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The Law of Real Property in England and the United States: Some Comparisons

Francis R. Crane

University of London King's College

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I. INTRODUCTION

In 1959 my colleague at King's College, Professor R. H. Graveson, delivered a Harris Memorial Lecture entitled "The Task of Comparative Law in Common Law Systems," urging the need for comparative study of the various common law solutions to legal problems. I would not detract, as I am sure Professor Graveson did not mean to detract, from the value of comparison between civil and common law in many important fields, such as contract, tort and commercial law. I would suggest, however, that as far as real property is concerned, a basic difference in concepts may render such comparison less effective. For example, reform of the law of trusts is under consideration in Louisiana. Assuming for the moment a policy decision in favor of the Anglo-American trust, there is then the difficult technical problem of introducing the trust concept into the civil law—to know whether words meaningful in Indiana or England will be held to carry the desired meaning in a civil law context. Within the confines of the common law this particular difficulty does not arise. Instead comparison is simplified because the land law of Indiana and almost all American States, of England, and of many countries of the British Commonwealth, all spring from the English real property law of the 17th century. The technical date of departure in Indiana is 1607, but I understand that your courts have since then been persuaded by many of the English decisions. For these reasons I feel it appropriate to offer some thoughts in a comparative vein on the law of real property.

I would submit, too, that the English law is a valuable component in any such comparative study. Despite our feudal background, our preservation until fairly recent times of an important social and economic group termed "landed gentry," and retention here and there of the trappings of bygone ages, our reform and development of the law of real property has been extremely thorough and radical. We have, I think,
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gone further than any State in this country. Indeed, study of some parts of the real property law of the United States, especially that relating to future interests, produces in an English lawyer educated after 1925 the sensation of an excursion into history, for doctrines long abolished in England still flourish here.

II. Principal Purposes of Reform in England

The present English law of real property represents effects of about 130 years' statutory reform of the common heritage of law above mentioned. In the first quarter of the 19th century our law showed all the antiquity and complexity portrayed by Blackstone. Tenure indeed survived only in the difference between freeholds and copyholds, in a few honorable tenures, and in some customs of descent, such as gavelkind. But the common law's "wonderful calculus of estates," to use Maitland's phrase, was in full force: e.g., the fee simple absolute; the fee simple determinable or conditional and the consequent possibility of reverter and right of entry; the fee tail general or special, male or (theoretically) female; the base fee; life interests of various sorts, including dower and curtesy; reversions, remainders and executory interests; powers of appointment; leaseholds of different kinds; incorporeal interests; and four varieties of concurrent ownership. Beside the common law, equity had constructed a parallel and even wider range of interests, though restrictive covenants were not to be born until 1848. Common law and equity had combined to produce a mortgage which no one could understand "by the light of nature." The artificial distinction between real and personal property, derived originally from the feudal remedies for the recovery of land, controlled succession on intestacy and the basic structure of settlements. These settlements frequently made, combined and laid out in succession the various permissible interests in land so as to control enjoyment and provide family endowment to the full extent of the generous limits allowed by the rules against remoteness. Both legal and equitable interests were enduring and effective against the land. An unusual yet perhaps illuminating statement of the well-known rules as to the priority of legal and equitable interests was made in 1832 by J. J. Park, then the first and original Professor of Law and Jurisprudence in King's College, London.

2. Tulk v. Moxhay, 2 Ph. 774, 41 Eng. Rep. 1143 (Ch. 1848).
4. See text accompanying note 14 infra for discussion of terminology.
To protect the rightful owner, the law of England sacrifices *even* the innocent purchaser; an operation which she herself is so horror-struck with, that in some of her courts she has introduced a countervailing rule by allowing a defendant (under certain circumstances) to set up that very fact of his being a *bona fide* purchaser, as a defence; while, in others of her courts, such a defence would be a mere nonentity.⁶

The primary purpose of reform has undoubtedly been the simplification of conveyancing. Sir Benjamin Cherry, chief draftsman of the 1925 legislation, wrote:

> For many years past the ideal of law reformers has been to enable land to be dealt with as readily as stocks and shares, subject to the necessary modification in the subject-matter.⁶

The aim here has not been merely to enable a particular interest to be conveyed—English law has long insisted on that degree of alienability, but to make possible the conveyance of an unencumbered estate in fee simple or long term of years to a commercial purchaser. The principal steps have been the introduction of conveyancing by estate ownership, overreaching of beneficial interests, and registration of encumbrances or of title.

A secondary purpose has been the removal of obvious injustices, inconveniences and anomalies, notably in the law of future interests.⁷ Both the above types of reform culminated in the 1925 legislation,⁸ and since then have had too little attention from Parliament. On the other hand, Parliament has devoted much time to a third purpose of reform, that of ensuring that land is used in accordance with the social and economic needs of the community. Here we have been experimenting—the extent of reform has flowed and ebbed—to see whether the concept of duty as

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5. Public lecture entitled "Systems of Registration and Conveyancing." In this lecture Park acknowledged with great pleasure a letter of commendation from Joseph Story, then a judge of the Supreme Court of the United States, on an earlier inaugural lecture concerning the purpose of law studies in a University.


7. This type of reform, often preventing the destruction of a future interest, may run counter to the simplification of conveyancing.

8. This legislation, effective on January 1st, 1926, comprised the following Acts: Law of Property Act, 122, 12 & 13 Geo. 5, c. 16; Law of Property (Amendment) Act, 1924, 15 Geo. 5, c. 5; Settled Land Act, 1925, 15 Geo. 5, c. 18; Trustee Act, 1925, 15 Geo. 5, c. 19; Law of Property Act, 1925, 15 Geo. 5, c. 20; Land Registration Act, 1925, 15 Geo. 5, c. 21; Land Charges Act, 1925, 15 Geo. 5, c. 22; Administration of Estates Act, 1925, 15 Geo. 5, c. 23; Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. 5, c. 49. A number of important retrospective amendments were made by the Law of Property (Amendment) Act, 1926, 16 & 17 Geo. 5, c. 11, and the principal Acts must always be read as so amended.
well as of rights cannot be made part of the law and philosophy of the ownership of property. I propose now to discuss those reforms in relation to the structure and nature of the law of real property—leaving aside as far as possible the practice of conveyancing—and to make some comparisons with the various laws of the United States.

III. Conveyancing by Estates

To quote Sir Benjamin Cherry again, "it was considered expedient [in 1925] to secure that in all cases there should be an owner of full capacity, able to deal with the fee simple or term of years in favour of a person dealing for value." The word "expedient" is precise because this was a planner's policy decision, and simplified conveyancing could also have been based on a system of powers, whereby persons conveyed interests of which they were not "owner."

The Law of Property Act, 1925, Section 1, made the basic move to implement this policy. Legal estates were restricted to two, the fee simple absolute in possession and the term of years absolute. Lesser legal interests such as easements and rent charges for value were restricted to five, while all other interests in land were declared to be equitable. Thereafter consequential directions were given concerning the vesting and devolution of the legal estate in land, of which I wish to mention those relating to settlements, concurrent ownership, title on death and mortgages.

Settlements. An initial problem of terminology must be cleared out of the way. In England "the word 'settlement' is used in a general sense for all kinds of arrangements whereby property is given to particular persons in succession." The word "arrangement" includes dispositions by deed and will alike, and is wide enough to cover, for example, the creation of a determinable fee followed by a possibility of reverter as well as a life interest with remainders over. The word "trust" in England is almost an alternative, for since 1925 all settlements in this sense must be created by way of trust, but the bare or simple trust (where A holds the legal estate on trust for B absolutely) does not constitute a

9. "Restored to" might be preferred, depending on one's view of feudalism.
10. WOLSTENHOLME & CHERRY, op. cit. supra note 6, at clxiii-iv.
11. 15 Geo. 5, c. 20, § 1 (1).
12. 15 Geo. 5, c. 20, § 1 (2).
13. 15 Geo. 5, c. 20, § 1 (3).
16. A will is a trust instrument for this purpose. Any instrument inter vivos purporting to create successive or limited interests directly in the beneficiaries takes effect as a trust instrument, and the trust remains to be completely constituted by a transfer of the legal estate in the prescribed form. Settled Land Act, 1925, 15 Geo. 5, c. 18, §§ 4-9.
settlement. In the United States, I understand, neither word is entirely appropriate; settlement is not generally used, and future interests can be created other than by way of trust. In this article I propose to use "settlement" in the general English sense explained above.

In England since 1925 a settlement may be made either under the Settled Land Act, 1925, or by way of trust for sale. In the former the legal estate must be vested (by means of a deed from the settlor or by an assent from his personal representatives) in the person entitled by virtue of his beneficial interest to the possession and enjoyment of the settled land (termed, generically, the tenant for life) or, if there is no such person, in a person nominated by the settlement, or in the absence of such a nomination in the trustees of the settlement. The legal estate is held upon trust to give effect to the interests of all the beneficiaries; in the normal case, therefore, the estate owner is both trustee and beneficiary. If the alternative method of settlement, the trust for sale, is preferred, the legal estate will be vested in not more than four trustees upon trust for sale with power to postpone, and subject thereto to give effect to the beneficial interests. Choice between the two methods may be determined by a lawyer's preferences in regard to the details of conveyancing—the trust for sale is generally thought to be simpler—but more probably by a decision as to who shall enjoy, as of right, control of the land through entitlement to the legal estate.

Concurrent Ownership. Since 1925 only joint tenancy and tenancy in common can exist in England, co-parcenary and tenancy by entireties having been abolished. Tenancy in common presented a potential hindrance to easy conveyancing because the legal estate might be divided among many persons. Consequently the Law of Property Act, 1925, provided that wherever land was conveyed to joint tenants or tenants in common, the legal estate should vest in them, or in the first four named if more than four, as joint tenants on trust for sale, with power to postpone and subject thereto on trust for those beneficially entitled.

Title on Death. The Administration of Estates Act, 1925, re-enacting the provisions of the Land Transfer Act, 1897, provides that on death all property vests in personal representatives of the deceased,

17. The estate owner may have a life estate simpliciter or an interest such as an entail or determinable fee, etc. Settled Land Act, 1925, 15 Geo. 5, c. 18, §§ 19, 20, 117.
20. Law of Property Act, 1925, 15 Geo. 5, c. 20, §§ 34-36. All methods of creating concurrent ownership are not here included, e.g., A and B provide the purchase money and the conveyance is made to A alone, but it seems that the courts may hold a trust for sale to exist in all cases. See Bull v. Bull [1955] 1 Q.B. 234.
who transfer it to the beneficiaries under the will in the course of administration.

Mortgages. Prior to 1926 the English mortgage of freehold land was made by conveyance to the mortgagee, and mortgage of leasehold land by sub-demise. Since 1925 both freeholds and leaseholds may be mortgaged by either demise or sub-demise respectively, or by a "charge by way of legal mortgage," or if the title is registered under the Land Registration Act, 1925, by a "registered charge." In this way the legal estate remains in the mortgagor, the true owner. The mortgagee of course has the usual extensive powers of realizing his security, and thereby obtaining or selling the mortgagor's legal estate.

IV. THE PRINCIPLE OF OVERREACHING

Successive and future interests under settlements as above defined and some forms of concurrent ownership, have always been the chief obstacle to the simple commercial transfer of land. The system of estate ownership just described does not, per se, enable land to be sold, leased, etc., free of these beneficial interests. There has to be some system whereby those interests can be detached from land and attached to purchase money. This process is termed "overreaching" by the English 1925 legislation, and I shall so use it.

English law. In England, in the middle of the 19th century, overreaching was possible only if a settlement contained express powers, or was made by way of trust for sale. Both cases were rare. The Settled Land Act, 1882, now replaced by the Settled Land Act, 1925, provided a radical remedy by giving to the estate owner wide overreaching powers of disposition, by way of sale, lease, etc. Similarly wide powers are derived by trustees for sale, whether holding under an express settlement or by virtue of the statutory provisions relating to concurrent ownership, from the Law of Property Act, 1925, and by personal representatives from the Administration of Estates Act, 1925. All these powers of disposition are inalienable, cannot be restricted directly or indirectly, and are normally exercisable without any reference to the court. In all cases, provided the transaction is intra vires the statutory authority and any capital money is paid to two trustees or a trust corporation, the beneficial interests are overreached and attach to the proceeds of sale. In short,

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21. This could be the tenant for life, as described earlier, or if none, the person designated to exercise the powers, or if none to the trustees of the settlement.

22. Trustees for sale may be required to obtain consents; if these are not given, the court has jurisdiction to dispense with them. Law of Property Act, 1925, 15 Geo. 5, c. 20, §§ 26, 30.
beneficial interests in English settlements exist in the trust fund for the
time being, not in any particular form of property.

American law. It seems that in the United States overreaching dis-
positions may occur in three ways. First, the trust instrument may
authorize or direct a sale. Secondly, American courts have inherent
jurisdiction to direct dispositions of land subject to future interests or
trusts where adherence to the terms of the instrument would, through
change of circumstances or for other reasons, be unfair or defeat the
original purpose. Further, some states, including Indiana, have by
statute enlarged this jurisdiction based on reasonable necessity by per-
mitting the court to authorize dispositions which are advantageous to the
beneficiaries. A sale of land subject to concurrent interests may be
ordered in a partition action if that is the only practicable way of deal-
ing with the property. In all these cases beneficial interests are over-
reached and continue in the money produced by the disposition.

Comment. As regards the English system of overreaching, Profes-
sor Lawson has said in his invaluable Hamlyn lectures on “The Rational
Strength of English Law”: “I regard this wholesale combination of a
rigorous regime for the land itself with an astonishingly free regime for
the endowments to which it may be devoted as one of the most brilliant
feats of the English mind. . . . Moreover, this is one point at which
English law is ahead of all the other common law systems . . . .” in-
cluding that of the United States.

Now you may reply, with some force, that Indiana and many other
States could achieve this feat of ratiocination by a stroke of the pen per-
mitting trustees to sell out of court, and that being “ahead” depends upon
where one wants to go. Nevertheless, I submit that this answer is in-
complete. Obviously the United States, as compared with England, has
had much more land, far fewer settlements and, it seems, more express
powers of disposition. Yet the fundamental question is, surely, whether
the dead hand of the settlor is to be allowed to control the nature of the
trust fund. This would seem to be essentially a matter for contemporary
decision; the views of the settlor necessarily become ever more irrelevant.
The contrary view on this point seems to give rise, logically, to the ex-
ceptional “necessity” jurisdiction. But, with respect, once the “advan-

23. See 1 American Law of Property §§ 4.98–99 (Casner ed. 1952); 2 id. § 6.26;
Restatement, Property §§ 167, 190; 4 Thompson, Real Property §§ 2015–269
(Permanent ed. 1940).
25. “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.” Leach, Cases on Future
tage” rule is accepted, the only reason for requiring application to the court seems to be a distrust of trustees. English experience shows that one can trust not only trustees but the tenant for life, at least if the onus of proper payment is placed on the cautious purchaser. The English extension of overreaching to concurrent ownership, which may be commercial in nature, must be justified on grounds of convenience of conveyancing, but has worked well and may merit study.

However, the conveyancing part of English law has its defects. The conveyancing machinery of the Settled Land Act is clumsy. The trust for sale has to be used for purposes which belie its name, for often the intention is to hold rather than sell. Such a trust is in form still an imperative trust to sell combined with a discretionary power to postpone, but in fact, I submit, it is usually no more than a conveyancing device to enable land to be held and transferred. Yet where the persons concerned disagree, the courts may still look to the form rather than the substance in deciding whether or not to order a sale. What is required is a simple form of settlement, such as a conveyance to trustees simpliciter on the American model, with a proviso that, if so desired, the powers of management and disposition can be given to the principal beneficiary. This would involve departure from the 1925 policy of conveyancing by estates, but this creates no problems.

V. RECORDING AND REGISTRATION

The various American and English rules of recording and registration which are primarily designed to assist investigation of title and conveyancing also determine the validity of interests against the land in the hands of a purchaser; they cut across and replace in this context the earlier distinction between legal estates and equitable interests.

In the United States, except in the few registered title areas, recording is universal. Its principal features appear to be these: apart from some transitory interests all dispositions whether of legal estates or equitable interests must be recorded; recording constitutes notice and preserves priority; failure to record involves postponement to certain subsequent purchasers—the exact rules in each state depending on the effect of actual notice and of the race to the recording office; full details appear on the record, which is public. Consequently the recording rather than the actual deed is usually the evidence of title on which transactions take place. In England recording of deeds has been confined to two counties,

Middlesex (1705-1936 when it was replaced by registration of title) and Yorkshire (since 1705). We have at the present time existing side by side, two systems of conveyancing, unregistered and registered, in each of which statutes affect the validity of interests against purchasers.

**Unregistered conveyancing.** Here the actual title deeds are the evidence of title, and so the foundation of the abstract of title, and they are handed over on completion to a purchaser or mortgagee. Such conveyancing is obviously private. The Land Charges Act, 1925, buttresses this system by requiring registration of both private and public encumbrances. The former, registrable in a central registry against the name of the estate owner at their creation, include pending actions, writs or orders affecting land, legal or equitable mortgages unless protected by deposit of the deeds with the mortgagee; contracts to convey or create a legal estate, restrictive covenants (by far the most numerous registration) and equitable easements. Public encumbrances, registrable against the actual land in registers kept by county, borough and district councils, comprise all sorts of statutory charges imposed by public bodies, including planning restrictions. In all cases registration constitutes notice; failure to register makes some interests void against all purchasers and others against only purchasers of legal estates; actual notice, even by possession is here, it seems, no substitute for registration notice.

**Registered Conveyancing.** Registration of title began in England in 1862 but need be considered only in terms of the Land Registration Act, 1925. The title to a legal estate may be registered (leases under 21 years, mortgage terms, and unassignable leases are exceptions to this rule). The first registered proprietor sheds no liabilities by registering his title nor does his donee, but a purchaser for value takes subject only to interests protected on the register and to certain overriding interests which affect the land without mention on the register (e.g., leases for 21 years or less, easements, and the rights of persons in actual occupation or in receipt of rents and profits). Consequently the Land Charges Act, 1925, does not apply to private encumbrances on registered land which must be protected on the register of title itself unless they are within the list of overriding interests. But public encumbrances known as local land encumbrances.

27. It would of course be an unwarrantable presumption to describe anything emanating from Yorkshire as less than important.

28. A first mortgagee normally requires the title deeds to be handed over to him; thereby a purchaser investigating title will have notice of the mortgage, (if it be not disclosed) for he should ask why the deeds are not held by the vendor. But a second mortgagee must register if the first mortgagee has the deeds. So far as notice goes, registration may be the better method, for negligence with the title deeds can postpone a mortgagee. But the advantage of having the title deeds in one's possession is great if it becomes necessary to realize the security.
charges are not affected by registration of the title and remain registrable as described in the previous paragraph.

In some areas, which are selected by local option, first registration of title is compulsory on sale of a fee simple or grant, or sale of a lease of 40 years or more. In all areas title may be registered voluntarily. Once registered, title cannot be de-registered and all transfers of legal estates must take place by registered disposition. The register is private, for it can be inspected only with the consent of the registered proprietor.

Comment. The long existence of recording in the United States has brought full recognition of its place not only in the machinery of conveyancing but also in the structure of real property law. Your books emphasize the importance of recording as the foundation of the rules determining the continuing validity of interests against the land, and treat the older rules concerning the relationship of legal and equitable interests in land primarily as background material. In England, in my opinion, we do not emphasize sufficiently the changes in the law made by the Land Charges Act, 1925, and the Land Registration Act, 1925. The tendency is to present the Land Charges Act as an amendment to the judge-made rules, and to deal with the Land Registration Act only as a separate topic at the end of a course or book. Yet more than one-quarter of English conveyancing already takes place under that Act, while compulsory and voluntary registration of titles increases at a rate restricted only by the Land Registry's digestive abilities. Registration of title is clearly destined to become dominant in England. Therefore as regards priority, title security, validity against the land—whatever expression be used—classification of interests in land must soon come to depend principally on the terms of the Act. Only where the Act is inapplicable—as to leases under 21 years—will the earlier law be relevant. The statutory classification of the Land Registration Act, and the Land Charges Act, I submit, should now be given that prominence and emphasis in England which the recording classifications have in the United States. Registration of title seems unlikely to make further substantial headway in the United States. Consequently, the details of practical conveyancing here and in England are likely to differ more than they already do. However, the objects and principles of recording and regis-

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29. See 6 Powell, Real Property 269 (1958); Casner & Leach, Cases on Property vi, xi (1st standard ed. 1951), where recording is variously described as the "heart," "pulse-beat" and "core" of the land law.


31. For a discussion of this classification see Crane, Equitable Interests in Registered Land, 22 Convey. (n.s.) 14 (1958).
ration seem sufficiently similar to prevent any vital divergence in this sector of the substantive law of real property.

VI. **Beneficial Interests Under Settlements**

A good many rules of real property law relating to present and future beneficial interests, were originally intended to preserve either the privileges of the feudal lord, or the transferability of land. The former has long been irrelevant, and the latter is more easily effected by over-reaching provisions. Today rules controlling the creation and duration of beneficial interests should stand or fall by their present rational significance, and I propose to examine some of them on that basis.

**Limitation to Heirs.** The common law refused to give the obvious interpretation to limitations to heirs. Without attempting a precise statement of the law, we may say that a limitation to the heirs of a life tenant, by the Rule in *Shelley's Case*, gave that tenant the remainder in fee simple; and that a limitation to the heirs of the grantor, by the doctrine of worthier title, either left a reversion in the grantor or gave his heirs a title by descent. The Rule in *Shelley's Case* was abolished in England in 1925 and has gone in most American jurisdictions, though remaining in a few. The doctrine of worthier title was abolished in England in 1833, but in the United States has continued to flourish as a somewhat unpopular rule of construction of deeds, even extending its sway to personal property.\(^2\) It is hard to see any rational justification for the retention of either of these ancient rules; their probable original purpose of preserving the feudal lord's rights has been irrelevant for centuries, and, despite some judicial dicta,\(^3\) they must almost invariably frustrate the settlor's intention. The draftsman can do without these traps.

**Destructibility of Contingent Remainders.** At common law legal contingent remainders were destructible either artificially by tortious conveyance or naturally by failure to vest on or before the termination of the prior estate in possession. There can surely be no valid defence of these rules for the preservation of feudal seisin. In the United States both forms of destructibility have largely, but not wholly gone, and show considerable vitality in Florida.\(^4\) England got rid of destructibility in

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33. In Doctor v. Hughes, *supra* note 32, at 313, 122 N.E. at 223, Cardozo, J. said, "... seldom do the living mean to forego the power of disposition during life by the direction that upon death there shall be a transfer to their heirs."
34. Blocker v. Blocker, 103 Fla. 285, 137 So. 249 (1931); Popp v. Bond, 158 Fla. 185, 28 So. 2d 259 (1946).
several stages, about which there seems some misapprehension here. The Real Property Act, 1845, abolished artificial destructibility. The Contingent Remainders Act, 1877, provided that any remainder failing through too early a determination of the prior estate should take effect as an executory limitation if valid as such—that is, if valid under the Rule against Perpetuities. Consequently, the Act did not save a legal limitation to “A (a bachelor) for life, remainder to his first son to attain 25”; this had to stand or fall under the destructibility rule.\textsuperscript{35} If in this example the age was 21, as was usually the case in practice, the Act applied. American books tend to say that this Act abolished the destructibility rule in England.\textsuperscript{36} In fact two more statutes were needed; the Land Transfer Act, 1897, giving land to personal representatives and so making all beneficial interests under wills equitable, and the Law of Property Act, 1925, making all future interests equitable, as already described.

\textit{Determinable Fees and Fees upon Condition}. Both England and the United States recognize the determinable fee and the fee upon condition, giving rise respectively to a possibility of reverter and right of entry in the grantor. In both countries these early examples of the common lawyer’s propensity for acute and subtle analysis, though strictly falling within my definition of “settlements,” are used for commercial as well as endowment purposes, and so therefore are not wholly within the terms of reference of the present section of this paper. But obviously they must be discussed as a whole.

In England both determinable fees and fees upon condition will normally be created either under the Settled Land Act, 1925, or behind a trust for sale, and will therefore be overreachable on a commercial disposition of the land. Moreover, both possibilities of reverter and rights of entry appear to be void, so as to leave a fee simple absolute, if the determining event can take place outside the period of the Rule against Perpetuities.\textsuperscript{37} Lastly, all restrictions on the alienation of possibilities of reverter and rights of entry were removed by the Real Property Act, 1845. Subject to two statutory exceptions, therefore, we have these interests pretty well under control. The first exception occurs where de-

\textsuperscript{35} Compare the textbook case of Abbiss v. Burney, 17 Ch. D. 211 (1881), where the losers sought to apply the remainder rules to just such equitable limitations to escape from the Rule against Perpetuities.

\textsuperscript{36} \textit{E.g.}, \textsc{Leach}, \textit{op. cit. supra} note 25, at 103; \textsc{Sim}, \textit{op. cit. supra} note 25, at 47; 1 \textsc{American Law of Property} § 4.63 n.1. (Casner ed. 1952); 2 \textsc{Tiffany, Real Property} § 331 (3rd ed. 1939). The English view of the matter is clearly stated in \textsc{Megarry \& Wade, op. cit. supra} note 30, at 201-05.

\textsuperscript{37} The law is settled as regards rights of entry, but less clear as regards determinable fees. See \textsc{Morris \& Leach, The Rule against Perpetuities} 203-06 (1956).
terminable fees have been created under certain statutes, notably the School Sites Act, 1841, and its predecessors; the second exception occurs where a fee simple has been conveyed with the reservation of a legal rent-charge supported by a right of re-entry—a form of land development used in Manchester and some other areas instead of the more usual long lease. In both these instances the determinable fee or fee upon condition still subsists as a legal estate, subject neither to overreaching or the Rule against Perpetuities, but in neither instance do any serious problems appear to have arisen.

In the United States determinable fees and fees upon condition are not normally overreachable, and possibilities of reverter and rights of entry are not subject to the Rule against Perpetuities; further, rights of entry are normally inalienable intervivos. Consequently as compared with the English situation these interests are much more capable of creating troublesome restrictions on the use of land, and my impression is that they do cause trouble. Some states have legislation providing that both types of limited fee shall become absolute after a number of years. It has been generally held in the United States, however, that grants of oil and gas create determinable fees and therefore any legislation must take account of these valuable commercial interests. It might, for example, be preferable to give the courts power to declare possibilities of reverter or rights of entry void after a period, rather than to strike them down outright.

Determinable fees and fees upon condition therefore show considerable vitality and some potential or actual nuisance value. But it seems that the combined efforts of our two countries have developed ample methods of control, if our legislatures care to use them.

The Rule against Perpetuities. So much has been written so cogently by so many about the Rule against Perpetuities that it is impossible to do more here than mention a few points concerning the common law Rule that appeal to one observer as important.

First, there must be significance in the remarkable power and vitality shown by the common law Rule against Perpetuities. In several American states, including Indiana, it has been restored to the law after having been displaced for a long period by other rules of remoteness. In England no one doubts its value, despite the ease with which land and other property can be transferred free from beneficial interests. It would

39. E.g., Leach, op. cit. supra note 25, at 20-22; Morris & Leach, op. cit. supra note 37, at 206-11.
seem that the boundary of the perpetuity period, which is broadly speaking, the coming of age of the first unborn generation, is a convenient natural terminus for family endowment. The Rule is not easily replaced.

Secondly, the real trouble with the Rule is, I would submit, simply that the requirement of initial certainty of validity of any limitation makes it too complex for operation by the average lawyer working under the normal pressures of practice. A competent draftsman may easily find he has not achieved the needed feats of imagination concerning the sex life of those well known characters the "fertile octogenarian," "the precocious toddler," and the "unborn widow," for years later his document may fail to withstand the "brain-child" of the more lively and recently whetted imagination of the young man just out of law school. On the other hand, one wonders how many settlements and wills contain a perpetuity that is never noticed and so ignored—perhaps with very satisfactory results. The moral seems to be that cautious removal of defects in the common law rule is preferable to radical reformation.

In England we have made one useful reform, and have proposed others. First, Section 163 of the Law of Property Act, 1925, provides that if a gift is contingent on the beneficiary attaining an age greater than 21, such greater age shall be read as 21 if this is necessary to save the gift. A surprising number of typical limitations are saved from remoteness by this simple rule. Secondly, our Law Reform Committee in 1956 proposed no fewer than twenty-five remedial reforms to the law of perpetuities and accumulation. The proposals included adoption of a general "wait-and-see" rule (deriving, it seems, from both the Pennsylvania Estates Act, 1947, and the Massachusetts Perpetuities Act, 1954); a presumption against fertility in women after 55; abolition of the all-or-nothing class rule; and a constructional preference for existing wives as against unborn widows. Perhaps the very comprehensiveness of the Report has deterred the Lord Chancellor from introducing legislation; at any rate, so far none is in sight, which is unfortunate.

Variation of Trusts. In 1954 the House of Lords, in Chapman v. Chapman, ruled that the court's inherent jurisdiction to vary trusts was limited to certain situations of emergency. The application in Chapman was for the variation of a trust to avoid inheritance taxes, and Lord Morton of Henryton remarked on the undesirability of "a game of chess" between the courts and the Revenue. This decision provoked dissatisfaction in general, and in particular it was said that judges in chambers

41. Created by Professor Barton Leach.
42. LAW REFORM COMMITTEE, FOURTH REPORT, CMD. PAPER 18, at 30-33 (1956).
(where the proceedings are not reported) had long been exercising the jurisdiction now denied them. Consequently the Lord Chancellor referred the matter to the Law Reform Committee, which disagreed with the House of Lords. The result was the Variation of Trusts Act, 1958, which now gives the court jurisdiction to approve proposed variations in trusts on behalf of (i) any person with a vested or contingent interest who lacks capacity to consent; (ii) any person who may become a member of a class; (iii) any unborn person; (iv) any person who may become a beneficiary under a future discretionary trust, provided that, except as regards (iv), the variation is for the benefit of the persons concerned. Adult and capable persons can of course consent for themselves. The greatest number of applications has been to enlarge investment clauses, but the court has shown itself ready to terminate or remodel settlements, at least for tax purposes, putting aside only very limited sums for persons in fact unlikely to take.

I would submit that it is a rational to permit variation of trusts to meet varying circumstances, rather than allow the dead hand of the settlor to exercise control to the limits of the rules against remoteness. Yet one may be sure that only the extreme pressure of taxation, including death taxes, produced the ready acceptance of the 1958 Act. In their history the English courts have previously assisted property owners to evade the effect of all sorts of undesired rules—the evasion of feudal dues through the device of the use is the obvious example. It is nevertheless perhaps surprising to find such jurisdiction expressly conferred by the legislature on courts which had denied it.

Extension of Entails to Personal Property. The Law of Property Act, 1925, permitted entailed interests to be created in personal as well as real property. This was a rational assimilation of the rules governing the two types of property, and had the further advantage of permitting any settlement to take either of the permissible forms. But entail are rarely created in England today, for a settlement in that form gives every advantage to the Revenue.

Construction of Conditions Subsequent. Many testators (the cases all seem to concern wills) try to control their beneficiaries by attaching to their gifts conditions of defeasance. Thus attempts have been made to control religion, marriage, residence, and the use of surnames— attempts ranging, one may suggest, from unwarrantable interference to a display of harmless vanity. Until 1943 such conditions in England nor-

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44. If a trust for sale is used there is notional conversion in equity, so the beneficial interests are in personality. For an example of a settlement made by way of trust for sale in 1927 and creating an entailed interest, see In re Meux [1958] Ch. 154 (1957).
mally stood or fell by the test of public policy. Since a decision of the House of Lords in that year, however, our courts have tended to emphasize primarily the requirement of certainty. They have revived and applied strictly Lord Cranworth’s dictum of 1859 that the court and the beneficiary must be able to see “from the beginning, precisely and distinctly, upon the happening of what event it [is]” that the interest is liable to determine. If the desired destination be invalidity, the courts can hereby avoid the unruly horse of public policy and take a smoother ride in the automobile of uncertainty.

Comment. This catalogue of reforms, by no means exhaustive, does, it is submitted, sustain the claim that the English law of beneficial interests has undergone a re-examination more extensive than any undertaken in the United States. The result has been a single and reasonably coherent scheme of beneficial interests available for the purpose of family endowment, and removal of the more extreme forms of control by the dead hand of the settlor.

VII. Mortgages

The law of mortgages in the United States appears to be intricate, to vary considerably from one state to another, and still to retain something of that English reserve which prompted Maitland’s gibe of suppressio veri and suggestio falsi. Consequently conclusions based on a necessarily brief study must be submitted with caution. Subject to this caveat the following provisions of United States law seem to invite comparison with English law.

American law. In the United States mortgages may confer a title—that is, pass an estate—on the mortgagee but now are more generally held to give him only a lien. This distinction is important because lien-theory mortgages (including some hybrids) do not give the mortgagee a right to possession, whereas title theory mortgages do. All mortgages require recording and thereby acquire priority and become part of the title to the land. The principal remedy for realizing the security is judicial sale, though some eighteen states use an express power of sale; the latter power is not always viewed with favor and judicial sale may be preferred. A few states forbid express powers of sale—Indiana so forbids in regard to mortgages but recognizes such powers in trust deeds used to create security rights. Because of these characteristics of the

47. IND. ANN. STAT. §§ 56-703, 56-614 (Burns 1951).
law of mortgages in the United States the differences between legal and equitable mortgages have become largely irrelevant.

**English law.** In American terminology, England is in the process of transition from a title-theory to a lien-theory jurisdiction, and the differences between legal and equitable mortgages are still important. It will be convenient to consider the points described above in the same order.

Until 1926 a legal mortgage of freehold land was created by conveyance of the fee simple, the mortgagor retaining a brief legal right to redeem and an indefinite equity of redemption. All second and subsequent mortgages of freeholds were therefore equitable. Legal mortgages of leaseholds were created by sub-demise. After 1925, in accordance with the drafting principle of estate ownership, the mortgagor retains the fee simple and both freeholds and leaseholds are mortgaged alike. If the title is unregistered, the mortgage is by demise or by "charge by way of legal mortgage," the latter having become the normal method; if the title is registered, the mortgage is by a "registered charge" which must be completed by entry on the register. Therefore, all second and subsequent mortgages can now be legal. Equitable mortgages are usually made by memorandum under seal, though less formal ways are practicable, such as a mere deposit of title deeds. Such a memorandum normally contains an irrevocable power of attorney giving the mortgagee power to create a legal mortgage and to convey the mortgagor's estate.

A legal mortgagee is entitled at law to possession by virtue of either his term of years or statutory provisions giving him equivalent rights. The courts must give effect to this right—often exercised as a prelude to sale after default by the mortgagor—and have no general equitable jurisdiction to refuse an order. Equitable mortgagees need the assistance of the court to obtain possession.

Where the title is unregistered a first mortgagee, whether legal or equitable, will normally insist on possession of the title deeds. Any mortgagee who does not take the deeds must register his mortgage under the Land Charges Act, 1925. Thus priority is obtained either from cus-

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48. The modern law is contained in the Law of Property Act, 1925, 15 Geo. 5, c. 20, §§ 85-120, and the Land Registration Act, 1925, 15 Geo. 5, c. 21, §§ 25-36. The acts define the powers of a mortgagee by demise and give the same effect, by statutory reference, to the charge by way of legal mortgage and the registered charge. This is an inelegant adherence to title theory, the more so as mortgages by demise are now rarely made.

49. Banks usually take an equitable mortgage in this form.

tody of the deeds or by registration. Legal mortgages of unregistered land become part of the chain of title thereto and will be abstracted, but it is not the practice to abstract discharged equitable mortgages. If the mortgagor's title is registered under the Land Registration Act, 1925, the mortgage whether legal or equitable should be protected by entry on the register. Priority is assured by entry, though deposit of the Land Certificate may be an alternative method. When the mortgage is discharged the entry will be cancelled and cease to be part of the title.

The remedies available to a legal and equitable mortgagee differ. A legal mortgagee is entitled to possession and may foreclose by order of the court, or sell out of court. The latter is the normal remedy. Only if the mortgagee is a building society are any special formalities prescribed. This exception, introduced by the Building Societies Act, 1939, is important, because in England almost all installment house-purchase mortgages are made to building societies; the sale is still, however, a sale out of court. An equitable mortgagee's primary remedy is sale through the court but, as already mentioned, equitable mortgagees usually take power to convert themselves into legal mortgagees.

Formal differences still exist, therefore, between legal and equitable mortgages, but in practice, as has been seen, their importance is not very great.

Comment. English law seems still too much concerned with title. It is hard to see what would be lost by abolishing the difference between legal and equitable mortgages and adopting a full lien theory, giving to all mortgagees the right to possession and the power of sale now enjoyed by legal mortgagees. This reform could be very easily made under the Land Registration Act, 1925, and perhaps is not worth considering until that Act is dominant. On the other hand, by English standards American law seems to impose too many restrictions on realization of the security; the question here posed (without attempt to answer) is whether those restrictions afford worthwhile protection to the mortgagor, or whether they are accustomed, yet costly formalities without real justification. Lastly, the English unregistered system seems to have a definite advantage in its removal of discharged equitable mortgages from the title, and the Land Registration Act goes one better by removing all discharged mortgages from the register.

VIII. PUBLIC CONTROL OF THE USE OF LAND

Both the United States and England recognize, as must any modern community, the necessity of some measure of public control of the use of land, in time of peace, as well as in war or other emergency.
are inevitably continual conflicts in which private needs or desires must give way to the public welfare, as determined—ultimately—by the organs of government. Several matters need mention here; one may preface the discussion with the caveat that the actual operation and administration of the law in this field may be at least as important as the law itself.

**Taxation.** In the United States and in England taxation, particularly in the form of income tax and death taxes, causes a substantial redistribution of wealth, finances major public projects involving the use of land, and greatly influences the beneficial dispositions made by private individuals. This position appears to be generally accepted. Reduction of taxation is regularly demanded, but cessation of spending causes alarm; the true question seems to be whether government spending shall remain big or grow bigger. Yet as compared with other methods of control, the effect of taxation is indirect; it is the cause of transactions involving land, not a control of the use of land.

**Eminent Domain—Compulsory Purchase.** In both countries land may be compulsorily acquired on payment of compensation. The public need for streets, schools, redevelopment of cities, and utilities and services of all kinds may justify the termination of private ownership of particular land. Sometimes the government definition of “public need” seems a little strained. Yet neither in England nor the United States does compulsory purchase or the use of eminent domain seem to be sufficiently widespread to materially effect the concept of ownership. One does not define a fee simple as a statutorily terminable interest. It may be added that England, where Parliament is legally sovereign and its Acts cannot be declared unconstitutional, this position could quickly change. For example, at the last General Election the Labour Party advocated the acquisition by local government authorities of the landlords’ interests in all medium and low-value rented dwelling houses. If an Act authorizing and directing such acquisition were enacted, how should one describe the interest of a landlord? Technically, compulsory acquisition is no more than a transfer, but would it in such circumstances be exaggeration to talk of a statutorily terminable interest?

**Zoning or town-planning.** The English Town and Country Planning Act, 1947, is broadly comparable with American zoning law but in two present provisions, and one former one, seems to go further. First, local planning authorities (the larger units of local government) had to prepare and submit to the Minister a comprehensive plan for use and de-
development of their area which must be reviewed every five years. Thus, there has been created a duty to plan and to continue planning in positive terms; no authority may wait on events. Second, planning permission must be obtained for almost every change of use, however simple. This requirement is mitigated in practice by a departmental administrative order, made under the authority of the Act, giving blanket permission for certain changes, but of course this order can be varied at any time. Strong emphasis must be placed on the pervasiveness of this requirement of permission for a change of use, for it extends to many matters a landowner might consider minor in character. Thirdly, the 1947 Act in effect expropriated future increases in the value of land caused by change of use, in exchange for a promise of future payment of compensation. If X owned land worth £10 an acre in its existing state but £100 an acre as a building site, the difference of £90, called "development value," had to be paid to the State when development took place. The Act allowed all landowners who thought their land had development value to apply for compensation within a limited time of the passing of the Act, and set up a fund of £300,000,000 to meet these claims at a date to be decided. In theory, therefore, in the above example X put in his compensation claim, and sold his land to a builder for £10, the builder paying the additional £90 to the State. In practice, however, X either refused to sell or sold for say, £60, and the extra £50 was added by the builder to the cost of the property in a subsequent sale. Too often, therefore, the result of these efforts to take the unearned "capital gains" out of landowning was to increase the sums payable by the consumer for a house or other building. As a result the Town Planning Acts of 1954 and 1959 have more or less reversed these financial provisions, so X now sells for the market price and generally, though with some important exceptions, is entitled to compensation if planning permission is refused. All these financial problems have attracted much attention but must not be allowed to obscure the substantial and apparently permanent restrictions now placed on the use of land.

Control of Tenancies. In both England and the United States rent control and security of tenure for tenants have been necessitated by World Wars I and II, especially the latter. In the United States such control has normally been confined to dwelling houses, though New York has a scheme covering business premises also. These measures are essentially temporary in conception and are not envisaged as enduring beyond exceptional or emergency conditions which, however, have not yet ended. The general attitude seems to be expressed by Professor Richard Field of the Harvard Law School: "The freezing of a particu-
lar occupant's right to possession is a serious interference with the landlord's freedom of contract, which can be justified only by a showing of urgent necessity."

In England, recent years have seen the introduction of gradual decontrol of dwelling houses by the Rent Act, 1957, though at the same time the Landlord and Tenant Act, 1954, Part I has permanent provisions for the conversion to controlled tenancies upon the expiration of long leases. But legislation designed to be permanent gives to business and agricultural tenants security of tenure at a fair rent on fair terms; a landlord can only terminate such a tenancy, generally speaking, if he desires to occupy himself or to develop the property, or if the tenant misbehaves himself. The technical means for achieving this result vary; a business tenant gets a new lease and an agricultural tenant does not get notice to quit. This policy is not new as regards agricultural tenancies but was first applied on any comprehensive scale to business tenants by a Conservative government in 1952-1954. The general common law of landlord and tenant is therefore profoundly and permanently modified in England.

An Experiment in Agriculture. The really radical English measure was not the much publicized Town and Country Planning Act, 1947, but the short-lived Part II of the Agriculture Act, 1947. Part I of this Act was headed "Guaranteed Prices and Assured Markets"; Part II was entitled "Good Estate Management and Good Husbandry." The provisions were to "have effect for the purpose of securing that owners of agricultural land fulfill their responsibilities to manage the land in accordance with the rules of good estate management, and that occupiers of agricultural land fulfill their responsibilities to farm the land in accordance with the rules of good husbandry." "Good estate management" was management reasonably adequate to enable a reasonably skilled occupier to maintain production efficient as to both quantity and quality; "good husbandry" was the maintenance of such production. The penalties for failure were first, supervision and on failure to improve, compulsory purchase from an owner and ejection of an occupier. This scheme, operated through local committees comprised of farmers and other agriculturists, had worked well in wartime but proved unacceptable in peacetime. Supervision orders became rare and usually received adverse publicity sympathetic to the farmer. Consequently Part II of the Act was repealed by the Agriculture Act, 1958. But one may recall how

52. CASNER & LEACH, op. cit. supra note 29, at 548.
53. Landlord and Tenant Act, 1954, 2 & 3 Eliz. 2, c. 56 Pt. II; Agricultural Holdings Act, 1948, 11 & 12 Geo. 6, c. 63.
54. Agricultural Act, 1947, 10 & 11 Geo. 6, c. 48, § 9 (repealed).
many accounts of major legal developments must begin with the words "... after various abortive measures, the legislature eventually in the year... ."

Comment. Obviously any complete account of the land law in either country must discuss the public control of land. In the United States it seems to be fairly described as one topic, comparable, for example, with the law of restrictive covenants. In England, however, it is much more extensive and pervasive. Much of the old law of landlord and tenant has been virtually superceded by control. No longer could Challis, that great authority on real property, write as he did in 1885, that the fee simple “confers, and since the beginning of legal history it has always conferred, the lawful right to exercise over, upon, and in respect, to the land, every act of ownership which can enter into the imagination... .” The English Town and Country Planning Act, 1947, produced some fairly extravagant prose, pride of place being held by Time magazine's comparison with “Soviet Russia's collectivization of peasants.” My predecessor at King's College, the late Professor Harold Potter, wrote two learned stimulating, yet deliberately provocative articles, one on the Agriculture Act, 1947, entitled “The Twilight of Landowning” and the other suggesting that after the Planning Act the fee simple was no longer in the land but only in the permitted use thereof. These extreme views have not won acceptance. English opinion would rather agree with the writer of a note in the Harvard Law Review, who in 1947 found that “compared with either existing British measures or American practice, the proposed [Town and Country Planning Act] loses much of its revolutionary luster.”

Two more quotations reflect a wider view. The late Professor Hargreaves, a learned and staunch supporter of the traditional law of real property, wrote in 1952:

The real significance of these Acts for . . . the principles of land law lies in the unmistakeable breach which they have torn in the artificial barrier which has for so long divided private and public law. And they have achieved this by reintroducing into law, as distinct from ethics, the conception that duties as well as rights are an integral feature of legal ownership—duties which arise solely from the fact of ownership and not merely

56. CHALLIS, REAL PROPERTY 218 (3rd ed. 1911). The first edition was published in 1885.
57. 12 CONVEY. (n.s.) 3 (1947), Caveat Emptor or Conveyancing under the Planning Acts, 13 CONVEY. (n.s.) 36 (1948).
58. 60 HARV. L. REV. 800, 811 (1947).
those corresponding to the proprietary rights of others. No doubt the Planning Act, or most of it, lends itself to an interpretation in terms of the old law of restrictive covenants, but the positive duties imposed on freehold owners by the Agriculture Act cannot be explained by any analogy based on modern private law. . . . The essential point is the association of duties with rights in the one conception of ownership. . . . 59

And his lecture on land law in the symposium entitled "Law and Opinion in the Twentieth Century," Professor Griffith selected this question of public control as the subject-matter of his lecture, saying "The attempt is made to harness private interest to the public good. If there is one single characteristic which dominates postwar legislation it is this attempted compromise. . . . And political passions are most aroused today . . . when the compromise seems to be departed from." 60 The principle and philosophy of public control are accepted; argument turns on application. All this is a far cry from the spirit and aims of the 1925 legislation.

IX. CONCLUSION

Nothing would be gained by a reiteration of these selective comparisons, or any further attempt to allocate praise or criticism to one side of the Atlantic or the other. I trust the extensive and radical nature of the English reforms has been established. Much public attention inevitably focuses on the development of public control of land use. Here the lawyer has the double responsibility of expressing his opinions both as an educated citizen and as a technical adviser capable of assessing the efficiency of the legal tools selected to implement the policy decisions. This double responsibility he shares with others, such as the economist, sociologist, and financial expert. He is one of a team.

As regards the private law of real property, however, the lawyer is in sole command. He alone can understand and operate the law—he is, as Sir Frederick Pollock once said, the familiar spirit without whom nothing can be attempted or accomplished. Yet understanding usually brings appreciation, and operation often a cautious conservatism. These are dangers, for the law ought to undergo constant re-appraisal. The Anglo-American law of real property, for all its complexity and variance, is a great feat of analytical jurisprudence and an invaluable legal tool. It is our responsibility to keep it so.
