CHAPTER 4

ENGLISH CONVEYANCING

1 Prefatory

1.1 A conveyance (in this context) is a mode of transferring an interest in property from one person to another; it is also the instrument (as the lawyers call a formal legal writing) whereby that transference is effected. "`Conveyance' includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property except a will."[1] Conveyancing is defined as "the drawing of deeds and other instruments for the transference of property from one person to another"[2] but the actual drawing of the document is only one part of what can be a long and very intricate process.

1.2 Registration of title is essentially a conveyancing device, since its primary purpose is to make the creation and transfer of interests in land simpler and more certain. Therefore if we are to appreciate its advantages we must know something of the conveyancing procedure it is designed to supplement or replace. This procedure varies widely from country to country, but we think that the description of a modern conveyance in England will serve to illustrate what a transaction in land involves. It will also explain the meaning of various words and expressions that should be understood by anybody considering registration of title in an English speaking country. Conveyancing has a formidable jargon of its own which contributes to the mystique surrounding it and makes discussion of it, and so registration of title, difficult for the layman (who inevitably, we fear, will find this chapter heavy going).

1.3 In England there is widespread ignorance of the subject, and few Englishmen would contemplate buying or selling land (a house, being attached to land, is land for this purpose) without the aid of a solicitor. Clearly, if the advantages claimed for registration of title are real, the work required and the responsibility incurred must be greater in conveying 'unregistered' land than when the title is registered; yet there are not many landowners who appreciate the distinction, and solicitors seldom explain it to their clients. In fact many landowners have no idea whether their title is registered or not. This situation is inevitable so long as registered and unregistered land parcels are found side by side as they are in England and Wales.

1.4 There is a wide variety of legal transactions which fall within the generic title of conveyancing, ranging from the simple tenancy agreement, through leases at a rack rent[3], long leases at a ground rent or at a nominal rent plus a premium, grants of casements, mortgages, and many other transactions, to the most common

[1] Law of Property Act 1925 s205(1)(ii)
[2] SOED
[3] The full annual value of the land (see 3.6.6)

of all, the sale and purchase of land. These all give rise to differences in procedure but, for our purposes, we need only consider sale and purchase; from the procedural point of view, it introduces all the factors that we wish to consider. Since the buying of land so often necessitates the borrowing of money, probably on the security of the land itself, we must also explain how this is effected.

2 Sale and purchase of a house

2.1 A common transaction in land in England is the purchase of a house. It is rare for a purchaser to be able to pay the whole of the purchase price out of his own pocket, and so he has to seek a loan, usually from a building society or local authority. It also frequently happens that the person selling the house (the vendor) had to borrow money from a building society when he bought it, and some of this debt is still outstanding. We therefore now propose to describe the various steps which occur when the owner of a freehold dwelling house, mortgaged to a building society, wishes to sell it to a purchaser who proposes to borrow a substantial part of the purchase price from another building society. We are supposing that an estate agent (a professional 'broker' in houses and landed property) has negotiated the sale and different solicitors act for each of the four parties concerned: the vendor, the purchaser, and their respective building societies.

2.2 It should be noted how much of the bargain has been arranged before ever the solicitors come on the scene. Any prospective purchaser must first find what he wants and then make sure that it satisfies his requirements. This is as true of a house, a farm, or land required for any other purpose as it is of a motor-car, a mowing machine, or a suit of clothes. The difference with a house, however, is that its purchase is usually by far the largest and most important business transaction in the lives of ordinary people, and they necessarily have little or no experience of what is involved. It requires special care and knowledge by no means always connected with questions of title. For example, just as the purchaser of a second-hand motor-car may consider it advisable to obtain expert opinion on its mechanical condition, so should the prudent purchaser of a house require a structural survey to assure himself that it is free from hidden defects such as dry-rot, woodworm, unsafe electric wiring, cracked drains, or any of the numerous things that can be wrong in old houses, or even in new ones, perhaps quite unbeknown to the vendor. But though this, like the choice of the house itself, is vitally important to the purchaser and requires professional advice to ensure that the tyro makes no avoidable mistake, it is outside the field of registration of title.

2.3 Indeed by the time solicitors are instructed, all this essential business may have been completed. The purchase price will certainly have been agreed, but the parties will have been advised (probably by the estate agent through whom the transaction is being arranged) to mark any correspondence as being ‘subject to contract'. These magic words indicate that neither the vendor nor the purchaser has yet committed himself to the transaction. Even the payment of a deposit at this stage, having been expressed to be 'subject to contract', is no more than a sign of good faith, and either the vendor or the purchaser is free to withdraw from the

transaction without obligation to the other, in which event the purchaser is entitled to have his deposit returned in full.

2.4 The purchaser may also have applied to the building society of his choice for a loan on the security of the house he proposes to buy. It may be some time before he is notified that his application is successful, as there are many matters which affect this issue; these again, however, are not strictly relevant to our subject. All that need be said here is that whilst the purchaser will obviously not be in a position to commit himself by signing a contract until he has confirmation that his application for a loan has been approved, the procedure leading up to the preparation of the contract can be put in hand by the solicitors acting for the vendor and the purchaser in order to save time. The purchaser's solicitor may himself help in arranging the loan, just as it may be his advice which leads to a structural survey. Indeed the raising of the money required for the purchase may necessitate 'professional advice', particularly when the purchaser is changing houses and must sell the old one (and pay off the mortgagee) in order to help pay for the new one (also to be mortgaged). The purchaser is likely to require advice and assistance not only on 'bridging finance'[1] for this purpose but also on other financial aspects such as estate duty and possibly even capital gains tax. Planning considerations may also require careful investigation; they have introduced problems into conveyancing which, unfortunately, registration of title does little to resolve.

2.5 The legal procedure falls into two main parts: pre-contract and post-contract, the contract for sale being the divide. The purchaser may have made up his mind that the house is just what he wants and that the price is right; he may have raised the money and his surveyor may be completely satisfied that there are no structural snags; but there is still a long way to go before his solicitor will allow him to commit himself and sign the contract for sale which marks the point of no return. Till then there is only a 'gentleman's agreement', which has been defined as an agreement "which experience shows is only too often a transaction in which each side hopes the other will act like a gentleman and neither intends so to act if it is against his material interests".[2] Since not being bound is a two-edged weapon, the vendor also remains in a position to call off the sale, or to accept a different offer, should he be so minded. This is an ugly practice to which the appropriately ugly name of 'gazumping' has been applied. Of course, it is not only the purchaser who may suffer; the 'gentlemanly' vendor who considers that he has accepted a firm offer and on that account rejects a better, may find that the prospective purchaser has changed his mind.

[1] The misprint 'briding finance', in an earlier draft of this chapter, indicates yet another complication when a couple set up house together for the first time.
[2] Sachs J. in Goding v. Frazer [1967] 1 WLR 286

3 The contract for sale

(1) DESCRIPTION OF CONTRACT

3.1 The first step in the legal process is for the vendor's solicitor to provide the purchaser's solicitor with the necessary particulars of the property which is being sold. He does this by preparing a draft contract for sale, using as a basis one of the standard forms of printed contract. Though these differ in detail, they all cover the same salient features fundamental to the contract and divided into three parts: (A) particulars of the property, (B) special conditions, and (C) general conditions. We will consider each of these in turn.

A. Particulars of the property

3.2 If the same property has been sold before, its description is commonly taken from the 'parcels' of the last preceding conveyance. The parcels are that part of a conveyance which describes in precise detail the property affected by it and, once fixed for a particular property, it is unusual to alter the description except to add any right, such as an easement, which may have arisen to burden or benefit the land since the last conveyance. Nevertheless, great care should be taken, and a physical inspection should be made, to make sure that there has been no change of boundary since the property was last described and, indeed, that the description is correct; this duty is sometimes overlooked by solicitors. HM Land Registry finds that something like 12 per cent of deed plans lodged in support of applications for first registration are defective. "It seems remarkable that, in what is usually the most expensive purchase of a lifetime, some purchasers, or their solicitors, neglect to check, or have checked, that what has been bought is accurately recorded by a plan which forms part of the conveyance on which they have no alternative but to rely for title."[1] There is in fact considerable danger in slavishly copying old parcels. "The subject matter of the contract is not words, but land"[2], and it is up to the purchaser to make sure that the description fits what he is buying. Where a parcel is being newly created by subdivision from or amalgamation with other land obviously a new description will be needed, and this of course must be verified.

B. Special conditions

3.3 These provide the essential particulars needed in respect of the transaction which is being effected. They normally cover at least the following points:

(1) *The purchase price*. The statement of the purchase price will include the vendor's stipulation as to the deposit (customarily 10 per cent); if this has not already been paid in full the purchaser will be required to pay it, or the balance due, on or before the day on which the contract is signed.

(2) *The date for completion*, i.e. the date when the whole transaction is to be concluded. Most standard forms of contract make provision for a completion date

[1] B M White 'The Place of Survey in Land Rehistration' 22 *Survey Review* (Jan 1973) 6
[2] See Ferrand Contract and Conveyance 329

four or five weeks after delivery of the abstract of title (described below in paragraph 4.2), to take effect in the absence of any other date fixed in the contract. It is desirable that the date should be settled and included in the contract since certain consequences follow a failure to complete on the stated date.

(3) *The capacity in which the vendor is selling*. The vendor can sell in one of several capacities, such as 'beneficial owner', 'trustee' or 'mortgagee' and this affects what are known as 'covenants for title'.[1] "In former days a deed of conveyance ran to considerable length since it usually contained elaborate covenants for title, the object of which was to render the vendor liable in covenant if a flaw were later discovered in his title...it was usual before 1882 to set out the appropriate undertakings at length, a practice which, while it militated against simplicity and brevity, increased the profits of solicitors, whose remuneration in those days depended upon the length of the documents they prepared."[2] This 'payment by the yard' ceased with the Solicitors Remuneration Act 1881. Also, since 1881, covenants for title need not be expressly stated, but are implied if the appropriate words are used. These covenants vary in extent according to the capacity in which the vendor purports to sell; in the case of a beneficial owner, the most common example, they imply that the vendor has full power to convey, that the purchaser shall have quiet enjoyment of the land, that the land is free from incumbrances other than those to which the contract is expressly made subject, and that the vendor will do such things as are necessary to cure any defect in the conveyance to the purchaser. In the case of a mortgagee, trustee and several other analogous categories, the only implied covenant is that the vendor has not himself incumbered the land.

(4) *The root of title offered*. A good root of title is a document which describes the land sufficiently to identify it, which shows a disposition of the whole legal and equitable interest contracted to be sold, and which contains nothing to throw any doubt on the title."[3] Originally, by the custom of conveyancers, it had to be at least 60 years old; this was reduced to 40 years by the Vendor and Purchaser Act 1874,[4] and then to 30 years by the Law of Property Act 1925.[5] In 1969 it was reduced to 15 years.[6] Thus a conveyance on sale effected not less than 15 years ago is a good root of title and, if any intervening dispositions have been in order, the present purchaser will acquire a sound title. It is obvious that a transaction of the sort constituting a good root will not necessarily be found at the 15 years mark or just beyond it, and a purchaser may have to go back several years more before a good root is found. Even more obviously a registered title is better than any other possible root.

(5) *Whether the sale is with vacant possession or subject to tenancies*. Usually a house is sold 'empty', but if it is subject to one or more tenancies, full particulars of each tenancy (name of tenant, term, rent, etc.) must be disclosed.

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[1] See Law of Property Act 1925 s76
[2] Cheshire 749
[3] M & W 586
[4] s1
[5] s44(1)
[6] Law of Property Act 1969 s23

(6) *Details of any 'restrictive covenants' affecting the property*. Residential properties are often subject to covenants restricting use or development, which may have been imposed by the original vendor on the subdivision of a large private estate, or by those building on it, or by both. If there are any such covenants, they should be set out in full.

(7) *Defects in title*. If the vendor is aware of a defect in his title (e.g. breach of a restrictive covenant) he will refer to this in the contract and exclude the purchaser's right to raise any objection; otherwise the vendor may be denied specific performance if the purchaser refuses to complete.

3.4 The foregoing remarks cover a normal situation, but it should be noted that the vendor has a duty to disclose everything material to the purchase. Subject to this, the terms and conditions of a contract for the sale of land are negotiable, just like any other contract.

C. General conditions

3.5 These regulate a substantial number of matters for which the contract must make provision and which can be standardized and applied to all contracts without alteration. They provide "against dangers undreamt of by the layman",[1] and it would be a bold (and foolhardy) layman who would claim complete understanding, let alone venture any detailed criticism, of, for example, the National Conditions of Sale published by the Solicitors Law Stationery Society Ltd, containing twenty three conditions. At some 25 words to a line and 100 lines to each of two pages, they fall, literally and metaphorically, into the 'small print' part of the contract.

(2) PRELIMINARY INQUIRIES

3.6 Having prepared the draft contract, the vendor's solicitor sends it, in duplicate, to the purchaser's solicitor. The latter sends back 'preliminary inquiries'. This term may surprise the purchaser, in view of all that has happened before this stage is reached, but his solicitor must now obtain definite answers to various questions relating both to the title of the property and also to what can be called its administration. These inquiries deal with such matters as ownership of boundary features, outgoings (i.e. expenditure), provision of public services (such as drainage, electricity, gas, and water), town planning provisions, notices affecting the property, rateable value and so on. The inquiries are sent in duplicate to the vendor's solicitor, who answers them from information provided by his client and from the title deeds, and returns one copy to the purchaser's solicitor.

(3) LOCAL SEARCHES

3.7 At the same time as he makes his preliminary inquiries, the purchaser's solicitor makes searches in the registers of local land charges maintained under the Land Charges Act 1925[2] by local authorities. He uses a standard form of

[1] Stewatt Wallace Land Registration 7
[2] s15

inquiry for the purpose, which he addresses to the responsible authority with a request for an official search. These searches, and ancillary inquiries, are designed to elicit information on matters which can be described as 'public rights', as distinguished from the 'private rights' which may be revealed by a search of the five registers maintained under the Land Charges Act 1925[1] at the Land Registry.[2] Thus the local searches will reveal such things as outstanding charges for making up the road on which the property fronts, prohibitions or restrictions on the use of the land under planning legislation or bylaws, and whether or not the land is designated for compulsory acquisition. Though these matters may not strictly be related to title, they are of course vitally important to the future enjoyment of the land.

3.8 The replies to the preliminary inquiries or the result of the local searches may call for further inquiry and investigation by the purchaser's solicitor, who continues this process until he is satisfied that he has achieved all that he can. He then sends all the papers to the solicitor acting for his client's building society in order to be sure that the position as revealed is acceptable. This is important because, if it is not done before the contract is signed, there could be an objection to some provision (such as the root of title offered) which the purchaser, having accepted and signed the contract, would be prohibited from raising with the vendor.

(4) Exchange Of Contracts

3.9 When all these steps have been taken the purchaser's solicitor makes any amendments to the draft needed in the light of the information obtained, and returns one copy to the vendor's solicitor. There may then follow argument over the amendments, but finally the draft is approved. By this time, if the purchaser's building society has agreed to make a loan to the purchaser, the way is clear for the contract to be 'engrossed'; this means that the vendor's solicitor will have an exact copy of the approved draft typed for signature by his client, and the purchaser's solicitor will do the same for his client. When both vendor and purchaser have signed their respective parts, and the date for completion has been finally agreed and inserted, the two parts are exchanged by the solicitors on either side and the purchaser pays the deposit or the balance of the deposit then due. At this point both parties are committed to the transaction and can only withdraw with all the consequences which flow from a breach of contract.

3.10 The procedure described above may take only a few days to complete, but a normal time is probably about three weeks. It should be noted that, so far, it makes little difference whether the title is registered or not.

4 Investigation of title

4.1 Up to this point the purchaser's solicitor only has the basic particulars of the vendor's title (parcels, root, and restrictive covenants) which have been

[1] s1(1)
[2] See para 4.8 below and 3.17.4

disclosed in the contract; he has not investigated the title and has no knowledge of the details of it. However, the purchaser is protected by the fact that the law implies into the contract an obligation on the part of the vendor to make a good title, which is a title that a purchaser can be required to accept. Indeed at one time an 'open contract' (i.e. a contract which merely specifies the parties, the property and the price, leaving the other terms to be implied by law) could impose upon the vendor a burden of proof which he was unable to fulfil. As a reaction against this position the formal contract for sale went so far in the opposite direction that one commentator paraphrased the vendor as in effect saying to the purchaser: "You have to take the land as I happen to describe it, whether that description be correct or not. With regard to the title deeds and evidence of facts, you must content yourself with such as I happen to have in my possession (which may be none at all); the rest you must search for and pay for their production. The title you must accept or reject just as it happens to be. You are bound to complete the sale on pain of forfeiting your deposit, but I reserve the right to withdraw from the contract at any time."[1] This is the sort of quotation which invites the comment that it was an obvious distortion even at the time it was written and, in any case, is now so out of date as to be misleading. But the fact that a responsible lawyer could write in these terms is indicative of the unsatisfactory nature of the contract for sale, at least at that period of its long evolution. We discuss below the need for a contract when title is registered.

(1) Abstract Of Title

4.2 Within the time stipulated in the contract (usually fourteen days after contracts have been exchanged) the vendor's solicitor is required to deliver to the purchaser's solicitor the 'abstract of title'. The abstract sets out the history of the title. It is a summary of all the documents and a statement of all the events which have affected the title from and including the agreed root of title. Such events are marriages, deaths, probate of wills and so on which the vendor's solicitor must also check. The abstract follows a well settled pattern. To begin with, it needs to be written, or even typed, on that large unmanageable paper contradictorily called brief."[2] An esoteric form of abbreviation is used which is capable of reducing lengthy documents to comparatively few words, but requires an experienced conveyancer to understand it.

4.3 The purchaser's solicitor then investigates the title. He examines the abstract against the original title deeds; in our case these will almost certainly be in the office of the solicitor of the vendor's building society and the purchaser's solicitor will have to go to that office for the purpose. It is possible that all the deeds may not be available there as, for instance, when the property is a plot which has been subdivided from a larger holding, in which case the purchaser's solicitor may have to visit another firm of solicitors in order to inspect the deeds of the larger holding. He may in fact have to visit several other offices. There is usually no difficulty in arranging for the production of the deeds, as it is

[1] Stewatt Wallace *Land Registration* 7 (quoting Mr Eustace Harvey); see also D & S 13
[2] Farrand *Contract and Conveyance* 109

customary to include in a conveyance of part of an estate an undertaking for the safe custody of any deeds retained by the vendor and an acknowledgment of the purchaser's right to their production. They will then be produced on payment of a small fee. Solicitors are frequently prepared to rely upon inspection of examined abstracts of title or certified copies of deeds, that is, abstracts of copies which have been examined against the original deeds and marked as such by the solicitor who examined them.

4.4 Indeed, the advent of efficient copying machines in recent years has reduced the very substantial professional and typing effort of producing an abstract, since the practice has developed of providing an epitome of all the documents of title, in chronological order, giving the date, the parties and a brief description of each document in turn, so that a picture is built up of the devolution of title from the root down to the conveyance to the vendor. This schedule is accompanied by a photocopy of each document referred to.

4.5 Farrand calls this a "new fangled relaxation" and says that his impression is that it "for long meant little or nothing to the majority of conveyancers who, fearing to depart from the beaten track, expected their abstracts to be served up in the traditional way and then complained at the lack of expertise shown…But clearly the practitioner is slowly yet surely being led, and sometimes leading, away from this attitude. For the rest, the race seems to be between the manufacturers of photocopying equipment satisfactorily substantiating their claims to permanency and the spread of compulsory registration of title in which not only does this permanency become irrelevant but the photographic office copies of the register are the recommended fare."[1] (We might add that the slow march of registration of title seems unlikely to win any sort of race.)

(2) REQUISITIONS ON TITLE

4.6 Having investigated the title, the purchaser's solicitor prepares his ‘requisitions on title'; these are questions designed to clear up any defects in the title which may have become apparent in the course of the investigation. The contract usually stipulates that the requisitions must be delivered to the vendor's solicitor within so many days after his delivery of the abstract of title to the purchaser's solicitor, and in this regard time is usually made 'of the essence',[2] so that if requisitions are not delivered in time the vendor and his solicitor are under no obligation to reply to them. The requisitions are important because, if the vendor fails to reply to a reasonable requisition, the purchaser may refuse to accept the title and ultimately be able to rescind the contract and claim damages against the vendor. In our case, the purchaser's solicitor will send the abstract and his draft requisitions to the solicitor acting for the purchaser's building society, who in his turn will raise any requisitions that occur to him; the purchaser's solicitor adds these to the requisitions he has proposed, and sends the final edition, in duplicate, to the vendor's solicitor, who will reply to them, keeping one copy.

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[1] Farrand *Contract and Conveyance* 110

[2] Time is said to be 'of the essence' if failure to keep to the time stipulated will constitute a breach invalidating the contract.

4.7 The purchaser's solicitor may then send back 'observations' on the vendor's 'replies', and so the game proceeds, with the vendor holding the trump card of the 'right to rescind' if the purchaser should persist in any objection to the title which the vendor is unable, or unwilling on 'reasonable grounds'[1] to remedy. "Resting on the excuse that titles to land tend to pass the understanding of mortal vendors, the standard conditions of sale are all constructed with an integral escape route from the contract in case the purchaser, mortal or otherwise, not only perceives that the vendor's title is not what it ought to be but is also tactless enough to point this out."[2] It should be noted that this comment is not some quotation from the murky past, but comes from a standard work on the subject first published in 1968.

(3) SEARCH IN LAND CHARGES REGISTER

4.8 To ascertain whether there are any undisclosed charges of a type which can be registered under the Land Charges Act 1925,[3] the purchaser's solicitor will make a search in the Land Charges Register which is kept in the Land Charges Department of the Land Registry. This time (unlike the local land charges search which lie made in respect of the properly) he searches against the vendor and possibly against other persons whose names appear in the abstract of title. He will also be required to make a search against his own client, in respect of bankruptcy matters only, for the benefit of the building society which proposes to lend money for the purchase.

5 The conveyance

5.1 It is also the responsibility of the purchaser's solicitor to prepare the draft conveyance; he may do this at the same time as he prepares his requisitions, or he may wait until the requisitions have been satisfactorily answered. At whatever stage he drafts it, he will again submit it to the solicitor acting for his client's building society and then to the vendor's solicitor for approval, with a copy for the latter's use. When all requisitions have been satisfactorily answered, and the draft conveyance has been approved, the purchaser's solicitor prepares the engrossment, that is to say, he has a fair copy made of the agreed draft conveyance, so that it is ready for 'execution'. It must be 'signed, sealed and delivered' before it becomes a 'deed'.

5.2 Here again is yet another anachronism in English legal formality. A distinctive seal may have been a sensible and necessary requirement in times when many landowners could not sign their names, but "typically of English law, the rule remains though the *raison d'être* has gone"[4] and nowadays the seal is usually no more than an adhesive wafer. The person executing the deed used to place a forefinger on the wafer and declare: "I deliver this as my act and deed", but since a court boldly held (after due argument) that the omission of these words

[1] What is 'reasonable' is always a fertile field for argument, and we cannot venture into it here.
[2] Farrand *Contract and Conveyance* 122
[3] See 3.17.4
[4] Farrand *Contract and Conveyance* 414

did not invalidate the document, this colourful ceremony has fallen into "innocuous desuetude" (in Churchill's immortal phrase). Nevertheless sealing in some form is still required,[1] though it seems not only absurd but quite wrong in principle to make a duly signed document less effective merely because a small circle of red paper has not been stuck on it. Moreover, signing and sealing alone are not enough to turn an instrument into a deed; it must also be handed over with the intention that it shall operate, and this may be made conditional on the occurrence of some specified event. Until the event occurs the deed is inoperable and is known as an 'escrow'. Thus in England a vendor of land usually executes a conveyance some time before completion of the sale and it remains an escrow in the hands of his solicitor until the latter hands it to the purchaser (or his solicitor) on completion. It should be noted that, if there are covenants by the purchaser, such as to observe certain restrictions, he will execute the conveyance first, but otherwise it is only necessary for the vendor to execute it.

5.3 A lot of progress has been made since the days when Lord Westbury, who was Lord Chancellor at the time when registration of title was introduced in 1862, described title deeds as "difficult to read, impossible to understand and disgusting to touch". The modern form of conveyance is a relatively simple document. It even discloses at once the nature of the document by beginning, 'This Conveyance', 'This Mortgage' and the like, instead of 'This indenture', a cryptic (and indeed false) word when used to begin a deed which is no longer written out twice on a single sheet of parchment and then severed by cutting with an irregular or 'indented' edge, so that the genuineness of the two halves could be shown by fitting them together. The names and addresses of the parties are set out in the conveyance, and this is followed by the 'recitals', which indicate the purpose of the deed and used to include brief references to much of the earlier devolution of title; but the recitals are now often short and do no more than include a reference to the seisin (i.e. freehold possession) of the vendor and the agreement for sale; indeed, except in a few special cases when they are essential, it is not uncommon for them to be omitted entirely. The operative part of the conveyance comes next. This states that in consideration of the purchase money, receipt of which is acknowledged, the vendor conveys unto the purchaser the property (which is described in the words used in the contract for sale) "to hold unto the purchaser in fee simple", subject to such easements and restrictive covenants as have been referred to in the contract. In plain English this means that, having paid the purchase money, the purchaser gets the land but subject to the restrictions agreed in the contract for sale.

5.4 Whilst the draft conveyance is changing hands between the solicitors acting for vendor and purchaser, the solicitor of the purchaser's building society is preparing a draft mortgage for submission to the purchaser's solicitor for approval. This will follow a standard form which will include covenants (i.e. undertakings) by the purchaser to repay the money borrowed, and to insure the premises and keep them in repair, and there will also be many other provisions designed to protect the building society's security. The purchaser has little chance of objecting

[1] Law of Property Act 1925 s52(1)

to any of these covenants, as the building society is in a position to dictate its own terms. The mortgage will of course also include a clause making the property liable to satisfy the loan if it is not repaid in accordance with the agreement. We need not go into details here.

6 Completion

6.1 The scene is now set for the "melodrama called 'completion'"[1]. This event, which is the culmination of the whole process, will in our case take place at the offices of the solicitor of the vendor's building society, and the solicitors for all the parties to the transaction will be present. Without going into the detail of what is obviously a nice exercise in timing, the end product is that the solicitor of the vendor's building society will finish up with the amount of money required to redeem his client's mortgage; the vendor's solicitor will finish up with the balance of the purchase price and an authority addressed to the estate agents from the purchaser's solicitor releasing the deposit to the vendor; the purchaser's solicitor probably finishes up with nothing; and the solicitor of the purchaser's building society finishes up with all the old deeds plus the conveyance to the purchaser and the mortgage by the purchaser to the building society and a receipt on the vendor's mortgage executed by his building society. The vendor moves out, the purchaser moves in, the solicitor of the purchaser's building society stamps those documents which require stamping and delivers all the deeds to his clients, the solicitors are paid their fees, and the files are put away until the next time.

7 Registered title and the contract for sale

7.1 We must now examine the procedure when the title is registered. The parties concerned may not appreciate the distinction between registered and unregistered title but it makes a significant difference to their solicitors.

7.2 Where a title is registered no abstract of title is required; instead an 'office copy' (i.e. an officially made photocopy) of the entries on the register, and an office copy of the filed plan (or an official certificate in respect of the plan) are provided. These prove all that is needed, and so requisitions on title are necessary only in exceptional circumstances. Even the conveyance itself consists of a standard form in which it is necessary only to fill in the title number, the purchase price or consideration, and name and description of the grantee. As Brickdale and Stewart Wallace put it: "A purchaser of land registered with an absolute title...has ordinarily only three things to do: namely, (1) to find out who is the registered proprietor of the land; (2) to obtain a transfer...from that proprietor; and (3) to procure his own registration. If there are charges, incumbrances, notices, cautions, inhibitions, or restrictions registered, they must also be dealt with...Where the parties have confidence in one another, and desire to save expense and delay, there is no difficulty, and practically no risk, in combining the two first of these

[1] Farrand *Contract and Conveyance* 269

operations in one. The vendor produces his land certificate, the purchaser peruses it, and, if satisfied, pays the purchase money at once in exchange for a duly executed instrument of transfer, and the land certificate...In countries where registration of title has prevailed for a long time this is a very usual course of proceeding. Under such circumstances there is seldom any interval between contract and conveyance."[1]

7.3 Curtis and Ruoff, in examining the need for a contract, say that these remarks are still as valid as when they were written (the book first came out in 1899) but go on to point out that at that time planning charges were unknown and local land charges generally were few and usually of no great significance. "Today it is essential to make searches and inquiries with the local authorities, but it does not follow from that fact that a formal contract between vendor and purchaser is always necessary. The answer to the question whether or not a formal contract is needed is that although in some instances a formal contract can be, and in practice often is, avoided on the sale of registered land, it is sometimes desirable for the parties to enter into a preliminary agreernent."[2] However, practice appears to be changing, for in the latest edition of Registered Conveyancing (Ruoff and Roper) this passage now ends, "although in some instances a formal contract can be, and in practice sometimes is, avoided on the sale of registered land, *many solicitors consider that it is* desirable for the parties to enter into a preliminary agreement".[3]

7.4 But what is a 'prefirninary agreement'? It is not surprising that, as soon as the purchaser is prepared to buy at the vendor's price if there are no snags (or such as there are can be remedied), the parties should require some sort of binding agreement to ensure that the transaction will go through. It takes time to arrange the removal of furniture, the connection of gas and electricity, and the installation of telephones; a firm contract seems the only secure base from which to enter into such commitments. But since 'gazumping' has reared its ugly head, it is patent that the present procedure with regard to contract for the sale of land has, in any case, serious shortcomings, which are magnified in time of severe inflation and housing shortages.

7.5 We obviously cannot pursue the argument here, but the main point we wish to make is that so far as title and its proof are concerned, the special factors which distinguish the sale of land from the sale of goods are eliminated where title is registered, because this process goes most of the way towards assimilating the ownership of land to the ownership of goods. As Thomas Cyprian Williams said in the evidence from which we have already quoted,[4] this was the reform of the land law which would really be most beneficial to the community. Registration of title effects this reform, but it is evident that it has not yet had the impact it should have on the archaic system of conveyancing that is still practised in England and Wales where conveyancing by unregistered deed still flourishes. There are few, if any, other places where it is not only unnecessary but impossible to register either

[1] Brickdale and Stewart Wallace Land Registration Act 1925 28
[2] C & R 390
[3] Ruoff and Roper 328 (our italics)
[4] 3.1.5

deed or title, as has been the case in the non-compulsory areas of England and Wales since voluntary registration was suspended by the Land Registration Act 1966.[1]

8 Defects of unregistered conveyancing

8.1 Unregistered conveyancing is easy enough to criticize; and Dowson and Sheppard listed the following defects from which the English system suffers:[2]

(1) Title deeds are drawn in single copy. If one is lost or destroyed, proof will depend on such secondary evidence as may be available.

(2) The procedure must obviously occupy a considerable time; two months is stated to be the average time necessary but in some cases this is considerably extended.

(3) Although a legal examination of title is made, no physical examination or location of the land purported to be sold is considered necessary and the purchaser of land is seldom sure of its limits or put in a position to establish them to the satisfaction of a Court if the occasion arises. They quote Sir Charles Fortescue Brickdale who, in 1913, wrote, "During the last thirteen years over 150,000 conveyances have passed through the Land Registry and it is our experience that about one in every four descriptions necessitates a visit to the ground to clear up some question of doubt, and this is not on account of slight imperfections in regard to delicate points which do not really matter, but substantial doubt, for instance, as to which of two properties is intended to be conveyed, or as to whether some distinct portion of the land as it actually exists is, or is not, intended to be included. Properties are described by names long disused, by occupiers long since departed; wrong dimensions are inserted, wrong positions, wrong boundaries, no boundaries; half a house is conveyed as if it were the whole, six houses as if they were five, north appears for south, long for short, straight for crooked, a house on one side of the street conveyed by mistake for one on the other."

(4) Conveyancing is very expensive. The vendor's solicitor must be paid for preparing the abstract of title and contract, answering requisitions and the work in connection with completion; the purchaser's solicitor for studying and advising on the contract, checking the title and preparing and stamping the conveyance.

(5) The procedure entails an enormous waste of labour, for there is no finality. The same title is examined on the occasion of every successive sale or mortgage, the former examinations going for nothing. Where an estate is sold in parcels, the same title may be examined by as many different lawyers as there are parcels sold.

(6) An unfair burden is also placed on the purchaser. The vendor is allowed to shift the onus of clearing up and establishing the title onto the purchaser's shoidders.

(7) The most serious defect of the procedure is that it lends itself to serious fraud. A landowner is at complete liberty to draw what deeds he likes, in whatever

[1] s1
[2] See D & S 14

form he likes, and to do with them as he likes. He can execute and put into circulation any number of conveyances and mortgages of the same land. The deeds being in his custody, he can suppress, tamper with, revoke or destroy them at will; and there is no compulsion to mark an exhausted deed as such. The fact that landowners sometimes have no title deeds also provides the fraudulent vendor or mortgagor with a plausible excuse for non production of deeds. The prevailing uncertainty in the definition of parcel limits in title deeds is a further aid to fraud.

8.2 It is not difficult to challenge this list, not only item by item but in particular the general impression it leaves that English landowners must lie trembling in their beds because of the insecurity of the tenure of their land which in any case they are unable to identify. But Dowson and Sheppard realized that this indictment of the English system, however valid in theory, bore little relation to current practice, and they went on to give four main reasons why "processes so open to criticism and condemned repeatedly and authoritatively for over a century should remain in general use in England":

"(i) These processes have become the customary ones, so that landowners for the most part accept thern with a grumble even if they realize that cheaper, quicker and securer methods of land transfer have long been known and regularly used elsewhere.

"(ii) The rarity of dishonourable landowners and the high standard of professional care and integrity of conveyancing lawyers,

"(iii) The habitual practice of primogeniture, which has avoided the repeated re-arrangement of the land in petty parcels on death.

"(iv) The exceptionally stable and stably marked pattern of the English countryside resultant therefrom, which sets physical barriers to petty encroachments and acts as a powerful corrective to untrustworthy or unintelligible plans."[1]

8.3 In fact the security of land tenure in England is very high. This, however, is in no way due to any merits in private conveyancing but has been attained in spite of its manifest and long recognized defects. When the English system is imitated in other countries, the result, even when supported by deeds registration, is seldom satisfactory. The essence of the system, as we have seen, is that the title has to be traced back to a good root over a sufficiently long period. This makes it reasonably certain that, provided the lawyers have done their business properly, the title is good. But when titles stem from customary law what is a good root? Indeed, what is the nature of the title itself? How can abstracts of title be prepared where there are no title deeds? In Lagos in Nigeria, for example, one lawyer described conveyancing as "often a matter of taking a deep breath, boldly reciting a fee simple and 'touching wood'.[2] There really seems to be no sensible alternative to registration of title in such circumstances and even in England it is now at last generally recognized that registration of title is the best system, and its introduction is no longer delayed by objection or opposition but only by the slow process of compiling the register.

[1] D & S 15

[2] *Report on Registration of Title to Land in Logos* (1957) 7