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Land Title Registration: An English Solution to an American Problem

C. Dent Bostick*

INTRODUCTION**

Some fifty years ago, respected American legal scholars engaged in an extended debate on the virtues and the feasibility of land title registration.1

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I. Prompted by the failure of three of the four title insurance companies operating in New York City, the Real Estate Board of New York procured a grant from the Carnegie Corporation to the New York Law Society which engaged Professor Richard R. Powell of Columbia University to conduct a study of title registration. The publication of his results was the starting point of the approximately four-year debate. See R. Powell, Registration of the Title to Land in the State of New York (1938).

Professor Powell was a longtime advocate of the Torrens system, a voluntary title registration system that, in its American version, relies on the use of a certificate of title to evidence ownership of real estate. However, Powell concluded that voluntary registration could not be made to work in New York because of the substantial costs associated with the transition from recordation to registration. He further rejected compulsory registration with a public subsidy of the costs because there was not a reasonable probability that title registration would operate better than recordation. Breaking camp with the Torrens school of thought, Powell recommended repeal of the registration statute and public regulation of privately-controlled title insurance companies. Id. at 74.

The New York Law Society and the Carnegie Corporation disclaimed Powell's conclusions. The Real Estate Board of New York entered a vigorous and unanimous dissent from the conclusions reached. Bade, Book Review, 23 Minn. L. Rev. 874, 874 (1939). Reviewers of Powell's book were quick to take issue with his positions. Their suggestions, however, were far from uniform.

Professor Edward S. Bade of the University of Minnesota Law School defended the system of title registration existing in Minnesota, although he did not claim perfection, and acknowledged the hope for improvement. Id. at 876. Professor William F. Walsh of the New York University School of Law suggested supplementing the present system of recording by requiring the owner to obtain and pay for an official abstract of title to be kept on record under a tract index. No change in the substantive law of real property was recommended, but the accuracy of the abstract would be guaranteed by the state. If a need for compensation would arise, the state would utilize a fund created by a surcharge on the abstract's costs. See Walsh, Book Review, 16 N.Y.U. L. Rev. 510 (1939).

The most in-depth analysis of Powell's evidence and conclusions was that offered by Professor Myres S. McDougal of Yale Law School and Mr. John W. Brabner-Smith, former Special Assistant to the U.S. Attorney General. See McDougal & Brabner-Smith, Land Title Transfer: A Regression, 48 Yale L.J. 1125 (1939). Initially, these writers concede that the success of voluntary registration is unlikely in light of the costs of initial registration and the
The subject was not one that might be expected to rivet the attention of the academic legal community, let alone that of the profession at large. Beyond the legal profession, there was probably no awareness of this scholarly debate among the American public. Yet this professorial exchange centered on a subject of substantial national importance. It is not an overstatement to suggest that problems relating to matters of title assurance have affected directly the pocketbook of every American who has bought or sold land in this century. Any practitioner who has had to explain to a client the astonishingly high “closing costs” related to title search and title insurance, and any client who has had to pay these costs, is painfully aware of the shortcomings of title assurance under the existing American practice.\(^2\)

opposition by the vested interests of title insurance companies and attorneys. \textit{Id.} at 1140, 1147. However, they suggest that foreign experience cannot be discounted easily, and they propose either compulsory registration or public subsidy of voluntary registration with lowered transition costs creating an irresistible attraction to the new system. \textit{Id.} at 1149-50.

In response to the critical reviews of Powell’s book, Bordwell notes, in a very conciliatory mood, that registration appears unsuitable for the multiple common law estates, yet revision of substantive property law seems undesirable. See Bordwell, \textit{The Resurrection of Registration of Title}, 7 U. Che. L. Rev. 470 (1940). Further, Bordwell assumes a middle-of-the-road position with regard to the relevance of foreign experiments. The secrecy of conveyancing under the English system (with resulting restraints on alienation) is contrasted with public transfers, \textit{ab initio}, in the United States (corresponding with freer alienability). However, the difference pointed out is not used to discount foreign experiments, but only to require a stronger case for registration in America. \textit{Id.} at 479. Land liquidity is attributed primarily to the condition of the market, rather than the system of transfer. \textit{Id.} at 483. The position taken with respect to whether registration should be voluntary or compulsory was merely to state that a compulsory system must be accompanied by a public subsidy. \textit{Id.} at 488. In conclusion, Bordwell recommends switching from alphabetical grantor-grantee indexes to tract indexes and creating a comprehensive action to quiet title. His reasoning is that this should be attempted before adopting the more revolutionary Torrens system, because the tendency to look at foreign models is not always desirable. \textit{Id.} at 479, 483, 488.

McDougal’s final chapter is written in response to Bordwell’s article. McDougal concludes that, in fact, Bordwell strongly favors title registration since he recommends all of the important administrative features of a registration system. Further, he intimates that abolishing concurrent and future interests would be acceptable. McDougal, \textit{Title Registration and Land Law Reform: A Reply}, 8 U. Che. L. Rev. 63, 64, 74 (1940).

2. In many respects, the shortcomings of the American title assurance system reflect a broad acceptance of the notions Professor Powell advanced five decades ago, and the failure of those charged with developing our system to move to the ideas of Professor McDougal. Powell’s justifications for the conclusions and suggestions of his study were as follows. First, difficulties of administration result from the level of incompetence and the political nature of American public officials entrusted with implementing title registration. Second, America’s success in adopting a registration system is unrelated to other countries’ experiences with similar systems. This dissimilarity is due to several factors:

a. the dictatorial nature of foreign governments, under which registration has been successful, as contrasted to American democracy;

b. the absence of an existing recordation system in some foreign jurisdictions which would be replaced by registration (American adoption would displace existing recordation statutes);

c. the necessity for an initial judicial proceeding to accomplish registration resulting from
This Article critiques methods of assuring real estate titles in the United States today and encourages fresh interest in a better approach. The Article arises from the belief that current practices in all American jurisdictions are wasteful, unreasonably expensive, archaic, and worst of all, uncertain to achieve that which they purportedly intend to accomplish: certainty in land ownership. After examining a portion of Great Britain's recent experience in dealing with the problems of land transfer and title assurance, this Article will consider the feasibility of adapting elements of the British scheme to an American context.  

U.S. constitutional requirements of due process and separation of powers;  
d. the differential in skill and honesty between American and European public officials;  
e. the unwillingness of Americans to accept an inconclusive certificate of title as contrasted with the ease of satisfying foreign land owners; and  
f. the complexities of the substantive American law of real property (primarily the existence of concurrent and future interests) compared to the relative simplicity of European property law. See R. Powell, supra note 1, at 56-60.  

McDougal's response to Powell's specific justifications seem well taken. With respect to the competency and trustworthiness of American public officials, it is pointed out that Powell presents no evidence of corruption and little evidence of incompetence. Further, the general growth of assurance funds discredits corrupt or incompetent public officials. As regards the relevance of foreign experience, arguing in a reductio ad absurdum style, it is shown:  
a. that many foreign experimenters are not, in fact, dictatorships;  
b. that only a small number of foreign jurisdictions did not replace an existing recordation system;  
c. that it is constitutionally possible to eliminate an initial judicial proceeding by registering only possessory title which would not become absolute until the expiration of a limitations period;  
d. that there is a lack of evidence on corrupt practices by, and incompetency of, American public officials;  
e. that American landowners have accepted the inconclusiveness of the recordation system, much of which would become more certain under registration; and  
f. that only a small part of American land is encumbered by future interests, which can be accommodated by a Torrens system in any event. McDougal & Brabner-Smith, supra note 1, at 1133-36, 1138-43.  

An especially virulic attack is mounted on Powell's cost comparisons between title insurance and registration. Additionally, Powell's suggestions are criticized for the extra costs associated with regulation of title insurers. Finally, the focus on the controversy is shifted from comparative costs to comparative protections, with the conceded superiority of the latter under a registration system acknowledged by all writers. See id. See also Fairchild & Springer, A Criticism of Professor Richard R. Powell's Book Entitled Registration of Title to Land in the State of New York, 24 CORNELL L. REV. 557 (1939).  

3. The legislation of 1925, analyzed herein, applies only to England and Wales. This Article addresses the Law of Property Act, 1925, 15 & 16 Geo. 5, ch. 20, § 209(3); the Land Registration Act, 1925, 15 & 16 Geo. 5, ch. 21, § 148(3); the Settled Land Act, 1925, 15 & 16 Geo. 5, ch. 18, § 120(3); and, the Land Charges Act, 1972, ch. 61, § 19(3).  

Some years ago, Professor John E. Cribbet of the University of Illinois Law School undertook an interesting comparative analysis of Scandinavian property law, with primary emphasis on adaptations of land-use planning methods for use in America. He notes the success of title registration, similar to a Torrens system, and the absence of commercial title insurance. Real estate agents frequently handle entire transactions of land transfer due to the simplicity of the system. Cribbet, Some Reflections on the Law of Land—A View From Scandinavia, 62
It is surely one of the curiosities of the late twentieth century that broad segments of English law, developed from the middle ages to the nineteenth century, survive in the United States more or less intact while the nation in which this law principally evolved long since has abandoned its most archaic and non-functional features. One has only to see the smile of puzzled bemusement on the face of a British professor at the suggestion that the Rule in Shelley's Case may well be operative in half a dozen American states to gauge the contemporary gap between our law and the British structure from which it was derived. Add to this oddity some attempt to explain the workings of the American recordation system with its amazing cost and duplication and the English lawyer's disbelief grows, especially since few English lawyers today recall their own archaic practices before the enactments of the modern legislation. How can it be, they may well ask, that a society whose science has conquered the moon is preoccupied with such irrelevances in an important sector of its jurisprudence? How indeed? Yet these cobwebs continue to plague our realty practice. These enduring anachronisms, ever more expensive to indulge, may gratify the ghosts of those ancient conveyancers who devised them, and their survival may warm the heart of the dedicated teacher of future interests. It is less likely, however, that anyone else will be persuaded as to the merits of this practice.


In suggesting a program of reform adapted from the above legislation, the author has profited from the opportunity of a sabbatical year in England to see firsthand something of the modern British system as it pertains in England and Wales.


5. Most states have abolished the Rule in Shelley's Case by statute or judicial decision, but the rule survives in some states. The Rule has not been modified statutorily in six states: Arkansas, Colorado, Delaware, Indiana, North Carolina, and Texas. In three states—Nevada, Utah, and Wyoming—neither the legislature nor the courts have addressed the issue. L. Simes & A. Smith, THE LAW OF FUTURE INTERESTS § 1563 (1956 & Supp. 1985).

Two other early common-law rules survive to some extent in American jurisdictions. The Doctrine of Worthier Title (Conveyor-Heir Rule), a rule at common law, continues to have force in many jurisdictions but is now generally considered to be a rule of construction. Id. §§ 1603, 1605. In a few states, however, the Doctrine has been abolished by statute. L. Simes, HANDBOOK OF THE LAW OF FUTURE INTERESTS 64 (1966). The Doctrine of Destructibility of Contingent Remainders apparently has viability in four American jurisdictions—Florida, Oregon, Pennsylvania and Tennessee. See J. Ritchie, N. Alford, Jr. & R. Effland, DECEDEXTS' ESTATES AND TRUSTS 849 n.9 (6th ed. 1982).

Difficulties arise in stating with certainty in which states the various rules actually survive. Some statutes have been inexact in attempting to abolish the various rules, and states may refer to wills, deeds, or both.
The British effort at reforming conveyancing law was, like the comparable American experience, a patchwork of abolition and modification for many years. The hit and miss approach was perhaps even more understandable in America given the numerous jurisdictions and the constitutional limitations involved. It was not until the 1880's that the work of the British began to take on the character of a comprehensive and pervasive change.

By 1925, reform reached full flower in the final enactment of the four property statutes considered by this Article. This extraordinary legislation, which swept away much of the flotsam that had so long clogged the law of

6. The earliest reform prevented the creation of new tenures. This was accomplished by the Statute Quia Emptores, 1290, 18 Edw. 1, ch. 1 & 2, which prohibited further alienation by subinfeudation. The Statute of Uses, 1535, 27 Hen. 8, ch. 10, resulted in vast changes in the law of real estate, including conveyancing. The next step was the conversion of all free tenures into free and common socage (the forerunner of the freehold) and the abolition of practically all of the burdensome incidents. See Tenures Abolition Act, 1660, 12 Car. 2, ch. 24. Subsequent to this legislation, only two tenures survived: freehold and copyhold. Copyhold was an unfree tenure peculiar to manors in that transfer could only be effected through a proceeding in the manor court.

The traditional method of investigating past transactions evidenced by the deeds was utilized for the transfer of freeholds. Provision was made for voluntary conversion of copyholds into freeholds. Copyhold Act, 1841, 4 & 5 Vict., ch. 35; Copyhold Act, 1843, 6 & 7 Vict., ch. 23; Copyhold Act, 1844, 7 & 8 Vict., ch. 55. Compulsory conversion soon followed. See Copyhold Act, 1852, 15 & 16 Vict., ch. 51; Copyhold Act, 1858, 21 & 22 Vict., ch. 94; Copyhold Act, 1887, 50 & 51 Vict., ch. 73 (current version at Copyhold Act, 1894, 57 & 58 Vict., ch. 46).

While the conversion of copyhold into freehold proceeded, England first attempted title registration on a voluntary basis and few registrations occurred. Land Registry Act, 1862, 25 & 26 Vict., ch. 53; Land Transfer Act, 1875, 38 & 39 Vict., ch. 87. Finally, all copyholds were transformed into freeholds by the Law of Property Act, 1922, 12 & 13 Geo. 5, ch. 16, § 128, sched. 12, ¶ (0).

In spite of these reforms, English realty is still subject to feudal tenurial ownership rather than American allodial ownership. All land is still owned by the sovereign and held of him or of some lord by a tenant in fee simple. Practically though, the effect is the same as the American fee simple absolute. See R. Megarry & H. Wade, The Law of Real Property 9, 25, 28-38, 195-96 (5th ed. 1984). For further reforms regarding the abolition of rules limiting future interests, see supra note 4.

7. The Settled Land Act, 1882, 45 & 46 Vict., ch. 38, quickened the process by granting equitable owners of limited interests (such as life tenants or tenants in tail) statutory powers of sale, even though the legal estate was vested in another. See J. Riddell, Introduction to Land Law 96, 123 (3rd ed. 1983).

Following a bitter dispute between the Liberal Party, led by Lord Chancellor Halsbury, and the solicitors, acting through the Law Society, a compromise was reached on compulsory title registration. The Land Transfer Act, 1897, 60 & 61 Vict., ch. 65, provided for compulsory registration in the County of London, but conceded a County Veto to the solicitors. The Veto prevented extension of the area under compulsory registration, unless initiated by a county or urban district council. See Offer, The Origins of the Law of Property Acts, 1910-25, 40 Mod. L. Rev. 505, 506 (1977).

8. Six statutes were enacted in the 1925 reform. This Article focuses on the Law of Property Act, 1925, 15 & 16 Geo. 5, ch. 20; the Land Registration Act, 1925, 15 & 16 Geo. 5, ch. 21; the Settled Land Act, 1925, 15 & 16 Geo. 5, ch. 18; and the Land Charges Act, 1925, 15 & 16 Geo. 5, ch. 22, amended by the Land Charges Act, 1972, ch. 61. The remaining two statutes are the Trustee Act, 1925, 15 & 16 Geo. 5, ch. 19, and the Administration of Estates Act, 1925, 15 & 16 Geo. 5, ch. 23.
property, has reached mature years from which its effectiveness can be measured. The legislation is far from a perfect answer to all contemporary needs, yet by any standard, it has been a remarkable advance over the old English practice. Surprisingly little litigation and, indeed, widespread acceptance of the basic principles of the legislation have resulted. From time to time Parliamentary Reform Commissions have convened to consider change, but most of their recommendations have amounted to little more than tinkering or fine tuning of the basics. The structure remains solidly rooted in the original legislation.

Despite this acceptance, flaws exist, and some of them are quite serious. Furthermore, some flaws are growing more serious due to modern societal concerns. These defects are clearly visible through the prism of sixty years experience and will receive special attention here. This Article proposes that despite the deficiencies in the English title assurance system, the present American title assurance system can be improved by adopting some of the successful features of the British system, especially features of the Land Registration Act of 1925.

I. THE GOAL OF TITLE ASSURANCE SYSTEMS

Before moving to a review of current American practice, it is appropriate to consider what an ideal title assurance plan should involve. The philosophy of an ideal system is that it provides, as conclusive title binding all the world, a state-guaranteed registration evidenced by a certificate which reflects the exact state of the title at any moment in time. The ideal system substitutes registration for any inquiry into actual or constructive notice of facts about ownership. Presently, inquiry is concerned with evidence of title obtained through recordations, actual notice, or possession. Under the ideal system,
however, inquiry is solely a matter of whether there is a registration and what that registration contains.

The registration scheme must be so comprehensive as to provide procedures for handling every kind of interest possible: legal estates, marital rights, bankruptcy claims of every kind, and all equitable interests. It must be possible to register any legitimate interest or claim, so that the moving question is whether the claim is or is not registered. If the claim is properly registered, it is effective; if it is not registered, it is ineffective. The compensation fund, mentioned below, must resolve matters of fraud, error, and mistake.

The ideal plan should reduce drastically the number and complexity of interests that concern the person undertaking to establish title. At present, the myriad of possible legal estates and the details of all equitable interests bearing on the land are of primary importance to the conveyancer and his purchaser because they all bear directly on a successful assurance of title. The methods by which the English reduced the number of possible legal estates, converted the rest to equitable estates, provided for overriding many equitable estates so that they need not burden the purchaser, and limited concurrent estates are discussed below. These features are an essential corollary to a successful registration scheme.

Once the number of relevant interests is reduced, the registration system will function so that one registration card, clearly and simply arranged, will mirror exactly the state of a title at any given moment. In addition, the card must be consistent and totally accessible, quickly and inexpensively amendable to reflect current change, and absolutely binding on all parties.

Administrative procedures, not a full scale judicial hearing, should accomplish the initial registration. Ideally, public revenues should support registration costs. The title should be state-guaranteed and backed by sufficient financial resources to compensate adequately those who are innocent, yet suffer losses because of fraud, error, or the mistakes of others. The process

13. See Payne, In Search of Title, 14 ALA. L. REV. 11, 11-12 (1962) (indicating that problems in conveyancing can arise based on the various interests parties may hold in the land).

14. Even in an ideal system, compelling values can exist that require diminished certainty in the registration system. These compelling values should be weighed carefully. One area in particular that has caused such concern in England is that of an implied trust in the case of the marital home. See infra notes 147-51 and accompanying text.

15. One difficulty with title registration is that the costs become higher as the degree of certainty of title increases. See 6A R. POWELL & P. ROHAN, POWELL ON REAL PROPERTY ¶ 908[3] (1986). Powell suggests that the expense of title registration could be decreased by “establish[ing] a system of compulsory registration of ‘possessory title,’ as was adopted in England.” Id. This system would reduce detailed searching of previous conveyances. He also advocates combining compulsory registration “with a ten-year statute of limitations, which would permit the registration of possessory title to become transformed into a registration of ownership, by . . . presentation of evidence of continuous possession for . . . ten years.” Id.
should rest on a system of tract identification, rather than on the ambiguities and vagaries of a name index. Those administering the system should be highly trained, competent professionals. Registration procedures, once established, should prove relatively cheap to maintain and administer.

The successful system is one that is simple, accessible, inexpensive to administer once in place, and above all reliable. It is the premise of this Article that the current American system is none of these.

II. CURRENT AMERICAN PRACTICE

A rural Georgia lawyer who began his practice during the depression once told the author, "Son, I never began searching a title unless I was starving to death, and I never finished one without wishing I had." That remark is understandable when one considers the modern American methods of title assurance, unchanged in their basics since before the 1930's.

Each of the American jurisdictions has a somewhat different system, often with significant variations. Although the theme is fundamentally the same and centers inevitably on a system of recordation of the evidence of title, as opposed to a recordation of the title itself, how, where, and by whom these records are kept varies considerably among the states. The practice of examiners in reviewing either the original records, or an abstract of them prepared by someone else, also varies. Nevertheless, all methods have the goal of producing a certificate of opinion prepared by a competent professional, ordinarily an attorney, accurately assessing the state of the title at the moment of transfer. The evidence of the records and of certain extrinsic matters, such as actual possession, serve as the basis for the certificate in most cases.17

Because such a certificate hinges on the professional competence of the certifier, and therefore on the ability of the examiner to make good any deficiencies in certification, a supplementary assurance for the purchaser has developed in the form of title insurance. Title insurance undertakes to insure the purchaser against those defects enumerated in the policy and supposedly provides a back-up compensation for certification errors. For this transfer of risk, the insurer charges a substantial premium ordinarily linked to the purchase price of the property.18

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16. Id. ¶ 908[2].
17. Id. ¶ 909[5].
18. For example, Chicago Title Insurance Company publishes rates for owner's policies and mortgage policies. Except for the four major metropolitan areas, the rates in Tennessee are as follows:
As an additional back-up, many deeds contain warranties. Warranties are contractual guarantees by the transferor about the state of the title. This technique is the oldest of the types of protection offered today and is certainly the least effective because of the drastic limitations on the amounts recoverable, limitations on the identity of those who can be pursued, and the lack of standard meaning for the phrases used to construct the warranties.

<table>
<thead>
<tr>
<th>Original Owner's Title Insurance Policy</th>
<th>Policy Premium (per thousand dollars of coverage)</th>
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</thead>
<tbody>
<tr>
<td>Up to $100,000 of liability written</td>
<td>$3.50</td>
</tr>
<tr>
<td>Over $100,000 and up to $5,000,000, add</td>
<td>$2.00</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Original First Mortgage Title Policy</th>
<th>Policy Premium (per thousand dollars of coverage)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to $100,000 of liability written</td>
<td>$2.50</td>
</tr>
<tr>
<td>Over $100,000 and up to $500,000, add</td>
<td>$1.75</td>
</tr>
<tr>
<td>Over $500,000 and up to $10,000,000, add</td>
<td>$1.50</td>
</tr>
</tbody>
</table>

**CHICAGO TITLE INS. CO., RATE CARD (effective Feb. 19, 1987).**

The company has a minimum fee plus additional charges for a title search and examination. If one purchases both an owner's policy and a mortgage policy, the fee is the larger of the two policies plus $35. Id.

19. Three basic types of deeds are employed to convey property in the United States. These are the general warranty deed, the special warranty deed, and the quit claim deed. The general warranty deed generally indicates to the purchaser that the title is not defective and usually contains six covenants of title—the covenant of seisin, the covenant of the right to convey, the covenant against encumbrances, the covenant of quiet enjoyment, the covenant of warranty, and the covenant of further assurances. The grantor warrants that the title is free from any defects. J. BRUCE, J. ELY, JR. & C. BOSTICK, MODERN PROPERTY LAW 695-96 (1984).

A special warranty deed contains the same covenants as a general warranty deed. This deed, however, does not provide as much protection to the grantee because the grantor warrants only that he did not cause any defects in title. He does not warrant against any and all title defects. The least measure of protection to a grantee is found in the quit claim deed. This deed contains no covenants and the grantor conveys only the interest he holds in the property. Id.

20. Different jurisdictions attach various interpretations to the covenants of title. For example, in a majority of American jurisdictions, the covenant of seisin indicates ownership of the land, but in a few states this covenant attests only to "the grantor's possession of the conveyed land." 6A R. POWELL & P. ROHAN, supra note 15, ¶ 986. See, e.g., Simpson v. Johnson, 100 Idaho 357, 361-62, 597 P.2d 600, 604-05 (1979) (finding that grantees were entitled to relief when grantors did not have legal title to all of the property described in a warranty deed containing a covenant of seisin); Brown v. Lober, 75 Ill.2d 547, 550-51, 389 N.E.2d 1188, 1190-91 (1979) (citing the Illinois statute which states that a grantor covenants to a grantee that he is "...lawfully seized and has the power to convey ...[that] which he professes to convey"). But see Baughman v. Hower, 56 Ohio App. 162, 168, 10 N.E.2d 176, 179 (1937) (stating that if "the original grantor ... was not in possession at the time of the deed to [the grantor] ... there [is] an immediate eviction," and quoting Wetzel v. Richcreek, 53 Ohio St. 62, 70, 40 N.E. 1004, 1006 (1885), that "[i]t has long been the law of this state that a covenant of seisin is not broken ... if the covenantor has the actual seisin, though not the legal title, at the time of the conveyance").

The covenant of warranty "can be either all-inclusive or specifically restricted in its scope." 6A R. POWELL & P. ROHAN, supra note 15, ¶ 899 (footnotes omitted). An all-inclusive, or
Finally, in some states a system of registration based on the "Torrens system" exists alongside the recordation system.\(^2\) This system seemed to hold bright promise in the early days of this century, but has failed to take hold in any American jurisdiction for reasons particularly pertinent to this Article's proposals.\(^22\)

The American title assurance plan is, then, one of patchwork. Various elements of it evolved centuries ago. Some features of it arose only in this century. Due to various reasons—the problems of multiple jurisdictions, lawyers' vested interests in the current system and their resistance to change, perceived constitutional problems, title insurance company opposition,\(^23\) and the peculiar sanctity always accorded to land ownership and the law surrounding it—a systematic, pervasive scheme of reform has never evolved in the United States. The following sections turn to a more detailed consideration of the present system and its shortcomings.

A. Deed Warranties

The development of the oldest extant variety of title protection can be attributed to the genius of the 17th century conveyancer Sir Orlando Bridgman.\(^24\) Sir Orlando and others who developed the idea of deed warranties apparently felt that a transferor of realty would be less likely to convey a general warranty, usually indicates that a grantor, his heirs, and his personal representatives warrant the property against any future claims or demands made by anyone on the grantee, his heirs, personal representatives and assigns. See, e.g., N.J. STAT. ANN. § 46:4-7 (West 1940); N.Y. REAL PROP. LAW § 253(5) (McKinney 1968); VA. CODE ANN. § 55-68 (1986). In contrast, special warranty covenants restrict a grantor's warrant to claims and demands of the grantor or those claiming through or under him. See, e.g., D.C. CODE ANN. § 45-305 (1986); Mass. GEN. LAWS ANN. ch. 183, § 17 (West 1977); N.J. STAT. ANN. § 46:4-8 (West 1940); VA. CODE ANN. § 55-69 (1986).

21. The Torrens system originated in 1858 with Sir Robert Torrens, Register General of the Province of South Australia. He was associated with the shipping industry and drew upon that experience in drafting the first law for title registration. His objective was to make the transfer of title to land as simple and easy as the transfer of title to a vessel or an automobile. A. CASNER & W. LEACH, CASES AND TEXT ON PROPERTY 918 (2d ed. 1969); J. Cribet, PRINCIPLES OF THE LAW OF PROPERTY 230 (1962).

22. See infra notes 51-59 and accompanying text.

23. See Johnstone, Title Insurance, 66 YALE L.J. 492, 513 (1957) (asserting that title insurance companies oppose the Torrens registration system because it threatens their "economic lives").

24. Lord Bridgman is generally known as "the father of modern conveyances." 6 W. HOLDsworth, A HISTORY OF ENGLISH LAW 605 (1924). Lord Bridgman apparently assisted many of his royal friends in the area of conveyancing. Id. One of his most noted clients was the Duke of Norfolk, from whose case the foundations for the Rule Against Perpetuities evolved. See A. CASNER & W. LEACH, supra note 21, at 356 n.14. Another of Lord Bridgman's contributions to the law of property was his "creation of an intermediate estate in trustees to preserve contingent remainders ...." Id. at 356 (emphasis in original).

Lord Bridgman held several important posts in the English legal system. His most prominent position was that of Lord Keeper from 1667-72, an appointment that occurred from a lucky accident according to Holdsworth. Prior to this appointment, Lord Bridgman served as Chief Baron of Exchequer and then as Chief Justice of the Common Pleas which apparently was his most heralded position. See 6 W. HOLDsworth, supra, at 537-38.
defective title if certain guarantees of a contractual nature accompanied a deed. Accordingly, they began the practice of inserting into some deeds a contractual promise from the grantor about the title, and commitments from the grantor on what measures would be taken to protect the grant if specified deficiencies arose. Eventually some six variations developed, often overlapping and variably construed by those dealing with them. Indeed, one of the shortcomings of deed warranties has been the lack of standard forms of expression. The eighteenth century Statute of Anne provided some relief by decreeing that certain usages in deeds would be construed to contain certain warranties. That statute became the model for numerous American attempts to achieve the same end. Even now, however, lack of standard usage and meanings remains a problem.

Other and equally severe difficulties limit the function of deed warranties. The question of the time at which breach of warranty occurs is fundamental.

25. See supra note 19. The covenant of seisin generally assures a grantee that the grantor is legally seized of the property. A minority of jurisdictions hold that the covenant of seisin only warrants that the grantor has possession of the land, not that he has legal title. See 6A R. Powell & P. Rohan, supra note 15, ¶ 896.

The covenant of the right to convey is similar to the covenant of seisin but provides additional protection to grantees because under this covenant the grantor warrants that he has the legal right to convey the land. This covenant becomes important in jurisdictions that regard the covenant of seisin as assuring only that the grantor has possession of the property. Also, when a grantor holds legal title to the property but a third party is in adverse possession of the land, this covenant protects the grantee. Id. ¶ 897.

The covenant against encumbrances warrants that the property is free of encumbrances such as mortgages, liens, and easements that are not known to the grantee. If the grantor breaches this covenant, the grantee can recover damages. Recovery, however, is nominal unless the breach “impairs the beneficial use and enjoyment of the premises.” Id. ¶ 898.

These three covenants are present covenants that are breached, if at all, on delivery of the deed. The three covenants discussed below are future covenants that are breached “only if the grantee is evicted from the property. The statute of limitations begins to run at the time of the breach in each case.” J. Bruce, J. Ely, Jr. & C. Bostick, supra note 19, at 695.

The covenant of warranty protects a grantee against losses occurring “by virtue of a failure of the title which the deed purports to convey.” 6A R. Powell & P. Rohan, supra note 15, ¶ 899. Today this covenant and the covenant of quiet enjoyment are essentially the same. Id. ¶ 900. The covenant of further assurances requires the grantor and his heirs to do whatever is necessary to make the grantee’s title good. Id. ¶ 901.


27. See supra note 20.

28. The covenant of seisin, in a majority of American jurisdictions, warrants that the grantor legally owns the property. See supra note 25. A minority of states, however, hold that this covenant relates only to the grantor’s possession of the land. Thus, differences can arise concerning breach of this covenant.

Under the ownership concept, breach occurs when the grantor purports to convey a greater estate, in quantity or quality, than he actually owns. See 6A R. Powell & P. Rohan, supra note 15, ¶ 896. See also Russell v. Belsher, 221 Ala. 360, 361, 128 So. 452, 453 (1930) (emphasizing “that a covenant of seisin is broken as soon as made, if the covenantor had no title to the estates granted”); accord Rainey v. Davidson, 224 Mo. App. 679, 26 S.W.2d 841 (1930); Rhodes v. Johnson, 32 Tenn. App. 127, 222 S.W.2d 38 (1949).

In the possession states, breach of the covenant of seisin occurs when the grantor does not
Different theories lead to dramatically different results on whether the covenants relate to "possessory" rights or to "ownership" rights.  

Perhaps the most difficult question is whether a covenant "runs with the land." The answer determines ultimately who can sue whom in the chain of title. Once a breach of a covenant has occurred, it is presumably converted to a chose in action, and controversy arises over the manner in which one must assign such a right.

Finally, the entire question of damages permeates the covenant usage. Even if the party finally injured can travel up the chain of warrantors until a solvent and available party to respond to damages is found, the maximum amount recoverable is drastically limited. Seldom will the recovery be adequate to cover the loss.

have possession of the property. See, e.g., Baughman, 56 Ohio App. at 168, 10 N.E.2d at 179 (holding that if a grantor is "not in possession, there [is] an immediate eviction"). See also Wetzel, 53 Ohio St. at 70, 40 N.E. at 1006 (stating that "if the covenantor had the actual seisin, though not the legal title, . . . and the [covenantee] is put in possession" then the covenant of seisin has not been breached "until there has been an eviction under a paramount title").

Although present covenants generally are breached on delivery of the deed, and future covenants are breached at a later date when the grantee suffers an eviction, some states have enacted statutes so that the "present" covenants run with the land and can be breached at a date after delivery of the deed. For example, in Colorado, 

Although present covenants generally are breached on delivery of the deed, and future covenants are breached at a later date when the grantee suffers an eviction, some states have enacted statutes so that the "present" covenants run with the land and can be breached at a date after delivery of the deed. For example, in Colorado, "[c]ovenants of seisin, peaceable possession, freedom from encumbrances, and warranty contained in any conveyance of real estate . . . shall run with the premises and inure to the benefit of all subsequent purchasers and encumbrancers." Col. Rev. Stat. § 38-30-121 (1973).

Similarly, in Georgia:

The purchaser of lands obtains with the title . . . all the rights which any former owner . . . under whom he claims may have had by virtue of any covenants of . . . freedom from encumbrances contained in the conveyance from any former grantor unless the transmission of such covenants with the land is expressly prohibited in the covenant itself.

Ga. Code Ann. § 44-5-60 (1982). Finally, in New York, "[i]n an action based upon breach of a covenant of seisin or against incumbrances, the time within which the action must be commenced shall be computed from an eviction." N.Y. Civ. Prac. L. & R. 206(c) (McKinney 1972).

29. See supra note 20.

30. See 6A R. Powell & P. Rohan, supra note 15, ¶ 902 (indicating that the modern view is that future covenants run with the land). See also J. Cribbet, supra note 21, at 209 (stating that some American jurisdictions also permit "present covenants to run with the land").

31. See J. Cribbet, supra note 21, at 209 (asserting that traditionally a later grantee could not sue an original grantor for breach of a present covenant of title because once one of these covenants was breached it became a chose in action which was non-assignable, and noting that some American courts, however, "abandoned this 'technical scruple' " so that present covenants could run with the land and a remote grantee would have an action against an original grantor if the covenant were breached).

32. If the title proves defective it may not be discovered for many years and, by this time: the land may have increased greatly in value and major improvements may have been added . . . is the damage to be determined by the actual loss suffered at the future eviction or will it be restricted to the purchase money paid to the warrantor? A small minority of states . . . have followed the former rule and thus given the warrantee the maximum protection under the future covenants. The over-
Deed warranties do not purport to be, nor could they be, sufficient protection in the modern land transaction. They are, at best, auxiliaries in the search for proper title assurance. Worst of all, deed warranties are survivors of a simpler age, and are of little utility today.

B. The Recordation System

The recordation system is the center of modern American title assurance. It is the link on which all else depends. The system has ancient roots on this side of the Atlantic, existing in some form since long before the Revolution. Interestingly, no comparable system evolved in England. Various reasons have been advanced for its absence there and its development here.

The vast stretches of available land, less likely to be visibly occupied by the owner, must have played a part in the perceived need for an alternative method of putting purchasers on notice of claims. The statutes were by no means uniform in their development and have resulted in four recognized forms.

The overwhelming majority of states have felt this placed too great a burden on the warrantor and have restricted recovery to the purchase price, or a proportionate share thereof for partial breach, plus interest. J. CRIBBET, supra note 21, at 212 (footnotes omitted).

33. See 6A R. POWELL & P. ROHAN, supra note 15, ¶ 904[1] (discussing the origination of recording systems in colonial America); 4 AM. LAW OF PROP. § 17.4 (1952) (setting forth the history of American recording acts and stating that "[t]he earliest mention of the record of a deed in the United States is found in the records of the Plymouth Colony in 1627").

34. Prior to the Statue of Enrollments, 27 Hen. 8, ch. 16 (1535), no system of recording land titles existed in England. This statute was part of a plan to record or register land conveyances. It met, however, with opposition from the landed aristocracy who did not want to make their affairs known to the public. Thus, conveyancers devised a scheme to circumvent the statute. See 1 R. PATTON, PATTON ON LAND TITLES § 3 (1957).

In 1845, Parliament passed the Real Property Act which made it possible to convey land by a simple deed and to avoid the schemes developed by early conveyancers. Id. Even today, "proof of title in England is . . . by possession of the property and by exhibition of the original title deeds" except in limited areas affected by a registration system. Id. § 6.

In contrast, a recording system developed quite early in American history. See supra note 33 and accompanying text. Proof of title in the United States comes primarily from public records. Perhaps one reason for the rapid and widespread growth of recording in the United States is that a much larger expanse of land is involved than in England, and that a more efficient system is needed to determine who had title to land. See 1 R. PATTON, supra, § 6; 6A R. POWELL & P. ROHAN, supra note 15, ¶ 904[1].

35. The four types of recording statutes are the following:

a. Race—The grantee who records first prevails over any other grantees from a common grantor. Even if the grantee who records first took the property with notice of a conveyance to a prior grantee who did not record, the statute protects the first grantee to record.

b. Period of grace—The first grantee receives protection under the statute for a set period of time. If he does not record by the end of that time, he is no longer protected, and a subsequent grantee who records will prevail in a contest over ownership of the land. The use of this type of recording statute has declined over time.

c. Race-notice—A subsequent purchaser who takes without notice and records first is
The extent to which the records bind, the modes of record keeping, and the overall quality of the system vary widely from jurisdiction to jurisdiction. As to the latter, even within the states themselves, variation occurs, especially from rural to urban areas. The systems, however, are similar in the following respects: most records are indexed on a name basis rather than a tract basis; all anticipate their use as the vehicle for establishing a "chain of title" over some period of time; all purport to contain "evidence" of title rather than title itself; and all in theory should contain within their bounds most of the "evidence" of title needed to make a basic judgment as to the validity of the title. If one cannot find the appropriate chain of title and the related transactions, the title is of course defective. Remember, however, that not every fact bearing on title is recordable. Nor must every factor bearing on title be recorded to have effect against purchasers. Typically an instrument does not require recordation to be effective between the parties to it.

The records that constitute notice under the recording system are themselves widely scattered. Usually they are county-based. If the land is spread over several counties, a search of the records of each county is required. Pertinent records may be found in a county clerk's office, in a Federal Building, in a City Hall, in a zoning office, in state and federal environmental offices, and throughout the records of courts of all jurisdictions. The pos-

protected by the statute.

36. Id. at 216-17.
37. Id. at 224.
38. Id. at 218.
39. 4 AM. LAW OF PROP., supra note 33, § 17.34.
40. One unrecorded factor that can affect a purchaser's title is adverse possession. The recording system does not protect a purchaser against a party who has acquired the property by adverse possession. See, e.g., Mack v. Luebben, 215 Neb. 832, 835, 341 N.W.2d 335, 337-38 (1983) (stating that "after the running of the statute an adverse possessor has an indefeasible title which can only be divested by his conveyance of the land to another, or by a subsequent disseisin for the statutory period"); West v. Tilley, 306 N.Y.S.2d 591 (1970) (finding that adverse possession by defendant for longer than the statutorily required time entitled her to title to land purchased by plaintiff).

Other matters affecting the validity of one's title and not disclosed by the recording system include:

- forgeries and other frauds; matters of heirship, marriage and divorce; recorders' errors; infancy, insanity, and other disabilities; validity of mortgage foreclosures and of judgments and decrees; delivery of instruments; existence of unprobated wills, pretermitted heirs, and posthumous children; falsity of affidavits; parol partitions and dedications; inchoate mechanics' liens; extent of restrictive covenants; and facts as to boundaries.

O. Browder, R. Cunningham & A. Smith, Basic Property Law 943-44 (4th ed. 1984) (citing McDougal & Brabner-Smith, Land Title Transfer: A Regression, 48 YALE L.J. 1125, 1128 (1939)).

41. J. Cribbet, supra note 21, at 218.
abilities are extraordinary. The level of competence and accuracy in record keeping is wide ranging as well, with presentation running from handwriting to computer cards. Officials and their staffs vary from incompetent to highly trained and motivated professionals. Regrettably, the custodial office is often political, with no prescribed qualifications, and the result is an officeholder whose personal popularity may exceed professional competence.

Against this backdrop of myriad complexity and uncertainty, two additional problems confound the effort to provide a proper title assurance, and both contribute to the overburdening of the recording system. The first problem concerns substantive American property law. The intricate nature of the various means by which and by whom title to realty may be held aggravates and complicates any effort to improve the existing creaky system. The second problem involves the vastly complicated procedures which must be followed to identify and evaluate the substantive property law interests.

The first problem results from substantive American property law allowing for the creation of too many legal interests. The British had the same problem before 1925, and they realized that any successful new approach had to deal with this aspect of the law as an integral part of the reform. Legal estates creatable in most American states include at least: fee simple absolutes, determinable fees, fees on condition, the life estates, the term of years, various lesser tenancies, and a full range of traditional future interests. Even fee tail still can be created in a few states. In addition to these legal estates, various legal interests such as easements, licenses and restrictive covenants can be created.

The problem of concurrent legal estates also remains. Not every state recognizes all the traditional forms possible, but most have some form of joint tenancy and tenancy in common. Many states recognize the marital estate of tenancy by the entirety as well.

A title search must also move through a maze of equitable interests of all kinds. Many of these are recordable; some are not and yet may be effective against a purchaser. The system requires meticulous confirmation that fiduciaries have carried out details of their responsibilities regarding retention or disposition of land. A searcher must confirm that necessary court orders were obtained and establish evidence that sales conformed to

42. Although the fee tail estate can be created in a few states, it has little effect and often can be defeated. See J. BRUCE, J. ELY, JR. & C. BOSTICK, supra note 19, at 292-93.

43. Either judicially or statutorily, the following jurisdictions recognize tenancy by the entirety in some form: Alabama, Alaska, Arizona, Arkansas, Colorado, District of Columbia, Florida, Hawaii, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, and Wyoming. Some states have abolished tenancy by the entirety explicitly while others either have not addressed the issue or have confusing statutes and case law. 4A R. POWELL & P. ROHAN, supra note 15, ¶ 620[4].
requirements of documents or statutes. Confirmation of appropriate dispersal of any resulting proceeds is also necessary. Proper inquiry does not end with the recording system but extends to investigation of conditions on the land which may constitute notice even though not recorded.

The second problem of effective title assurance is evidenced by the searcher who sorts through the records and discovers a procedural nightmare. Working through indexes that most often are name based, the searcher must first construct a chain of title. More often than not, deeds fail to contain references to former owners or to earlier deeds in which the same property may have been differently described. The searcher, therefore, is left to rely on evidence ranging from modern tax records to memories of those who might recall the details of long past owners' lives and relationships. The possibility for error in establishing the chain for the requisite period and for examining the acts of each owner for the time required is thus very high.

Other problems include unadministered estates or improperly administered estates; name changes through marriage, adoption, error and otherwise; possibilities of large numbers of tenants in common, especially in cases of large families with several generations of intestate deaths and unadministered estates; marital rights flowing from either common law or statute; incompetency of owners; and vague or difficult to manage conditions in wills that may shift estates on virtually as many contingencies as the mind can devise. The list of potential pitfalls continues with such matters as modern constitutional doubts about spousal prerogatives in dealing with realty held by husband and wife as tenants by the entirety. There is as well the entire range of claims by third parties against owners. These claims include taxes, judgments and marital separation claims.

44. See J. CRIBBET, supra note 21, at 219 (indicating that erroneous descriptions of property lead to difficult cases and splits of authority with the modern trend being to uphold a bona fide purchaser's interest in the property). Cf. 4 AM. LAW OF PROP., supra note 33, § 17.23 (stating that "in most cases the description is sufficient to make the instrument [judicially] operative as between the parties, ... but useless when a subsequent purchaser is involved [because] the description is such that in examining the records to the land which he is buying ... he will not find it").

45. Title insurers refer to defects not revealed by searching the chain of title as "off-record risks." See D. BURKE, JR., LAW OF TITLE INSURANCE § 1.3.2 (1986). Burke lists examples of these "off-record risks" as follows:

(1) the misindexing or misfilling of a document by the recorder,
(2) matters pertaining to the identity of the parties to a document,
(3) its delivery to the transferee, or
(4) the status of the party executing it—e.g., its execution by a
   (a) married person whose property is subject to a claim of dower or courtesy [sic],
   (b) an alien unable to hold property in a jurisdiction requiring citizenship as a pre-condition to ownership, or
   (c) an insolvent person whose creditors have a claim on the property through a trustee
difficulties, the information to be gleaned requires the laborious search of many different sources often housed in different offices or even different cities, as described above.

A second fundamentally unacceptable feature of recordation is that this tedious, expensive and often inaccurate process must be conducted more than once to establish title. It is incomprehensible that the process is repeated de novo on each occasion of transfer. Since the end product is a certificate expressing a professional opinion as to the state of the title, the certifier cannot afford to risk that opinion based on an earlier examination by another person. Hence, each person making a certificate must form a judgment. It is true, of course, that practice varies among the states. For example, lawyers in some states search the records at the source itself and base their opinions on this search, while in other states lawyers examine an “abstract” of the records prepared by someone else, and carefully hedge their opinions regarding the accuracy of the abstract. Another variation is to rely on the title insurer to “certify the title” and to virtually eliminate the attorney, a practice that has led to much dispute.

In each instance, therefore, an “expert” personally examines some record for the period of time covered by the certificate. As a result, the hapless client must pay for the endless duplication of effort. However, the necessity

in bankruptcy.

Id. at 23.

For examples of problems that can lead to difficulty in establishing a chain of title, see Soreson v. Davis, 83 Iowa 405, 49 N.W. 1004 (1891) (holding that one who takes property from another person, with notice that the property was held by tenants in common, cannot establish a chain of title to the property independently of the other tenants in common); First Nat’l Bank v. Spelts, 94 Neb. 387, 143 N.W. 218 (1913) (establishing that a mortgagee obtains legal title to land and can convey this title to one, other than the mortgagor, who has only an equitable title, and who pays the mortgage, and also establishing that a judgment lien against the mortgagor neither attaches to the legal title nor interferes with the grantee’s chain of title); and, Garden of Memories, Inc. v. Forest Lawn Memorial Park Ass’n, 109 N.J. Super. 523, 264 A.2d 82 (1970) (deciding that when a deed refers to reservations and exceptions listed in other deeds from a common grantor, but outside of the grantee’s chain of title, the grantee has constructive notice of the provisions in the other deeds and takes his title subject to the reservations and exceptions, e.g., a mortgage secured by the property).

46. The examining attorney does not assume any responsibility for the correctness of the abstract but limits his opinion to the title disclosed by the abstract records. Any error in the abstract itself . . . is the fault of the company. Both the lawyer and the abstracter may be liable to the client for any negligence in the areas of their respective responsibilities.

J. CRIBBET, supra note 21, at 228.

47. In many localities it is or has been customary to dispense with a formal abstract, and in its stead the examiner merely “certifies the title,” . . . basing his certificate upon his personal examination of the records. This is merely an opinion of title, and its worth depends wholly upon the learning, ability, and financial responsibility of the individual rendering it.

G. WISE, ABSTRACTS AND EXAMINATIONS OF TITLE TO REAL PROPERTY § 90 (4th ed. 1921).
to pay does not end with the examiner's certificate. In contemporary practice, yet another expensive backstop in the patchwork of security has evolved: title insurance.

C. Title Insurance

The certificate of title is worth only as much as the examiner's own pocketbook (and perhaps as much as the professional liability insurer) can bear in the event of error in the search. For this reason, the custom of "insuring" titles to land has developed. At first there was a rather modest start of hiring an "approved" attorney to examine title to property and issuing, or not issuing, a policy based on that attorney's opinion. Subsequently, title insurance companies moved aggressively into the entire fabric of conveyancing. In some cities it is common for those companies to have their own title "factories" containing information, gleaned from official records and various other sources, on many titles. The advantage for the company lies in the fact that its records are more efficiently organized and collated than those of the official agencies. Each policy issued is a separate matter with each individual. If the same title, for example, should change hands once each day for a week, seven different policies, each carrying a full premium, may be required. This is true even though each policy was based on essentially identical information available on the first day of the week.

Beyond the expense, another fundamental objection to title insurance is that policies are often quite limited in their scope of coverage. This practice leads to substantial difficulties because the exceptions in policies often relate to those problems most likely to be encountered. The variety of exceptions, coupled with policy limitations on the amount of liability, often not reflecting the value of the property at the time of the loss, can lead to understandable disillusionment in the insured. These inherent defects make questionable the

48. See, e.g., Johnstone, supra note 23, at 499-500, 506-08, 515-16 (discussing the role of title insurance companies and their impact on attorneys' services); Residential Real Estate Transactions: The Lawyer's Proper Role—Services—Compensation, 14 REAL PROP. PROB. & TR. J. 581, 604 (1979) (stating that "[i]n some sections of the country the use of title insurance has eliminated the lawyer from conveyancing or drastically reduced the lawyer's role").

49. Title insurance companies, however, allow a reissue credit when a new policy is purchased. Chicago Title Insurance company makes the following provision for policy holders in Tennessee: "A reissue credit is a 30% discount given on the premium amount for the new owner's policy for the previous owner's coverage in force. Chicago Title will give a reissue credit for any previous owner's policy issued by a reputable title company." CHICAGO TITLE INS. CO., RATE CARD (effective Feb. 19, 1987).

50. See Johnstone, supra note 23, at 494-95 (indicating that title insurance companies generally "except any risks apparent after the title has been examined" and that they "frequently refuse to insure a title unless exceptions for known defects are added to their regular form of coverage").
actual efficiency of this lucrative business in affording a proper measure of protection.

D. The American Registration Acts

In terms of enduring impact on the American title assurance scheme, the registration acts in the various states deserve little attention. Yet it is because they so resemble the present British system which is discussed in this Article that they must be evaluated as important precursors of what may come.\(^5\) Their importance lies in the fact that they represent early attempts in this country to register the title to land itself, rather than simply to register evidence of title. The statutes should be examined not so much for the details of their provisions as for a general assessment of why they failed. At their zenith, early in this century, some twenty states and one or two territories had adopted some version of registration.\(^6\) Many of those states have since repealed the statutes.\(^7\) In no state was the system compulsory and that feature, along with the inevitable hassle and expense of initial registration, contributed heavily to their failure. It is interesting to note that when the system of registration in England was largely voluntary, it too failed.\(^8\) The compensatory funds, such an essential feature of fairness if the system is to rigorously protect the credibility of the register, were inadequate.\(^9\)

Initial difficulties of registration were formidable. Even if the certificate were finally issued, it could only be effective if notice had been given to all interests involved and opportunity to defend had been provided.\(^10\) Rigid constitutional notions of due process had to be observed and accommodated before conclusiveness of registration could be assured. In some states, compliance was deemed to mean a full scale judicial proceeding, and attempts to substitute cheaper and more efficient administrative procedures were found to be unconstitutional.\(^11\) As discussed below, hopefully the constitutional

51. For short summaries on the effectiveness of title registration statutes in Australia and Canada, see V. DiCASTRI, Thom's Canadian Torrens System 161-62 (2d ed. 1962); D. JACKSON, Principles of Property Law 106 (1967).


53. California, Mississippi, Nebraska, North Dakota, Oregon, South Carolina, South Dakota, Tennessee, and Utah. Id. ¶ 908[4] n.44.

54. R. MEGARRY & H. WADE, supra note 6, at 195-96.

55. Assurance funds were operated either separately for each county or on a state-wide basis. Both the fund for California and the fund for York County, Nebraska were completely exhausted and a deficiency existed which would absorb future payments. See R. POWELL, supra note 1, at 72.

56. Id. at 131-32, 239-41 (citing People v. Chase, 165 Ill. 527, 46 N.E. 454 (1896); State v. Guilbert, 56 Ohio St. 575, 47 N.E. 551 (1897)).

57. See, e.g., State v. Guilbert, 56 Ohio St. at 618, 47 N.E. at 556.
position has shifted sufficiently in this century to permit the non-judicial administration of a successful system similar to the system in England, despite the fact that due process concerns in other areas of law may have even intensified.\textsuperscript{58}

No attempt was made in these early statutes or in concurrent legislation to limit the number of estates with which the registration scheme would have to cope. Consequently, the need to account for all possible legal and equitable arrangements remained within the purview of the acts. In leaving intact multiple details of the many legal estates possible and the need to account for all manner of trust disposition, the American legislation differed dramatically from that in England where the substantive property law was made far simpler and, therefore, more manageable in registration matters.

Above all, the registration acts failed in the United States because judges in many jurisdictions were unwilling to accord a high degree of conclusiveness to registration, especially in those cases in which to do so would have offended the equity notion of fairness.\textsuperscript{59} Such inbred concerns, based as they are on excellent premises in context, are difficult to overcome, even when the legislative mandate seems unambiguous. When it becomes clear that the conclusiveness of registration in itself presents the fairest resolution in terms of cost and efficiency to the greatest number of people in a vast and complex society, these fundamental objections may well disappear. The difficulties in the English registration scheme and the judicial interpretations of the same problems as they appear in this Article are highly instructive in how a successful, modern American scheme might evolve.

III. THE ENGLISH EXPERIENCE

Old habits die hard in England. A probably apocryphal story tells of the distinguished solicitor who was taken up on a high hill overlooking the gorgeous farms of an English countryside. He stood for a moment and said: "The sight of all that registered land makes me sick." Colleagues at a British university are fond of telling another story involving the elderly professor at a fine university who until the mid-1970's always referred to the 1925 Land Acts as "the recent land legislation."\textsuperscript{60} These comments demonstrate that England is a land much given to the values of tradition, and provide one all the more reason to marvel at the Acts' excellent success.

\textsuperscript{58} See R. Powell, \textit{supra} note 1, at 199-201 (citing State v. Westfall, 85 Minn. 437, 89 N.W. 175 (1902)).

\textsuperscript{59} See R. Powell, \textit{supra} note 1, at 118, 140, 205, 250 (citing, \textit{inter alia}, Covey v. Talalah Estates Corp., 183 Ga. 442, 188 S.E. 822 (1932); Sheaff v. Spindler, 339 Ill. 540, 171 N.E. 632 (1930); Boart v. Martin, 99 Minn. 197, 108 N.W. 945 (1906); Kirk v. Mullen, 100 Ore. 563, 197 P. 300 (1921)).

\textsuperscript{60} The author is indebted for this story to Mrs. Mavis Pilkerton, Lecturer in Law, University of Leeds.
At the outset, it should be said that this Article does not undertake to weigh and evaluate exhaustively each provision of the British land legislation of 1925. This is not an effort to evaluate acts for their own sake or for a British audience concerned primarily with the efficacy of their operation there. The statutes are discussed selectively for those qualities and weaknesses which might bear specifically on an American adaptation. It is necessary to set out the legislation to make the statutes and their operation understandable. The British cases analyzed are those which have illuminated most clearly the advantages and pitfalls that have become apparent over six decades.

A. Before the Great Reform

Prior to the 1880's, the British land law mosaic incorporated the full range of legal and equitable interests that had been developed laboriously by the common law and equity courts, with an occasional Parliamentary contribution, since the time of the Norman conquest. There had been episodical patchwork reform of the system such as abolition of some of the most bizarre Common Law rules. In addition, the Rule Against Perpetuities had developed, and methods of conveyancing gradually had become more sophisticated. Much of this reform occurred early in the nineteenth century, but until the latter part of that century, no reform of a broadly comprehensive nature had emerged. Interestingly, legal title to realty continued to be proved by an ownership land deed coupled with physical possession of the land. To a far greater extent than in the United States, where recordation systems had sprung up early in its history, the British continued for a very long time to rely on the less sophisticated title deeds coupled with possession, which together constituted a form of proof which was said to bind all the world as to the legal title. There were some early attempts at registration, but they were in no way pervasive or successful programs of registration in the modern sense.

The British have had a notion, tracing at least from Henry VIII's ill-fated Statute of Enrollments, that public recordation of ownership evidence con-

61. See supra note 6.
62. It was eventually settled that the lives in being could be chosen at random and be completely unconnected with the property. Further, the period of twenty-one years after the life in being could be extended by actual periods of gestation. The Perpetuities and Accumulations Act, 1964, ch. 55, modified the rule to void only interests which must vest, if at all, outside the perpetuity period. It also allowed designation of a fixed perpetuity period not to exceed eighty years.

The deed of grant became the common form of conveyance by virtue of the Real Property Act, 1845, 8 & 9 Vict., ch. 106, § 2. Conveyance by feoffment was abolished pursuant to Law of Property Act, 1925, 15 & 16 Geo. 5, ch. 20, § 51. See R. MEGARRY & H. WADE, supra note 6, at 241-42, 1172.
63. See, e.g., Land Registry Act, 1862, 25 & 26 Vict., ch. 53; Land Transfer Act, 1875, 38 & 39 Vict., ch. 87. See also R. MEGARRY & H. WADE, supra note 6, at 195-96.
64. Statute of Enrollments, 27 Hen. 8, ch. 16 (1535).
stitutes an invasion of privacy and perhaps leads the tax collector to know more than is desirable. This historical oddity has permeated the modern land legislation so that even today the British handle registered items with extraordinary secrecy and confidentiality. The excessive confidentiality of the registration system constitutes a substantial weakness in the operation of the Land Registration Act.65

While deeds coupled with physical possession traditionally evidenced legal interests, equitable interests were evidenced by ancient concepts of notice of their existence, fairness, and the identity of the claimant as a purchaser, donee, or some other transferee. No recoridan or registration provision existed to protect equitable interests.66

Change, however, began in earnest in the late nineteenth century, not only in matters of title assurance, but in substantive property law as well. The Settled Land Act of 188267 was an early effort to fundamentally reform the English land law. Like that of its successor, the Settled Land Act of 1925,68 the purpose of the 1882 legislation was to free settled land from the long-term entanglements imposed upon it by those wishing to perpetuate land in the family for generations to come. Both the Acts of 1882 and 1925 frustrated this desire by vesting in a "tenant for life"69 wide powers to sell and otherwise deal with the fee simple title, treating any successive interests as interests in personalty only.70 In other words, the successive interests were taken off the land and placed on the money.

The early legislation was innovative in the 1880's, but it became increasingly irrelevant because changing patterns in the nature of wealth in Britain made the use of a settlement unpopular.71 In 1894, when death duties were imposed on successive transfers within a settlement,72 the settlement became even more unpopular, explaining in part why the Settled Land Act of 1925 never

65. See R. Megarry & H. Wade, supra note 6, at 195, 218; Land Registration Act, 1925, 15 & 16 Geo. 5, ch. 21, § 112; Land Registration Rules, S.R. & O. 1925 No. 1093, r.12.
68. Settled Land Act, 1925, 15 & 16 Geo. 5, ch. 18.
69. The tenant for life is the person of full age who is for the time being beneficially entitled under a settlement to possession of settled land for his life . . . . This includes persons with life interests, a tenant in tail, a tenant in fee simple subject to a gift over or to family charges, a tenant for years terminable on life, a tenant pur autrie vie, a person entitled to the income of land for his own life or any other life, and others.
Id. §§ 19(1), 20(1). See also R. Megarry & H. Wade, supra note 6, at 350.
70. R. Megarry & H. Wade, supra note 6, at 321, 398 (citing Settled Land Act, 1882, 45 & 46 Vict., ch. 38, §§ 20, 22(5), 39(1); Settled Land Act, 1925, 15 & 16 Geo. 5, ch. 18, § 72).
71. J. Riddall, supra note 7, at 124.
72. It is said that the grand fleet of World War I was built with the monies raised from this tax. See K. Gray & P. Symes, supra note 12, at 157 n.6 (citing F. Lawson, Introduction to the Law of Property 94f (1958)).
took hold.\textsuperscript{73} The great legislative effort waxed and waned in the first decade or so of this century,\textsuperscript{74} was delayed by the First World War and its aftermath, and finally proceeded in 1925 only after some remarkable compromises.

\textbf{B. The Legislation of 1925}

\textit{1. The Grand Design}

In the four acts discussed below, Parliament was concerned with four broad legislative purposes.\textsuperscript{75} One purpose of the acts was to reduce the number of legal estates in land to a manageable number so that the purchaser would have to deal with a minimal number of estates and parties in securing good legal title. A further very important benefit from the drastic reduction in the number of legal estates was to make possible a simpler land registration system.

A second purpose of the acts was to provide a system of registration which would mirror exactly, at any point in time, the status of title to real estate. The title so appearing would have been judicially determined and guaranteed by the state.

The third purpose of the acts, achieved through the use of the trust device, was to sweep equitable estates and interests off the legal title and into the fund created by a sale of the land. By such process the purchaser only had to know that equitable arrangements existed in order to pay the purchase money over to the appropriate trustees. Upon making payment, the purchaser was totally relieved of the details and consequences of the trust arrangements. Finally, the acts were meant to provide appropriate protection for "commercial" type encumbrances, as opposed to "family" type encumbrances.

\textsuperscript{73} The change in the nature of British wealth and the adverse tax consequences of the strict settlement combined to cause conveyancers to avoid the creation of the arrangement, resulting in its present archaic nature. \textit{See id.} at 156-57.

\textsuperscript{74} Although title registration had experienced the support of both political parties since 1885, had commanded a majority in the House of Lords since 1893, and was the official policy of the Law Society from 1895, the years preceding World War I contained considerable compromises. In 1911, the report of the Royal Commission on Land Transfer Acts (which received much input from Chief Registrar C.F. Brickdale) recommended abolition of the County Veto, but refused extension of compulsory registration until the system was perfected in London. The Law Society, through President Humphreys, countered with a bill opposing the abolition of the County Veto and any extension of compulsory registration until the system was perfected in London. The compromise worked out between Brickdale and Humphreys was abolition of the County Veto in return for an increase in solicitors' scale fees. \textit{See Offer, supra note 7, at 505-12.}

Negotiations, however, came to a halt in 1912 with the illness and resignation of Lord Loreburn, a vocal opponent of the solicitors who maintained that the high cost of transfer was inhibiting the diffusion of property. The basic outline of the present system was embodied in legislation introduced in 1913 and reintroduced and amended in 1914, but the exigencies of World War I halted further progress until 1919. \textit{Id.}

\textsuperscript{75} \textit{See} K. \textsc{Gray} \& P. \textsc{Symes}, \textit{supra} note 12, at 320-21; R. \textsc{Megarry} \& H. \textsc{Wade}, \textit{supra} note 6, at 123.
To achieve all these purposes, the acts did two things. First, they reduced the number of legal estates to two: the fee simple absolute and the legal term of years. The equitable mandate exempted the term of years because it was seen most often as a business arrangement, and as such, often an inappropriate candidate for use behind a trust arrangement. In addition to reducing the number of possible legal estates, the acts provided for certain legal "interests" other than "estates" to be created. Examples of such interests are easements and profits which are of the same duration as the legal estates. An easement for life, therefore, can be created only as an equitable interest, but an easement for a term of twenty-one years can be created as a legal interest.

The second way in which the acts achieved Parliament's purposes was to divide equitable estates and interests into two basic categories: those that can be overreached, and those that cannot be overreached. In the first category are all of the so-called family arrangements. Family arrangements, such as strict settlements, involve either direct grants to family members in succession, or a similar conveyance to trustees on comparable uses. These arrangements are overreached when the property is sold so that the interests of the equitable owners have no relation to the land and need not be the concern of the purchasers. The concept of overreaching is that the equitable interests of beneficiaries are detached from the land and attached instead to the purchase money paid to the trustees for the land. In this sense, overreaching means "being detached from the land." The equitable owners' interests are attached instead to the fund created by the purchase price and are protected in that manner.

The second basic category involves the equitable interests that cannot be overreached. Into this category fall restrictive covenants, estate contracts, and certain equitable interests in the land of another, such as an equitable easement. These are regarded as "commercial" equitable interests as opposed to "family" equitable interests and as such cannot be overridden. Some of the legislation defines and governs only family settlements, and different

76. Law of Property Act, 1925, 15 & 16 Geo. 5, ch. 20, § 1(1).
77. Id. § 1(3).
78. See id. § 1(2).
79. R. Megarry & H. Wade, supra note 6, at 125.
80. The device of overreaching allows land to be sold free from an equitable interest, even though the purchaser has notice of it. The holder of the interest loses any prospect of enjoying the land itself, but obtains a corresponding interest in the purchase money. The distinction between overreaching and an interest being overridden is that with the latter, the interest is void (ceases to be an interest in any property) against a purchaser of the legal estate who is without notice, or who fails to register. Id. at 137.
81. See K. Gray & P. Symes, supra note 12, at 75-76 (noting objectionable aspects of the involuntary conversion of a right in realty to a right in personality (i.e., money)).
82. See J. Riddell, supra note 7, at 427-28.
statutory arrangements often define and govern commercial interests. Both types of equitable interests are contemplated and dealt with by the Land Registration Act of 1925, as will be seen below.

2. The Implementing Acts

All of the changes discussed above were the product of some six pieces of legislation enacted by Parliament in 1925. Two of these acts, the Administration of Estates Act and the Trustee Act, are beyond the purview of this Article and will not be considered here. The acts discussed are: the Law of Property Act, the Settled Land Act, the Land Charges Act, and the Land Registration Act.

To grasp what the legislation intended, it should be understood that the acts interrelate. Some were enacted as temporary measures until the Land Registration Act could be brought into full operation. Parliament recognized that effective and full implementation of the Registration Act would take considerable time. But in 1925, no one foresaw the Great Depression, the Second World War, and the various economic problems that were to afflict Great Britain and delay full application of the Act to the present day.

To ensure a mechanism for handling affairs under the Settled Land Act and the Law of Property Act, interim arrangements were provided. These arrangements still prevail where the land is not yet within a registered land jurisdiction (perhaps twenty percent of England and Wales at this writing), or where the land is within a registered land area, but no statutorily defined

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83. Although "land" is defined as including easements both in the Law of Property Act, 1925, 15 & 16 Geo. 5, ch. 20, § 205(1)(ix) and in the Settled Land Act, 1925, 15 & 16 Geo. 5, ch. 18, § 117(1)(ix), provisions governing notice of easements or acquisition of the same are in the Law of Property Act, 1925, 15 & 16 Geo. 5, ch. 20, § 200, and in the Land Registration Act, 1925, 15 & 16 Geo. 5, ch. 21, § 108.

84. Administration of Estates Act, 1925, 15 & 16 Geo. 5, ch. 23.

85. Trustee Act, 1925, 15 & 16 Geo. 5, ch. 19.

86. Law of Property Act, 1925, 15 & 16 Geo. 5, ch. 20.


89. Land Registration Act, 1925, 15 & 16 Geo. 5, ch. 21.

90. Pursuant to the Settled Land Act, § 119(3), that act is subject to the provisions of the Land Registration Act. Scholars have noted that since not all land is subject to registration, two different systems of law operate side by side—one for registered land and one for unregistered land. The outcome of particular situations may differ according to which system applies and some statutes apply to one or the other system only. See, e.g., J. Riddall, supra note 7, at 446-47.

91. By 1980, three-quarters of the population of the country was located in compulsory registration areas and by 1983, approximately eight million titles were on the register. See R. Megarry & H. Wade, supra note 6, at 199. Approximately seventy-five percent of conveyances involve registration. J. Bruce, J. Ely, Jr. & C. Bostick, supra note 19, at 647.
event has occurred to require the registration of the particular tract of land in question. For unregistered land, the general scheme of the 1925 legislation provides that:

(a) Legal title need not be registered, but continues to be validated by ancient title deeds and possession concepts;

(b) Family economic arrangements such as strict settlements are governed by either the Settled Land Act or the “trust for sale” provisions of the Law of Property Act, which provide for notice of any equitable interests of this kind; and

(c) Commercial claims and interests such as “estate contracts” are protected by registration under the Land Charges Act. That Act deals almost exclusively with specified equitable interests of the commercial variety. Because the Land Registration Act provides for the equitable commercial interests fully, it was believed in 1925 that as the registered land system spread, the Land Charges Act, all purposes of which are subsumed into that broader Act, would pass into oblivion.

In summary, the reform acts made interim provisions for protection of all the possibilities pending the arrival of the Registered Land Act: legal estates and interests in the way they existed prior to 1925; family type overreachable interests through the Settled Land Act or the trust for sale; and commercial, non-overreachable arrangements by the Land Charges Act. The substance of those acts, as a background to how they influence the registration scheme, will be examined in the next section.

a. The Settled Land Act of 1925

The Settled Land Act is designed to define and manage private economic arrangements relating to land, primarily family settlements, by forcing all future interests behind a trust. The details of the trust are of no interest or concern to a purchaser who has bought from the person entitled to convey the legal fee simple absolute title. The Act, though ingenious in concept, is marred by unnecessary complexity. This is especially so because it requires two instruments to achieve a proper settlement: the “vesting deed” and the

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92. In areas where compulsory registration is in effect, a conveyance on sale of the fee simple absolute, a grant of a term of years absolute, or assignment of a term of years absolute (each of the latter requiring a future term of at least forty years) triggers the registration requirement. Land Registration Act, § 123(1).
93. See K. Gray & P. Symes, supra note 12, at 87.
94. See supra text accompanying note 81.
95. K. Gray & P. Symes, supra note 12, at 154, 216-17.
96. See 15 & 16 Geo. 5, ch. 22.
97. See supra notes 75-83 and accompanying text.
98. See J. Riddall, supra note 7, at 116.
trust instrument itself. In addition, there are taxation disadvantages attached to the use of a settlement under the Act. These problems have led the legal profession to virtually abandon the Act, especially since all of its purposes can be accomplished through the simpler trust for sale device without the major tax problems. A settlement under the Settled Land Act is most likely to be encountered today when a careless conveyancer fails to properly create a trust for sale, because the Settled Land Act by its terms applies to any settlement that is not a part of a trust for sale.

Despite its relegation to little more than a snare for the uninformed or the careless, the Settled Land Act does contain some features that should be of interest to an American audience considering reform. The Act builds on the Law of Property Act's provisions, reducing the number of possible legal estates to two and forcing all other interests under a settlement into equitable interests behind a trust. Consequently, the critical feature of this Act is the role of the person designated as the "tenant for life." This person may in fact be a life tenant under the terms of the settlement, but the individual also may be one who holds any present estate, even one other than a traditional life tenancy. The significance of the position is that the tenant for life, in virtually all cases, holds the legal title to the fee simple absolute. That position carries the right to convey the legal title and to deal effectively as full owner in other respects for both the benefit of the tenant for life, in whatever present possessory equitable interest that person holds under the settlement, and for the benefit of all other equitable owners. All equitable interests in the land are thereby overreached and attached to the fund created by the action in lieu of the interest in the land.

Trustees of the settlement, of which there are usually two, have a rather broad supervisory power over the land and the duty to receive monies resulting from transactions involving the property. For the most part, however, the active role of trustee is played by the tenant for life rather than by those persons designated as trustees. The tenant for life receives this broad authority over the property on the theory that this person is entitled to possession and is logically the most likely person with whom a prospective purchaser would want to deal. It is unfortunate that an un-

100. See supra note 73 and accompanying text.
104. See supra note 69.
105. See id. §§ 16(1)(a), 38, 107.
106. See id. § 18(1). See also supra note 80 and accompanying text.
107. See id. § 18(1). See also supra note 80 and accompanying text.
108. See Settled Land Act § 95.
necessary complexity effectively defeated the Settled Land Act. It is one of
the more interesting pieces of the 1925 legislation and held considerable
potential for accomplishing some of the major goals of the overall scheme."

If land is held under a settlement in a land registration situation, the land
is registered in the name of the tenant for life as proprietor. The interests
of the beneficiaries of the settlement are protected by entering an appropriate
"restriction" on the register indicating that the land is settled land. The
effect of such a restrictive entry is that any purchaser will be on notice that
the land is settled land and must be dealt with only under the terms of the
Settled Land Act if an effective transfer is to occur. At no time would
the purchaser know, or need to know, of the provisions of the trust in the
settlement. As long as the purchaser abides by the provisions of the Settled
Land Act in making the transfer and paying the monies to the appropriate
parties, the purchaser can be totally indifferent to the ultimate distribution
of those monies.

The overall complexity of the Settled Land Act makes it an unlikely
candidate for an American adaptation. Nevertheless, parts of its provisions,
especially the role accorded to the tenant for life in both holding the legal
title and enjoying broad authority for dealing with the land, might be utilized
in conjunction with some of the more versatile provisions of the Law of
Property Act to good result.

b. The Law of Property Act of 1925

The Law of Property Act of 1925 is a remarkable piece of legislation,
both for its innovations and for the fact that it managed to pass through
Parliament. Virtually overnight, this Act swept away the practice of cen-

110. While American landowners generally have never been subject to the same preoccupation
with family settlements as English landowners, the concept of the tenant for life could be
beneficial by adapting it for use with concurrent interests, such as joint tenancies and co-
tenancies.

111. See Land Registration Act § 86(1).

112. See id. § 86(3).

113. See K. Gray & P. Symes, supra note 12, at 326.

114. This follows from the fact that the presence of the restriction on the register requires
that effective dispositions must be made under the terms of the Settled Land Act, 1925; and
pursuant to Settled Land Act, § 110(2), a purchaser of settled land is generally not entitled to
review the provisions of the trust instrument. See J. Riddall, supra note 7, at 428.

115. The tenant for life concept merits special consideration because the person in actual
possession of the land is logically the one most likely to be consulted by prospective purchasers. See supra note 107 and accompanying text.

116. Following World War I, proposals for reform were again introduced at Parliament; however, the Law Society continued to oppose abolition of the County Veto. Initially, the
solicitors priced their support for the measure, including abolition of the veto, at a three-year
postponement of extending the area under compulsory registration. Subsequently, the length
of the postponement was increased to five and eventually to ten years. At one point Chief
turies. It is difficult to imagine an American jurisdiction acting quite so broadly or boldly as this, at least in regard to land.\textsuperscript{117} Hopefully, an assessment of the success of the British legislation might encourage some to try. The resistance in Parliament was formidable, and final passage took place only after appeasing some in the House of Lords by incorporating such measures as retaining the fee tail estate, which survives even today as a rather curious relic among such advanced provisions.\textsuperscript{118}

As stated, the Act's provisions are wide ranging. For purposes here, two segments are of special interest: the sections defining the new legal and equitable interests possible,\textsuperscript{119} and the provisions relating to the trust for sale.\textsuperscript{120}

It is certainly one of the most valuable aspects of the "estates" system in Anglo-American law that the concept of ownership, measured on a plane of time, permits extraordinary flexibility in the quality of possible arrange-
Consequently, when the decision was taken to reduce the number of possible legal estates to two, it was vital that the former legal estates survive in the form of equitable estates. There was no conceptual or practical objection to the existence of these estates, because the estates were essential to flexible arrangements. The objection was that the equitable estates attached to land in such a way that the identity of an owner, who was always able to convey the total fee simple estate, could be lost for long periods of time. The solution was to permit the creation of the former legal estates but now only in equity, where they had long been creatable in any event. Then, at least in the case of family settlements, the provisions of the settlement attached to the proceeds of a sale when overreached by the sale of the legal title. Rights of the commercial type were, of course, not overreached and were protected by notice to the purchaser, first through the vehicle of the Land Charges Act, and ultimately through the Land Registration Act.

A second major variance of the Law of Property Act was its treatment of concurrent estates. Those who developed the legislation recognized that one of the principal factors that would overwork a registration system was the old practice of permitting the creation of unlimited numbers of legal tenancies in common. If undivided shares could be created in vast numbers of owners at law, the volume of matters necessary to be registered relating to that ownership might either overwhelm the system or make it so cumbersome as to compromise the basic need for simplicity. This situation was perceived as a fundamental difficulty in establishing title. Provisions that treated any named concurrent tenants as joint tenants holding the

121. The estate concept is unique to Anglo-American land law. See A. Casner & W. Leach, supra note 21, at 244.
122. The rationale for converting former legal estates into equitable interests was to require their satisfaction from money generated by the transfer rather than from the land itself.
123. For example, the intestate death of a co-tenant, leaving ninety-seven next-of-kin, presented particular problems for prospective purchasers. Likewise, difficulties are encountered where the remainder following a life estate is held by an infant. A sale might not be possible until the infant attained majority. See J. Riddell, supra note 7, at 457-58.
125. See Land Charges Act § 2(5) (allowing registrations as a Class D land charge on the register of land charges); Land Charges Act § 4(6) (providing that Class D land charges are void against a purchaser for value unless they are registered).
126. See Land Registration Act § 70(2) (requiring notice on the register at the time of initial registration of any easement, right, privilege or benefit which is created by instrument and which appears on the title adversely affecting the land).
property on implied trust for sale for themselves, and perhaps for others as well, resolved the matter.\textsuperscript{130} In England, it is no longer possible to own legal title to land concurrently except on trust for sale as joint tenants.\textsuperscript{131} The number of joint tenants holding legal title on trust for sale is limited to four.\textsuperscript{132} Whether the equitable interests behind the trust are also joint interests, or whether those interests are treated as equitable tenancies in common, depends on the circumstances of the basic transactions.\textsuperscript{133} Either result is possible. With the number of legal title holders limited to four, and with the survivorship features of joint tenancy further simplifying matters, the registration procedures and conveyancing concerns remain relatively uncluttered.

The third principal innovation of the Law of Property Act important to this Article was that the Act introduced the trust for sale.\textsuperscript{134} This device proved so successful and popular in its relative simplicity of operation that it soon drove the more cumbersome machinery of the Settled Land Act out of business.\textsuperscript{135}

The fundamental premise of the trust for sale is that when land is transferred on a settlement, that is, on successive interests, and when there is a mandatory direction to the trustees to sell the property to implement the trust, a trust for sale arises under the Law of Property Act, rather than a settlement under the Settled Land Act.\textsuperscript{136} Legal title rests in the trustees for sale,\textsuperscript{137} and the trustees, two of whom are required in most instances, must manage the property and act in accordance with the mandate of the trust.\textsuperscript{138} While the creation of a trust for sale requires that the property be sold, and does not give merely a power or entitlement to sell it, it is a curiosity of the operation of the trust for sale that immediate sale is not necessary.\textsuperscript{139} Indeed, the device is often used to implement a long term family settlement when the expectation is that the property will not be sold for a very long period of time, if ever.\textsuperscript{140} Such a course may, however, require the consent of the beneficiaries.\textsuperscript{141} The interests of the beneficiaries are in effect converted to personalty since the property is required to be sold and "equity looks on

\textsuperscript{130} See Law of Property Act §§ 34(2), 36(1).

\textsuperscript{131} Id. § 34(1).

\textsuperscript{132} Id. § 34(2).

\textsuperscript{133} See R. Megarry & H. Wade, supra note 6, at 446.

\textsuperscript{134} Law of Property Act § 205(1)(xxix).

\textsuperscript{135} See supra notes 99-101 and accompanying text.

\textsuperscript{136} See Law of Property Act § 205(1)(xxix); Settled Land Act § 1(7).

\textsuperscript{137} Law of Property Act, sched. 1, pt. II, §§ 3, 6(0).

\textsuperscript{138} See id. § 3(1)(6).

\textsuperscript{139} See id. § 25 (granting the trustees for sale the power to postpone the sale without incurring any liability). See also R. Megarry & H. Wade, supra note 6, at 392.

\textsuperscript{140} See, e.g., In re Evers’ Trust (Papps v. Evers), [1980] 1 W.L.R. 1327, 1330 (C.A.).

\textsuperscript{141} See, e.g., In re Inns (Inns v. Wallace), 1947 Ch. 576, 582; Re Herklot’s Will Trusts (Temple v. Scorer), [1964] 1 W.L.R. 583, 589 (Ch. 1965).
that as done which ought to be done.'\textsuperscript{142} For purposes of devolution, for instance, the assets are treated as personality.\textsuperscript{143} Elaborate provisions govern the responsibilities of the trustees in taking into account the views of the equitable owners in making their decisions.\textsuperscript{144} Unlike the trustees of the settlement in Settled Land matters, the trust for sale trustees perform as active, responsible fiduciaries in the management, general decision-making and sale of the trust property.\textsuperscript{145} Theirs is not a supervisory role; it is an active, decision-making role.\textsuperscript{4}

The trust for sale may arise in ways other than direct, express provision.\textsuperscript{146} For example, it is implied when titleholders convey to grantees as concurrent owners.\textsuperscript{147} As stated above, irrespective of what was said or intended, the grantees are deemed to be joint tenants to the legal title and they are deemed to hold the ownership of the equitable interests for themselves and others in whatever form is appropriate. Trust for sale is also implied in circumstances in which legal title is in fact held by one person, but under conditions where the legal title holder should be deemed as trustee for one or more persons, perhaps including the trustee.\textsuperscript{148}

An implied trust may arise most often in the case of the marital home. Without doubt, marital home ownership and the problem of the protection of that home for both spouses, has emerged as a major concern for the entire field of land law, especially as it relates to the Land Registration Act.\textsuperscript{149} When both spouses contribute to the purchase price of a marital home, and the legal title is taken in the name of one only, usually the husband, the courts, without a clear legislative mandate, now imply a trust. Moreover, the trust implied is a trust for sale, with the spouse in whose name the legal title is held taking that title as trustee for sale for both spouses.\textsuperscript{150} The difficulty posed for a purchaser in discovering this implied trust has posed a serious problem when the legal titleholder acts without authority and outside the parameters of the Act in dealing with the realty.\textsuperscript{151}

An English case, \textit{Caunce v. Caunce},\textsuperscript{152} involved a marital home, and was instrumental in establishing that, in hard cases, certainty of title is more important than rough justice equity solutions. \textit{Caunce} involved a non-registered land area of the country where the legal title to a matrimonial home

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\item \textsuperscript{142} J. RIDDALL, \textit{supra} note 7, at 135.
\item \textsuperscript{143} \textit{In re Kempthorne} (Charles v. Kempthorne), [1930] 1 Ch. 268, 275-76 (C.A. 1929).
\item \textsuperscript{144} \textit{See} Law of Property Act § 26(3).
\item \textsuperscript{145} \textit{See} \textit{id.} § 28.
\item \textsuperscript{146} \textit{See id.} §§ 34, 36.
\item \textsuperscript{147} \textit{Id.} § 36(1).
\item \textsuperscript{149} Thompson, \textit{Registration, Fraud and Notice}, \textit{44 CAMBRIDGE L.J.} 280 (1985).
\item \textsuperscript{150} \textit{See} Waller v. Waller, [1967] 1 W.L.R. 451, 453 (Ch. 1966).
\item \textsuperscript{151} \textit{See, e.g.}, Caunce v. Caunce, [1969] 1 W.L.R. 286, 289 (Ch. 1968); Williams & Glyn's Bank Ltd. v. Boland, [1980] 3 W.L.R 138, 141.
\item \textsuperscript{152} Caunce, [1969] 1 W.L.R. 286.
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was solely in the husband. Nevertheless, the wife had an equitable interest in the property by reason of her contribution to the purchase price. Although the wife occupied the property with her husband, the court held that the bank to whom the husband mortgaged the property was not put on notice of any rights stemming purely from the marital status. The court said that her possession was consistent with her status as a spouse and, consequently, constituted no notice. The bank prevailed.

Apparently Caunce is still the law regarding unregistered land despite the fact that the House of Lords reached a different result in a similar case, Williams & Glyn's Bank v. Boland, which involved registered land. In Boland, the decision in Caunce was questioned, but not overturned. The House of Lords' decision in the Boland case clearly established that a wife similarly situated to the wife in Caunce, but in a registered land context, would by reason of her possession and her equitable interest have an overriding interest that would defeat a bank mortgage. A highly undesirable difference of result occurs, therefore, in unregistered and registered land settings when the facts are otherwise the same. The Caunce case reduces the obligation of inquiry to include only those in possession. The Boland decision reaches the opposite result in the registration context on similar facts.

In summary, the Law of Property Act dramatically reformed the substantive law of property by reducing the number of legal estates to two. In the trustee for sale concept, this act provides a convenient vehicle for conveying title. These two developments make possible the operation of the efficient, simple registration system established by the Land Registration Act.

c. The Land Charges Act of 1925

Of all the land legislation of 1925, the Land Charges Act, now replaced by the Land Charges Act of 1972, is likely the least successful. Ironically, some of the judicial decisions upholding its broad purposes as to sanctity of registration are better results than those flowing from the provisions of the Land Registration Act.

Before 1925, no generally applicable recordation or registration system was available to care for the wide variety of equitable interests possible in realty. Both the owners of these equitable estates, and the owners of the

153. Id. at 293.
154. Id.
156. Id. at 146.
158. Land Charges Act, 1972, ch. 61.
159. See K. Gray & P. Symes, supra note 12, at 72-73.
legal estates to which they pertained, were in an undesirably unstable posture. The validity of the equitable interests against third-party purchasers of legal estates depended entirely on ancient equity doctrines of fairness and notice.\textsuperscript{160} The nightmare of the equity owner was that the legal owner would transfer the legal estate to a purchaser who would have no notice of the equitable claim, thereby taking free of it. The nightmare of a purchaser was that a legal title would be purchased by him with an equitable claim attached to it that was not apparent and the existence of which he had no knowledge. In such a case, the purchaser would have the burden of showing a purchase in good faith and without knowledge.\textsuperscript{161} It is often difficult to prove a lack of knowledge and, hence, neither party was in an entirely satisfactory position prior to the 1925 legislation.

Virtually all protections of the Land Charges Act deal with equitable interests. Only rare instances of provisions for the protection of a legal interest, as in the case of a "puisne" mortgage, exist.\textsuperscript{162} Nevertheless, the Land Charges Act was not intended to provide protection for all equitable interests, only for those broadly characterized as commercial interests and specified in the six categories laid out in the Act itself.\textsuperscript{163} The equitable interests of the family variety\textsuperscript{164} were protected by the mechanisms of the Settled Land Act, the trust for sale provisions of the Law of Property Act, and, of course, by the Land Registration Act when it applied.

The Land Charges Act has numerous shortcomings, but fails principally for two reasons, both peculiarly pertinent to the major concerns of this Article. First, the registration scheme is name-based, not tract-based, with all the hazards this procedure entails.\textsuperscript{165} Second, under post-1925 developments, a "root of title" search is limited to fifteen years,\textsuperscript{166} while a purchaser is bound by any land charge registered since 1925.\textsuperscript{167} Because the purchaser cannot require the seller to furnish names of titleholders prior to the time root of title is established,\textsuperscript{168} and because a purchaser has no other feasible way to obtain these names other than by chance, the purchaser is in the position of not knowing what names on the register to search. He is bound, however, by any registered claim on the land in those unknown names. This lethal combination, a name index with no way of ascertaining the name, has curtailed drastically the effectiveness of the Land Charges Act. Fortu-

\textsuperscript{160} See, e.g., Pilcher v. Rawlins, [1871-72] 7 Ch. App. 259, 266, 269 (1872).
\textsuperscript{161} See, e.g., In re Nisbet & Potts’ Contract, [1906] 1 Ch. 386, 404, 409-10 (C.A.).
\textsuperscript{162} Land Charges Act §§ 2(4)(i), 3(3), 4(5), (7).
\textsuperscript{163} Id. § 2.
\textsuperscript{164} See supra text accompanying notes 75-96.
\textsuperscript{165} Ironically, at least as to the Land Charges Act, this shortcoming is common both to registered conveyancing in England and Wales and to the present recordation systems in America.
\textsuperscript{167} Id. § 4(3), (7), (8).
\textsuperscript{168} R. Megarry & H. Wade, supra note 6, at 609-10 (citing Law of Property Act § 45(1)).
nately, as the Land Registration Act takes hold, the Land Charges Act is reduced to irrelevancy.\textsuperscript{169}

Nevertheless, the judicial interpretations of the Land Charges Act are of particular importance to any adaptation of the British system to an American context. Because these decisions under the Land Charges Act do not have to be concerned with any overriding interests matters as in the Land Registration Act,\textsuperscript{170} they often produce results more supportive of a credible register than do decisions under the Land Registration Act on similar facts.\textsuperscript{171}

The question Parliament considered in adopting all of the 1925 Acts was the extent to which the registration of an interest, or its non-registration, would supplant any inquiry into notice and fairness.\textsuperscript{172} Parliament used what appears to be quite clear language in setting out its intent.\textsuperscript{173} Even such a statement, however, was not sufficient to prevent the British Court of Appeals, and especially Lord Denning,\textsuperscript{174} from resurrecting the old concerns in the much discussed case of \textit{Midland Bank v. Green}.\textsuperscript{175}

\textit{Midland Bank} turned on the extent to which a mother, holding legal title to property, would be permitted to disregard her full knowledge of the existence of an unregistered estate contract between her deceased husband and her adult son. The mother declined to convey the property to the son on the ground that she was not bound by the contract because it was unregistered. The Court of Appeals could not bring itself to ignore the mother's knowledge of the contract although admittedly the contract was registerable under the Land Charges Act and had not been registered. All parties conceded that the contract could have been registered by the son and that if he had done so, the problem would not have arisen. Since the contract was not registered, it would seem that the clear language of the Act would render it void against the other children even though they had purchased from the mother at an admittedly small consideration.

\textsuperscript{169} As the area of compulsory registration extends, the Land Charges Act will become irrelevant since under Land Registration Act, § 59(2), the registration of a land charge against registered land can be effected only by registering a notice, caution, or other prescribed entry on the Charges Register which is then reflected on the Land Certificate. See Land Registration Act § 63(1), (2).

Prior to the imposition of compulsory registration, purchasers of unregistered land had been given protection against losses resulting from undiscoverable land charges through a claim on the compensation fund. See supra note 11.

\textsuperscript{170} Under the Land Charges Act, if the charge is registerable but unregistered, a purchaser takes free of it, and the rights of the owner of the charge against the land are defeated. Hence, overriding interests are unnecessary. R. Megarry & H. Wade, supra note 6, at 170.


\textsuperscript{172} R. Megarry & H. Wade, supra note 6, at 185-86.

\textsuperscript{173} \textit{Id}.


\textsuperscript{175} \textit{Midland Bank}, 1980 Ch. 590.
The Court of Appeals relied on the basic unfairness of permitting one who in fact knew of the contract to act in law as if she did not have that knowledge. Thus, it permitted the son’s executor to prevail over the claims of the later purchasers. This result cut a huge swath through the credibility of the registration system until the case was reversed by the House of Lords.\textsuperscript{176} There, Lord Wilberforce restored the situation, at least as to the Land Charges Act, to that which Parliament had intended. Lord Wilberforce took the position that “good faith” was an irrelevant issue in the case. He maintained that the legislation deliberately had omitted any consideration of the absence or presence of good faith in the purchaser.\textsuperscript{177} Further, he was not impressed with the lower court’s concern over whether the consideration paid by the purchaser was adequate to classify him as a “purchaser” within the meaning of the Act.\textsuperscript{178} Since the claim was unregistered, the House of Lords held it to be non-binding on the mother.\textsuperscript{179} The case was regarded as a significant victory for those seeking protection of the integrity of the registration system and, therefore, for the orthodox view of the importance of the protection of property titles, even at the expense of fairness.\textsuperscript{180}

Since \textit{Midland Bank}, the position has been strengthened that the test is not to be one of notice or lack of notice of unregistered interests. The real test is whether an interest is required to be registered to be given effect against purchasers. If such a requirement exists, and has not been met, the claim is void irrespective of notice.

A final evaluation of the Land Charges Act, therefore, shows that it is severely flawed because it relies on a name-based, rather than a tract-based, system. Since the Act was always intended as a temporary expedient, it will soon become irrelevant as the Land Registration Act of 1925 continues to cover more land transactions in England and Wales.

d. The Land Registration Act of 1925

The last of the English acts to be considered, and the one of most immediate concern for purposes of this Article, is the Land Registration Act of 1925.\textsuperscript{181} This Act, together with the Law of Property Act,\textsuperscript{182} is the most important of the 1925 property legislation. The expense of its implementation coupled with the notable problems of the British nation since 1925 have delayed, even until the present day, the full advantages that the Act promises.
The Act's provisions are compulsory in those areas to which it has spread and eventually will be compulsory throughout England and Wales. It is now estimated that something over eighty per cent of the land in England and Wales has been drawn within the network of registered land. It is also estimated that the rest of the country will soon be covered by its provisions. Of course, not all land within the areas subject to registration is now registered since in many instances no event has yet occurred that requires an original registration.

The Land Registration Act is ambitious because it purports to deal with every conceivable estate or interest in land. Also, the Act seeks to exemplify, in its fullest sense, the "mirror principle," that is, an exact display of the state of the title at any given moment. The Act also undertakes to provide both a state-guaranteed title for proprietors and a proper scheme of compensation for those improvidently harmed by the existence of that title. The Act has failed to achieve totally any of these goals, in part because of unnecessarily restrictive interpretations, and most importantly because it contains within its provisions an Achilles heel known as "overriding interests."

i. Purposes of the Land Registration Act

Technically, the Land Registration Act of 1925 is structured to meet the requirements of an effective system. The Act's stated purpose is that a transferee for valuable consideration takes the legal title to an estate subject to entries on the register and subject to overriding interests, but free from all other estates and interests. But for the ominous "overriding interests" gap, the stated purpose would seem to confer on the register that absolute "mirror" quality that any successful system must have to function as the sole source of title status. The courts, however, have chipped away at the conclusive nature of the register in a number of ways. Similar facts lead
different results in cases of registered and unregistered land, and this is an undesirable situation. Admittedly, the terms of the Land Registration Act itself often make for a different result in registered land than the Land Charges Act would impose in unregistered land.  

Certainly, Parliament intended that the Land Registration Act would insure that the register would be an extremely accurate "mirror" of any interests affecting registered land. Section 20(1) of the Act provides that when there is a disposition of a legal estate supported by consideration, the estate transferred or created is free from all other estates and interests whatsoever. Section 59(6) goes so far as to say that such a disposition shall mean that the purchaser shall not "be concerned" with any matter not properly protected under the provisions of the register. Parliament obviously meant to impose a policy for registered land which was as rigorous as that which pertained to unprotected land charges in unregistered land.

ii. Registration procedures

The workings of the registration and recordation structure are admirably simple: one register is located in London and thirteen are in District Registrars. Each proprietorship register is based on an index card system. Each registration is placed on an index card that is divided into three parts. The first part designates the tract of land with reference to a plan or map showing the land parcel. The second part describes the features of the title in terms of quality, that is, absolute, good leasehold, qualified, or possessory. This subdivision also lists the name and address of the registered proprietor and sets out limitations. These limitations are known as cautions, inhibitions, notices and the restrictions on proprietorship. The third portion of the card provides for entry of notice of rights adverse to the land, such as

to defeat the vendor's wife's right of occupation).

Another method of giving effect to registrable, but unregistered, interests is to imply an economic tort action for inducing breach of contract when a purchaser takes free of the interest under the Law of Property Act, yet had knowledge that his taking would induce breach. See Sefton v. Tophams Ltd., 1965 Ch. 1140 (C.A.), rev'd, [1967] 1 A.C. 50 (no damage would result). A third method is through permitting rectification of the register, as in Freer v. Unwins Ltd., 1976 Ch. 288 (1975), when entry of a registered land charge was omitted upon first registration of title.

191. See supra notes 170, 172 and accompanying text.
192. See Land Registration Act §§ 20(1), 59(6). See also K. Gray & P. Symes, supra note 12, at 321.
193. Land Registration Act § 20(1).
194. Id. § 59(6).
195. See Thompson, supra note 149, at 302.
196. Land Registration Act §§ 126(1), 132. See J. Riddall, supra note 7, at 421.
197. Land Registration Rules, 1925, r.6.
easements, restrictive covenants and mortgages, as well as all other rights defining and protecting rights over the land.198

Since it is the land registration itself that is the title,199 not the title deeds as was formerly the case, a copy of the "land certificate," or the registration document, is given to each registered proprietor.200 No transfer of the title occurs until the registration actually takes place at the Register Office.201 Because deeds in the American sense are no longer used to effect the transfer of title, all the infirmities surrounding the use of deeds, such as improper delivery, are avoided. This illustrates how the Act, which was designed and intended to improve the conveyancing mechanism, has in fact had a much wider impact in altering the basic law of property. The Act not only has altered the time and manner in which title passes, it has changed other fundamental concepts as well, such as the extent to which one can pass to a purchaser a better title than one has.202

Because it is the act of registration that effectively passes title, it follows that when registration is compulsory the registerable transaction is ineffective to convey legal title until the registration occurs. In the case of a first registration, such a transaction is void as to the legal estate unless the registration occurs within two months.203 The Register office may extend this time for "sufficient cause."204 In the case of land already registered, the grantor is said to hold the title on trust for the grantee until the registration occurs. In this situation, the two-month limitation seemingly does not apply.205

iii. Interests which must be registered

The Land Registration Act provides that three classes of interests—"Registered Interests," "Overriding Interests," and "Minor Interests"—must be registered. The first of these classes, the "Registered Interests,"206 are the legal estates only, and in England this indicates either a legal fee simple absolute or a term of years. The Act is much too complex and obfuscated

198. Id. r.7.
199. See Land Registration Act § 69.
200. Id. § 63(1).
201. Id. § 19(1).
202. See id. § 77.
203. See id. § 123(1).
204. Id.
205. See R. Megarry & H. Wade, supra note 6, at 200. See also Land Registration Act §§ 19, 22.
206. Land Registration Act § 2 (stating that "legal estates shall be the only interests in land . . . which . . . can be registered and all other interests . . . (except overriding interests and interests entered on the register at or before such commencement) shall take effect in equity," but all non-legal interests "except undivided shares in land" can be handled by the Act).
regarding the registration of leasehold estates and has been widely criticized for this deficiency.207

The second class, “Overriding Interests,”208 deals with rights which bind the purchaser even though they do not appear on the register. Thus, these rights override the register. This category includes legal easements, rights relating to adverse possession, and most difficult and significant of all, “rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed.”209 This provision has undercut dramatically the philosophical underpinning of the 1925 legislation. The problem is so potentially serious that, if left unattended, given the present drift of the House of Lords on the matter, it may threaten the progress of the 1925 legislation towards title security.210 The reason is obvious. To the extent that one can prevail on the basis of rights outside the register, the seeker of good title must return to the dreary business of establishing who is or is not in possession of the property, and who knows or should have known about those claimed rights.211

As noted earlier, registerable but unregistered land charges are offered scant protection by the courts, thereby strengthening the Land Charges Act

207. See K. Gray & P. Symes, supra note 12, at 324-25; R. Megarry & H. Wade, supra note 6, at 725-27; J. Riddall, supra note 7, at 425.

208. Land Registration Act §§ 3(xvi), 70, 71.

209. Id. § 70(1). See also R. Megarry & H. Wade, supra note 6, at 206-07 (explaining the protection the Act affords to “equitable owners in possession [who] have not lodged cautions or other entries in the register . . . and . . . [whose] occupation is not obvious to a purchaser” (citations omitted)).


211. The largest single reason for the failure of the Torrens system in the United States is that judges could not bring themselves to uphold the title registration system in favor of one who used the system against innocent people. Thus, courts went outside the registration system to provide relief to those whose claims were not covered by the system. See, e.g., Eliason v. Wilborn, 281 U.S. 457 (1930) (holding that owners of registered land, who entrusted their certificate to another party who then forged a deed and obtained a new registered title in his name which he subsequently conveyed, were not deprived of their property unconstitutionally and that the bona fide purchasers were innocent grantees who obtained legal title to the property); Echols v. Olsen, 63 Ill. 2d 270, 347 N.E.2d 720 (1976) (finding that a judgment creditor did not hold a superior interest to a prior grantee, when pursuant to a divorce decree a man delivered to his ex-wife a quitclaim deed surrendering his interest in registered property originally owned by the two of them, but failed to register the deed; the judgment creditor then recorded its lien on the original registration of title, but the court held that this did not operate against the ex-wife); Chicago & Riverdale Lumber Co. v. Vellenga, 305 Ill. 415, 137 N.E. 212 (1922) (deciding that the Torrens act did not prohibit a subcontractor from seeking to enforce a mechanic’s lien against registered land even though the party engaging the subcontractor had not recorded his deed and subsequently conveyed the property to a third party who registered his deed with no indication of the lien).

This same attitude now threatens to diminish the effectiveness of the English registration system. This author advocates adhering strictly to the registration system and compensating innocent victims from the insurance fund.
by according a high degree of credibility to its registration requirement.212
One who owns any registerable, equitable interest in unregistered land under
the Land Charges Act risks everything by not registering it. Further, as in
Caunce,213 a lender need not inquire as to the nature of the interest of a
spouse in occupation of unregistered land. In stark contrast, the registerable
but unregistered interest in registered land under the Land Charges Act may
very well be protected as an overriding interest in cases in which the interest
enjoys dual status.214 These rights may be in the nature of estate contracts
or an option to purchase a freehold in an occupying lease,215 but they can
take a wider variety of forms and may not always be apparent to a potential
purchaser.216

One of the most difficult situations is that of spouses occupying property
as tenants in common. Because this sort of tenancy now cannot exist at
law, it can take effect only behind a trust. As in the Caunce217 and Boland218
cases, this situation often arises in the case of a wife who has in fact made
a contribution to the purchase of the family home, but the title to the
property has been taken in the name of the husband only. Here, the Law
of Property Act has been interpreted to imply a trust for sale with the
husband deemed a trustee for the benefit of both himself and his wife.219
Despite the fact that under the doctrine of conversion the wife’s interest is
regarded as personality for many purposes, it is nonetheless regarded as “an
interest subsisting in reference to land” to bring it within the overriding
interests category of the Land Registration Act.220

In 1983, Parliament enacted the Matrimonial Homes Act,221 providing for
a statutory “right of occupation” in a spouse in certain situations. The
Land Registration Act of 1925, however, refuses to grant an overriding

212. See supra note 170 and accompanying text.
214. Any interest in land that is not a registered interest or an overriding interest is a minor
interest pursuant to Land Registration Act § 3(xv). Protection of minor interests requires making
an entry on the register. However, minor interests include a spouse’s right of occupation of the
matrimonial home.

Since the rights of persons in actual occupation of land are overriding interests under Land
Registration Act § 70(1)(g), it is possible that a wife in actual occupation of a matrimonial
home, who fails to enter her minor interest on the register, may still prevail over subsequent
purchasers because her interest enjoys dual status as both a minor interest and an overriding
interest. See K. Gray & P. Symes, supra note 12, at 342-45; J. Riddall, supra note 7, at 427-
32.

215. See Land Registration Act § 70(1)(g), (h).
216. Overriding interests include easements not required to be protected through registration,
liability to repair highways originating in tenure, liability to repair the chancel of any church,
and liability with respect to embankments, and river and sea walls. Id. § 70(1)(a)-(d).
interest to a spouse who acquired rights under the Matrimonial Homes Act. Nevertheless, she may still be a person in occupation and own an overriding interest by reason of her status as an equitable tenant in common. The matrimonial right of occupation can be registered as a minor interest by an appropriate entry of notice, but even if it is not so registered, the wife may still prevail. If she is in occupation and has an equitable property right by reason of a contribution to the property, this right has status as an overriding interest that saves the wife's claim. This variety of claim particularly is a trap for the conveyancer because nothing visible suggests that the reason for the wife's occupation is anything other than the spousal relationship.

Several cases illustrate the frustrations of the overriding interests problem. The most important of these in recent times is Williams & Glyn's Bank Ltd. v. Boland, in which the court both protected the wife's tenancy in common interest and seemed to restate emphatically the sanctity of the register and the irrelevancy of matters extraneous to it. This very important case has caused much comment and controversy in England, for it seems to open wide the question of what sort of "actual occupation" can constitute an overriding interest under the registration act. The case involved the claim of a wife as a beneficial party under a trust for sale, but the fact of the marriage seemed irrelevant to the principle established by the case. The legal title to the property was registered in the name of the husband only and nothing on the register suggested the wife's interest. The House of Lords held, nevertheless, that a bank lending money on the property had an obligation to inquire about the nature of the claim on the property by the wife in actual occupation.

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222. See id. § 1(11).
223. See, e.g., K. Gray & P. Symes, supra note 12, at 355 (indicating that a wife's "beneficial interest [as a tenant in common] behind the trust for sale . . . qualifies for protection as a minor interest in registered land"); R. Megarry & H. Wade, supra note 6, at 206, 208-09 (discussing the court's holding in Boland that a wife in occupation of a home with her husband had an overriding interest as a tenant in common).
224. See Land Registration Act § 103.
225. See supra note 176 and accompanying text.
226. Presumably, if a prospective purchaser or mortgagee inspects the property and either does or does not discover persons in occupation other than the registered owner, he must still inquire as to the owner's marital status, the relationship between the owner and any persons found in occupation, and the source of funds utilized to acquire the property.
229. See, e.g., K. Gray & P. Symes, supra note 12, at 361-85 (discussing the changes created by the court's interpretation of "actual occupation" in Boland and the resulting implications of a broader definition).
As stated, the fact that the person in actual occupation was a spouse is not essential to the *Boland* holding. If a mistress, a cohabitee, or perhaps just anyone who had at some time made a contribution to the purchase price or to improvements on the property were in actual occupation, the result might have been the same.\(^{231}\) The situation is not clear and the enhanced risk to purchasers is obvious.

The Act's third category of rights in registered land is known as "minor interests."\(^{232}\) The interests protected here can be inserted into the register through notice, a caution, an inhibition, or a restriction.\(^{233}\) Sometimes more than one of these vehicles is available to meet the need.\(^{234}\)

The array of rights protectable under this category includes restrictive covenants\(^{235}\) (enforceable only in equity in England), estate contracts\(^{236}\) and, very importantly, rights such as family and other interests which fall either behind a trust under the Settled Land Act,\(^{237}\) or behind a trust for sale under the Law of Property Act.\(^{238}\) These rights are protected by putting a purchaser on notice that the prescribed procedures in the Settled Land Act or the trust for sale sections must be observed if there is to be an overreaching of the private arrangements under their provisions.\(^{239}\)

*Peffer v. Rigg*\(^{240}\) involved an unregistered "minor interest"\(^{241}\) in registered land. In *Peffer*, a person who had undisputed actual knowledge of an unregistered claim sought the benefit of the register. The person having the knowledge proved to be free of the claim. The court dealt, in part, with whether the claimant was in fact a "purchaser" within the meaning of the Act given the nature of the consideration advanced. More importantly, the court suggested that if the claimant tried to take advantage of the other party's failure to use the machinery of the Act, he could not do so because

\(^{231}\) See K. Gray & P. Symes, *supra* note 12, at 301-02 (asserting that the marital relationship was not the crucial factor in *Boland*, rather it was that joint property rights were at issue, and "ultimately a social calculus [will decide] the issue" of to whom these rights extend).

\(^{232}\) Land Registration Act §§ 101-103, 105.

\(^{233}\) Id. § 101(3). See also id. §§ 48-62 (describing in detail the use of notices, cautions, inhibitions, and restrictions).

\(^{234}\) See, e.g., K. Gray & P. Symes, *supra* note 12, at 326 (explaining, for example, that commercial equitable interests in registered land can be entered on the Land Register by use of either a notice on the Charges Register or a caution on the Proprietorship Register). For detailed information on the various uses of these protections, see Land Registration Act, §§ 48-62.

\(^{235}\) Id. §§ 40, 50.

\(^{236}\) Id. § 70(1)(6), (g), construed in *Bridges*, 1957 Ch. 475.

\(^{237}\) See J. Riddall, *supra* note 7, at 428; Land Registration Act, § 3(xv).

\(^{238}\) See J. Riddall, *supra* note 7, at 428.

\(^{239}\) Hence, if a purchaser fails to pay the purchase money to the trustees of the settlement or trustees for sale, his purchase will fail to overreach the equitable interests of the beneficiaries. See *id*.

he was not a "purchaser in good faith" in that he had actual knowledge of the other party's interest.\textsuperscript{241}

This result has been widely criticized as contrary to the purposes of the Land Registration Act.\textsuperscript{242} In \textit{Peffer}, it seems that old equity principles were reintroduced and permitted to supersede Parliament's instruction. This case confuses the law regarding the failure to protect a minor interest by entering it on the register. What it seems to hold is that one who purchases with notice cannot rely on the registered title. Perhaps the broader question is whether reliance on legal rights may ever constitute fraudulent conduct. Those who have sought to diminish the right to reliance on the register have suggested that circumstances exist in which such reliance can be the basis of fraud.\textsuperscript{243} These persons have supported this contention with the equitable maxim that a statute cannot be used as an instrument of fraud.\textsuperscript{244}

An excellent article by Thompson assesses this approach and the consequential dangers to the fundamentals of the Act. Thompson concludes that the English always have tended not to give effect to clear provisions of registration statutes.\textsuperscript{245} He suggests that this has been done either through the \textit{Peffer v. Rigg} route, or, more recently, through indirect means such as theories of economic torts, personal actions for complicity in breach of trust, and actions for rectification of the register.\textsuperscript{246}

Maintaining close control of collateral attacks on the registration system is a matter of first importance to the integrity of the register. If courts are allowed to introduce equitable principles to override the obvious intent of the legislature, then the Land Registration Act may be inadequate to fulfill its purpose. American jurisdictions should pay close attention to the issue of legislative intent and to the possibility of future collateral attack of registration legislation when they take steps to reform current American practice.

iv. Entries on the register necessary to protect interests

Some four types of entries are available for the protection of specified minor interests under the Land Registration Act. Generally, the first entry, called "notice,"\textsuperscript{247} is used to enter "friendly" matters on the register because the notice can be entered only on production of the land certificate by the owner.\textsuperscript{248} This strange provision means that if the owner does not wish the

\begin{footnotesize}
\textsuperscript{241} Id. at 294.
\textsuperscript{242} K. Gray & P. Symes, \textit{supra} note 12, at 330; Thompson, \textit{supra} note 149, at 285.
\textsuperscript{243} See K. Gray & P. Symes, \textit{supra} note 12, at 300.
\textsuperscript{244} See id. at 280.
\textsuperscript{245} See Thompson, \textit{supra} note 149, at 280-85.
\textsuperscript{246} Id.
\textsuperscript{247} See Land Registration Act §§ 48-52 (statutory sections on the use of restrictions).
\textsuperscript{248} Id. § 64(1).
\end{footnotesize}
particular entry to be made on the certificate, he simply can refuse to produce it. Two types of interests that might be the subject of a notice are restrictive covenants and estate contracts.

A second entry, the "restriction,"249 is another of the "friendly" variety of registrations and in that sense it is more akin to the notice entry than to the caution or the inhibition entries discussed below. Often the proprietor will want to enter the restriction, as in the case of the trustee for sale who desires to put prospective purchasers on notice that the land is held on trust for sale, and dealings with the property must therefore comport with statutory requirements relating to that status.250

The next type of entry, "cautions,"251 takes two forms: one that pertains to first registration and another that pertains to dealings with land already registered. Both forms are intended to enable the cautioner, a person "interested" in the land but one whose interest is neither registered nor the subject of a notice, to receive notification of intended transactions involving the land. If so notified, the cautioner must then be prepared to protect his interest within the quite limited time provided.252 Functionally, the caution provides a means for those who are unable to file a notice to protect their claim. Equitable easements or options to purchase are possible subjects of a caution.253

The means of last resort to protect one's interest is an "inhibition"254 which is an order obtained from a court or the registrar to forbid dealings with the land in question for a period of time or until some specified event. Together, these four types of entries protect certain interests because the transferee takes legal title subject to what is entered on the register.

v. Provisions for secrecy

A feature of the Land Registration Act, inconsistent with an ideal system and incomprehensible except as a by-product of history, is the Act's preoccupation with confidentiality.255 If the information on a register is more open, it is more likely that the system will work as intended in conveying notice. As a general matter, however, subject to a few exceptions such as  

249. See id. § 58 (statutory section on the use of restrictions).
250. See R. Megarry & H. Wade, supra note 6, at 215 (explaining the rationale for the use of restrictions).
251. See Land Registration Act §§ 53-56 (statutory sections on the use of cautions).
252. See Land Registration Rules, rr.67, 218 (limiting the time period to fourteen days).
253. See Land Registration Act § 101(3) (stating that minor equitable interests can be protected by entering cautions on the register).
254. See id. § 57 (statutory section on the use of inhibitions).
255. See id. § 112, amended by Administration of Justice Act, 1975, § 67(1); Land Registration Rules, r.12. See also K. Gray & P. Symes, supra note 12, at 323; R. Megarry & H. Wade, supra note 6, at 1152-53.
a court order for obtaining information for limited purposes, the register may not be examined by anyone without permission of the registered owner. but basically, and totally unlike the American recordation system, the land register is not a public document.

Perhaps in practice this aspect of the system is not as onerous as it appears to be. When a purchaser is involved, the statute requires the proprietor to give the purchaser access to the register in order to confirm the seller’s representations about what appears on the register. In the case of mortgages, the money will not be lent until permission to search is given by the mortgagor. Less leverage, however, is available for lessees, and though they will be bound by the many possible limitations which an examination of the register would reveal, they have no right to inspect in the absence of the proprietor’s permission.

Any American adaptation should dispense with the secrecy provisions. The better thinking in England today is that no logically sound reason requires this excessive privacy and that these features should be modified. Dispensing with the secrecy provisions will ensure that all interested parties will have easy and ready access to the registration documents.

vi. Absoluteness versus the right to rectification

Any evaluation of the English acts must consider the costs and benefits of the provisions for amending the land title register. It can be said that if the goals of a title registration act are met, the registered title owner has, as nearly as possible for any system, a title that is absolute and guaranteed as such by the state. In fact, this concept of guaranteed absolute title is considerably watered down in the English version when one considers the amendability aspects of the register. The English call this procedure for amendment “rectification.” Any American adaptation should weigh care-

256. The Land Registration Act, § 112(2)(b)(i), allows the High Court to authorize inspection or copying the register if it contains information that is relevant to a pending proceeding, including a proceeding for the enforcement of any court’s judgment. Likewise, section 112(3) allows a country court the same powers. Further, section 112(2)(b)(ii) grants authority to the High Court to order inspection or to copy the register if it appears that such order ought to be made for any other reason.

257. The Land Registration Act, § 110(1), provides that only the registered proprietor of any land or charge, or any person authorized by him, by court order, or by general rule shall have a right to inspect and copy the register.

258. See Land Registration Rules, r.12.

259. Land Registration Act § 110(1).

260. See K. Gray & P. Symes, supra note 12, at 531.

261. See K. Gray & P. Symes, supra note 12, at 324-25; R. Megarry & H. Wade, supra note 6, at 727.

262. See, e.g., R. Megarry & H. Wade, supra note 6, at 1152.

263. Land Registration Act § 82.
fully a system as broadly subject to amendment as that in England, and
should consider a more restrictive approach.

In principle, any successful system must provide means of amendment
under proper circumstances. Even as successful a document as our Consti-
tution succeeded in part because it is amendable as necessary. Nonetheless,
as a corollary principle, the Constitution has succeeded because it is so
difficult to amend, and because it has yielded so rarely to amendment. A
registered land system must be similar.

The critical point is that the easier it is to amend a registration, the less
credible the registration, and the more likely it is that those who have relied
on the sanctity of the certificate will be put at risk. A system with no
provision for amendment is unreasonable and unacceptable. Yet a system
amendable virtually at will or on the caprice of an official is equally un-
workable. The English rectification procedures fall between the extremes,
but these procedures err somewhat on the side of being too easily rectified.
Clearly, they reflect a more liberal view of amendment than that found in
other jurisdictions employing similar registration notions.\textsuperscript{264}

The problem of ease of rectification is linked to the problem of access to
the fund provided for pecuniary compensation for certain losses. While the
possible bases of rectification are wide ranging, the access to the compens-
satory fund is too limited.\textsuperscript{265} The provisions should be the other way around;
access to rectification should be stingily granted, and access to a broadly
available and fully funded source of financial compensation should be granted
generously.

The breadth of rectification has found favor with some British authori-
ties,\textsuperscript{266} in good part because of the high competency of the Registrars, whose
control of rectification is quite extensive. Such a delegation of discretion
may be justified in England where the professionalism of the Registrars is
commendable. Given the American experience with wide variation in quality
and competence of some county guardians of land related records, the same
broad grant of power would be a mistake here.

\textbf{C. Assessing King George's 1925 Legislation}

From the long English experience, valuable conclusions are possible about
what has worked and what has not worked in the area of title assurance.
Unquestionably, the acts have been a huge overall success in achieving most
of what they were intended to achieve.\textsuperscript{267} It is equally certain, however, that

\begin{footnotes}
264. See R. Megarry & H. Wade, \textit{supra} note 6, at 227.
265. See \textit{Land Registration Act} § 83. Limited access results in many being denied relief.
266. See, e.g., R. Megarry & H. Wade, \textit{supra} note 6, at 227.
267. See \textit{supra} note 9.
\end{footnotes}
they need revision. The American advantage is that of the blank page. A jurisdiction considering reform is free to consider either a fresh start, or perhaps a modification of the system presently in place. Which should it be?

The contemporary American quest for title assurance is unsatisfactory because it is expensive, full of duplication, and propped up by the concerns of various special interests. The focus of our system should be the well-being of the property purchaser. It is, instead, too often the preserve of those who profit from its artificial complexities.

The existing system can be improved, and impressive on-going efforts are underway to do so. Statutory forms of deed warranties, with generally predictable consequences in their use, somewhat enhance this old safeguard. The recording system itself is being made measurably more efficient in many areas by the establishment of tract indexes. Other improvements are emerging. For instance, sometimes more elaborate mapping of counties takes place to assure more standardized descriptions of property, and a better con-

268. See supra note 9.
269. See supra notes 48-50 and accompanying text.
270. See supra notes 33-50 and accompanying text.
271. Many states have enacted statutes specifically addressing deed warranties and covenants of title. These statutes generally elaborate on the meaning of the covenants. See, e.g., GA. CODE ANN. §§ 44-5-60 to -62 (1982); N.J. STAT. ANN. §§ 46:4-3 to -10 (West 1940); N.Y. REAL PROP. LAW § 253 (McKinney 1968). In addition, some statutes provide for the recovery of damages when a warranty is breached. See, e.g., CAL. CIV. CODE § 3304 (West 1970); MONT. CODE ANN. § 27-1-316 (1985).

Many states also allow the use of short forms of conveyances, some of which imply the inclusion of, and others not inferring any, covenants of title. See, e.g., CAL. CIV. CODE 1113 (West 1970) (indicating that “the use of the word ‘grant’ in any conveyance” implies the existence of the right to convey and the covenant against encumbrances); MASS. GEN. LAWS ANN. ch. 183, § 10 (West 1977) (stating that a “Warranty Deed” form includes the covenant of seisin, the covenant against encumbrances, the covenant of the right to convey, and the covenant of warranty). But cf. MASS. GEN. LAWS ANN. ch. 183, § 12 (West 1977) (stating that the use of the word “grant” is “a sufficient word of conveyance... [but] no covenant shall be implied from the use of the word ‘grant’ ”); R.I. GEN. LAWS § 34-11-26 (1956) (indicating that “the word ‘grant’ shall be a sufficient word of conveyance... [but implies] no covenant”)

272. See J. CRIBBET, supra note 21, at 329 (asserting that a system of tract indexing “is clearly superior” to a grantor-grantee index system, and use of a tract system leads to greater efficiency in the recording system).
273. Many scholars regard tract indexing as superior to the use of a grantor-grantee index system. Use of a tract index system simplifies a title search because it not only describes the particular property but also provides information about all transactions affecting the parcel of land. One advantage of a tract index over a grantor-grantee index is that instruments outside the chain of title are easily discoverable on the tract index, whereas such instruments are not apparent on the face of the grantor-grantee index. Another reason to prefer the use of a tract index is to decrease problems associated with the misspelling of a grantor's or grantee's name on the index. See Note, The Tract and Grantor-Grantee Indices, 47 IOWA L. REV. 481, 482, 486-88, 493-95 (1962). See also Cross, The Record “Chain of Title” Hypocrisy, 57 COLUM. L. REV. 786, 799-800 (1957) (explaining the advantage of the use of tract indexes in regard to chain of title problems); Fairchild, Improvement in Recording and Indexing Methods for Real
sensus of the time frame required for an adequate title search is emerging. To effect improvements, several developments still must occur. For instance, it is essential that the pertinent records are housed centrally and more efficiently, just as title factories have done. Also, widespread adoption of some of the proposed uniform laws on marketable title and simplified land transfer may be a proper response to many problems. Abolishing a great many county governments with the consequent centralization of record-keeping authority and efficiency would be an excellent step, but this is probably beyond the political realities of today.

In the end, all of these steps would produce a better system, yet one still fundamentally inept and inadequate to handle the needs of modern life. Conservative measures are not enough. What is needed is surgery. If, then, the move is to be towards comprehensive, major reform, American jurisdictions must be highly selective in what they take from the modern English legislation. The models are available, and for the most part, they work. The case law is adequate, and in general, it addresses sensibly the gaps in legislation that have become apparent in the decades since the basic enactments. From the models themselves and an examination of how they have worked, one may conclude specifics about the acts.

First, the provisions of the Settled Land Act concerning successive ownership and conveyancing are original and fascinating in design, but they have proven clumsy in practice. As it exists in England, this Act can be disregarded as inappropriate for our purposes here. All of its stated major purposes have been met by the widely used and more functional trust for sale technique of the Law of Property Act. Nevertheless, at least one provision of the Settled Land Act deserves close scrutiny. The concept of the "tenant for

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In spite of the enumerated advantages of a tract index system, a majority of jurisdictions employ a grantor-grantee index system or use the two systems in combination. See Note, supra, at 481-83.

274. At common law, the period of time that a title search had to cover was fifty to sixty years. The time period has been decreased, however, to thirty to fifty years in states that have adopted marketable title acts. See D. Burke, Jr., supra note 45, at 360.


276. See J. Riddall, supra note 7, at 460.


278. As a result of the complexities of dealing under the Settled Land Act, as well as the adverse tax consequences flowing from a strict settlement, the trust for sale device has almost totally displaced it. See supra notes 73, 99-102.
life, as titleholder of the legal fee simple estate and with wide-ranging powers to deal with the estate, is an appealing one. Perhaps this is because, as the drafters of the Act imagined, the tenant for life is a person obviously situated to deal with the property and the one with whom third parties naturally would expect to deal. An American statute should heed this innovative and useful concept, stripped of the clumsiness and other disadvantages attached to it in England. Some combination or melding of the role of the tenant for life with the role of the trustee for sale might be useful.

The next act to consider is the Land Charges Act. Just as the Settled Land Act, as it exists in England today, need not be of much concern in an evaluation of the importance of the English legislation, so also the Land Charges Act, in and of itself, is of little concern. As discussed above, the Land Charges Act was a temporary expedient, even in England. It was necessary there because of the lack of any general recordation system for equitable interests prior to 1925. Some means had to be developed to deal with these interests under the new system pending the arrival of the Land Registration Act in all areas of the country. Since equitable interests are broadly recordable under existing American systems, there is no need here for a similar transitional act. Still, the Land Charges Act holds valuable lessons for an American audience regarding the manner in which British courts have chosen to give high credibility to the charges register. Beyond that, all of the Act's more important purposes are subsumed into the more complete and more sophisticated Land Registration Act.

This third Act, the Land Registration Act, is not a perfect vehicle for American needs, but provides a model that, as modified on the basis of English experience, can be adapted for a vastly improved system here. Necessary changes include improvements in the procedure and philosophy of rectification and secrecy, as well as a more realistic method of handling lease registration. The Land Registration Act, nevertheless, provides the basic model and it could well provide the essentials of a workable system here.

Finally, the Law of Property Act must be considered. This act, the central legislation of all the 1925 reforms, provides elements critical to the success of the overall program. Those elements provide for reducing the number of legal estates to two, reducing the number of possible concurrent

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279. The tenant for life is the person who is entitled to possession of the land at any given time. See supra note 69.
280. Land Charges Act, 1925, 15 & 16 Geo. 5, ch. 22.
281. See supra note 169 and accompanying text.
283. See supra notes 170-71 and accompanying text.
284. Land Registration Act, 1925, 15 & 16 Geo. 5, ch. 21.
285. See supra notes 257, 263, 267 and accompanying text.
land estates to one, and creating the trust for sale as a method for owning legal title and transferring it. These reforms are vital to the English scheme, and they would prove invaluable in an American reform. Much can be adapted in a United States system from the Law of Property Act.

IV. CONSTRUCTION OF A NEW AMERICAN SYSTEM OF TITLE ASSURANCE

Clearly, an American scheme of title assurance reform can benefit in major ways by adopting both philosophies and procedures worked out and tested in Britain. No wholesale, or “as is,” adoption is desirable. If starting again, the British themselves might do it somewhat differently. What is suggested as appropriate is to incorporate into an American reform effort the broad strengths and themes of the best of the English acts. The principal theme is simplicity and certainty. The broad strengths of the legislation following on those basics are (i.) comprehensive legislation “clearing the decks” for a truly workable and reliable assurance system, and (ii.) the creation, made possible by (i.), of a secure registration system which meets within its parameters all of the title assurance needs of any transferee.

A. Designing a Workable System in the United States

To meet the requirements of creating a workable and reliable assurance scheme, a matter of first priority is that the substantive property law must be reformed to assure that the number of permissible legal estates is drastically reduced. The English have been successful in reducing the number to two such estates with recognition of comparable legal “interests.” No discernable policy or practical reason exists why the same reform could not be effective here. Similarly, the English abolished the concurrent legal estates in property, other than joint tenancy, and this has been singularly effective in simplifying the substantive law. The several concurrent legal estates that are possible in most American jurisdictions complicate considerably and unnecessarily the search for secure title. A reduction to a single permitted form of concurrent legal ownership would have the same beneficial effect here that it has had in England.

Finally, the provision of a much restricted arrangement for the holding of legal title to land held on successive estates and for land owned concurrently is essential to the goal of title security. In an earlier age in which land ownership signified uniqueness and was near sanctity because of its

287. See supra notes 75-76 and accompanying text.
288. See supra notes 134-45 and accompanying text.
289. See supra note 12.
290. See supra notes 42-43 and accompanying text.
importance as a form of wealth ownership, these changes would have been unthinkable. Today is a time when wealth most often takes a form other than legal ownership of land. Therefore, when the money flowing from the land's sale can be at least as valuable an item as the land in its original form, no reason exists for restricting land ownership to advance other goals, such as easy conveyancing and easy title security. Once the preliminary work of substantive reform has been achieved, the benefits of that reform can be woven into a successful registration program.

The general outline of the English registration act should serve well as the basis for American legislation. Those provisions that enhance the theme of sanctity of registered title should be adopted and enhanced. Those provisions, such as the "overriding interests" categories, that cut the other way should be evaluated skeptically and avoided when this can be done reasonably. The emphasis on a "just" result in hard cases should be on the use of the compensatory fund, not on a dilution of the mirror quality of registered title. Similarly, rectification of the register should be discouraged in favor of appropriate compensations from the fund. In England, where the notion of rectification has been favorably received and where registrars are granted broad discretion in its use, a highly competent group of professional registrars have evolved. Delegation to such professionals makes more sense there than here, where wide variation in the quality and competence of county guardians of land records justifies less confidence in their use of broad discretion. Obviously, too, the extent to which the register can be altered subsequent to the registration bears on the confidence one can have in the system regardless of who makes the rectification.

A second modification of the English act should deal with the provisions for registering leases. British conveyancers have long utilized what seem to be extraordinarily long leases to achieve various purposes. Most likely, the preservation of the term of years as one of the two retained legal estates possible is a recognition of both the importance of the lease and the inappropriateness of its use within the trust structure in many commercial settings. This is understandable as a measure of the importance placed on the lease in a society in which fee simple ownership was so long regarded as the basis of enduring wealth, and the long-term lease served that purpose. At the same time, the long-term lease permitted the owner to benefit from the income from the property. The Land Registration Act makes intricate and

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291. Land Registration Act § 70.
292. The Land Register is controlled by the Chief Land Registrar, who is appointed by the Lord Chancellor. Id. § 126(1). See also K. Gray & P. Symes, supra note 12, at 322.
293. See supra notes 263-66 and accompanying text.
294. Land Registration Act §§ 8-12.
296. Id.
obtuse distinctions in leasehold registrations, usually based on the duration of the lease.\textsuperscript{297} Hence, some leases must be registered, some cannot be registered, and others may be registered optionally.\textsuperscript{298} The result is more snare than utility and these provisions have proven to be an unpopular feature of the legislation.\textsuperscript{299}

Finally, the excessive secrecy aspects of the Registration Act\textsuperscript{300} serve no real purpose and should not be part of an American act. Beyond these deficiencies, the Land Registration Act exists as a viable mechanism from which American reformers can borrow liberally. Nevertheless, it is uncertain whether such a system will succeed or win support in the United States.

**B. Will the English System Work in the United States?**

One of Professor John Chipman Gray's fundamental propositions on the Rule Against Perpetuities is that one first decides whether the Rule applies, and if it does apply, then "the rule is to be remorselessly applied."\textsuperscript{301} That is, the application is without regard to what may be wrought among the interests affected. This principle of "remorseless application" has proven difficult for American courts in perpetuities matters.\textsuperscript{302} The reason is understandable. Such a rule results in some very hard cases indeed.\textsuperscript{303} The

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\textsuperscript{297} See Land Registration Act § 19(2)(a). See also J. Riddall, supra note 7, at 424.

\textsuperscript{298} See supra note 207 and accompanying text.

\textsuperscript{299} See supra note 207 and accompanying text.

\textsuperscript{300} See supra notes 255-62 and accompanying text.

\textsuperscript{301} J. Gray, The Rule Against Perpetuities § 629 (4th ed. 1942).

\textsuperscript{302} Courts often have been faced with clear violations of the Rule Against Perpetuities, but have refused to enforce the rule. Depending on the particular situation, various explanations have been given. For example, in Forman v. Troup, 30 Ga. 496 (1860), the court tried to explain its rationale for finding gifts under the late Governor Troup's will to be valid by differentiating between fee simple and fee tail gifts. In the end though, the court stated that "of all men, ... [the court] never would ... impute such an intention to violate the laws of ... [Georgia] to a man who loved her, and every letter of her laws, and every inch of her soil with an energy and devotion that no soul could inspire but that of George M. Troup." Id. at 499.

Similarly, in Colt v. Industrial Trust Co., 50 R.I. 242, 146 A. 628 (1929), some of the testator's heirs sought to invalidate a trust because it violated the Rule Against Perpetuities. The court interpreted the language of the will so that it would not violate the Rule and asserted that the testator "was a member of the bar of this state for many years and was Attorney General for several years. ... [I]t is presumed that he knew of the rule against perpetuities and ... would not knowingly make a will attempting to dispose of his property in violation of that rule." 50 R.I. at 246, 146 A. at 630. See also In re Bassett's Estate, 104 N.H. 504, 190 A.2d 415 (1963) (rejecting the common-law conclusive presumption that men or women of any age or physical condition can bear children, and deciding that the Rule Against Perpetuities is not violated when the likelihood of children being born to a beneficiary is "negligible").

\textsuperscript{303} Remorseless application of the Rule has spawned several rigid results, some of which may not have been intended by testators or which may not seem sensible. Two examples of these strict interpretations are:

a. the case of the fertile octogenarian, see, e.g., Jee v. Audley, 1 Cox. 324, 325, 29 Eng.
reluctance to give effect to Gray's directive has spawned many reform efforts in the field of perpetuities. Yet each has its own cost. Gray's solution had the indisputable advantage of early resolution of perpetuities problems. The "Wait and See" reform may save some otherwise void dispositions, but it requires that one "wait to see" what happens, and sometimes for a long period of time. "Cy Pres" reforms require the grant to tribunals of wide powers to rewrite wills and deeds, sometimes to the point of unrecognizability.

Problems of title security present an obvious analogy to problems of perpetuities. No doubt the reluctance, indeed refusal, of some American courts to abandon old equity notice rules in favor of a highly credible registration system contributed much to the failure of early Torrens system efforts in this country. The English too have had difficulties in abandoning...

Rep. 1186, 1187 (1787) (holding that the testator violated the Rule Against Perpetuities because the interest given to the fee's issue was not valid at the time of its creation, even though the fees were well past child-bearing age, and stating that the court was not "at liberty . . . to suppose it impossible for persons in so advanced an age to have children"), and
b. the case of the unborn widow, see, e.g., Loring v. Blake, 98 Mass. 253 (1867) (finding that the testatrix' gift of trust income to the husband or wife of any of her children on her child's death was void because of the possibility that one of her children could marry someone who was not in being at the time of her death and this person could survive the testatrix' child).

Another facet of the Rule that creates hard cases is the requirement of certainty of vesting within the required time. See, e.g., In re Campbell's Estate, 28 Cal. App. 2d 102, 82 P.2d 22 (1938) (affirming an order that a testamentary gift was invalid because of lack of certainty that it would vest in the legatees within the statutorily required time); In re LaTouf's Will, 87 N.J. Super. 137, 208 A.2d 411 (1965) (deciding that the fertile octogenarian rule did not bar a testamentary gift, but that the lack of certainty of vesting within twenty-one years plus lives in being resulted in an invalid gift).

To avoid the harshness of the Rule Against Perpetuities, many jurisdictions have modified the rule, either by statute or case law. Among the reform efforts are:
a. extending the time period for vesting of an interest, see, e.g., CAL. CIV. CODES 715.6 (West 1982) (stating that an interest "which must vest, if at all, not later than 60 years after [its creation]" does not violate the Rule Against Perpetuities); and,
b. "wait and see"—waiting to see if the Rule is violated or not, rather than determining from the outset that a possibility exists that an interest will not vest within the time required by the Rule, see, e.g., Merchants Nat'l Bank v. Curtis, 98 N.H. 225, 97 A.2d 207 (1953) (holding that in New Hampshire the Rule is not applied remorselessly, and that when two possible constructions can be given to a testamentary clause it is possible to wait and see what events actually happen before deciding on the validity of a gift); PA. CONS. STAT. ANN. tit. 20, § 6104 (Purdon 1975) (stating that "[u]pon the expiration of the period allowed by the common law rule against perpetuities as measured by actual rather than possible events, any interest not then vested . . . shall be void"); and

c. "cy pres"—allowing the court to reform the gift and bring it into conformity with the rule so that the testator's wishes can be accomplished as far as possible, see, e.g., In re Estate of Foster, 190 Kan. 498, 376 P.2d 784 (1963) (affirming a lower court order to strike a provision of testatrix' will so that it would not violate the Rule Against Perpetuities); Edgerly v. Barker, 66 N.H. 434, 31 A. 900 (1891) (changing the time of vesting of remainder interest to fall within the time period of the Rule Against Perpetuities).

305. See, e.g., Newcomb v. City of Newport Beach, 7 Cal. 2d 393, 60 P.2d 825 (1936) (holding that the Torrens registration system could not be used to defeat the state's interest in
these long held equity notice principles. Especially in regard to the Law of Property Act and the Land Registration Act, the dilemma of how much to dilute the register by introducing notice concerns has become more intense as recent changes in societal views on the status of women has crept into policy debates on registered land. The question of rights in the matrimonial home, and especially the right of one spouse to dispose of or mortgage a home without the consent or knowledge of the other spouse, has become a matter of national importance.

Distinguished British scholars have dealt at length with the emerging problem of the marital home as it relates to registration. The debate seems to be a part of a broader national concern. Currently, political leaders in Britain often speak of the "caring society." The question is asked whether a given law, politician, or political party is "caring" in its approach to social issues. Some who treat the subject of the matrimonial, or even "cohabitational," home in the context of registered land, frame their positions in terms of this inquiry. Those who push for a more secure title system are portrayed as representing both selfish "commercial" property interests and the conveyancer's obsessive preoccupation with certainty at the expense of the higher societal goals. The secure title advocates are presented as "uncaring" in their narrow protective concerns. Little regard is expressed for the notion that whatever the merits of spousal rights, it would seem that spouses have at least as much interest in secure title as anyone else.

Better means exist to address this valid concern than tampering with and substantially weakening the registration system. Interestingly, one proposal as an alternative to the overriding rights in registered land approach is a suggestion that matrimonial homes be treated always in substantive law as some form of community property. The property would be regarded as

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a public easement involving tidelands without serving notice on the state of the plaintiff's action to quiet title; Moakley v. Los Angeles Pac. Ry. Co., 99 Cal. App. 74, 277 P. 883 (1929) (deciding that notice must be given to private parties who have an interest in land when another party seeks to quiet title and to register title); Dewey v. Kimball, 89 Minn. 454, 461, 95 N.W. 317, 320 (1903) (stating that under the Torrens law a title examiner is duty-bound "to search the records and investigate all the facts brought to his notice," and that "any party whom the examiner finds to have... an interest" in the property must be named as a defendant in a suit to confirm title and registration of the property).

306. See K. GRAY & P. SYMES, supra note 12, at 562-63 (discussing, inter alia, the Law Commission's proposal for compulsory co-ownership of the matrimonial home).

307. See J. RIDDALL, supra note 7, at 456.


311. Id.

312. See K. GRAY & P. SYMES, supra note 12, at 562-63.
owned by both spouses so that any purchaser is always bound to consider the claims of the spouse as a matter of course. This route seems to suggest a return to something looking like tenancy by the entirety, long abolished in England. Despite our headlong rush from some of their efforts, not all of our ancestors were fools, and perhaps we can still learn from them.

C. Overcoming Obstacles to the New System

One of the major obstacles to the new system will be the expense of putting it into place. This is especially true if the initial registration must take place in the form of a full scale judicial procedure. To this concern the author submits several responses.

First, much of the expense of a registration procedure is duplicated by any title search, and although the burden will fall on different parties in the chain, the ultimate expense relating to any single title will be much reduced because of the ease of subsequent transfers. An argument can thus be mounted that the ultimate governmental savings in extravagant recordation arrangements can justify a shift of all or a proportion of the burden on public expense. Second, if the proposed registration alternative were combined with concurrent reform of the substantive property law of legal and concurrent estates in the English fashion, a far smaller volume of transactions would occur with which a register would have to cope. Finally, contemporary constitutional law may well allow for a registration procedure of an administrative nature rather than a full blown judicial proceeding. This seems especially likely if provisions are made for adequate and full financial compensation to those injured by the process.

One of the most important lessons to be learned from the English experience is that overly-generous exemption of interests from registration, or a progressive dilution of a good system to meet current related social issues, can be the undoing of the entire effort. Caunce, Bull, Boland, and Peffer all deal with “fairness” issues. But fairness must concentrate on the compensation scheme, not on rectification or dilution of the register through “overriding interests.” Such a frailty killed the earlier “Torrens”

313. See Law of Property Act, ch. 20, sched. 1, part VI.
315. See Thompson, supra note 149, at 302.
efforts. The American reform effort must not be taken over by the kind of response made towards spouses who lacked knowledge about their right to register, nor by the fear that if this group were to have that knowledge and were to exercise their right to register, it would overwhelm the system. A financial arrangement must be provided to properly compensate those who, in hard cases, are denied the realty through operation of the register. To modify the register to meet these cases is to deny it that remorseless character it must have to function efficiently.

CONCLUSION

Radical change in law is never easy. This is a factor for stability. But when the procedures, techniques, and substance of an important portion of the law come to serve the needs of those who administer it at the expense of those for whom it is designed to serve, it is time for a change. Americans are fortunate to have a comprehensive, well thought out and well-tried scheme for a better way in the English land law legislation. Granted, Americans are in a vastly different situation. The whole of England and Wales are scarcely bigger than the state of Georgia, our twenty-first state in size, yet together, England and Wales are peopled with some fifty million. We are a nation close to 240 million inhabiting a continent. For centuries, the English have relied on the services of a small, highly proficient group of solicitors who are experts in the field of conveyancing. They enjoy a high level of professional competence along with those skilled bureaucrats who run the register and who are in fact creating a kind of informal common law about how the register should be conducted. Finally, the English have a long tradition of acquiescence to central authority in London.

This very European trait of centralism, in contrast to the American federal system, permits a high level of concentration of resources and methods without particular regard to local political sensibilities which are especially evident when realty is involved. Nevertheless, the English system is one from which we can learn much in the long overdue reform of our land law.

Former Chief Justice Burger has said:

[T]he basic system of real estate titles and transfers and the related matters concerning financing and purchase of homes, cry out for reexamination [sic] and simplification. . . . I believe that if American lawyers put their ingenuity and inventiveness to work [on this subject,] they will be able to devise simpler methods than we now have.\textsuperscript{320}

He is right. It is time for such reform.
