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ESCAPING THE TYRANNY OF COMMON LAW ESTATES

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The complexities of the law of future interests are not wholly due to the medieval English judges' enjoyment of legal technicalities. Complications inevitably arise when a legal system allows any form of ownership of property more sophisticated than absolute ownership by a single individual. The Anglo-American common law has dealt with the problems of future and successive interests in land by its doctrine of estates or, as Maitland called it, the "wonderful calculus of estates." However wonderful it is, our inheritance has not been trouble-free.

This article will examine a possible line of solution to some of the problems which arise where the ownership of land is split between different persons. It will be suggested that some assistance may be gained towards the solution of these problems by an examination of the principles of the English property legislation of 1925.¹ In England whether the ownership of land is split between different persons by the creation of successive future interests, or by present concurrent interests, the title to every piece of land, however complicated the beneficial interests, can be conveyed immediately, either by a single person or by a group of trustees. All future freehold interests exist in equity only, and all the technicalities relating to legal future interests disappear at a stroke.

I. LIMITED INTERESTS IN LAND

In an early state of development of a legal system nothing more than

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1. See Bordwell, *English Property Reform and Its American Aspects*, 37 YALE L.J. 179 (1927); Schnebly, "Legal" and "Equitable" Interests in Land under the English Legislation, 40 HARV. L. REV. 248 (1926); Crane, *The Law of Real Property in England and The United States: Some Comparisons*, 36 IND. L.J. 282, 297 (1961); Fratcher, *A Modest Proposal for Trimming the Claws of Legal Future Interests*, 1972 DUKE L.J. 517.

absolute ownership by one person is permitted. As development continues, ownership of property by various persons in succession or by a number of persons concurrently is allowed. The method in which this is accomplished varies, of course, both between and within each system depending upon the nature of the property. For example, in the case of ownership of an ice cream cone, a simple system of absolute ownership is all that is needed because the property is short-lived and not suitable for sharing. Although disputes as to the ownership may arise, the problems met in solving these disputes are simple in comparison with those which arise in connection with the conflicts of various interests existing in an advanced legal system.

Successive and concurrent interests first developed in connection with land. An efficient system of land ownership was essential to the social, governmental, and military structure of a feudal state, and aristocratic landowners sought to develop ways of perpetuating the privileged position of their families. By comparison, movable property, consisting in those days mainly of money and chattels, was of less significance. As a result, personal property did not acquire a "permanent" form until the development of corporations allowed the investment of funds in corporate stock to be regarded as the basic form of family capital.

In the case of both personal property and real property it is necessary not merely to determine questions of ownership but to establish a system which will allow a complex series of beneficial interests to be created in various beneficiaries. Such a situation arises not only where there is a grand family trust containing millions of dollars, but also where there is merely a gift by will to a widow for life with remainder to the children. In both cases the principle is the same. A legal system should provide the means by which a settlor or testator can create a series of beneficial interests, even though the creation of these interests may complicate the method of dealing with the property.

In modern trusts of personalty the creation of such beneficial interests is usually not a problem. Legal title to the stock is vested in the trustees who can sell it and buy other stocks. The beneficial interests do not clog the title. It is a problem in the case of common law estates because in these estates the legal ownership is split. For example, if one desires to purchase land given to a widow for life remainder to the children, should the purchaser buy it from the widow, the children, or from both? Various answers are possible; and different legal systems give different answers. If one looks at the matter from the point of view of the civil law systems, which allow one person to have the dominium or ownership of land, then that person is the person who should make the sale. The widow in such a case will be a usufructuary, and the question arises whether a purchaser from the owner takes free from, or subject to the widow's interest. If one looks at the matter from the point of view of the common law system, the question is answered quite differently. The doctrine of estates provides that individuals do not theoretically *own* the land. Instead they *own* only an *estate* in the land. The

greatest of these estates is the fee simple. If the enjoyment of the land is split among persons successively, each successive owner is entitled to an estate in the land smaller than the fee simple. In all cases, however, the estates add up precisely to one fee simple. Thus, if the limitation is to the widow for life, remainder to X in fee simple, the widow is the owner of a life estate in possession, and X is the owner of a fee simple estate in remainder. Added together, these estates equal one fee simple in possession.

The more complex the series of successive interests, the more complex the number of estates which are required to exist. For convenience of conveyancing, a system is needed in which the purchaser can buy the land without buying separately each beneficiary's estate. If the purchaser has to buy the interests of each beneficiary, the land may become unmarketable, either because it is impossible for a purchaser to negotiate separately with each beneficiary or because the beneficiary is unascertainable, a minor, or not yet born.

One possible way of meeting these problems is to vest the legal estate in trustees upon trust for the beneficiaries, as is done in the case of a trust of personalty, so as to give the beneficiaries an equitable estate instead of a legal estate. This allows the trustees, on sale, to transfer the legal estate to the purchaser. The difficulty with this situation is that in a trust of land, the purchaser would have notice of the beneficial interests and would take subject to them. This could be overcome by express provision in the trust instrument to the effect that the purchaser should take free from the interests of the beneficiaries and that a receipt given by the trustees would be a complete discharge to the purchaser.² However, it is clear from reading the cases that this is not always done, and, even if it were, provision should be made by some statute to protect the purchaser; otherwise he takes at his own risk because the trust provision may be insufficient to protect him. Any doubt on this question may render the land unmarketable.

In summary, it is in the interests of the conveyancing system generally that provision should be made by statute to the effect that the purchaser shall be protected when buying land in which there are successive or concurrent interests. Whenever the land is owned by a person other than an absolute fee simple owner, the interests of the beneficiaries must be equitable, and the person in whom the fee simple estate is vested should have the power to sell the land and to transfer to a purchaser a legal estate which is unaffected by the equitable beneficial interests. The beneficial interests are transferred from the land to the purchase money. This results in a legal estate that always is alienable. However, this policy also is contrary

2. As Leach said in 1940, "Most future interests are now created by way of trust with powers of sale and lease in the trustees ample to insure full use of the property." W. LEACH, *CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS* 802 (2d ed. 1940).

to much American legislation of the 19th century, which statutorily restricted the occasions on which trusts of land could be created.³

II. FUTURE INTERESTS

The creation of successive interests necessarily involves the creation of future interests of one sort or another. This results in a number of difficulties. Some of these problems, such as constructional problems, the application of the perpetuity rule, the Rule in Shelley's Case, and the doctrine of worthier title, affect equitable as well as legal future interests. Others, such as the liability of contingent remainders to destruction by failure to vest or by tortious feoffment, affect legal future interests only. The proper treatment of these problems is a separate topic. The point here is that if future interests were equitable, the *legal* future interest problems would disappear. More importantly, if the legal estate owner were given the power to convey and "overreach"⁴ the equitable interests, then any problems relating to such interests would not affect the validity of the trustees' title. As a result, the land would remain marketable.

Consider Professor Fratcher's illustration of this principle.⁵ A family owns a piece of land which is needed for development. An offer of \$2,000,000 is made conditioned upon title being made marketable within six months. The title to the land is complicated by two parts of the land being subject to possibilities of reverters. One is subject to a right of entry on breach of a condition subsequent, and the other is subject to a contingent remainder and to an executory interest. Because none of these contingencies can be determined within six months, the land is unsaleable. If all these interests were equitable and the legal estate owner had overreaching powers on a sale, the title would be marketable even though there might be litigation over the proceeds of sale. This is the result achieved by the English legislation. It "preserves the freedom to create future interests but deprives them of their former effect of restraining the use and transfer of land in the manner must beneficial to its owners and the community."⁶

III. THE ENGLISH LEGISLATION OF 1925

On January 1, 1926, a number of property statutes came into force in England. The most important of these are: the Settled Land Act 1925, the

3. See N.Y. REAL PROP. LAW §§ 91-99 (McKinney 1968) (§ 96 amended 1965) (§§ 91-96, 98 repealed 1967; §§ 97, 99 repealed 1965); 1 A. SCOTT, THE LAW ON TRUSTS § 59.1 (1939).

4. To "overreach" is to transfer, on a sale, the equitable beneficial interests from the land to the purchase money. The owner retains his interest; he has exactly the same interest in the purchase money as he previously had in the land. See text accompanying note 9, *infra*; Law of Property Act, 1925, 15 & 16 Geo. 5, c.20, § 2(1), at 565 (1925); Settled Land Act, 1925, 15 & 16 Geo. 5, c. 18, § 75, at 456 (1925).

5. Fratcher, *A Modest Proposal for Trimming the Claws of Legal Future Interests*, 1972 DUKE L.J. 517.

6. *Id.* at 549.

Trustee Act 1925, the Law of Property Act 1925, and the Land Registration Act 1925. This legislation basically follows the principles discussed above. Much additional detail is included in the legislation which is not relevant here, but it is worth looking at some of the most significant of the provisions to see how they establish the principles of the system.

A. *The Law of Property Act 1925*

The Law of Property Act 1925 provides that the only estates in land which are capable of subsisting or of being conveyed or created at law are:

- (a) an estate in fee simple absolute in possession,
- (b) a term of years absolute...⁽³⁾ all other estates, interests, and charges in or over the land take effect as equitable interests.⁷

Thus, the only freehold estate which can exist as a legal estate is a fee simple absolute in possession.⁸ Each lesser estate, such as a fee simple in remainder, a life interest in possession or in remainder, an executory interest, a possibility of reverter, or a power of termination, can exist in equity only.

Although future interests in land are all equitable, and the legal estate is in trustees, it is still necessary to provide that, on a sale of the land by the trustees, the purchaser takes the fee simple free from the interests of the beneficiaries. One must, however, also provide for the protection of the interests of the beneficiaries. This would seem to create a dilemma, as the interests of the purchaser and of the beneficiaries appear to be diametrically opposed. The English solution to this question is the doctrine called "overreaching." This doctrine states that when land held by trustees upon trust for the holders of future equitable interests is sold, the legal estate passes to the purchaser free of the beneficial interests. In return, the purchase money, if paid to nominated trustees, is held by them upon the same trusts as the land was originally held. Thus, the purchaser gets the land free from the beneficial interests. The beneficiaries lose their interests in the land, but instead they receive precisely the same interest in a sum of money that is equivalent to the value of the land. A sale of land held subject to trusts in these circumstances is regarded not as a question of competition

7. Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, § 1(1), at 563-64 (1925).

8. There is an exception in the case of "a fee simple subject to a legal or equitable right of entry or re-entry" which is for the purposes of the Act a fee simple absolute. These words were added to the Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, § 7, at 570 (1925) by the Law of Property (Amendment) Act, 1926, 16 & 17 Geo. 5, c. 11, Sched. at 61 (1926). The intention of the Legislature appears to have been to include as legal estates certain holdings, common in the North of England, where a fee simple is purchased in return for a perpetual rent charge on the land. But the enactment is, in its terms, wider than this and appears to include a grant to A in fee simple subject to a right of entry in the grantor on the happening of some event. One would have expected a fee simple subject to such a condition to have been an equitable interest, and for such a grant to have created a settlement. Indeed, the Settled Land Act, 1925, 15 & 16 Geo. 5, c. 18, § 1(1)(ii)(b), at 394 (1925) would appear to include it.

between the interests of the purchaser and the beneficiaries, but as a situation in which the purchaser gets the land free from the beneficial interests, and the trustees are regarded as having changed the nature of the investment of that amount of family capital. The balance of the interests of life tenant and remaindermen remain the same. Whether or not the change works out to be profitable is a matter which depends upon the success of the different forms of investment.

The doctrine of overreaching is set out in broad terms of Law of Property Act 1925. The Act provides that a conveyance to a purchaser of a legal estate in land shall overreach any equitable interest or power affecting that estate whether or not the holder of the equitable interest has notice of it, if the conveyance is made in one of various ways.⁹ The most significant means by which the conveyance may be made are a conveyance under powers conferred by the Settled Land Act 1925 and a conveyance made by trustees for sale. These situations will be examined in more detail below.

The principle which is emerging from this examination of the English legislation is one in which ownership of land is enjoyed essentially in one of three ways: as an owner of a fee simple absolute in possession, as a tenant for life of a settlement of land which is governed by the Settled Land Act, or as trustees holding the land on trust for sale. These are three different and exclusive ways of holding land, and almost all land is held in one of these ways.

B. *The Settled Land Act 1925*

The Settled Land Act 1925¹⁰ is the latest of a number of statutes which have modernized ways of dealing with the problem of successive interests in land. Traditionally, landed English families set up what the English call a "strict settlement" of land. This was a series of successive interests in land, designed to keep the land in the family for the longest possible period. The perpetuity period was of course the limit; but by means of a resettlement once a generation, it was possible to keep the land in the family indefinitely, and there are families who can show a continuous occupation of land back to medieval times. Since all future interests in land now are required to be equitable, a strict settlement is a trust of land. However, the name "settlement" continues, and it is commonly used in England to denote trusts of personalty as well.

It is no longer common to create elaborate settlements in the old style. Under the English tax system, capital transfer tax is payable upon the principal value of a trust upon the death of a life tenant.¹¹ Therefore, a long series of successive interests is obviously unsatisfactory. Other methods are not employed and there has been much activity in England in

9. Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, § 2(1), at 565 (1925).

10. Settled Land Act, 1925, 15 & 16 Geo. 5, c. 18 (1925).

11. Finance Act, 1975, c.7; See Maudsley, *The British Capital Transfer Tax*, 13 SAN DIEGO L. REV. 778 (1976).

terminating family trusts for tax reasons.¹² Nevertheless, successive interests in land are still found. One most commonly sees such interests in the case of a modest family home which has been given by will to a widow for her life and after her death to the children; but one also finds successive interests which have survived from old family settlements.

The Settled Land Act 1925 provides that where land is held in trust for persons by way of succession, the legal estate must be vested in one person.¹³ The person selected is the person entitled to possession, that is to say, the tenant for life.¹⁴ He holds the legal estate upon trust for himself for life and then for the remaindermen. He is given various powers of dealing with the land such as leasing and mortgaging, and he is also given the all-important power of sale.¹⁵ Thus the life tenant is given the fee simple as trustee.¹⁶ If he sells the fee, the purchaser takes free of the beneficial interests. These interests leave the land and attach themselves to the purchase money. It would not be safe to allow the purchaser to pay the capital money to the life tenant as trustee because he might spend it. Therefore, the Act provides that all capital money arising in respect of dealings with settled land shall be paid to other trustees who are nominated in the document, and they hold the purchase money upon the trusts of the settlement.¹⁷

The Settled Land Act 1925 provides a definition of settled land. The Act states that any instrument whereby land stands for the time being "limited in trust for any persons by way of succession" is a settlement.¹⁸ A settlement is also created where land is held by "an infant, for an estate in fee simple or for a term of years absolute."¹⁹ The reason why land held by a minor in fee simple is included in the definition is that it would otherwise be impossible to deal with such land. The minor is neither a tenant for life nor does he hold the legal estate or exercise the statutory powers. Instead, special provision is made for the trustees of the settlement to exercise the powers of the tenant for life during the infant's minority.²⁰

Under the Act, the tenant for life is basically "the person of full age who is for the time being beneficially entitled under a settlement to possession of the settled land for his life."²¹ He is given certain powers in relation to the settled land and is allowed to execute a deed of conveyance which is effective to pass the land conveyed free and discharged from all the limitations and powers and provisions of the settlement (with various exceptions).²² In return the money received for the sale of the land is held

12. Variation of Trusts Act, 1925, 15 & 16 Geo. 5, c. 53, at 503 (1958).

13. Settled Land Act, 1925, 15 & 16 Geo. 5, c. 18, § 4(2), at 396 (1925).

14. *Id.* §§ 19, 20.

15. *Id.* § 38.

16. *Id.* § 107.

17. *Id.* §§ 18(2), 94.

18. *Id.* § 1(1), (5).

19. *Id.* § 1(1)(ii)(d).

20. *Id.* § 26.

21. *Id.* § 19.

22. *Id.* § 72.

on the same trusts as the land was held.²³ Where there is no one who qualifies as a tenant for life, his powers are given to other persons, usually the trustees of the settlement.²⁴ Provision also is made in the Act for the appointment of trustees²⁵ and for the purchaser to know who they will be.²⁶

C. *Trusts for Sale*

The standard form of a trust for sale is where property is vested in trustees upon trust to sell whereby the trustees hold the rents and profits until sale and hold the proceeds of sale on trust for the beneficiaries in succession or concurrently. The trustees are given the same powers of dealing with land as a tenant for life under a settlement²⁷ and have a discretionary power to postpone sale indefinitely.²⁸ Overreaching is provided for by law.²⁹ However, it would seem that, in the case of a trust for sale, it would so operate without express provision.³⁰ This conclusion results because of the doctrine of conversion which requires a court of equity to treat as done that which ought to be done. Thus, by virtue of this doctrine the beneficial interests under the trust for sale are automatically considered to be interests in personalty in the proceeds of sale.

Since 1925, a settlor who desires to create a series of successive interests, whether life interests, entails, or fee simple remainders, has been able to do so either by creating a settlement of interests in realty or by creating a similar settlement, behind a trust for sale, of interests in personalty.³¹ If a settlor wishes to create concurrent interests, however, he *only* can do so behind a trust for sale. The settlement and the trust for sale can be regarded as different methods of achieving in effect the same result. An amendment to the Settled Land Act³² makes the definition of a settlement applicable only to the case where land is not held upon trust for sale. Why

23. *Id.* § 75(5).

24. *Id.* § 23.

25. *Id.* § 30.

26. *Id.* § 5(1)(c).

27. *Id.* § 29.

28. *Id.* § 25.

29. *Id.* § 2.

30. It was originally the rule in equity that a purchaser held the land subject to a claim in favor of the *cestui* until proper application of the purchase money had been made, or the receipt of the *cestui* procured, except in cases where the trust instrument provided expressly or by implication of fact that the receipt of the trustee alone should suffice. But now by statute in England and in many of the United States [J. PERRY, TRUSTS AND TRUSTEES (6th ed. 1911) n. 58, at 1303] the receipt of the trustee alone is sufficient in all cases where he sells under the power of the trust.

Comment, 40 HARV. L. REV. 248, 262 (1926).

31. Entails in personalty were permitted by the Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, § 130(2), at 660 (1925).

32. Law of Property (Amendment) Act, 1926, 16 & 17 Geo. 5, c.11 (1926) amending Settled Land Act, 1925, 15 & 16 Geo. 5, c. 18, § 1, at 394 (1925).

the 1925 legislation provided two alternative and exclusive ways of achieving a similar result is a difficult question. The most likely answer is that, while the trust for sale was the most favored system, the settlement, being the traditional method of landholding among the nation's leading families, was politically difficult to discard. A single method would have been much better.

D. *Statutory Trusts for Sale*

We began by saying that some of the complications in this field arose from the fact that interests in favor of a number of persons could be created in the same piece of land. In the context of the strict settlement, this was illustrated by the case of successive interests in land. In the case of trusts for sale, it was pointed out that this might arise where the interests were successive or concurrent. We now need to deal with the situation in which concurrent interests arise, but are not expressly placed behind a trust for sale. In that situation the Law of Property Act provides that the concurrent interests shall be held behind a trust for sale.³³

The most important forms of co-ownership with which we are concerned are the familiar forms of joint tenancy and tenancy in common.³⁴ Joint tenancy creates no significant conveyancing problems because there is only one title among the joint tenants. The only practical difficulty is that where there are a very large number of joint tenants, a purchaser may have difficulty in negotiating with each of them. Tenancy in common, however, gives rise not only to this problem, but also to more serious conveyancing problems as well. This is due to the fact that each tenant in common owns an undivided share in the land and his interest will pass as part of his estate, may be divided among a number of takers, or may be subjected to a complicated series of beneficial interests. A joint tenancy, of course, may become translated into a tenancy in common by severance, as by the alienation of the interest of one of the joint tenants.

Law of Property Act 1925 provides that where land is expressly conveyed to any persons in undivided shares, then the land shall be held by them or, if there are more than four of them, by the first four mentioned, as trustees upon "statutory trusts."³⁵ Similarly, where a legal estate is beneficially limited to persons as joint tenants, the land is to be held on statutory trusts.³⁶ Land held upon statutory trusts is held upon trust to sell and to hold the net proceeds of the sale, and the net rents and profits until sale, for the persons interested in the land.³⁷ For example, if land is conveyed to *A, B, C, D*, and *E* in undivided shares, the effect of that convey-

33. Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, §§ 34-36, at 584-86 (1925).

34. Effectively, these are the only forms of co-ownership still existing in England.

35. Law of Property Act, 1925, 15 & 16 Geo. 5, c. 20, § 34(2), at 584 (1925).

36. *Id.* § 36.

37. *Id.* § 35.

ance is to vest the legal estate in *A, B, C*, and *D* upon trust to sell and to hold the proceeds of sale in trust for *A, B, C, D*, and *E* as tenants in common. The beneficial interests are retained as originally intended and are placed behind a trust for sale, the legal estate being held by not more than four trustees. Instead of being interests in land, the beneficial interests are personalty interests. Anyone who has had experience with the difficulties involved in a partition suit or other suit involving concurrent interests will appreciate how greatly a system of this sort simplifies the conveyancing of such interests.

IV. CONVEYANCING SYSTEMS—REGISTRATION OF TITLE

A. *Land Registration Act 1925*

Most parts of England still operate under the ancient conveyancing system under which the landowner retains the deeds to the property and makes title by producing his deeds to the purchaser.³⁸ In this situation, it is important to make the investigation of title as simple as possible. The 1925 property legislation certainly does that. Indeed, it is difficult for those brought up in the law since 1925 to understand how a conveyancing system coped with the complications which existed before that time. Many of the matters which are discussed in American future interests courses are historical anachronisms in England.

Because a system of conveyancing based on the making of title by the production of deeds by the individual landowner is not a satisfactory system, the Land Registration Act 1925 provides for an alternative procedure. Under this procedure the title to land is registered under a state-run Land Registry. This provides an official record of the title, and compensation is paid to anyone who suffers a loss by reason of a mistake.³⁹ Thus, in effect, title is guaranteed. Any purchaser can safely buy from the registered owner of the land without making an examination of the applicable deeds and documents. Because of practical difficulties which would arise if the Act attempted to require the immediate registration of all interests in land, registration is only required upon the first transfer of the land following the Act's adoption.⁴⁰ The Act makes the use of this procedure optional. Very few sections of England elected to adopt it. However, since the transfer of the responsibility of adopting the registration system from local authorities to the central Government by the Land Registration Act 1966,⁴¹ the use of the system has increased.

The Act divides all interests in land into three categories: interests capable of registration, minor interests, and overriding interests. The old categories of legal estates and equitable interests are abandoned. Interests

38. Crane, *The Law of Real Property in England and the United States: Some Comparisons*, 36 IND. L.J. 282, 290 (1961).

39. Land Registration Act of 1925, 15 Geo. 5, c. 21, § 83.

40. *Id.* § 123.

41. Land Registration Act of 1966, c. 39.

capable of registration are a legal fee simple, a long term of years, and the interest of a legal mortgagee. The names of the holders of such interests are registered as proprietors of these interests.

Minor interests are defined by exclusion. They comprise all interests in land not being interests capable of registration and not being overriding interests. Minor interests are those which require protection against purchasers by being "entered on the register." The protection given depends upon the nature of the interest and the method of notification. Interests behind a settlement or trust for sale are included among the category of minor interests,⁴² even though they will be overreached upon sale in the case of registered land in the same manner as with unregistered land.

Overriding interests are a miscellaneous category of interests which are binding on a purchaser even though no steps have been taken to enter them on the register.⁴³ This is a category of interests which do not fit a system of registration. One example of an overriding interest is a legal easement. Under the unregistered system, legal easements were legal interests and therefore binding. Under the registered system, they will not be binding unless provision is made to that effect in the statute. It would not be satisfactory to require these interests to be registered because in many cases the dominant owner would not register them, and the status of those which are in the course of being acquired by prescription is unknown. Other interests which came within the category of overriding interests include rights in the course of being acquired under the Limitation Act, the proprietary rights of any person in actual occupation of the land, and the obligation attaching to certain pieces of land to contribute to the maintenance of the roof of the chancel of the village church.

B. *Settlements and Trusts for Sale*

As would be expected from what has been said of the 1925 legislation, the tenant for life in the case of settled land and the trustees for sale in the case of land held on trust for sale are the registered proprietors.⁴⁴ The purchaser buys from them. The beneficial interests, even if they are entered on the register as minor interests, are overreached on the sale in just the same way as they were with unregistered land. One question arises however: How does a purchaser distinguish between land owned beneficially by a registered proprietor and land held by a registered proprietor as tenant for life or as the survivor as trustees for sale? It is essential the purchaser be able to make this distinction because in the case of beneficial ownership he will pay the purchase money to the registered proprietor and in the case of a settlement or trust for sale, he must pay capital money to at least two trustees or to a trust corporation. The Act deals with this problem by providing a "restriction." The restriction instructs the purchaser that

42. Land Registration Act of 1925, 15 Geo. 5, c. § 21, § 3(xv).

43. *Id.* § 70.

44. *Id.* §§ 86, 94.

"no disposition under which capital money arises is to be registered unless the money is paid to [the trustees of the settlement or trust for sale] or into court."⁴⁵ It is the duty of the tenant for life and the trustees in the case of a trust for sale, to enter the restriction.⁴⁶ If they fail to do so, any beneficiary may protect himself by an appropriate entry on the register.⁴⁷ Such an entry informs the purchaser that there are trusts affecting the land and that he should make inquiries as to the manner in which payment of the purchase money should be made. If the proprietors do in fact enter the restriction, nothing is gained by the entry on the register of the beneficiary's interest because they will be overreached.

V. A SINGLE SYSTEM—THE QUEENSLAND LEGISLATION

As previously stated, the present legislation provides two alternative systems—the settlement and the trust for sale—by which what is effectively the same objective may be achieved. It is essential to know under this dual method which is applicable in a particular situation because if there is some doubt as to which of the two procedures is applicable, the legal title to the land will be in dispute.⁴⁸ This problem would be avoided if there were only a single system for land held for beneficiaries successively or concurrently.

Modern thinking has suggested that the whole matter would best be treated by providing that all future and concurrent interests in land exist in equity only, that the legal title to land subject to such interests be held by trustees, that the trustees, by statute, be given all the necessary powers of management and sale, and that a sale by the trustees have the effect of overreaching the beneficial interests.⁴⁹ This would replace the present Settled Land Act legislation (which gives the powers to the tenant for life), and the trustees would have complete powers of management, sale, and overreaching without the necessity of the land being subjected to a trust for sale. Such a system has been introduced in Queensland, Australia.

The Queensland Trusts Act 1973⁵⁰ applies to all property subject to a trust "whether express, implied, resulting, bare or constructive"⁵¹ and gives to the trustee all necessary powers of management which are retained "whether or not a contrary intention is expressed in the instrument (if any)

45. Land Registration Rules of 1925, 15 Geo. 5, Statutory Forms 9, 62.

46. *Id.* form 104.

47. Land Registration Act of 1925, 15 Geo. 5, c. 21, §§ 56, 86.

48. *In re Leigh's Settled Estates*, [1926] Ch. 852; *In re Parker's Settled Estates*, [1928] Ch. 247; *In re Norton*, [1929] 1 Ch. 84.

49. Grove, *Conveyancing and the Property Acts of 1925*, 24 MOD. L. REV. 123 (1961); Marshall, *A Critique of the Property Legislation of Western Nigeria*, 1 NIGERIAN L.J. 151, 152 (1965); BELFAST QUEEN'S UNIVERSITY FACULTY OF LAW LAND WORKING PARTY, SURVEY OF THE LAND LAW OF NORTHERN IRELAND, para. 89 (1971); Crane, *The Law of Real Property in England and the United States: Some Comparisons*, 36 IND. L.J. 282, 289 (1961).

50. Queensland Trust Act 1973, No. 24 (Australia).

51. *Id.* § 5.

creating the trust."⁵² Thus, the trustees have irrevocable statutory powers and the "dead hand" of the settlor is not permitted to restrict the freedom of dealing with the land in the interests of the living. Although a trust for sale may be created expressly if desired, the settlement and the statutory trust for sale are abolished.

VI. CONCLUSION

The acceptance in the United States of a system similar to the one adopted in England would dispose of the most harmful effects of the technicalities of common law estates, would greatly simplify dealing with land held for successive or concurrent interests, and would eliminate the evil effects of the legal technicalities of future interests. However, if legislation adopting such a system was made applicable to the existing interests, it might be unconstitutional because it substitutes a legal estate for an equitable interest. This might constitute a deprivation of property without due process of law.⁵³ In England this was not a problem, for what Parliament says is the law, and there is no basic constitutional rule which cannot be the subject of ordinary legislation. Fratcher has suggested one solution to this problem.⁵⁴

There would be general agreement in England that the property legislation of 1925 has been a great success, and the paucity of litigation on the construction of the legislation has been remarkable. Whether reform on these lines would be successful in the United States is difficult for an outsider to judge. The problem to be remedied was much greater in England. The retention of land by aristocratic families was a feature of English social life up to modern times. Strict settlements were designed to do this. But with the advent of the industrial revolution in the middle of the 18th century, it was in no one's interest for the land to be unavailable for development because of its unmarketability. New tax legislation made strict settlements even more unattractive. Because this was not a problem in the United States many of the details of the English legislation would have no relevance. Nevertheless, the principles would appear to be of value. Conveyancing problems arise where there are either successive or concurrent interests in land. These problems exist without the social phenomenon of the English "landed gentry." As Bordwell said: "A strong argument could be made for the abolition of the law of estates and the putting of partial interests in trust. It would seem to be the only alternative to a modernized law of estates."⁵⁵ And, it may be a much simpler solution.

52. *Id.* § 31(1).

53. Fratcher, *A Modest Proposal for Trimming the Claws of Legal Future Interests*, 1972 DUKE L.J. 517, 550.

54. *Id.*

55. Bordwell, *English Property Reform and Its American Aspects*, 37 YALE L.J. 179 (1927).

