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Simes: The Improvement of Conveyancing by Legislation

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liberty, rather than wealth.24 The Girard College25 case would be a good starter. Persons interested in civil rights and disappointed with the present pace of desegregation might be surprised at how well the institution of property can be utilized to augment as well as to diminish human dignity. In any case, Zechariah Chafee, Jr. was right when he described property as “the hardest of the first-year subjects.”26 It is a subject that is patiently waiting a renaissance and we should be grateful to Professors Cribbet, Fritz, and Johnson for their commitment.

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The legal profession has often been accused of being successful in thwarting progress. Charles Dickens’ ridicule of the practices of lawyers is considered justifiable by many even today. No matter how hard we try to ignore the charges, upon occasion we detect what seems to be a slight degree of earnestness in the spoofing of our less well-bred clients or acquaintances.

Reasonably enough, many of the criticisms of the bar’s practices derive from the layman’s observance of the impracticalities connected with real estate transactions.4 Among other things, the layman is here exposed to the title search. Depending on the jurisdiction, he may learn that a proper conveyance of real estate may require checking tens of documents in as many as ten or twenty different sets of public records, that on the next sale or security transaction a nearly duplicate search is required, and that despite the most careful search, the record title holder may not be able to uphold his title against another. An even more unfortunate impression on the layman is made by the bill for “closing costs” which is often five per cent of the value of the real estate and may be as much as ten per cent. Is it not a little surprising that we have escaped a revolution in which laymen demand the same ease and safety in transferring

24. In Professor Philbrick’s great article, supra note 15, he argues for the separation of the concepts of property and liberty so that each can be developed by a “socially responsive policy.” Id. at 732. Assuming the distinction between property and liberty can and should be made, we should ponder the propriety of treating them differently in accordance with a double standard. See Judge Learned Hand’s discussion in Stone, Conception of the Judicial Function, 46 COLUM. L. REV. 696, 698 (1946).

25. A private charitable educational institution, bequeathed in trust to the city of Philadelphia, prohibited by the terms of its creation the admission of Negro children. Although the restriction was the private wish of the benefactor, when administered by the city, it violated the 14th amendment.


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1. For an enlightening one-page description of the layman’s eye view of a real estate closing, see Atkinson, The Other Side of the Coin, Title News, April 1959, p. 20.
title to real property that is characteristic of transferring title to personal property?²

Professor Lewis M. Simes (in cooperation with Mr. Clarence B. Taylor), in his workmanlike book entitled The Improvement of Conveyancing by Legislation, has done a small bit in recommending modes of alleviating these problems. The work consists of a discussion of conveyancing problems and proposed model acts to solve or minimize them. It is the first result of a program of study for the improvement of conveyancing sponsored by the University of Michigan Law School and the Section of Real Property, Probate and Trust Law of the American Bar Association.

The book is divided into two parts—a section dealing with “Major Remedies” and a treatment of “Specific Problems and Their Solution.” In Part I are set forth a marketable title act, a curative act, an act concerning evidentiary effect of the record and a model real property limitations act. Part II consists of thirty recommended statutes dealing with such specific problems as delivery, corporate conveyances, tax titles, and the like. Four appendices contain valuable articles on the constitutionality of some of the recommended acts, and on marketable title legislation, statutes of limitations, and “hazards in conveyancing practice.”

The multitude of recommended statutes are proposed to perform what Simes considers to be the two basic objectives of conveyancing reform: (1) minimizing the risk of defects in titles, and (2) lightening the title examiner’s load. (p. xxi). But the amazing thing about his approach is that he almost invariably stops short of clearing up the problem completely. And at times he makes compromises in the solution of the first problem in order to solve the second.³ These stop-gap measures leave us with the same cumbersome conveyancing system, despite the many recommended changes.


The situation appears to have worsened to the point where sober, responsible and competent observers have expressed the fear that the increased dissatisfaction with our conveyancing system will, unless checked, bring about ultimately a breakdown of present procedures and a revolutionary change therein. If this change takes place, it will have a serious effect on the welfare of the public and the economic position of the bar. It is my impression that the revolutionary change referred to is not to embrace title insurance as a cure-all. The revolutionary change referred to is some sort of government controlled modified Torrens System which would affect the economic position of persons other than the practicing attorney.

See Comment, 48 Yale L.J. 1238 (1939), discussing the usefulness of the automobile registration statutes as examples for model land title registration statutes.

3. For example, in discussing the proposed legislation for the name variances problem at page 67 it is admitted that objective number one is sacrificed, apparently to achieve objective number two.

And even though a prima facie case of identity is made by recitals, affidavits, or presumptions, this case is rebuttable. But the risk that there will be no identity in the cases stated is slight and can well be borne by the purchaser of the land. The
The more obvious criticisms of the proposed "Major Remedies" are listed in the 1960 report of the American Bar Association Committee on Acceptable Titles to Real Property. In the Committee's view marketable title legislation still leaves a lengthy record to be examined, while curative acts are generally of an excessively specific and restricted character and require the passage of a substantial time interval between the occurrence of the defect and its statutory correction. Statutes of limitations have three weaknesses—uncertainty of term due to extensions of time for disabilities, uncertainty of the fact of adverse possession, and the failure to bar future interests. The presumption rules are also of too specific and restricted a character. Finally, title standards cannot cure defects; they merely exculpate title examiners from charges of negligence.4

Perhaps the fault for these defects in the proposed legislation must be laid to the basic self-imposed limitation of the study that reform be kept within the confines of the recording system.5 Whether this limitation is the result of a discretion which was the better part of valor, or reflects the interests of the project's supporters,6 it is not at all in keeping with the disinterestedness which is fundamental to intellectual achievement.

Simes states that the recording system is probably the only conveyancing system which would be deemed acceptable in most of the states.7 He never alludes in this book to what is commonly known as the Torrens system of title registration.8 Should not a truly unbiased study of conveyancing have included the problem is to find some device, by means of statute or title standards, to reach that result. (Footnote omitted.)

5. P. xvi.
6. The American Title Association, composed of title insurance companies and abstractors, and various title insurance companies contributed to the financing of the project. (p. xii). However, I was told by a member of the ABA committee that they contributed an aggregate of only about $5,000.
7. P. xvi.
8. In the Foreword by Professor Paul Basye the sole reference to title registration appears. He says, "A system of land registration in every state seems obviously unacceptable in this country." (p. xi). A passage by Professor Simes at page xvi was thought to be a veiled admission that the registration system is superior to the recording system, but Professor Simes has explained in correspondence that this passage has reference to some early statutes such as *N.C. Laws,* c. 7 (1821); *N.C. Laws,* c. 38 (1773); *N.C. Rev. Stat.* c. 37; § 1 (1837).
consideration of the title registration system? Why not study this system to
determine whether its defects could be removed? Why start at the bottom of
the progress ladder when we may start near the top?

Professor Simes indicates more by his actions than by his words that he is
well aware that title registration is the more beneficial system. In his statement
of the basic guide to accomplishing the objectives of conveyancing reform, he
states that “emphasis should be upon making the record as important and all
inclusive as possible”; under the title registration system, the record owner
takes priority over all claimants, including, in many jurisdictions, possessors
of the land. In stating five propositions, apparently considered as more detailed
guides to title legislation reform, Simes makes it apparent that three of his
suggestions for reform have as their ideal the registration system—an ideal
which he has no intention of attaining. The three propositions are these:

(a) *The record should include, as nearly as possible, all the facts required
to determine the state of the title.* This means that there should be some
method by which facts of death, birth, marriage, happening of con-
ditions, and many other matters of significance, can be placed on the
record.

(b) *So far as practicable, the record should be self-proving.* Recitals should
be evidence of the truth of the statements contained therein. Recorded
instruments should be presumed to be duly executed by competent per-
sons.

(c) *The length of the record required for a marketable title should be
shortened.* This is one of the primary objectives attained by marketable
title legislation.

Under the registration system these three requirements are successfully met:
almost all facts required to determine the state of the title appear in the record;
the record is conclusive as to all matters stated therein; and the length of the
record is minimal—theoretically only one document need be examined.

Professor Simes thus approaches the registration system but never quite
attains it. This new type of brinkmanship appears throughout the book. One
familiar with the registration of title system cannot avoid the impression that
Professor Simes' ideas are generally modifications of devices utilized in that
system. As additional examples, he makes a recommendation that the recording
officers be directed and authorized to refuse to record documents not meeting
certain standards; he recommends a statute raising a presumption of
delivery of recorded documents, conclusive after five years, and of capacity
of parties; and he proposes that in some areas tract indices be used.

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9. P. xvi.
10. P. xvii.
12. P. 63.
14. Pp. 87-88. But at page 88, it is stated:
   If satisfactory unofficial indices are available, and if the purchaser has the benefit of
Another major defect in this work is that it proposes, instead of a single statute, a host of statutes. Many of these must face constitutional tests. States enacting these statutes piecemeal will in all likelihood leave undone parts of even this limited reform. Modifications of some of the acts will undoubtedly be made; where two or more of the acts tie into each other, a change of one may not be accompanied by a change of the other, thereby making for inconsistencies and possible confusion. More important, perhaps, such a morass of statutes cannot be understood by laymen or by non-specialist lawyers. Valuable rights may be lost solely because of this complexity.

In addition, at page 404 Simes lists the items which he had included in a questionnaire sent to lawyers in Alabama, Colorado, Florida, Iowa, Minnesota, and South Dakota. These lawyers were asked to check items on the list which constituted "the most serious consequence of any inadequacies which may exist in our system of title security and title assurance methods." Answers were received from 214 lawyers. The items and number of times checked were as follows:

(a) Owner's loss of property due to outstanding interest or claim. [8]
(b) Purchaser's subjection to lien, encumbrance, or claim. [41]
(c) Owner's difficulty in selling property, the title to which is sound, but defective of record or otherwise unacceptable. [122]
(d) Loss of time in consummating transactions.
(e) Owner's difficulty in encumbering sound but imperfect or unacceptable title. [72]
(f) Inordinate expense of title transactions.
(g) Possibility of fraud or deception in title transactions. [27]

Items (d) and (f), concerned with time delay and expense in conveyancing, would seem to be the two biggest problems of conveyancing. Yet, we are not supplied with the opinions of one group of lawyers on these very vital matters even though the figures were apparently collected.

Adding up these criticisms, one must conclude that the entire study was encased in the strait-jacket of the author's unwillingness to oppose the title insurance and title abstracting industries.15

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15. I wish to make it clear that I do not mean to convey the impression that this desire is for some selfish purpose or is illegitimate in any other respect. Rather, it is clear to me that Professor Simes feels that no other course of action has hope of success; that
There is little doubt that the registration acts presently in force in the United States are, at best, doomed to be used for a small percentage of all land titles. Despite the ardent praise of many writers, practitioners have found initial registration to be too expensive and too time-consuming. And so, although it is admittedly a more desirable system once instituted, in its present stage of development it is unacceptable in the United States. The real problem is, can we obtain the obvious benefits of title registration and do away with or minimize its disadvantages, or must we settle for the recording system? If history is any indication, the answer is that a registration system of some sort will be the ultimate system used.

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the facts of life are such that conveyancing reform without the support of the title insurance industry is impossible and the title insurance industry cannot exist under, and therefore will not support, a title registration system.

This is a defensible view but it appears to be a premature surrender. Would it not be better for the tired warrior to retire quietly rather than to demoralize his vigorous replacements by taking it upon himself to wave the truce flag?

16. Two of the less inhibited articles were written a generation ago: McDougal & Brabner-Smith, Land Title Transfer: A Regression, 48 YALE L.J. 1125 (1939); Fairchild & Springer, A Criticism of Professor Richard R. Powell’s Book Entitled Registration of Title to Land in the State of New York, 24 CORNELL L.Q. 557 (1939).

17. AM. BAR ASS’N SECTION OF REAL PROPERTY, PROBATE AND TRUST LAW, REAL PROP. DIV., REPORT OF THE COMMITTEE ON ACCEPTABLE TITLES TO REAL PROPERTY 33 (1960), in discussing various systems of title protection states:

Obviously, the most effective of these is the Torrens system. It affords both greater title security and ease of transfer than can be obtained by any improvements in a system based on recordation.

18. DOWSON & SHEPPARD, LAND REGISTRATION 46 (2d ed. London, 1956), which contains an historical study of land records systems, states that the evolution of land records may be described as falling into three main periods: “(i) A very elementary procedure in which the contracting parties appeared before a public or quasi-public authority who made in his books a short note of the substance and effect of each transaction, (ii) when transactions were embodied in written instruments and recorded by copy (transcription) or memorial (inscription) in a public register, and (iii) the establishment of registration of title to land.”

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