 560 (1948).) In 1937 Professor Gage felt warranted in saying that title insurance had reached its zenith in 1930, GAGE, *supra* p. 85. However, this statement, if meant as a prophecy, failed to materialize and title insurance in recent years has continued a vigorous growth.

11. Conceivably lawyer-title company insurance might be employed to eliminate the cost of repeated reexamination of the same title. Having once issued a policy, the company could demand, on subsequent application for insurance covering the same title, merely that the attorney bring the examination up to date. No such arrangement has in practice proved of material benefit because of the refusal of examining attorneys and title companies to reduce their fees substantially on reissued policies. The attitude of both may perhaps be justified on grounds that most title losses are the result of transactions of recent date (see authorities cited in PAYNE, *supra* n. 7, at n. 9) and would most frequently arise between initial and subsequent examination. It should be remembered that the lawyer-title insurance company system is essentially wasteful in that it involves two guarantors, each compensated on the basis of risk assumed rather than that of work done.

12. Some companies operate simultaneously as title-plant and lawyer-title companies, issuing policies based on their own records for a particular area and policies based on lawyers' certificates elsewhere.

munity and carry out examinations by members of their own staffs. The policies which they issue are a substitute for an attorney's certificate and the employment of a title-plant company has the effect of eliminating the practicing attorney from the title examination process. Such companies are generally monopolistic or quasi-monopolistic and have perpetual existence. When a previously insured title is presented to them for a second time they need merely bring the search up-to-date. This system has the merit of eliminating the most wasteful feature of traditional title practice, the repeated reexamination of the same records, and it may be argued with some cogency that the employment of title-plant insurance is the only means by which the recording system can continue to be a workable device. This conclusion finds support in the fact that in some states this form of insurance has driven out virtually all other modes of title investigation, that in most large metropolitan areas it is at least the dominant method and that this trend is steadily increasing.¹³ Despite

13. REPORT OF THE COMMITTEE ON ACCEPTABLE TITLES TO REAL PROPERTY, *supra*, n. 4 Appendix A; GAGE, *op. cit.* n. 10, p. 156; Bicknell, *supra*, n. 1; Bicknell, *supra*, n. 2, Russell and Bridewell, *supra*, n. 1; Aigler, *Clearance of Land Titles—Statutory Steps*, *supra* n. 1; Aigler, *Land Title Problems in Land Transfers*, *supra* n. 1, Cushman, *supra* n. 5; cf. Leader, *What is to be Left of Your Law Practice in 1975*, 12 ALA. LAW. 304 (1951). Although the underlying reason for the spread of title insurance is the defects in the recording system several other factors have been of importance. During the last twenty years the financing of residential property has in large part been effected by government insured mortgages. Title insurance is generally required in such case. REPORT OF THE COMMITTEE ON ACCEPTABLE TITLE, *supra* n. 4, Appendix A. In any event, title insurance increases the marketability of mortgages and may be insisted upon by financial institutions engaged in brokerage or rediscounting operations. Guiliani, *Some Considerations*, 30 TITLE NEWS, No. 3, 19 (1951). Finally, the very vigorous promotional campaign carried out by the title insurance companies (who are unburdened of the professional inhibitions against soliciting business) and the increasing public confidence in insurance per se have undoubtedly been effective forces in the spread of the movement. The large literature devoted to accounts of the techniques employed by title companies in acquiring business is probably best illustrated by Ford, *How California Went Title Insurance Over Night*, 12 TITLE NEWS, No. 1, 13 (1932); Larue, *How California Went Title Insurance Over Night*, 12 TITLE NEWS, No. 1, 11 (1932); Hall, *How to Sell Title Insurance*, 29 TITLE NEWS 3, No. 8, (1950). Upon occasion title insurance proponents have been known to state their aims with great candor. In 1926 Donzel Stoney, a one-time president of the American Title Association and then chairman of the title insurance section, stated: "We all know the goal which the title insurance section is trying to reach is to eliminate from the title business all the general practitioners of law. Let's get the money that they are getting and save the public from them. Then hire some good attorneys, pay them by the year and take the profits which they otherwise would make." *Proc. American Title Assn.*, 5 TITLE NEWS, No. 10, 150 (1926). A somewhat more moderate commentator, in setting out the work which should be performed by the title insurance company, states: "The ideal services would be to take entire charge of the transaction for both parties, examine the records, examine the premises, make surveys if desired, close the transaction, and issue a complete policy without exceptions other than actually existing defects; for after all, what the average buyer wants is the land itself and if by any chance he should not get it, complete indemnity. It should not be necessary to add to the expense of a cash sale

this widespread acceptance, a general system of transferring land on the basis of title-plant insurance certificates entails several objections. In many cases the policies issued are of such limited coverage as to be of scant value other than to assure that thorough search has been carried out.¹⁴ A more important objection is the inherent wastefulness of maintaining two sets of land records, the one public, the other private. Although theoretically the elimination of the necessity of reexamination of the same records should greatly reduce the cost of title search, the fees actually charged for reissued policies are little less than those for initial coverage and policies are not permitted to run with the land. The excuse given is the large continuing expense incurred in maintaining title-plants, an expense which goes on unabated without reference to the

or mortgage by calling in a lawyer." (emphasis added) Kidd, *The Applicability of the Torrens Act in California*, 7 CALIF. L. REV. 75 (1919). In two state co-operative title insurance companies have been formed by the bar associations. Atkins, *Lawyers' Title Guaranty Fund*, 21 FLA. L. J. 215 (1947); Carter, *Lawyers' Title Guaranty Fund*, 22 FLA. L. J. 171 (1948); *Prospectus For Formation of An Ohio Bar Title Insurance Company*, Program, Ohio State Bar Assn. Annual Meeting, p. 72 (1952). Despite these efforts there is apparently limited understanding on the part of the bar either as to the significance of the title insurance movement or the reasons for its development. However, as early as 1938 a committee of the American Bar Association reported that, "Technical requirements on the part of examining attorneys are quite as responsible for the decline in the use of the abstract-lawyer method of closing real estate transactions as any other cause." *Report of the Committee on Standards for Abstracts of Title*, PROC. A. B. A. SEC. OF REAL PROP. PROB. & TRUST 56, 57 (1938). In 1951 the Committee on Future Development of Real Property Law of the Section of Real Property, Probate and Trust Law reported significantly: "Some of the members of the committee are of the opinion that in parts of the United States, and particularly in urban centers, there is a strong trend in the direction of monopoly of ordinary real estate transactions by institutions or individuals not licensed to practice law. . . . Basically real property law remains as it was at the turn of the century. That there has been improvement no one can deny, but real property law in this country has undergone no such sweeping reforms as have taken place in England. It is noteworthy also that real property law in the United States has lagged far behind commercial law in the field of reform. For one reason or another real property lawyers have shown a marked lack of enthusiasm for uniform laws or for basic changes in the recording systems. The law in all its aspects continues to be tremendously complex. The most important changes, and the most significant trends, have to do with the administration of real property law and of real estate transaction by lay agencies, often to the almost total exclusion of the lawyers." (emphasis added) PROC. A. B. A. SEC. OF REAL PROP. PROB. & TRUST L. 45 (1951). See also, *Report of the Special Committee of the Hennepin County Bar Association to Study Title Insurance*, 19 MINN. L. REV. 354 (1935).

14. *Report of the Committee on Standards for Title Insurance*, PROC. A. B. A. SEC. OF REAL PROP., PROB. & TRUST L. 61, 62 (1938); GAGE, *supra*, n. 10, Chap. XI; Clayton, *The Standardization of Exceptions in Title Policies*, 17 TITLE NEWS, No. 2, 5 (1937); Cline, *What The Title Policy Should Contain*, 21 LAWYER AND BANKER 30 (1928); Russell and Bridewell, *supra* n. 1; Walsh, Book Review, 16 N. Y. U. L. Q. 510 (1939). Despite a general tendency to widen coverage in recent years there continues a vigorous opposition on the part of some companies to giving even marketability coverage. O'Melveny, *Insuring Marketability*, 7 TITLE NEWS, No. 3, 10 (1928); Fisher, *What Is Title Insurance*, 21 OKLA. BAR J. 275 (1950); REEVES, *GUARANTEEING MARKETABILITY OF TITLES TO REAL ESTATE* (1951).

kind of policies issued.¹⁵ Finally, title-plant insurance creates a powerful vested interest in the status quo. The *raison d'être* of title insurance is the inefficiency of land transfers as they have traditionally been effected and it is not unfair to assume that title companies will resist any reform sufficient to make their business unnecessary.¹⁶

A third line of attack has been by way of the statutory modification in detail of traditional legal doctrine. These enactments have been chiefly designed to cut off stale claims and to prevent the long continued potential assertion of such claims from effecting the marketability of titles. While they vary greatly in form and content, they have been classified under four principal headings: (1) those relating to formal evidence of title; (2) those altering the period of limitation of actions; (3) curative acts; and (4) marketable title statutes.¹⁷ Despite the fact that the movement which has produced these enactments has been uncoordinated, desultory and unsystematic and that no single jurisdiction has put into force all of the legislation necessary to obtain even the limited objectives of proponents of these reforms, the overall pattern which has appeared has encouraged the belief that they may offer a solution of the most pressing problems faced by conveyancers and that the enactment of a comprehensive program along these lines will make the recording acts workable. Admitting the great usefulness of these statutes in eliminating many of the technical harassments of title practice, it may be doubted if these predictions are justified. The most comprehensive and effective enactments to date are those based upon the Michigan Marketable Title Act.¹⁸ This statute bars the assertion of all non-possessory claims against land (with certain enumerated exceptions) unless they have been recorded within 40 years prior to the passage of title and declares a record-

15. Henley, *Theory and Practice In Establishing Title Insurance Rate Schedules*, 5 TITLE NEWS, No. 10, 130 (1926).

16. One is confirmed in this conviction by the ferocious and unremitting attacks made upon the Torrens system by title companies.

17. For a complete history of the statutory reform movement, see BAYE, *op. cit.* n. 1. More abbreviated discussions will be found in Baye, *Streamlining Conveyancing Procedure*, 47 MICH. L. REV. 935, 1097 (1949); Spies, *A Critique of Conveyancing*, 38 VA. L. REV. 245 (1952) and RECORD LAND TITLES (1948) (Kan. Leg. Council Pub. No. 155). Legislative efforts have been supplemented by uniform title standards adopted by bar associations. See generally, Payne, *supra* n. 7.

With reference to Missouri, see: Eckhardt, *Proposed Missouri Marketable Title Act*, 9 JOUR. MO. BAR 175-178 (Sept. 1953) [discussion and text of proposed act]; and *Title Examination Standards of the Missouri Bar*, May 1953 Revision, with Comments, 9 JOUR. MO. BAR 179-188 (Sept. 1953).

18. MICH. COMP. LAWS § 565.101-109 (1948).

ed title of 40 years duration to be marketable. Questions of constitutionality aside,¹⁹ the effect of this legislation has been only a partial alleviation of the difficulties facing the title examiner. If the recording system is to be made workable it is necessary that the period of title search be radically reduced. In the case of occupied land this period should not exceed twenty years²⁰ and ideally might be further shortened.

THE PROBLEM OF SPECIFIC INTERESTS

The underlying reason for the conventional prolonged title search is the legal norms permitting the indefinite duration of interests in land which, because of their non-possessory character, are unaffected by prescription or statutes of limitation.²¹ Many ordinary common law

19. Prof. Aigler and Mr. Potter have made a strong defense of the constitutionality of these acts. *Constitutionality of Marketable Title Acts*, 50 MICH. L. REV. 185 (1951); *Marketable Title Acts and Decisions*, 31 TITLE NEWS, No. 11, 109, 111-13 (1952). However, until the Supreme Court of the United States voices its opinion the answer of title attorneys must be simply "not proved." See *Report of the Committee on Acceptable Title to Real Property*, *supra* n. 4, p. 46. Some of the difficulties arising from reliance upon short term abstracts in marketable title act jurisdictions have been brought out forcibly, if inartistically, in Habert, *The Need for a Complete Abstract of Title*, 31 TITLE NEWS, No. 9, 3 (1952).

20. In England proof of title for thirty years is normally required under the Real Property Act of 1925, 15 GEO. V, c. 20, Sec. 44. However this period is considered by many to be excessive and there is much feeling that it should be reduced to twenty years. See, Payne, *supra*, n. 7, at n. 9.

21. The English, through long experience, learned that simplification of titles must precede simplification of the transfer process. FIRST REPORT OF THE REGISTRATION AND CONVEYANCING COMMISSION 36 (1850); REPORT OF THE SELECT COMMITTEE ON LAW OF TITLE AND TRANSFER vi (1879); SECOND REPORT OF THE ROYAL COMMISSION ON LAND TRANSFER ACTS 49 (1911); FOURTH REPORT OF THE COMMITTEE DEALING WITH THE LAW AND PRACTICE RELATING TO THE ACQUISITION AND VALUATION OF LAND FOR PUBLIC PURPOSES 9 (1919); Holdsworth, *The Reform of The Land Law*, 42 L. Q. R. 158, 171-2, 178 (1926); SCRUTTON, LAND IN FETTERS 149-150 (1886); DOWSON AND SHEPPARD, LAND REGISTRATION 43 (1952); Topham, *The Law of Property Act, 1925*, 79, SOL. J. 772, 791 (1935); Kay, *Free Trade in Land*, Letter VII, p. 78 (1879); UNDERHILL, FREEDOM OF LAND 18 (2d ed. 1882); MORGAN, LAND LAW REFORM 15 (1880). This was also true on the continent of Europe, Rheinstein, *Some Fundamental Differences in Real Property Ideas of the Civil Law and the Common Law*, 3 U. OF CHI L. REV. 624, 625 (1936). If it seems that disproportionate reliance is placed upon English experience it should be remembered that in England the study of conveyancing procedures has been going on for more than a century, whereas in this country our attention, outside the abortive Torrens controversy, has been largely centered upon conveyancing law. Some discrimination is necessary in studying the English statutes. In part they represent an ad hoc attack upon specific problems raised by the strict settlement and much of the detail of these statutes is irrelevant to experience in this country. The underlying theories upon which this legislation rests, however, are entirely applicable to conditions on this side of the water. It should be kept in mind that support of such theories does not entail support of all of the mechanics by which they have been put into practice. Although there have been occasional supporters in this country of the English reforms (see, for example, Aigler, *Title Problems in Land, Transfers*, *supra* n. 1, at p. 216) the general attitude has been that of indifference or hostility.

interests take affect only after the expiration of a minority plus a life or lives in being, a period of indefinite duration but having certain practical limits. However, some non-possessory interests may continue to affect the legal title to land in perpetuity. The potential existence of such interests requires search back to the state in every case if the buyer of land is to be given complete protection. Where such a prolonged search is no longer possible or feasible the examiner must go back for so long a time as to allow the deficiencies of human memory to give practical security (though it is admittedly impossible to set the limits to such a period on the basis of any rational criteria) and as a consequence the risk of loss arising from short term abstracts is merely thrown on the shoulders of the purchaser of the land.²² As the duration of search is governed by the potential duration of the most attenuated interests recognized by law it would be to the theoretical advantage of the conveyancer if all interests other than the unencumbered fee simple absolute were abolished. However, an unavoidable conflict arises between the need for title security and the undoubted social usefulness of many of the non-possessory interests themselves. For example, the recognition of easements increases the effective utilization of land, mortgages are a recognized credit device of high economic and social value and the system of tax liens is a standard fiscal device of local governments. It should be immediately apparent, however, that not all such interests have the same characteristics and usefulness and that any acceptable resolution of the conflict just referred

This attitude has been justified on occasions on the ground that conditions in the two countries are dissimilar. *Report of the Committee on Uniform Estate Act*, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS OF UNIFORM STATE LAWS 279 (1933); Bordwell, *English Property Reform and Its American Aspects*, 37 YALE L. J. 1, 179 (1927). However, it is suspected that the real reason is the excessive volume and technicality of the English statutes and the lack of availability of the reports of Royal Commissions and Parliamentary Committee necessary to make them intelligible. In this essay the English reforms are referred to only in their simplest form in order that their essential nature may not be obscured by detail made necessary by the system of strict settlement.

22. The standard horror story for title examiners is Crocker, *History of a Title*, 10 AM. L. REV. 60 (1875), reprinted 22 MINN. L. REV. 129 (1937). It should be read by all those having the impression that limited periods of search should be adopted prior to the statutory limitation of non-possessory interests in land. Uniform title standards adopted by the state bar associations in Connecticut and Ohio limiting the period of search to 60 years and 65 years respectively, *Connecticut Title Standards* No. 1; *Ohio Title Standards* No. 2.2, can be criticized on this ground. The proposal to have abstracts extend back to a government grant "or from a date so remote that any antecedent defect in title must have been cured by lapse of time." A.L.I. Restatement of Sales of Land, Tent. Draft No. 1 § 25 (1935) is subject to similar criticism. Lawyer-title insurance companies which demand a search for only a limited period, say 60 years, can defend the practice on the ground that they are taking only a business man's risk and the assured is given protection.

to must take these variations into account. The primary deficiency of the Michigan-type statutes is that they are an oversimplified attack upon an inherently complicated problem in that they make no distinction in their treatment of the several kinds of interests in land. At best these acts represent an unsatisfactory compromise, on the one hand allowing some interests to continue to clog the title process for an unwarranted time and on the other creating unwise limitations upon rights admittedly beneficial. Because of the many exceptions which these statutes allow they have not been successful in limiting the period of search even to 40 years²³ and, if they had been able to create such a limitation, it would not be sufficiently short. On the other hand, they will probably have an adverse effect upon some legitimate rights. That such statutes, despite their faults, are a step in the right direction and have had a beneficial effect no one can deny. That they are a final solution of the title examination problem is, however, far from assured and it is apparent that a more comprehensive and sophisticated approach must be adopted.

As we have already seen, any adequate reform of the present system of conveyancing must be predicated upon the assumption that the primary end sought is that search of title, so far as the principal land records are concerned, be limited to a short period in gross. This can only be accomplished by limiting the duration of non-possessory interests in land. At the same time it may be desirable to continue to give recognition to a number of interests which have a potential duration considerably in excess of the maximum period of search which the law should require. If this conflict is to be resolved without revolutionary changes in the system of permissible property rights there must be a detailed analysis of the kinds of non-possessory interests in land and of the legal devices which may be available for the purpose of preventing their adverse effect upon the conveyancing process. The variety of interests involved prevents the solution of the problem by any one agent of reform and the attack must be carried out by the employment of more than a single

23. According to reports there has been some uncertainty on the part of the Michigan bar as to the necessary duration of abstracts subsequent to this statute. In Calhoun County a 50 year abstract is required, *Calhoun County Bar Association Uniform Standards for Examining Abstracts* 1 (2) (1951); and in Muskegon County an abstract of something more than 40 years is acceptable, *Michigan Land Title Examination Standards Prepared and Adopted by Muskegon County Bar Association* 1.15 (1953). A committee of Michigan State Bar currently has under study the adoption of standards to be uniform throughout the state. In other states which have adopted similar legislation there seems to have been no such limitation upon the period of search.

weapon. Of the claims which may be made against land by a person not in possession, some can properly be done away with entirely or can be limited to a short period in gross. Others, having greater utility and requiring greater duration, may still be insulated from the conveyancing process by the employment of the trust device. Finally, there remains a residuum of interests which should be allowed to affect the title for a period in excess of that set for ordinary search. In some cases it may be feasible to require that the instruments creating these interests be re-recorded at periodic intervals if they are to continue to give legal notice. Where this is permitted it should be required that the instruments be indexed as though they were a grant from the record owner of the fee at the time of re-recording in order that the instruments may appear in the chain of title within a limited time prior to the date of title examination. In one or two cases re-recording may not be feasible either because, as in the case of restrictive covenants, the number of owners affected is too large, or, as in the case of horizontally divided land, it is necessary to preserve indefinitely a static claim against the surface owner, whoever he may be. The relatively insignificant number of the instruments creating these interests make it practical to create special tract books in which they can be entered rather than in the general land records. Once recorded, these instruments would give notice indefinitely but the slight bulk of the tract books would prevent their examination from giving any inconvenience to the title searcher.

These proposals are based upon well-established practices long employed successfully in common law jurisdictions. The specific limitation upon the duration of interests is too common to require elaboration; the insulation of interests from the conveyancing process has been tried successfully in England; re-recording is required by Michigan-type statutes; and tract books of one kind or another are widely used in this country. The only novelty is the employment of all of these devices systematically and simultaneously in a particular jurisdiction for the purpose of reducing the period of title search to a minimum.

In the class of interests which should be limited to a short period in gross fall judgments, mechanics' liens, taxes, assessments, interests arising from *lis pendens* and so forth. In addition to limiting these interests specifically the full arsenal of devices already referred to²⁴ should be

24. See *BASIE*, *op. cit.* n. 1.

employed to bar potential claims arising from irregularities and defects in judicial and quasi-judicial proceedings or in any purported transfer of interests in land. There is no reason why persons asserting such claims should not be compelled to act seasonally. The present practice of permitting a claimant to rest indefinitely on his oars after recording his claim is the product of a more leisurely day and has no place in a modern world which demands dispatch in the transaction of human affairs. All else aside, it is incompatible with our sense of justice that such delay should occasion enormous expense to others than the direct parties to the transaction. The long continued existence of such claims is a clog upon the entire conveyancing process and should no longer be tolerated. This is true whether the claimant is an individual or the state. It is difficult to convince those accustomed to engage in ordinary business affairs that a person should be allowed to sleep on his rights for twenty years or more before actively asserting them.

Mortgages require special mention. The tendency in recent years has been to increase the volume of long-term mortgage indebtedness and this trend is considered economically and socially desirable. Nevertheless, those cases in which the payment of a mortgage is extended beyond twenty years are exceptional. It would not appear that an excessive burden would be imposed upon mortgagors if notice of recorded mortgages were limited to twenty years and if periodic re-recording in the name of the then record owner were required to give the lien validity for a longer period of time.²⁵

Interests which may be sufficiently insulated from the legal title to prevent their having an adverse effect upon the conveyancing process are conventional future interests and co-ownership. The unique Anglo-American system of so-called future interests²⁶ is the most important

25. Statutes permitting the continuation of the lien of a mortgage by endorsement of acknowledgment of partial payment on the original record (for example, see ALA. CODE Tit. 47 § 174 (1940)) are functionally unsound. They prevent ancient mortgages unaccompanied by such a notation from casting a cloud on title but the examiner is still required to check the entire record to determine whether there are in existence ancient mortgage containing such a notation. For a discussion of the efforts made by the Commissioners on Uniform State Laws to deal with this problem, see Bayse, *Streamlining Conveyancing Procedure*, 47 MICH. L. REV. 935, 1097, at 1006 *et seq.* (1949).

26. Included in this phrase are all the conventional future interests except rights of entry and determinable fee, which are treated separately, *post*. A rudimentary system of what may be called future interests prevails in some of the continental European countries, Rheinsteint, *supra*, n. 21.

single source of prolonged non-possessory interests in land. The product of feudal concepts and the intense desire of the English upper classes to perpetuate ownership in the family, it may constitute an unjustified anachronism in a mobile, democratic society where prolonged deadhand control is looked upon with increasing disfavor. Perhaps it should be done away with in toto.²⁷ However, there is no active demand for so radical an innovation and, family feeling aside, the present structure of inheritance tax laws makes the life estate-remainder pattern too profitable to permit its discontinuance if other legal alternatives are available. Provision for the periodic re-recording of these interests is not satisfactory because, if the period is sufficiently reduced to satisfy conveyancers, great hardship may be imposed upon those in whom the interests vest and, in any event, there is a serious constitutional question whether the rights of persons not in esse can be barred in this fashion.²⁸ A more effective way of dealing with this problem is to require that all future interests be placed in trust.²⁹ Adverse possession does not run against the holder of a legal future estate until it becomes possessory but as to an equitable holder possession adverse to the trustee may immediately bar the cestui, even though his estate is a future one.³⁰ However, if the purchaser from the trustee takes title with notice of the terms of the trust it will still be an act of prudence to investigate the course of title for at least a lifetime in order to eliminate the possibility that a trustee has made a conveyance hostile to the interests of the cestui. For this reason the abolition of legal future interests will not be entirely effective unless the trustee is vested with a statutory power of sale. The exercise of such a power would pass the full legal and equitable title in the land to the vendee. The rights of the cestui would thereafter be

27. This proposal is far from modern. The draft of a bill for which the Statutes of Uses was later substituted provided that entails should be abolished "so that all manner of possessions be in state of fee simple from this day forward for ever." IV *HOLDSWORTH, HISTORY OF ENGLISH LAW*, App. III, p. 572. The abolition of all estates except the fee simple has been a theme of reformers since that time. *SCRUTTON, LAND IN FETTERS* 139, 149-50, 159 (1886).

28. See n. 19.

29. This has been accomplished in England by the Real Property Act of 1925, 15 *GEO. V*, c. 20 § 1. Although no reliable data is available it is generally assumed in this country that virtually all substantial future interests are in fact placed in trust. 3 *LAW: A CENTURY OF PROGRESS*, 202-3; *ANNUAL SURVEY OF AMERICAN LAW* 948 (1945). The most serious practical problem raised by such a reform is that it necessitates the repeal of the Statute of Uses. In those states where conveyancing is still dependent upon the Statute it would be necessary to provide other means for transferring title to land.

30. 3 *AMERICAN LAW OF PROPERTY* § 15.12 (1952).

limited to a right against the trustee to account for the purchase price, or, where he had breached the trust in carrying out the sale, to an action against the trustee for damages. The effect of such a provision, substituting a right in personam for one in rem, would assimilate the law of trusts in land to that of trusts in money. It may be objected that some hardship might result from such an alteration in existing law and that, in particular the proper devolution of title to unique property, such as family homesteads, might thereby be obstructed. The increasing monetization of modern thought, the availability of adequate bonding for trustees and the mobility of modern life have reduced the cogency of such arguments, but, in any event, the danger of occasional loss to individuals is more than overbalanced by the enormous saving which the simplification of conveyancing procedures will occasion the public at large.³¹

The system of co-ownership by two or more persons is another major cause of prolonged title search. Where A and B are tenants in common or joint tenants the occupation of A is generally not hostile to B, no matter what the 'apparent indicia of ownership, and an adequate investigation of title must carry the search back far enough to eliminate the possibility that at some remote period the title was divided. This problem can be eliminated by forbidding legal co-ownership entirely and

31. ROYAL COMMISSION ON THE LAND TRANSFER ACT—2ND AND FINAL REPORT 32 (1911). The necessity of a power of sale in the trustee sufficient, as to purchasers, to override the interests of the beneficiary has been repeatedly emphasized by the English land reformers. REPORT OF THE COMMISSIONERS APPOINTED TO CONSIDER THE SUBJECT OF THE REGISTRATION OF TITLE WITH REFERENCE TO SALE AND TRANSFER OF LAND 30 (1857); REPORT OF THE ROYAL COMMISSIONERS APPOINTED TO INQUIRE INTO OPERATION OF THE LAND TRANSFER ACT AND INTO THE PRESENT CONDITION OF THE REGISTRY OF DEEDS FOR THE COUNTY OF MIDDLESEX (1870); Underhill, *The Line of Least Resistance* (app. I, 4th REPORT OF THE ACQUISITION AND VALUATION OF LAND COMMITTEE (1919)); *Memorandum—Law of Property Bill 1921* 3 (1921 PARLIAMENTARY PAPERS, Vol. 29). And such a power was created by the Law of Property Act of 1925, 15 GEO. V, c. 20, § 2. (For a general discussion see, RADCLIFF, *REAL PROPERTY*, Chap. XXXII, p. 273 (2d ed. 1938).) The assumption of Professor Bordwell that "It is unnecessary to make all future interests in land equitable because the need for a trustee is not the same in the case of land as in the case of chattels, and because we lack the English problem of the family settlement," *The Resurrection of Title*, 7 U. OF CHI. L. REV. 470, 477 (see also *Report of Committee on Uniform Estates Act*, *supra*, n. 21, Bordwell, *supra* n. 21) appears to ignore the problem of title search created by the existence of future interests. In studying the English property acts it must constantly be kept in mind that the primary purpose of these acts was to procure the free alienation of settled land. For this reason some of the devices employed (as, for example, the statutory power of sale in the life tenant, Settled Land Act of 1925, 15 GEO. V. c. 18, § 38) are not adaptable to conditions in this country, where the primary problem is to reduce the burden of search created by the recording system. This should not blind us to the intrinsic merit of many other devices suitable for employment here.

requiring that in case of equitable ownership the trustee be given statutory power of sale such as would be demanded in the case of future interests.³²

Those anachronisms known as rights of entry, determinable fees and covenants running with the land, together with their modern blood-brother, the equitable servitude, create one of the most vexing problems faced by the title examiner. They are not affected by the Rule Against Perpetuities and are not estates. They are not and cannot by their nature be affected by adverse possession prior to breach and may be of indefinite duration. When limited in time they have undoubted economic usefulness but when given perpetual existence they are universally condemned as a clog upon the utilization of land. Proposals for the modification of these interests have fallen into three general categories:³³ (1) those to limit the duration of such interests to the period of social usefulness; (2) those to limit the duration of such interests to a period in gross;³⁴ and (3) those to limit the period of notice of recorded instruments. The first of these will give no comfort to the conveyancer as the duration of the interest is still indefinite. The second and third may be effective if the period set is no greater than that contemplated for search. It may be objected, however, that the second alternative unduly limits restrictions of undoubted utility and that the third, if it contemplates the re-recording of instruments, presents the problem as to the method of indexing to be employed. If the name of the original covenantor or grantor is employed it will not ordinarily appear in the chain of title at the time of such re-recording. On the other hand, it would be virtually impossible to index in the name of all of the now affected parties. If such interests are to be permitted to extend beyond a period in gross, therefore the only feasible alternative is to record them in the special tract books already suggested.

In localities where mining interests are important the doctrine of

32. The excessively complicated English system based upon the need to make settled land readily saleable is not applicable in its entirety to conditions in this country. See RADCLIFFE, *op. cit.* n. 31, Chap. XXXVII.

33. Clark, *Limiting Land Restrictions*, 27 A. B. A. J. 737 (1941); UNIFORM ESTATES ACT, § 15. It has been said that if a provision for the removal or modification by court action of restrictions upon property in London had not been incorporated in the Law of Property Act of 1925, 15 GEO. V, c. 20, § 84, "a considerable part of West London would now be practically void of inhabitants . . ." Underhill, *Property*, 51 L. Q. REV. 221, 231 (1935).

34. Such legislation may not have retroactive effect. *Biltmore Village, Inc. v. Royal*, 71 So. 2d 727 (Fla. 1954).

horizontal division of land presents another serious problem to the title examiner.³⁵ Adverse possession of the surface does not run against the separated minerals³⁶ and the separation may have occurred at a remote time. It is a common occurrence for mining companies to acquire large reserve holdings which they leave untouched for years and to require periodic re-recording of their title instruments would impose a large and possibly undue hardship. It is probable that the system of tract books should also be employed for the recording of these instruments.

Rights dependent upon the marital relationship include curtesy, dower, homestead and community rights. The title examiner is not directly concerned with the controversy as to the public policy supporting these interests. Such rights may or may not be an anachronism and it may or may not be advisable to allow one spouse to disinherit the other. What the title examiner objects to is that these interests may continue inchoate for a generation without being subject to statutes of limitation. If the public policy of a community favors the existence of these marital rights a compromise may be reached by requiring the spouse not joined in a conveyance to record a caveat in a tract book within a limited time. Such a system would give protection in the tiny number of cases in which fraud upon marital rights is attempted and at the same time would eliminate a major cause for prolonged search of the principal land records.³⁷

Easements and profits, although non-possessory, are vested and

35. Air space above the ground may also be divided horizontally. See generally, Ball, *The Vertical Extent of Ownership in Land*, 76 U. OF PA. L. REV. 631 (1928); Ball, *The Division Into Horizontal Strata of the Landscape Above the Surface*, 39 YALE L. J. 616 (1930); Watts, *The Conveyance of a Residence Flat*, 1 AUST. L. J. 262 (1928); REEVES, *THE INFLUENCE OF THE METROPOLIS ON THE CONCEPTS RULES AND INSTITUTIONS RELATING TO PROPERTY* 173 *et seq.* (1935); Cf. LEASEHOLD COMMITTEE FINAL REPORT 31 (1950). (For a spectacular application of this principle, see account of the New York Merchandizing Mart, New York Times, Sept. 25, 1953, p. 1) However, division of air space presents little or no practical hazard to the title examiner as the division is generally obvious.

36. *Hooper v. Bankhead & Bankhead*, 171 Ala. 626, 54 So. 549 (1911); *United Fuel Gas Co. v. Dyer*, 185 F. 2d 99 (4th Cir. 1952); Comment, *Adverse Possession of Minerals*, 3 ALA L. REV. 145 (1950).

37. See BASYE, *op. cit.* n. 1, for a review of remedial legislation in the several state. These statutes generally provide that the defrauded spouse must file a caveat in the general land records within a specified time after the conveyance has been made. Acts of this kind are functionally effective to prevent ancient, unasserted defects from effecting title. However, they are entirely insufficient to reduce the period of title search, as the examiner must run down the complete chain of title to determine whether, in fact, such caveats have been filed. This difficulty can only be avoided if the caveats are filed in tract books.

of indefinite duration. They serve a highly useful purpose and there is a strong public policy in favor of their continuation. In most cases, such as roads, power lines, railroads and the like, the use is visible and is of itself notice of a claim of right. Such cases do not present a serious problem to the title examiner. However, certain kinds of easements, notably those for sewers and drains, are not in fact apparent and their potential existence creates a demand for prolonged title search. In these limited cases periodic re-recording or recording in tract books should be required.

Long term leases, as a practical matter, do not present serious difficulties. In most jurisdictions they are infrequently found and, in any event, are made only to responsible persons whose only indicia of ownership is the lease itself, and whose claim of adverse possession would be clearly barred by the payment of rent. Conceivably, if we employ limited title search, an assignee of a lease might take a deed from the assignor or might record a forged deed and later exhibit such deed to a third party as proof of ownership. While this danger seems slight it might be desirable to require the periodic re-recording of long term leases if they are to constitute legal notice.³⁸

If short term examination of title is to be practical it will be necessary to modify two doctrines affecting adverse possession. In the first place both the individual states and the United States, now exempted from the application of statutes of limitation, should be barred by long continued use. That the doctrine of the immunity of the sovereign has outlived its usefulness is gaining widespread recognition³⁹ and, in the case of titles, the protection afforded the state is insufficient to outweigh the expense which the doctrine imposes upon its citizens. So long as adverse possession, no matter how long maintained, does not bar the state it will be necessary to carry titles to their origin in the sovereign. The impracticality of such a procedure is becoming increasingly apparent and it is imperative that we substitute the concept, as in England, that the proponent of title seeks to show merely that he has a better title than anyone else.⁴⁰ No such substitution is proper, however, so long as claims

38. In a few jurisdictions the system of ground rents presents a peculiar problem requiring local solution.

39. As, for example, in the Federal Tort Liability Act.

40. For procedural reasons why this theory developed in England, see III HOLDSWORTH, HISTORY OF ENGLISH LAW, 90-1, 166-8 (1923).

of the state may not be barred by adverse use. In the second place it is necessary to prevent the indefinite prolongation of the period set by statutes of limitation on account of personal disabilities. This problem may be solved in one of two fashions. In England, the creation of legal interests in a person under disability is forbidden and may be created only in trust.⁴¹ In about half of the American states such disabilities may not bar the running of the statute beyond a specified period in gross.⁴²

THE TASK AHEAD

Some of the most important non-possessory interests in land affecting conveyancing have been set out. No effort has been made to present a complete catalogue. That could only be done in relation to the law of a single state. What has been indicated is how these interests can be dealt with so as to prevent them from adversely affecting the title examination process. If adequate reform is to be carried out it must be accomplished within the structure of legal interests existing within a particular jurisdiction and must be designed to limit the duration of *every* interest to a period in gross or must provide for the ascertainment of its existence by reference to records other than the general land books. This is not a task which can be accomplished by bits and pieces. So long as a single interest remains potential the examiner must eliminate the possibility that it may be asserted as a valid claim. Reform, when undertaken, may employ all of the devices which have been here suggested and many others as well; but it must be sweeping and inclusive if it is to be effective at all. That the accomplishment of such a program presents great difficulty cannot be denied. It will require the framing of a considerable volume of complex technical legislation and the steering of such legislation through state legislatures beset on every side by the concentrated attacks of offended special interests determined, if they cannot defeat the proposals, to emasculate them by exceptions. Careful analysis, skillful drafting, and consummate political ability will be required. Nevertheless, effective action must be taken and taken soon if we are not to be saddled in perpetuity with a slow, expensive and uncertain system of conveyancing and if the bar is not to lose its entire

41. RADCLIFFE, *op. cit.* n. 31, 277-9.

42. Such statutes have been passed in almost half the states. BASYE, *op. cit.* n. 1, § 54 n. 3.

title practice. If the task is to be accomplished it will probably be necessary to set up in each of the states commissions empowered to study the problem in its broadest aspects and to draft comprehensive legislation. In addition some national organization, such as the National Conference of Commissioners on Uniform State Laws, should undertake the drafting of model statutes dealing with such universal problems as future interests, co-ownership and the like. In any event, prompt and vigorous action is required. Reform has been too long delayed and the crisis in conveyancing deepens with each passing year.