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## AMERICAN LAND LAW REFORM: LEGAL CO-OWNERSHIP, DOWER, AND CURTESY

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### I

#### INTRODUCTION

THROUGHOUT the United States, there is a serious and growing shortage of fairly large tracts of contiguous land to which marketable title can be obtained readily and which are suitable for residential, commercial, industrial, or recreational uses.<sup>1</sup> This shortage will become more acute each year as the population increases,<sup>2</sup> its standard of living rises,<sup>3</sup> and industry expands to meet the increasing demand for consumer goods by the people of the United States and of other countries.<sup>4</sup>

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<sup>1</sup> William H. Whyte, Jr., has described the present demand for land as a shortage of space and not of land because builders have not been buying small vacant lots which are located here and there in our urban communities. *A Plan to Save Vanishing U.S. Countryside*, *Life*, Aug. 17, 1959, pp. 88, 92.

<sup>2</sup> About 1965, when the war-babies of World War II marry, the United States will need nearly 2,000,000 more dwellings each year than it had the year before. At that time, there will be a much more acute shortage of land. 196X—*The Next Revolution in Home Building*, *House & Home*, Jan. 1958, p. 118. In 1965, there will be about 6,000,000 more households than in 1959. *Special Report, As Population Keeps Climbing*, *U.S. News & World Report*, Jan. 2, 1959, p. 54.

<sup>3</sup> Seligman, *The New Masses*, *Fortune*, May 1959, p. 106.

<sup>4</sup> "In today's urban patterns we use about 70 acres of land for each 1,000 people. But for the future all trends indicate a much larger amount of land will be needed for urbanized use in relation to the population. House lots are getting larger; business places include large spaces for customer parking; factories spread out, airports are vast, schools have yards like campuses, streets are wider. So it seems reasonable to assume that up to 140 acres will be needed for each 1,000 people, double the area now used." *URBAN LAND INSTITUTE, HOME BUILDERS MANUAL FOR LAND DEVELOPMENT 2* (2d ed. 1958).

Several million acres of land will have to be developed each year in the United States for an indefinite period to house the increasing population.<sup>5</sup> Additional land will be needed for streets, roads, and schools.<sup>6</sup> Presently, there are over 179,000,000 persons in the United States. By 1965, the population may be in the neighborhood of 200,000,000.<sup>7</sup> It is possible that by the year 2050, the population may be as high as 1,000,000,000!<sup>8</sup>

Single-family residences can be built most economically and can be sold most readily in connection with the development of contiguous land of forty or more acres.<sup>9</sup> In certain residential areas, by either private restriction or zoning, each private residence must be built on a lot of a stated acreage that varies up to four acres *or more* for each residence.<sup>10</sup> Garden-type apartments also require a substantial acreage of contiguous land. Modern industrial plants, too, are often built on tracts of fifty or more acres to provide space for efficient horizontal buildings, parking facilities, future expansion, and proper landscaping.<sup>11</sup> And modern office buildings are being constructed on campus-like sites.<sup>12</sup>

<sup>5</sup> Newcomb, *Urban Areas of the Future*, Urban Land, Nov. 1956, p. 3.

<sup>6</sup> At least 2,000,000 acres are taken each year from crop production for roads, airports, factories, and suburban development. Bailey, *Our Land Dilemma*, Urban Land, April 1958, p. 3. The increasing population will need about 500 square miles of land each year for new streets and roads. Newcomb, *Urban Areas of the Future*, Urban Land, Nov. 1956, p. 3.

<sup>7</sup> *America's Exploding Population Will Bring on The Big Change of the 1960's*, House & Home, Jan. 1959, p. 105.

<sup>8</sup> Seligman & Mayer, *The Future Population "Mix,"* Fortune, Feb. 1959, p. 94.

<sup>9</sup> "The average subdivision currently being developed in the United States has an area of 36.7 acres and contains 101 lots; . . . both costs and limitations in layout increase as the size decreases." URBAN LAND INSTITUTE, *op. cit. supra* note 4, at 1. *Joint Venture in Land*, House & Home, June 1957, p. 124 (six builders formed corporation to buy and develop 1000 acres of land).

<sup>10</sup> *Senior v. Zoning Comm.*, 146 Conn. 531, 153 A.2d 415 (1959) (semi-rural area of 4000 acres, comprising over 600 separate parcels, upgraded from a minimum area of 2 to 4 acres). There is a trend toward upgrading with respect to the size of lot. House & Home, Sept. 1959, p. 45. See, *Is This New Idea for Subdivision Layouts a Good Answer to "Big-Lot" Zoning*, House & Home, Sept. 1959, p. 116.

<sup>11</sup> "Horizontal movement of goods in process is cheaper than vertical movement; hence the trend to one-story construction. *Automation frequently involves tremendous machines*; hence the trend to more floor space per worker; hence the need for large on-site parking areas. Management is becoming more public-relations conscious; result, better architecture and more site landscaping." Garrabrant, *Wanted: Sites for Industries*, Urban Land, Oct. 1955, p. 3 (Emphasis added.); MUNCY, *SPACE FOR INDUSTRY* (Urban Land Institute Technical Bull. No. 23, 1954).

<sup>12</sup> "The average of the site areas of all the developments is 93.6 acres, the largest being 315 acres in a rural area, and the smallest 1.1 acres in an urban area." Clark, *Office Buildings in the Suburbs*, Urban Land, July-Aug. 1954, p. 3.

This steadily increasing demand for large areas of land suitable for development can be met properly only by making land more freely alienable.

But more than mere quantity is involved in locating and acquiring title to suitable acreage for development. Much of the land within the United States is not presently, and may never be, suitable for development because of its arid or mountainous condition. And of the land that is suitable for development, that which is either in, near, or between large cities<sup>13</sup> or which is suitable for recreational use<sup>14</sup> will be most in demand in the next decade.

Although the demand for large tracts of land for farming purposes is not, as yet, very great, it is reasonable to anticipate the gradual disappearance of small farms and the growth of large farms consisting of from 400 to 1,000 or more acres of contiguous land.<sup>15</sup> Likewise, becoming more prevalent is tree farming by corporations and certain persons<sup>16</sup> who are acquiring title to large contiguous areas of timberland or land not suitable for profitable farming. The bulk of timberland, however, is still in small parcels owned by 3,400,000 farmers and 1,100,000 other private persons, with parcels owned by farmers averaging only forty-nine acres in size. Consequently, while farm and non-industrial private ownership of timberland represents sixty-one per cent

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<sup>13</sup> In 1975, most of the additional 50,000,000-60,000,000 persons in the United States will live in urban areas. "Cities will tend to merge into each other in sprawling 'megalopolises' along the expressways." *Roads and Housing*, House & Home, Oct. 1957, p. 43. "By 1975, we can expect the built-up parts of our metropolitan areas to cover something like twice as much land as they do now—nearly 10,000 square miles of newly urbanized land that is now rural or vacant." *New Highways May Create New Towns in Wrong Places*, House & Home, May 1957, p. 61. Whyte, *Urban Sprawl*, in *THE EXPLODING METROPOLIS* 133 (1958).

<sup>14</sup> *Demand for Recreational Sites Brings New Land into Market*, Properties, Aug. 1959, p. 52.

<sup>15</sup> "Farming is becoming big business. Few young men wanting to farm today have the capital, or the credit with which to make a start on a scale that offers even the remote possibility of financial success. In 1957 seven hundred farmers each day migrated to the cities." Bailey, *supra* note 6.

The average acreage of all farms in the United States increased from 174 acres per farm in 1940 to 242 acres per farm in 1954. *STATISTICAL ABSTRACT OF THE UNITED STATES* 619 (1959).

<sup>16</sup> "In recent years, many pulp companies and certain other forest industries have adopted aggressive land-acquisition programs. Between 1945 and 1953, for example, pulp company holdings increased by 8.5 million acres. . . . Although industry holdings comprise only 13 percent of the commercial forests, they include some of the most accessible, productive, and well-managed forests—a significant part of the Nation's timber resources." U.S. DEP'T OF AGRICULTURE, *TIMBER RESOURCES FOR AMERICA'S FUTURE* 301, 305 (1958).

of all commercial timberland, the productivity of these many small parcels, although highly important to the growth of the United States, is relatively quite low.<sup>17</sup> On the basis of his own knowledge, the writer would venture that the title to many of the uneconomical tracts is not readily marketable because of common ownership.

A substantial acreage of land between major cities or along waterfronts that not many years ago was considered of little value because vacant, unproductive, or not readily accessible, is now potentially valuable if marketable title to it can be obtained. One of the major factors that impairs the ready marketability of title to this land here too is common ownership (usually tenancy in common, or in coparceny), as well as dower and curtesy. And while co-ownership of land is certainly not the sole cause of slums and blighted vacant land, it is significant that a substantial number of such lots also are owned in common. Ira S. Robbins, Counsel, New York State Board of Housing, stated, with respect to problems in land assembly, in connection with slum clearance projects:<sup>18</sup>

Surprising as it may seem, experience has shown that the failure to assemble large tracts of land by purchase alone is due as frequently to the need for clearing doubtful titles as it is to the demand of 'hold-outs' for exorbitant prices.

The Resettlement Administration found it impossible to complete many transactions by direct purchase, for a variety of reasons, including:

1. Cases where title is in the estate of a deceased person and the heirs either refuse, or are financially unable, to probate the estate.
2. Cases where certain parties in interest cannot be located and the heirs of such persons are unknown. . . .

The Housing Division of the Public Works Administration found similar defects. In addition, it encountered breaks in the chain of title, outstanding interests in one or more heirs of a former owner who had failed to execute a deed with their co-heirs divesting them of title, unrelinquished dower rights, . . .

In connection with an analysis of blighted vacant lots scattered throughout the city of Chicago, it is also significant that marketable title to many was not obtainable, owing to the virtual impossibility of locating the numerous owners and their heirs. The lots are often located in areas of new growth and are dormant "not because of the lack of demand for home sites, or because these subdivisions are un-

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<sup>17</sup> *Id.* at 314.

<sup>18</sup> WALKER, URBAN BLIGHT AND SLUMS 175 (1938).

desirable for residential use, but because of diversity of ownership, etc."<sup>19</sup> Thus, antiquated statutes of descent and the laws with respect to the administration of an intestate's real property have been and are a primary cause of the impractical and undesirable ownership of a single parcel of land by many persons.

A prospective purchaser who needs a tract of forty or more acres in a certain area may not be able to acquire contiguous land of this acreage either (1) because all suitable tracts of forty or more acres are owned by many persons, and a substantial number of these persons are married, minors, or unknown; or (2) because for the same reasons it is not possible to obtain title to a number of small contiguous lots which together aggregate forty or more acres. The difficulties that normally arise and the delays usually encountered whenever a prospective purchaser attempts to buy a tract of land owned by ten, twenty, or hundreds of persons are sufficient to discourage the average purchaser from even attempting to acquire title to it. And to make a bad situation worse, there is the need in some states not only to deal with the numerous common owners of a specific parcel, but also to obtain releases of dower and curtesy from their respective spouses.<sup>20</sup>

Common ownership of land not only seriously interferes with its alienation, but also frequently prevents its proper utilization and maintenance.<sup>21</sup> Yet, since the American Revolution, this undesirable form of ownership has been the only way in which coheirs could receive title to land under our statutes of descent.<sup>22</sup> Under these statutes, an intestate's children take his realty as coheirs, either as coparceners or as tenants in common, with the issue of any deceased child taking the share

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<sup>19</sup> *Blighted Land*, Urban Land, Sept. 1950, p. 3.

<sup>20</sup> "To retain in a society which is primarily industrial in character rules which had their origins in the needs of agrarian communities in the Middle Ages may not only be anomalous but reflects an unwillingness on the part of legislatures rationally to consider the basic purposes to be served. In most jurisdictions the dower acts now in force are both varied and confused, and the practical job of the title searcher has received little consideration." 1 *AMERICAN LAW OF PROPERTY* § 5.5 (1952).

"American legislation pertaining to curtesy has in general been inconsistent and haphazard with the result that the statutes are both varied and confused. Modern acts incorporate ancient rules which have been elaborated with piece-meal innovations." 1 *id.* § 5.60.

<sup>21</sup> "When the rights of parties are distinct, that is, for instance, when they are not all trustees for one and the same purpose, both a joint tenancy and a tenancy in common are inconvenient methods for the enjoyment of property." *WILLIAMS, REAL PROPERTY* 149 (23d ed. 1920).

<sup>22</sup> *RHEINSTEIN, CASES ON DECEDENTS' ESTATES* 33 (2d ed. 1955).

of the deceased parent.<sup>23</sup> In many states, any surviving spouse of an intestate also takes a certain portion of the deceased spouse's realty as an heir, such as one-half when there is only one child and one-third when there are two or more children.<sup>24</sup> When the coheirs are the intestate's ancestors or collateral relatives, they too take his land as co-owners. The common ownership resulting from one or a series of intestacies is, as has been noted, one of the factors that causes slums in cities,<sup>25</sup> and that in rural areas causes the obvious deterioration of many farm buildings and the neglect of farms and timberland. Looked at somewhat differently, blighted vacant land in cities that is unmarketable because of common ownership necessarily increases the density of occupation of adjoining land and in this way contributes, too, to the creation of slum areas.<sup>26</sup>

Certain cities, after overcoming some initial constitutional problems, have used the power of eminent domain to acquire title to many small lots within their respective boundaries to eradicate slums, to provide public parks, or to make land of suitable size available to private persons, by sale or lease, for the construction of residential units and, in a few cities, for commercial or industrial facilities.<sup>27</sup> But for policy reasons, or owing to constitutional problems, a city may not wish to use the power of eminent domain to implement an urban redevelopment project. Also, the power of eminent domain, whether exercised by a city or some other

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<sup>23</sup> ATKINSON, WILLS 64 (2d ed. 1953).

<sup>24</sup> *Id.* at 61.

<sup>25</sup> WALKER, *op. cit. supra* note 18, at 175; *Blighted Land*, Urban Land, Sept. 1950,

p. 3.

<sup>26</sup> "It is also found and declared (a) that there exist in many communities within this State areas of platted or unplatted land which are predominantly open and which, by reason of obsolete platting, *diversity of ownership*, deterioration of structures or site improvements, or taxes and special assessment delinquencies . . . are unmarketable in fact for housing or other economic purposes, and which otherwise substantially impair or arrest the sound growth of communities . . ." ILL. REV. STAT. ANN. ch. 67½ § 64 (Smith-Hurd 1959) (Emphasis added.). *People ex rel. Gutknecht v. Chicago*, 414 Ill. 600, 111 N.E.2d 626 (1953) (condemnation by Chicago of blighted vacant area of 40 acres of predominantly open platted urban land upheld). See 70 Stat. 1097 (1956), 42 U.S.C. § 1460(c)(1)(ii) (1958).

<sup>27</sup> "The disposition of cleared land for redevelopment by private enterprise does not invalidate the taking of the land for a public use, namely, the clearance and prevention of slums and blight, according to the overwhelming weight of authority. Three courts have ruled, however, that a taking for slum clearance and urban redevelopment was not for a public use under the constitutions of the respective states . . . The acquisition of property for the construction of industrial buildings to be leased or conveyed to private enterprise has been upheld as a taking for a public use in some states and rejected in others." RHYNE, MUNICIPAL LAW § 17-2 (1957).

governmental unit, is neither a permanent, general nor a proper solution to the problem of unmarketable titles, including that caused by co-ownership, dower, and curtesy.

## II

### MODERN ENGLISH PROPERTY LAW

English common law early recognized the necessity of relieving coparceners (coheirs) of the inconvenience and problems of co-ownership of land, so that the "perverseness of one coparcener should not prevent the others from obtaining a more beneficial method of enjoying the property."<sup>28</sup> Through the writ of partition, coparceners could have the land divided among themselves, so that each would own in severalty a distinct part. Although joint tenants and tenants in common suffered from the same inconveniences and perverseness of one or more of the co-owners with respect to the management and the alienation of the land, it was not until 1539 that a joint tenant or a tenant in common was authorized by statute to bring an action for partition.<sup>29</sup> Relief was not authorized at an earlier date for joint tenants and tenants in common because they became co-owners voluntarily, and not involuntarily by operation of law as in the case of coparceners. It was not until 1868, however, that a statute was enacted which authorized the court in a partition action to sell the land and to divide the proceeds whenever it would not be practical to divide the land itself.<sup>30</sup>

Co-ownership in England was never as serious a problem as in the United States because, except for gavelkind tenure and borough English, primogeniture was the rule of descent until the beginning of 1926, when primogeniture was abolished with only minor transitional exceptions.<sup>31</sup> Simultaneously with the abolition of primogeniture and in order to avoid the inherent defects of co-ownership by the heirs of land as coparceners, tenancy in coparceny as a legal or equitable estate was abolished with only minor exceptions.<sup>32</sup> For the same reason, tenancy in common as a legal estate was abolished as of the end of 1925, but

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<sup>28</sup> WILLIAMS, *op. cit. supra* note 21, at 243.

<sup>29</sup> 31 Hen. 8, c. 1.

<sup>30</sup> Partition Act, 1868, 31 & 32 Vict. c. 40; MEGARRY & WADE, *REAL PROPERTY* 398 (1957).

<sup>31</sup> Administration of Estates Act, 1925, 15 Geo. 5, c. 23, §§ 45, 46. MEGARRY & WADE, *op. cit. supra* note 30, at 474, 490; PARRY, *THE LAW OF SUCCESSION* 149 (1953); SMITH, *INTESTACY AND FAMILY PROVISION* 1 (1952).

<sup>32</sup> Administration of Estates Act, 1925, 15 Geo. 5, c. 23, § 47. MEGARRY & WADE, *op. cit. supra* note 30, at 407.

retained, as is more fully explained below, as an equitable estate.<sup>33</sup> Joint tenancy, too, was modified to reduce the problems of management and alienation.<sup>34</sup> This, too, is explained more fully below. With respect to title to land owned in undivided shares at the end of 1925, the Law of Property Act of that year contains elaborate transitional provisions that in general place the legal title to this land in trust, so that the land can be properly managed and alienated.<sup>35</sup>

As to conveyances by deed in England after 1925 that would have created tenancies in common, the result is set forth in the Law of Property Act, 1925, as follows:<sup>36</sup>

Where, after the commencement of this Act, land is expressed to be conveyed to any persons in undivided shares and those persons are of full age, the conveyance shall (notwithstanding anything to the contrary in this Act) operate as if the land had been expressed to be conveyed to the grantees, or if there are more than four grantees to the four first named in the conveyance, as joint tenants upon the statutory trusts hereinafter mentioned and so as to give effect to the rights of the persons who would have been entitled to the shares had the conveyance operated to create those shares.

Although the statutory trusts are trusts to sell, the trustees have general powers of management, and by unanimous consent they may, and frequently do, postpone a sale indefinitely.<sup>37</sup> The trust for sale thus performs substantially the functions of the English land settlement trust.<sup>38</sup> It is, therefore, not surprising that in adopting legislation similar to the English land reform statutes, Kenya provides only for statutory trusts for sale.<sup>39</sup> It is important to note that one of the general objectives of the English legislation is to protect the bona fide purchaser for value who buys land from either an express or a statutory trustee, and to free the purchaser from any duty to ascertain the equitable interests or to check the disposition of the proceeds from the sale.

In England, upon the death of a person intestate after 1925, the legal title to his real and personal estate vests in the Probate Judge until the appointment of the administrator, at which time it vests in the

<sup>33</sup> Law of Property Act, 1925, 15 Geo. 5, c. 20, §§ 1(6), 34(1), 36(2). MEGARRY & WADE, *op. cit. supra*, note 30, at 380.

<sup>34</sup> Law of Property Act, 1925, 15 Geo. 5, c. 20, § 36.

<sup>35</sup> *Id.* 1st Sched., pt. IV. MEGARRY & WADE, *op. cit. supra* note 30, at 387.

<sup>36</sup> 15 Geo. 5, c. 20, § 34(2). For a discussion of tenancy in common after 1925 see MEGARRY & WADE, *op. cit. supra* note 30, at 395.

<sup>37</sup> *Id.* at 340.

<sup>38</sup> See Settled Land Act, 1925, 15 Geo. 5, c. 18.

<sup>39</sup> Kenya Ordinance No. 30 (1941); Note, 59 L.Q. REV. 24 (1943).

administrator.<sup>40</sup> The administrator, in addition to the usual power of sale to pay expenses, debts, and taxes, has, as statutory trustee, a general power of sale with respect to the intestate's realty and personalty.<sup>41</sup> The administrator, with the consent of all heirs who are of age, may partition undivided possessory estates in realty.<sup>42</sup> The executor also has similar broad powers of sale.<sup>43</sup> Thus, whether there are coheirs in the case of intestacy or a class gift in a will to a number of persons as tenants in common, the personal representative takes the legal title with the powers of a statutory trustee.

Under the Law of Property Act, 1925, legal joint tenancies may be created expressly in named trustees or by implication in statutory trustees, with the equitable interests vested in a number of persons either as tenants in common or as joint tenants.<sup>44</sup> The legal joint tenancy cannot be destroyed,<sup>45</sup> and in joint tenancies created after 1925, the number of trustees must not exceed four.<sup>46</sup> Equitable joint tenancies can be severed by a conveyance as at the common law, by a release by one joint tenant to one or more of the other joint tenants, or, if the land is not settled, by a written document.<sup>47</sup> They cannot be severed by will.<sup>48</sup>

It is rather significant that when the Law of Property Act, 1925, was being considered by Parliament, it was stated that the provisions abolishing tenancy in coparceny and legal tenancies in common, and limiting legal joint tenancies to not more than four trustees together with the use of the statutory trust almost alone justified passage of the act.<sup>49</sup> The principal objections to English property law prior to the

<sup>40</sup> Administration of Estates Act, 1925, 15 Geo. 5, c. 23, §§ 1, 9.

<sup>41</sup> *Id.* §§ 33, 39(1). PARRY, *op. cit. supra* note 31, at 223; SMITH, *INTESTACY AND FAMILY PROVISIONS* 66 (1952).

<sup>42</sup> Administration of Estates Act, 1925, 15 Geo. 5, c. 23, § 39(1). Law of Property Act, 1925, 15 Geo. 5, c. 20. PARRY, *op. cit. supra* note 31, at 233.

<sup>43</sup> Administration of Estates Act, 1925, 15 Geo. 5, c. 23, § 39 (1), (2), (3). MEGARRY & WADE, *op. cit. supra* note 30, at 504; 16 HALSBURY'S LAWS OF ENGLAND § 691 (1956).

<sup>44</sup> 15 Geo. 5, c. 20, § 36(1).

<sup>45</sup> *Id.* § 36(2).

<sup>46</sup> *Id.* § 34; Trustee Act, 1925, 15 Geo. 5, c. 19, § 34. MEGARRY & WADE, *op. cit. supra* note 30, at 387.

<sup>47</sup> Law of Property Act, 1925, 15 Geo. 5, c. 20, § 36(2).

<sup>48</sup> 27 HALSBURY'S LAWS OF ENGLAND § 1145 (2d ed. 1937). MEGARRY & WADE, *op. cit. supra* note 30, at 370, 403.

<sup>49</sup> "MR. BETTERTON . . . I myself have taken part in a number of partition actions, and I have seen what I would call the scandal of the estate being swallowed up before you could make the title clear. If this Bill is to cure what I regard as a very great abuse, that is almost sufficient to merit its passage." 154 H.C. DEB. (5th ser.) 139 (1922). Mr. B. L. Cherry, who was the principal draftsman of the Law of

1925 Act were two. First, although England had the rule of primogeniture in intestacy, there were sufficient tenancies in common, tenancies in coparceny, and joint tenancies to make it almost impossible—and at times, actually impossible—to obtain title to tracts of land so held because of the time required and the high cost of locating and negotiating with all the owners.<sup>50</sup> Second, owing to the small value of some parcels and to the small value of specific undivided interests, the action of partition was no longer an acceptable solution to the problems of co-ownership.<sup>51</sup>

After the Law of Property Act, 1925, had been in force for twenty years, one writer found the provisions with respect to co-ownership entirely satisfactory.<sup>52</sup> In 1957, other writers found a few minor defects, but approved the basic changes.<sup>53</sup> These latter writers criticized the Act for abolishing all legal tenancies in common and then failing to provide expressly for several situations which might arise,<sup>54</sup> and for failing to set forth more clearly the provisions applicable to joint tenancies. Of course, the abolition of dower, curtesy, and the action of partition has been satisfactory.<sup>55</sup>

Before returning to the problems of co-ownership of land in America, it would be well to consider briefly the English Administration of Estates Act, 1925,<sup>56</sup> and its amendments.<sup>57</sup> Under this Act, prior to its amendments, upon the death of a person intestate survived by a spouse and issue, the net estate was distributed as set forth below, subject to the statutory trust. The heirs received only equitable interests until the administrator assented to the vesting of legal title in them.<sup>58</sup> The surviving spouse received all of the intestate's personal chattels absolutely, £1,000 free of death duties, and an equitable life estate in

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Property Act, 1925, stated in a memorandum: "The vesting of the entirety of land held in undivided shares in trustees for sale will get rid of what may be regarded as the greatest blot in the existing system." The Acquisition and Valuation of Land Committee, *Fourth Report*, CMD. NO. 424, at 46 (1919).

<sup>50</sup> *Id.* at 30; 154 H.C. DEB. (5th ser.) 95 (1922); MEGARRY & WADE, *op. cit. supra* note 30, at 380.

<sup>51</sup> The Acquisition and Valuation Committee, *Fourth Report*, CMD. NO. 424, at 26, 31 (1919); 154 H.C. DEB. (5th ser.) 95 (1922).

<sup>52</sup> Withers, *Twenty Years' Experience of the Property Legislation of 1925*, 62 L.Q. REV. 167 (1946).

<sup>53</sup> MEGARRY & WADE, *op. cit. supra* note 30, at 382, 990.

<sup>54</sup> *Ibid.*

<sup>55</sup> Withers, *supra* note 52; MEGARRY & WADE, *op. cit. supra* note 30, at 990.

<sup>56</sup> 15 Geo. 5, c. 23.

<sup>57</sup> The Intestates' Estates Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 64.

<sup>58</sup> 15 Geo. 5, c. 23, § 46.

one-half the balance of the estate. The issue took as beneficiaries of a statutory trust the other one-half of the balance of the estate for the life of the surviving spouse, and upon his or her death, the issue took the entire balance. If any minor issue died either before attaining the age of twenty-one or before marriage, however, his share never vested and consequently passed to the surviving issue. If all issue predeceased the surviving spouse, under twenty-one years of age and/or unmarried, then the surviving spouse was entitled to an equitable life estate in the balance of the estate, and the other relatives of the deceased spouse took as remaindermen under a statutory trust, subject to the same requirement of attaining the age of twenty-one or marrying, in the following order of priority: parents, brothers and sisters, grandparents, uncles and aunts. The whole blood excluded the half-blood, and the issue of a brother, sister, uncle, or aunt were entitled to take by representation. If the statutory trust for issue failed because all the issue were minors who died before their interests vested and there were no parents, grandparents, brothers, sisters, uncles, or aunts, or their issue, then the surviving spouse took all absolutely. If there were no surviving spouse, no issue, and all other relatives were more remote than the issue of uncles and aunts, then the intestate's realty and personalty escheated. In order to expedite distribution, the statute provided for payment of the present capital value of the surviving spouse's equitable life interest upon his or her request and with the approval of the administrator.

Statutes of descent and distribution are amended or revised about every twenty or thirty years because of changing public opinion concerning the proper distribution of an intestate's estate. It is, therefore, not surprising that in 1950, a Committee on the Law of Intestate Succession was appointed to ascertain what, if any, changes should be made in the English Administration of Estates Act, 1925, respecting the rights of the surviving spouse and the provisions for family support. This Committee proceeded about its task in a sensible manner. Through the press, interested persons were generally invited to submit to the Committee their views on this subject. Special invitations to present written memoranda were also sent to select individuals and organizations. With the assistance of the Registrar of the Principal Probate Registry, the Committee compiled statistics as to the testamentary dispositions in wills over a certain period of time. The Committee also studied the laws of intestate succession in foreign countries. Because of this thorough study of the problem, the Committee's recommendations,<sup>59</sup> which were later

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<sup>59</sup> Committee on the Law of Intestate Succession, *Report*, CMD. NO. 8310 (1951).

enacted into law in the Intestates' Estates Act, 1952, deserve serious consideration.

In accordance with the Committee's recommendations, the following changes were made in the Administration of Estates Act, as of January 1, 1953, by the Intestates' Estates Act, 1952.<sup>60</sup> Upon the death of a person intestate survived only by a spouse and by no parent, brother, or sister of the whole blood or their issue, the entire estate is held in trust *for the surviving spouse absolutely*. If, in addition to the surviving spouse, issue also survive, the surviving spouse takes the personal chattels absolutely, £5,000 free of death duties and costs, and, as life beneficiary, one-half the balance of the estate, with the issue taking as equitable beneficiaries of the other half. In addition, the surviving spouse has the right to demand payment of the present value of his or her life estate and the option of buying the home. One of the prime reasons for increasing the surviving spouse's share from £1,000 to £5,000 was so that he or she could buy the home, since the home was usually worth more than £1,000.<sup>61</sup>

At this point, it would be well also to consider the amendments of the Inheritance (Family Provision) Act, 1938,<sup>62</sup> by the Intestates' Estates Act, 1952. Prior to its amendment, the Family Provision Act applied definitely to estates when the deceased died wholly testate, and possibly also when the deceased died partially testate. Under the amendments, the Family Provision Act applies whether the deceased dies wholly testate, partially testate, or wholly intestate. No application for support shall be made to the court, however, when not less than two-thirds of the income of the net estate "is payable to the surviving spouse and the only other dependents are children of *the surviving spouse*."<sup>63</sup> The persons who may apply for support are children who are incapable of supporting themselves because of a mental or physical disability, the surviving spouse, unmarried daughters, and minor sons. The right to support terminates at the death of the one receiving support, when the disabled child ceases to be under a disability, the surviving spouse remarries, the daughter marries, or the son becomes twenty-one years of age. The Committee specifically stated that when the share of the surviving spouse is substantial, such as £5,000, the children of an intestate

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<sup>60</sup> 15 & 16 Geo. 6 & 1 Eliz. 2, c. 64.

<sup>61</sup> Committee on the Law of Intestate Succession, *Report*, CMD. NO. 8310, at 6 (1951).

<sup>62</sup> 1 & 2 Geo. 6, c. 45.

<sup>63</sup> Intestates' Estates Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 64, § 1. (Emphasis added.)

who are not children of the surviving spouse must be protected by some statute such as the Family Provision Act.<sup>64</sup>

It is evident from this history of co-ownership of land in England that it has never been favored by the common or statutory law. The recent legislation that places co-ownership behind a trust in the form of either a statutory trust for sale or a settled land trust is consistent with the common law and its emphasis on freedom of alienation. It is rather American property law that has been and is inconsistent with this basic doctrine of freedom of alienation in that it has favored co-ownership of the legal title of land.

### III

#### DEVELOPMENT OF AMERICAN PROPERTY LAW

Today, as yesterday, the economic and political system<sup>65</sup> of a capitalistic nation functions at maximum efficiency when land is freely alienable. Personal observation made this fact obvious to early English and American judges and lawyers. Although the doctrine of unrestricted freedom of alienation of the fee has been restated from generation to generation,<sup>66</sup> the doctrine has been substantially nullified through various changes in basic common-law principles.

At the common law, primogeniture placed the legal title by descent in a single male heir.<sup>67</sup> The Rule in Shelley's Case made the ancestor the owner of a fee simple or fee tail estate, depending upon whether the purported remainder was to his heirs or to the heirs of his body.<sup>68</sup> Fee tail estates could be converted into freely alienable fee simple estates by common recovery.<sup>69</sup> Contingent remainders were often destroyed by merger or by the doctrine of destructibility when they failed to vest before the termination of the supporting freehold estate.<sup>70</sup> Re-

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<sup>64</sup> Committee on the Law of Intestate Succession, *Report*, CMD. NO. 8310, at 16 (1951).

<sup>65</sup> The writer believes that a dynamic economy tends to create a dynamic democratic society.

<sup>66</sup> 6 POWELL, REAL PROPERTY § 839 (1958); 5 TIFFANY, REAL PROPERTY § 1343 (3d ed. 1939).

<sup>67</sup> ATKINSON, *op. cit. supra* note 23, at 37.

<sup>68</sup> "It is highly probable that the rule [in Shelley's Case] would never have lived for centuries as it has but for the fact that, by eliminating a contingent remainder in unascertained persons, and giving the ancestor a present fee simple or a barrable fee tail, it aided the alienability of land. And judicial eulogies are still pronounced upon the rule for this reason." SIMES & SMITH, THE LAW OF FUTURE INTERESTS § 1543 (2d ed. 1956).

<sup>69</sup> 1 AMERICAN LAW OF PROPERTY 17 (Casner ed. 1952).

<sup>70</sup> SIMES & SMITH, *op. cit. supra* note 68, §§ 193-97.

mote future interests were declared void whenever they might vest beyond the period of the rule against perpetuities.<sup>71</sup> Direct restraints on alienation by the owner of the fee simple were void.<sup>72</sup> Concurrent ownership was reduced and often eliminated at the death of a common owner through presumptions in favor of joint tenancy<sup>73</sup> and tenancy by the entirety.<sup>74</sup>

Although as great, if not a greater, need for free alienation exists today, basic statutory changes in these common-law rules have seriously increased the indirect restraints on alienation. Primogeniture has not existed in the United States since the Revolution.<sup>75</sup> In many states today, upon the death of a person intestate, the legal title to his land passes directly to his children, the issue of any deceased child, and any surviving spouse of the intestate, as his heirs who hold either as coparceners or as tenants in common.<sup>76</sup> The Rule in Shelley's Case has been abolished in almost all states,<sup>77</sup> thereby creating a life estate in the ancestor, with a remainder in either his heirs or the heirs of the body of the life tenant, as the case may be. The abolition of the Rule in Shelley's Case creates not only successive estates, but often common ownership in fee simple in many persons at the death of the life tenant.<sup>78</sup> Contingent remainders have been made indestructible,<sup>79</sup> thereby making it more difficult to convey the fee simple title and resulting in common ownership whenever the contingent remainder is to a class such as heirs, heirs of the body, issue, or children. In a number of states, the fee tail estate has been converted into either a life estate or an estate tail for life in the tenant in tail, with a contingent remainder in the heirs of his body.<sup>80</sup> Most states have abolished the presumption in favor of

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<sup>71</sup> "The keeping of property free to answer the exigencies of its possessor was a corollary of the English stress on individualism and rested upon the acceptance of a society organized upon a competitive theory. It is obvious that limitations unalterably effective over a long period of time would hamper the normal operation of the competitive struggle. Persons less fit, less keen in the social struggle, might be thereby enabled to retain property disproportionate to their skills in the competitive struggle. Hence, the rule against perpetuities can be regarded as furthering the effective operation of the competitive system." 4 RESTATEMENT, PROPERTY 2132 (1944).

<sup>72</sup> 6 POWELL, *op. cit. supra* note 66, § 840.

<sup>73</sup> 2 AMERICAN LAW OF PROPERTY § 6.1 (Casner ed. 1952).

<sup>74</sup> 2 *id.* § 6.6b.

<sup>75</sup> RHEINSTEIN, *op. cit. supra* note 22, at 33.

<sup>76</sup> 3 AMERICAN LAW OF PROPERTY § 14.7 (Casner ed. 1952).

<sup>77</sup> SIMES & SMITH, *op. cit. supra* note 68, § 1563.

<sup>78</sup> *Id.* § 1570.

<sup>79</sup> *Id.* § 207.

<sup>80</sup> 1 AMERICAN LAW OF PROPERTY § 2.13 (Casner ed. 1952).

joint tenancy when the conveyance is to two or more persons who are not husband and wife.<sup>81</sup> Some states have either abolished tenancy by the entirety or the presumption in favor of tenancy by the entirety when the conveyance is to husband and wife.<sup>82</sup>

Future interests that would have been void under the common-law rule against perpetuities may be valid after waiting for a period of lives in being or for the period of the rule.<sup>83</sup> While these changes that have been made by statute or decision are often consistent with the general policy of carrying out the grantor's or testator's intent, they do increase the indirect restraints on free alienation. The changes frequently cause the vesting of legal title to a single parcel of land in many common owners, and these owners become more numerous in each successive generation through the operation of the usual statute of descent and distribution. The usual partition statutes are not adequate to make freely alienable land held in common ownership. The time required to institute a partition action and to bring it to completion is too long. Furthermore, individual common owners are reluctant to institute a partition action because their respective interests are small, they live some distance from the land, they are minors or incompetent, the costs are too great, etc.

The writer has seen a summons and complaint in an action of partition with respect to a tract of land in New York that was owned in 1766 by twenty-three persons as tenants in common.<sup>84</sup> In 1916, when this complaint was filed, 1,682 persons were listed as having an interest in this land. The share of one common owner is stated as 2,593,918,949/16,765,056,000. Another's interest is stated as 1/465,695, subject to a life estate. The widow of a deceased common owner is listed as having a dower interest in 1/99,000. It is stated that the wife of another common owner has an inchoate dower interest in 1/1,056. Another common owner's interest is given as 3,119/15,966,720, subject to the estate by curtesy of one of the other parties. Each defendant is assigned a number from 1 to 1,682 for ready reference. Furthermore, any partition proceeding becomes increasingly complex when mineral rights, successive owners, and lien creditors are involved.<sup>85</sup>

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<sup>81</sup> *Id.* § 6.3.

<sup>82</sup> *Id.* § 6.6*d.*

<sup>83</sup> AMERICAN BAR ASS'N, LEGISLATORS' HANDBOOK ON PERPETUITIES 7 (1958).

<sup>84</sup> Summons and Complaint in John Johnston, plaintiff, against Walter E. North et al., defendants, Supreme Court, Kings County, New York, Sept. 20, 1916.

<sup>85</sup> "While the rules as to who may obtain partition of fee lands are somewhat simple, the alignment of the parties as plaintiff and defendant, and especially the wide variety of interests that can be owned by those seeking partition of minerals, have caused many

Certainly, there is a real need to change our statutes to prevent the creation of common ownership and to provide a simpler method of alienation than is available under the usual partition statute. Present efforts to improve cumbersome and out-of-date recording statutes will not eliminate the basic problem of common ownership.<sup>86</sup>

Present federal and state tax laws, particularly the federal estate and gift taxes, have also indirectly interfered with free alienation of realty and personalty. A large number of trusts have been created primarily to avoid or to reduce taxes.<sup>87</sup> Although most of these trusts provide that the trustees have power to convey title to any land or personalty held in trust, it is a known fact that trustees are not likely to use trust funds to buy land, to start a new business, to put up a new industrial plant, to erect modern apartments, to finance industrial research, or to build homes. Neither are the trustees likely to buy the stock or bonds of a new corporation that plans to do these things. Therefore, it is reasonable to believe that the large number of trusts created to avoid or to reduce taxes are detrimental to the economic and political welfare of the United States.

These trusts usually provide for one or more equitable life estates, followed by future interests. These future interests are frequently in the form of alternate contingent remainders. Thus, the average trust

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states to reach different end results. Just imagine these parties in one suit, royalty owners, nonparticipating royalty owners, overriding royalty owners, lessors with possibility of reversion, lessees, farmout holders, oil payment holders, mortgagees, life tenants, farm tenants, holders of executive rights, remaindermen, widow with dowry or homestead right, operators in pooling, pressure maintenance, unitization and joint operating contracts, and all these either with or without cross-assignments. Then, vary this with the assumption that these interests are asserted under some portions but not all of the whole tract. Too, there can be production or non-production." Wallace, *Partition of Mineral Interests*, in 9 INST. OIL & GAS L. & TAXATION 211, 281 (1958).

<sup>86</sup> In 1957, the Section of Real Property, Probate and Trust Law of the American Bar Association, arranged to have the University of Michigan Law School do research and to prepare a model statute to improve conveyancing. The first of three publications resulting from this research became available January 1, 1960, under the title *Model Legislation for the Improvement of Conveyancing*. Later publications will be *Model Real Estate Title Standards* and *A Manual of Conveyancing for Lawyers and Legislators*.

<sup>87</sup> "[S]imple fairness points to equal tax burdens for estates of equal size, irrespective of the chosen form of disposition. On this tack, it is unfair that an estate which is passed from generation to generation by outright testamentary disposition should bear a heavier tax burden than a second, managed and conserved with equal skill, which passes in trust, each successive generation being limited to income interests." Waterbury, *Some Further Thoughts on Perpetuities Reform*, 42 MINN. L. REV. 41, 50 (1957). An attorney in the trust department of a large bank recently stated to the writer that the only reason for creating trusts is to reduce taxes.

seriously reduces or prevents the exercise of individual initiative by the life beneficiaries in the use of the trust principal, particularly with respect to the more speculative but often highly beneficial use of land. As a general rule, mature and normal adults should not be life beneficiaries of trusts, but should have the absolute control of the principal. The writer believes that America needs more freeholders and fewer beneficiaries of trusts who have nothing to do with the management of the trust principal.<sup>88</sup> But the problem of taxation as it relates to the free alienation of property in general and of land in particular is too extensive to be considered further in this article.

Each year, the United States becomes more industrial. Our immediate survival depends primarily upon our industries. Yet, our laws, by creating common ownership of land and by preserving dower and curtesy, make the acquisition of proper industrial sites, other than by use of the power of eminent domain, difficult, complicated, and at times impossible. A certain industrial plant may be able to operate most efficiently only if located on a specific tract of land in a certain state, because of its requirements as to water, materials, power, transportation, labor, market, etc. The right site is carefully selected. It may be urban, suburban, farm, timber, or scrub land. If the title to this site is not marketable or is not immediately available because of indirect restraints on alienation, such as many common owners, dower, and curtesy, then a less suitable site that can be obtained will have to be used, although it may have been the fourth or fifth choice. Obviously, American industry will suffer because of our inadequate property laws when an industrial plant is not built because no suitable site is available or when it is built on any site other than the most suitable one.<sup>89</sup>

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<sup>88</sup> Professor Bordwell has deplored the growing tendency to create trusts: "One who has sojourned in metropolitan Boston for a time is struck with the atmosphere of settled wealth. The adventurous spirit that once marked the Salem clippers seems nothing but a nostalgic memory. Trusts, and these are likely to be spendthrift trusts, are the order of the day. The estate planner is king. But this is not the atmosphere of most of the rest of the United States. Adventure still lurks . . . The estate planner is not king." Bordwell, *Perpetuities from the Point of View of the Draughtsman*, 11 RUTGERS L. REV. 429, 435 (1956). Unfortunately, contrary to Professor Bordwell's statement, "the atmosphere of settled wealth" is spreading throughout the United States in small and large towns and cities. A similar, but much greater, problem of control by fiduciaries is presented in a recent book, BERLE, *POWER WITHOUT PROPERTY* (1959).

<sup>89</sup> "What will be needed, and in considerable quantity, is land with such characteristics and in such locations that plants can be built to produce with maximum efficiency. Any compromise with this standard will increase costs of production, and higher production costs mean economic waste that have a detrimental effect upon the national economy." Garrabratt, *Wanted: Sites for Industries*, Urban Land, Oct. 1955, p. 3.

## IV

## STOPPING FRAGMENTATION OF LAND TITLES

In many countries of Europe and Asia, as a consequence of their laws of descent, the land itself has been fragmented into strips that are only a few meters wide and a few kilometers long.<sup>90</sup> An individual owns only a small narrow strip of land, or several noncontiguous narrow strips.<sup>91</sup> This fragmentation of land prevents proper utilization. It has been estimated that at least thirty per cent of efficiency is lost because of fragmentation.<sup>92</sup> For this reason, the governments of the nations where fragmentation has occurred have taken steps to stop this practice and to vest in one person or in the government the title to a tract of proper size for efficient cultivation.<sup>93</sup> In 1933, by statute, Germany enacted into law the general principles of certain local customs, so that farms of less than 125 hectares (about 310 acres) could not be subdivided without the consent of the inherited farmhold court, and these farms on the death intestate of the owner descended to a single heir.<sup>94</sup>

In America, it is the title to land that is fragmented by descent, and not the land itself. Under the partition statutes, if land owned in common cannot be equitably partitioned into tracts of proper size, the land is sold and the proceeds are divided among the common owners.<sup>95</sup> This provision for sale in cases of this type has certainly been beneficial. But over the years, the failure or neglect to bring partition actions for reasons previously stated has resulted in undesirable title fragmentation.

Although common-law dower and curtesy do not involve common ownership within the usual meaning of this phrase, the effect is substantially the same, because a prospective purchaser will not accept a deed signed only by the spouse who has title to the land.<sup>96</sup> Further-

<sup>90</sup> Alamuddin, *Practical Proposals for the Solution of Land Tenure Problems in Lebanon*, in LAND TENURE 105 (1956).

<sup>91</sup> "Fragmentation is common throughout the Old World—from Europe to Asia, wherever a village type settlement of farmers is found. Characteristically it results from a literal interpretation of equality in landholding; if any landholder in the village is to share proportionally in the lands of different quality and distance from the village he will usually have something like five pieces of land. Where inheritance practice follows this same literal principle, the inheritance of land may lead over a few generations to the fragmentation of a few hectare farms into from fifty to one hundred pieces." Parsons, *Land Reform and Agricultural Development*, in LAND TENURE 18 (1956).

<sup>92</sup> Alamuddin, *supra* note 90.

<sup>93</sup> Parsons, *op. cit. supra* note 91.

<sup>94</sup> Note, *West German Succession to Farm Land*, 2 AM. J. COMP. L. 219 (1953).

<sup>95</sup> 2 AMERICAN LAW OF PROPERTY § 6.26 (1952).

<sup>96</sup> FLICK, ABSTRACT AND TITLE PRACTICE § 428 (2d ed. 1958); 2 PATTON, TITLES § 593 (2d ed. 1957).

more, when there are common owners and several are married, the burden of obtaining title is necessarily increased.

#### A. Abolition of Dower and Curtesy

Although the need and reason for dower and curtesy have practically disappeared, a number of states still retain these institutions or their statutory substitutes.<sup>97</sup> Curtesy is a relic of the era of male supremacy, when the property of a married woman was managed by her husband, during the marriage, for his own benefit.<sup>98</sup> After the birth of a child capable of inheriting the wife's property, the husband received, upon his wife's death, the right to continue to receive the rents and profits of his wife's land until his own death.<sup>99</sup> There is not likely to be any substantial objection to the abolition of curtesy. The same thing, however, cannot be said with respect to dower and its abolition.

Under common-law dower, upon the husband's death his widow had the right to have assigned to her for her sole use and benefit during her life one-third of the land of which her husband was seised during their marriage, including any land conveyed by him during the period of their marriage without a release by her of dower.<sup>100</sup> When land was the principal source of wealth, when husbands had neither life insurance, pensions, social security, joint bank accounts, nor securities, dower was a desirable thing for the widow and society. Today, however, the position of the wife and widow is not the same as it was in the Middle Ages. The modern wife no longer needs dower because of her social security benefits, her rights as heir to a substantial fraction of her deceased husband's real and personal property in case of his intestacy, and her right to take against any will that she regards as unfair to her. In addition, the wife, at her husband's death, frequently receives title to bonds and to savings or checking bank accounts in the joint names of husband and wife with right of survivorship. She also is usually the principal beneficiary of life insurance and pensions. A husband may take title to the home, which is often the only realty he owns, in his wife's name, so that at his death, his wife will have the home, even though his assets may be insufficient to pay his debts. A husband may own the home with his wife, as tenants by the entirety or as joint tenants, so that on the husband's death, his widow, as survivor, will own the home.

For these reasons, the need for dower no longer exists,<sup>101</sup> and yet it

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<sup>97</sup> 1 *AMERICAN LAW OF PROPERTY* §§ 5.50, 5.60 (1952).

<sup>98</sup> *Id.* § 5.58.

<sup>99</sup> *Id.* § 5.59.

<sup>100</sup> *Id.* § 5.45.

<sup>101</sup> See Prestwood, *The Need for Changes in Alabama's Surviving Spouse Statutes*,

has not been abolished in a number of states. If its existence were harmless, dower might be tolerated as a relic and reminder of medieval times. But dower is detrimental to the proper utilization of land, because it indirectly interferes with free alienation. For this reason, it should be abolished. Today land is "a basic commodity of commerce."<sup>102</sup> If title is marketable, it may be transferred several times in a single year. For this reason, the transfer of title to land should be almost as simple as the transfer of title to securities.

In states that are predominantly agricultural and where farms are operated by individual families, it is possible that a farmer's wife may regard dower as a valuable means of preventing the sale of the farm by her husband without her consent. If dower and curtesy were abolished, it would become the responsibility of the wife to see to it that title to the farm was in the joint names of husband and wife as tenants by the entirety, joint tenants, tenants in common, or in the wife's name alone. If this were done, the widow would be in a better and stronger position than if she had taken as heir or as a dower claimant. Furthermore, if, as is suggested later, the surviving spouse as heir is entitled to all property of the deceased spouse who dies intestate whenever the total net estate is 60,000 dollars or less, there would be even less reason than there is now for dower.

The abolition of dower and curtesy is not a complicated matter. Prior to the death of a spouse, dower and curtesy are inchoate interests similar to the rights of an heir; therefore, any statute abolishing them should be constitutional.<sup>103</sup> In jurisdictions where certain land titles are presently unmarketable because a surviving spouse has an unlimited time within which to claim dower, these dower rights should be barred if not asserted within a stated period.

The following illustrations demonstrate specifically the adverse results of tenancy in common, dower, and curtesy.

*Illustration 1*

*H* holds title in his name alone to 140 acres of poor farm land. *H* is married to *W*. The *X* Corporation offers *H* a fair price for his farm.

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<sup>8</sup> ALA. L. REV. 317 (1956); McCarty & Shaw, *Report on Dower and Curtesy*, Mass. L.Q., Dec. 1954, p. 31.

<sup>102</sup> CASNER & LEACH, *CASES AND TEXT ON PROPERTY* 250 (1951 with 1959 Supplement).

<sup>103</sup> SCURLOCK, *RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND* 297 (1953); *Report on the Bill to Limit Dower and Curtesy to Land Owned at Death and the Recent Advisory Opinion of the Justices*, Mass. L.Q., Oct. 1958, p. 68.

*H* is tired of farming and willing to sell, but *W* refuses to release her dower interest. The *X* Corporation reluctantly buys less desirable land in another area of the state or in another state.

While *H* was the owner of this farm, it is as though *H* and *W* were common owners. Thus, dower creates the same problems as common ownership. These problems are exacerbated when either *H* or *W* or both are minors.

### *Illustration 2*

Land is subdivided into lots that are sold to young married couples. The title to each of these lots is taken in the name of the wife alone, in the names of the husband and wife, or in the name of the husband alone. The *X* Corporation desires to buy all the lots in this subdivision at a substantial profit to these young people. All the owners and their respective wives are willing to sell, except the wife of one of the husbands who took title in his own name. When the *X* Corporation learns that this wife will not release her dower and that some of the wives and husbands are minors for whom guardians would have to be appointed to convey title, it buys other, but less desirable, land.

The abolition of dower and curtesy in Illustration 2 certainly would have made the land more alienable by making it unnecessary to deal with spouses, including some minors, who were not owners of the land. The problem of minor owners would have remained, however. All persons who are married should be made competent by statute to convey, mortgage, will, or contract to sell their property as adults, unless they are suffering from some disability other than their minority.<sup>104</sup>

### B. Surviving Spouse as Sole Heir of Small Estate

Except for certain types of tenure, primogeniture was the general rule at common law with respect to the descent of land, so that the oldest son inherited his father's land, subject only to the dower interest of his mother. For a brief time in early American history certain states provided that all children, sons and daughters, should take land as heirs upon the death of a parent, but the oldest son, as under the laws of Moses, was given a double portion to enable this son to buy the shares of his brothers, sisters, and any issue of a deceased brother or sister.<sup>105</sup> Before 1800, however, certain states made the surviving spouse a coheir

<sup>104</sup> FLA. STAT. ANN. §§ 743.01-743.03 (1944); IOWA CODE ANN. § 599.1 (1950); OKLA. STAT. ANN. tit. 16, § 1 (1953); UTAH CODE ANN. § 15-2-1 (1953). 1 POWELL, *op. cit. supra* note 66, § 122 (1949).

<sup>105</sup> RHEINSTEIN, *op. cit. supra* note 22, at 28 (1955); DEUTERONOMY, c. 21, v. 17.

of the land with any surviving children and the surviving issue of any deceased children.<sup>106</sup> In those states where the surviving spouse as coheir received only a child's share, his or her share necessarily decreased as the number of children increased. Obviously, a child's share will in most cases be inadequate to provide for the surviving spouse when there are three or more children. For this reason, many statutes of descent and distribution now provide that the surviving spouse's share when the other heirs are two or more children, with the issue of any deceased child taking the parent's share, is never less than a stated portion—for example, it may be one-third, although there may be four surviving children. If there is only one child and no issue of any deceased children, the surviving spouse takes a child's share or one-half.<sup>107</sup> Over the years, in addition to the substantial increase of the surviving spouse's share as heir, the surviving spouse has received additional protection in a number of states by being allowed to take a specific amount—for example, \$2,000 or \$5,000—when the deceased spouse dies intestate. The surviving spouse in most states also has the right to take against the will when the deceased spouse dies testate.<sup>108</sup>

It is evident from these statutory changes and from the fact that the surviving spouse is usually the wife that upon the death of the husband and father, the widow and mother has substantially replaced the oldest son as the head of the family. Furthermore, owing to the increased longevity of parents in general and of widows in particular, the surviving spouse today often needs all or a substantial share of the deceased spouse's estate. It is for this reason that when tax factors are not involved, the deceased spouse with a substantial, but not a large, estate frequently wills it entirely to his or her surviving spouse in fee simple.

Indirect restraints on alienation caused by common owners become more burdensome with the increase in the number of common owners, the number of co-owners who are married, and the number of co-owners or their spouses who are minors. Thus, in many states, the following illustration is typical upon intestacy.

### *Illustration 3*

*H* owns in fee simple absolute and occupies a tract of 140 acres of poor farm land that is suitable for industrial or commercial use. *H* dies survived by eight heirs—namely, his widow (*W*), four children and three minor grandchildren (the issue of a deceased daughter). *H*, by

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<sup>106</sup> 6 POWELL, *op. cit. supra* note 66, § 995.

<sup>107</sup> *Id.* § 995 n.93. <sup>108</sup> *Id.* § 970.



up to \$60,000,<sup>111</sup> then even though *H*'s will was invalid, *W* would have been the sole heir and owner. If the land owned by the deceased spouse, usually the husband, is the home with a value of \$30,000 and the total value of the deceased spouse's estate is \$60,000, the surviving spouse, usually the wife, would have the home and \$30,000 with which to support herself and any minor or disabled children.<sup>112</sup>

The ideal statute of descent and distribution provides for the distribution of the property of an intestate in the way a normal testator would provide in his will.<sup>113</sup> Today, a normal testator with a net estate of \$60,000 or less would probably will it all to his wife if she survived him.<sup>114</sup> Likewise, under the same circumstances, a testatrix would probably will her entire estate to her husband if he survived her.

The effect of the suggested change in the usual statute of descent and distribution is to increase the amount that the surviving spouse can claim as heir. It would eliminate completely as to all small estates the common ownership of land by the surviving spouse, children, and issue of any deceased child. If there were no surviving children or issue, it would also eliminate common ownership in those states in which the

<sup>111</sup> The tendency is to increase the specific amount going to the surviving spouse. The sum of \$60,000 may be slightly higher than would be readily acceptable today. But since statutes of descent and distribution are not amended every year or every two years, this sum of \$60,000 would extend the life of the statute.

<sup>112</sup> "An appreciable proportion of the women who become widowed are still in the prime of life. Currently, the median age at which wives enter widowhood is about 56 years. A significant number are much younger; about one fifth of the new widows each year are under age 45. Thus most women have many years of life ahead of them after their husband dies. About three quarters of all women at age 50 can expect to live 20 years longer; that many years of life also remain for one out of every two at age 60." JACOBSEN, *AMERICAN MARRIAGE AND DIVORCE* 140 (1959).

<sup>113</sup> "If by any accident a man should die without making his will, it would seem to be the province of an equitable legislature to make such a disposition of his property as would, in ordinary circumstances, most nearly correspond with his intention." WILLIAMS, *PRINCIPLES OF THE LAW OF PERSONAL PROPERTY* 601-02 (18th ed. 1926).

<sup>114</sup> "A census was taken by the Probate Registries of every Will proved throughout England and Wales on two successive days in each week and for five successive weeks. . . . We found that in respect of Wills which had been executed from the year 1940 onwards and which were proved during the period of the census, male testators left the whole or a major part of their estate absolutely to the surviving spouse in the following proportions:—

- (a) 73 per cent where the estate was under £2,000;
- (b) 65 per cent where the estate was between £2,000 and £5,000;
- (c) 45 per cent where the estate was over £5,000.

The corresponding proportions of male testators who left a life interest in the whole or a major part of their estate to their widow were (a) 11 per cent, (b) 21 per cent, (c) 45 per cent." Committee on the Law of Intestate Succession, *Report*, CMD. No. 8310, at 7 (1951).

deceased spouse's ancestors or collateral relatives now take as coheirs with the surviving spouse. Probably most intestacies occur with respect to the small estates of \$60,000 or less. Persons with large estates normally do not provide for common ownership of the *legal* title to land, but provide for a trust with a broad power of sale in the trustee. Unfortunately, the wills of wealthier testators may be set aside through will contests, causing unexpected intestacies. Also, persons below a certain age, which varies from state to state, although they may own substantial property, are incompetent to make a will.

In the normal situation, when the net estate is \$60,000 or less and a widow and children survive, the testator wills all his property to his widow, because he knows that she is capable of handling it and that she will care for any minor children and for children under a disability other than minority. If, however, the surviving widow is a second wife and the children are by a prior marriage, a testator with a small estate would probably divide his estate, particularly property received from his deceased first wife, by bequests and devises, with or without a trust, depending on the amount involved, to his minor children and to children under some other disability.<sup>115</sup> For this and other ethical reasons, each state should consider the adoption of a family-support law,<sup>116</sup> which would allow a deceased's minor children, children under any other disability, minor or disabled issue of any deceased child, and possibly parents and grandparents to claim support if needed from the deceased's estate, whether the deceased dies testate or intestate and whether or not the surviving spouse is the natural parent of the issue entitled to support. The right to claim support should be for the period of minority or until the removal of any disability.

Not every spouse who dies testate leaving a surviving spouse wills all or a substantial portion of his or her property to the surviving spouse. For this reason, it is generally provided by statute that the surviving spouse has the right to take against the will of a deceased spouse a certain portion of the estate which may vary with the number of surviving children.<sup>117</sup> With respect to an estate of \$60,000 or less, the

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<sup>115</sup> "[W]hile we are in general favour of making generous provisions upon intestacy for a surviving spouse we think that increased provision may well work injustice in many cases where there are step-children by another marriage of the deceased, unless some discretionary power for the Court to intervene, such as is conferred by the [Family Provision] Act of 1938, is reserved." *Id.* at 17.

<sup>116</sup> Laufer, *Flexible Restraints on Testamentary Freedom—A Report on Decedents' Family Maintenance Legislation*, 69 HARV. L. REV. 277 (1955).

<sup>117</sup> 6 POWELL, *op. cit. supra* note 66, § 970.

surviving spouse should have the right to elect to take \$30,000 against the will and should also have the option of purchasing the home at its appraised value. Very likely whenever a surviving spouse elects to take against the will, he or she will also elect to buy the home at its appraised value, thereby avoiding the problems of common ownership. With respect to estates of more than \$60,000, the surviving spouse should have the right to elect to take a certain portion, depending upon the number of children. Other problems of common ownership of land which will arise in connection with estates of more than \$60,000 are considered later.

C. Descent of Legal Title to Common Owners;  
Statutory Trusts for Sale

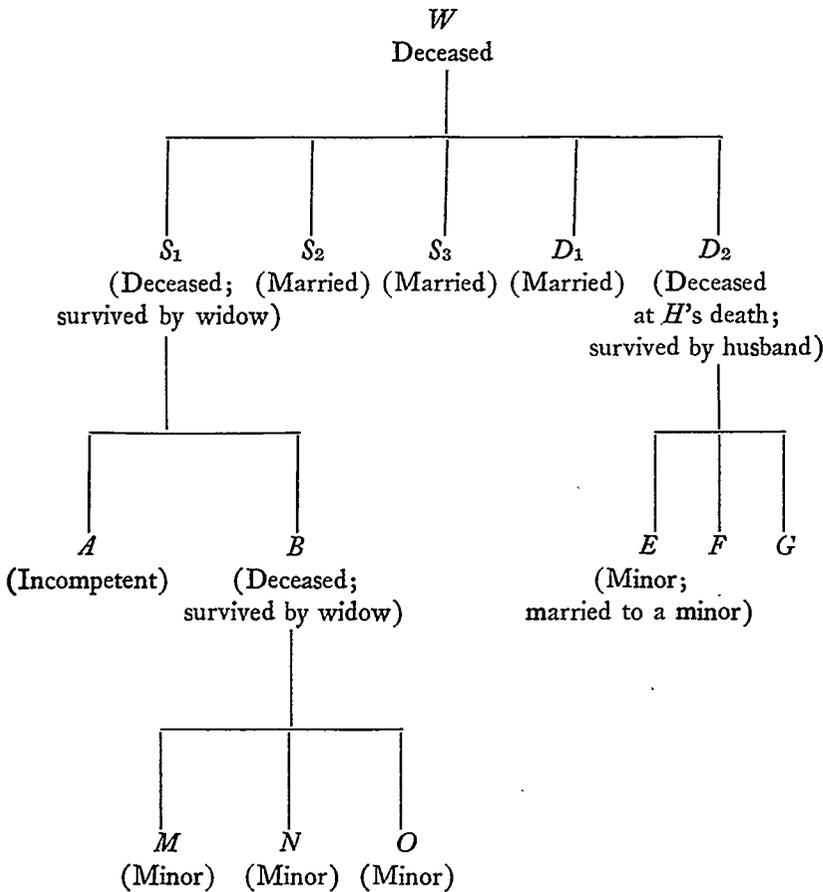
If the entire estate of an intestate goes to the surviving spouse by statute when its net value is \$60,000 or less, the problem of descent to several heirs as common owners will arise in estates of more than \$60,000 that include some realty when there is a surviving spouse who does not elect to take all the realty. The problem of descent to a number of heirs will also arise whenever the owner of realty dies intestate survived by no spouse, but survived by two or more heirs. Since the suggested solution in these situations is somewhat the same, there is no need to consider solutions to each separately.

The problem in Illustration 3 is one that arises frequently under obsolete, but, nevertheless, existing, state statutes of descent and distribution. In Illustration 4, the problem of common ownership becomes more complex fifteen years later at the death intestate of *W*, *H*'s widow, survived only by issue and no spouse.

*Illustration 4*

In Illustration 3, at *H*'s death, *W* received an undivided one-third interest in the farm of 140 acres as a tenant in common with her four children and the three issue of a deceased daughter. In many ways, this was obviously an unsatisfactory arrangement for all concerned. When *W* died fifteen years after *H*'s death, the buildings had deteriorated badly from want of repairs and the land was in poorer condition for farming than when *H* died. *W* was survived by two sons and a daughter, the issue of a deceased son, and the issue of a deceased daughter.

The relationship of these heirs to *W* at her death is shown in the following diagram.



*S*<sub>1</sub> and *B* died intestate after *H*'s death, but before *W*'s death. Each of them was survived by a spouse. *S*<sub>1</sub> predeceased *B*.

The computation in Illustration 4 of the undivided interest of each of the persons who took as heirs of *W* at her death is not easy. Furthermore, obtaining marketable title to this land will be difficult and will require considerable time and effort. After the death intestate of only two persons, a husband and his wife, the legal title to the farm owned fifteen years ago in fee simple absolute by the husband alone is now divided among twelve persons of whom one is incompetent, four are minors, four are married, including one of the minors who is married to a minor, and two are widows who might remarry. Not only is title to the farm not readily marketable, but with the passage of time, the number of common owners will increase, the whereabouts or marital status of some will not be known, and many individual shares will become smaller through successive intestacies. For example, when *H* died, his son *S*<sub>1</sub>

received an undivided  $2/15$  interest. When  $S_1$  died intestate survived by his spouse and two children, the spouse and each child received an undivided  $2/45$  interest. At  $B$ 's death survived by a spouse,  $B$ 's undivided  $2/45$  interest descended as follows: to his widow,  $1/3 \times 2/45$  or  $2/135$ ; to each of three minor children,  $1/3 \times 2/3 \times 2/45$  or  $4/405$ . When  $M$  marries, his spouse will have an inchoate dower interest in an undivided  $4/405$  interest in the farm!

The cumulative disadvantages of several intestacies of common owners of land who are not joint tenants or tenants by the entirety, as seen in Illustrations 3 and 4, is obvious. Yet Illustration 4 is typical of the operation of existing statutes of descent and distribution. If the farm in Illustration 4 were located in a state which recognizes dower and curtesy, then in order to obtain the title to this farm the purchaser would have to obtain conveyances signed by the two sons, the daughter, their respective spouses, the deceased son's widow, two grandchildren, the deceased grandson's widow, the guardian or guardians for the three great-grandchildren, and the guardian or guardians for the minor grandchild and his minor spouse. It is obvious from this illustration why banks, bar associations, and other organizations distribute pamphlets and folders warning people of the disastrous consequences of dying intestate. These organizations might well put forth an even greater effort to have enacted in each state a modern statute of descent and distribution. Intestacy should not be detrimental to the heirs nor to society.

The situation with respect to the farm in Illustration 4 would be only slightly better if it were located in a state that has abolished dower and curtesy, that makes minors who are married competent to convey their interest in realty or personalty, and that provides that a surviving spouse takes all the property of the deceased spouse whenever the net estate is \$60,000 or less. While the spouses of  $S_2$ ,  $S_3$ ,  $D_1$  and  $E$  would not have to sign the deed, the respective spouses of the deceased son  $S_1$  and grandchild  $B$  would have to sign as owners of undivided interests. If the surviving spouses of deceased common owners died before conveying their interests, then a deed would have to be obtained from the persons who took their interests by descent or devise. From this simple illustration, it should be apparent that there are so many common owners that it is almost as if no one owned the farm, in so far as its use and development are concerned. It should be obvious, too, that the previously suggested statutory changes are not alone sufficient. Any law that creates so many small undivided, legal fractional interests in one tract of land

through the successive deaths intestate of a father and mother is seriously defective.

If, under the laws of the state where the farm is located, *W* received the farm as sole heir because *H*'s estate was less than \$60,000, it is possible that during her life she might sell the farm and invest the proceeds in securities or deposit them in a savings account. If this were done, then at *W*'s death intestate, there would be no difficulty in dividing her estate among her heirs. If *W* did not sell the farm and died intestate, the problems of common ownership would then arise unless her personal property were insufficient to pay the costs of administration, debts, and taxes. In this event, the realty would be sold and any excess remaining after paying these obligations of the estate would be distributed in cash among the heirs.

There are several ways to prevent the creation of common ownership of a person's land by his heirs when he dies intestate. One way to do this would be to place the legal title to the intestate's realty in his administrator, who would sell it privately or publicly and divide the proceeds among the heirs whenever it would not be desirable to convey to each heir a specific portion of the realty.<sup>118</sup> This solution would be similar to the administration and distribution of property held under the usual private trust. A sale of the intestate's land would probably not be opposed by the heirs, because ancestral realty today seldom has special value to all the heirs. Realty should be treated today the same as personalty in the administration of an intestate's estate. If the administrator decides that it is either impossible or unwise to divide the realty among the heirs and that it would also be imprudent to sell intestate's realty in connection with the administration of the estate, then

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<sup>118</sup> MODEL PROBATE CODE § 152 (Simes 1946): "*Transfer under court order; purposes.* Any real or personal property belonging to an estate may be sold, mortgaged, leased or exchanged under court order when necessary for any of the following purposes:

.....  
“(f) For making distribution of the estate or any part thereof:

“(g) For any other purpose in the best interests of the estate.

“*Comment.* In the absence of provisions in the will, a statute was necessary to authorize a sale in all cases where the decedent had not taken affirmative steps to make the land liable for his debts. Gradually these purposes have been broadened, many of the statutory purposes appearing in current statutes being that expressed in (g) viz., for any purpose beneficial to the estate. Thus if a small tract of land were to be divided among many heirs or devisees, some of whom were under disabilities, a serious problem of marketability would be presented if it were distributed to them in kind. Under this section it could be sold by the personal representative and the proceeds distributed, thus eliminating a difficult and otherwise expensive problem for the interested persons. The above section was taken in part from N.Y. Surr. Ct. Act. § 234.”

the administrator should be authorized by statute to hold the realty, with court approval, for an initial period of ten years as statutory trustee, or to request the court to appoint a trustee to whom title would be transferred for this purpose. Of course, if there is a single heir, the title would be conveyed by the administrator to the heir.

The general nature of the proposed statutory trust for the administration and sale of the realty of an intestate is explained more fully in connection with the administration of the larger estate.

#### D. Large Estate with Surviving Spouse

When an intestate's estate is more than \$60,000, includes some realty, and there is a surviving spouse who is entitled to \$60,000 plus a stated portion of the balance, the surviving spouse should be given the right to select specific property at its appraised value, including realty, as his or her share. Under the proposed statute, it is possible that the surviving spouse might select all the realty and, consequently, would be the sole owner in fee simple of the realty. There would then be no problem of common ownership until the death of the surviving spouse owning the realty. It is possible, however, that the surviving spouse might not select the realty or the realty might be of greater value than the surviving spouses's share, in which event there would be common ownership of realty in cases where there were two or more heirs.

Today, whether the estate is small or large, the heirs seldom desire to live in the intestate's home or to be the owners of undivided interests in the intestate's realty investments. Consequently, it is reasonable to believe that the heirs of a large as well as a small estate would welcome a statute that provides for the administration of realty so that they would be freed from the burdens of management and would receive in cash their respective shares of the intestate's estate. For these reasons, title to realty as well as to personalty should vest in the proper court at an intestate's death, pending the appointment of an administrator. Upon the appointment of the administrator, title would automatically be vested in him with power to sell, publicly or privately with court approval, realty and personalty in connection with the general administration of the intestate's estate, whether or not this was necessary to pay costs of administration, debts, or taxes. If the administrator believed it would be prudent to sell the realty and if the realty were sold, no problem of common ownership by the heirs would arise. And the writer believes that not only would the heirs approve a sale of realty

in most cases, but that there would be fewer rundown buildings in cities and on farms and fewer vacant lots and parcels.

Of course, if an administrator could settle an estate by conveying specific parcels of land to individual heirs and if he believed that this method of distribution would be the best, there is no reason why this should not be done. Each heir should have the right, however, to demand, by filing a petition with the proper court, a sale by the administrator of the intestate's land. The land should be sold in parcels of the proper size to obtain the maximum selling price. For example, if the intestate's land is a ten-acre tract, it might be divided into half-acre lots among twenty heirs. But, if this tract could be sold most easily as a single unit or as two five-acre parcels and at a substantially higher price than in any other way, any heir should have the right to petition the proper court to have the land sold in this manner.

If, at the time of the intestate's death and during the usual period of administration, it would be imprudent to sell the realty and partition is not desirable, the administrator should have the right to petition the court to obtain authority to hold the realty as statutory trustee until such time, but not to exceed ten years from the intestate's death, when a sale would be prudent. In the meantime, the statutory trustee would pay any net income to the heirs as owners of undivided equitable interests. The statutory trustee, whenever it would be prudent to do so, would have power to lease the land held in trust for periods not exceeding the ten-year period and to authorize the removal of minerals, oil, and gas on a royalty basis. The administrator's right to hold the legal title as statutory trustee of the intestate's realty should be subject to the right of the owners of half or more of the undivided equitable interests in the realty to compel its sale by a written request to him. Furthermore, the statutory trustee should be required to sell the realty before the expiration of the ten-year period unless the proper court, upon petition, authorizes him to continue to hold it in trust for an additional period of not more than five years. If the court should refuse to grant this authorization, then the realty would have to be sold before the end of the ten-year period.

Should an administrator not wish to serve as statutory trustee and should he consider it imprudent to sell the intestate's realty during the period of administration, then, he should be authorized by statute to request the court to appoint a qualified statutory trustee.

Although today there is fairly general acceptance of the use of trustees, there is some belief that the use of a trustee to manage or to

sell real or personal property is not always economical. For this reason, when the number of heirs is not greater than four, it might be desirable to provide by statute that upon request of all heirs, the administrator must convey the legal title to the intestate's realty to them as joint tenants in trust for themselves, with full power to sell the land publicly or privately without court approval. Upon the death of any of the original heirs, the survivors would continue to hold the legal title, so that the total number of common owners of the legal title would never exceed four. The equitable interest of the deceased heir would pass to his heirs in case of intestacy or under his will in case of testacy. Equitable interests would be assignable. Bona fide purchasers from the trustees would take free of the equitable interests. Upon the death, testate or intestate, of the last survivor of the original heirs, his personal representative would receive the legal title as statutory trustee and would be responsible for administering the realty, including its sale, as previously explained in connection with intestacy.

When the number of original heirs is not greater than four and they elect to hold title as trustees, they, too, might be required to obtain court approval to continue the trust beyond an initial period of ten years from the intestate's death. Also, when the legal title is held by not more than four heirs as trustees and whenever the owners of half or more of the equitable interests request a sale, the trustees should be obligated to sell. Any equitable owners who do not approve of a sale can protect themselves in case of sale by bidding at a public sale or by being given the statutory right to buy at the highest offer received by the trustees from any third party.

#### E. Elimination of Descent to Remote Heirs

Whenever the heirs of an intestate are collateral relatives more remote than the issue of grandparents, it is probable that there may be a fairly large number of them and also that their whereabouts may be unknown or difficult to ascertain. Moreover, if these remote relatives take as common owners, there will be a group of persons who own land in common, but are strangers to each other and who often live in different states. This is an undesirable situation. Since there is often little concern among people for their distant relatives and vice versa, the distant relatives have been described as "laughing heirs,"<sup>110</sup> because they feel no grief at the distant relative's death. For this reason, some

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<sup>110</sup> Cavers, *Change in the American Family and the "Laughing Heir,"* 20 IOWA L. REV. 203 (1935).

jurisdictions have provided that if a person dies intestate survived by no relatives closer than issue of deceased aunts and uncles,<sup>120</sup> grandchildren of deceased aunts and uncles,<sup>121</sup> relatives in the sixth degree,<sup>122</sup> or relatives in the fifth degree,<sup>123</sup> his property passes to the state.

From a positive point of view, it is possible that since the state today, through its public school system, its recreation and health facilities, its universities, etc., represents what might be considered a public charity that provided for the deceased during his lifetime, the deceased, not having made a will, would probably wish all his property to go to the state for a particular use, such as education, and not to distant relatives who were strangers to him. Under these modern statutes of descent and distribution that eliminate remote relatives as heirs, land is made alienable because it does not descend to numerous heirs, but to the state, which will sell it to private persons unless it is needed for some public use.

#### F. Common Ownership by Devise or Deed after Adoption of Proposed Statute

In addition to common ownership of the legal title to land that results from intestacy and descent to two or more heirs, common ownership of the legal title may arise also by a devise or inter vivos conveyance of land to a class or to two or more named persons without the use

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<sup>120</sup> MODEL PROBATE CODE § 22 (Simes 1946). The *comment* to this section on the restriction of inheritance to the issue of grandparents is as follows: "This section, unlike many American statutes, does not permit all persons of the blood of the intestate, however remote, to take as heirs. This is believed to accord with the wishes of the average person who dies intestate. Relatives may be so distant that the decedent might well prefer that his property go to the state rather than to such relatives. The present English statute of descent and distribution recognizes this principle . . . Some American states also cut off the line of inheritance short of the most remote relative of the blood of the intestate."

<sup>121</sup> The Pennsylvania Intestate Act of 1947, PA. STAT. ANN. tit. 20, § 1.3 (1950), restricted inheritance to relatives not more remote than children of deceased uncles and aunts. The reason for this restriction is stated in the Commission's Comment as follows. "A decedent who does not provide by his will for relations more remote than first cousins cannot be supposed to have much concern for them, and it is desired to avoid tedious and expensive searches for distant relations not expressly favored by the testator." On Dec. 10, 1959, by Act No. 652 Pa. Gen. Laws, 1959, the Pennsylvania Intestate Act of 1947 was amended to extend the line of descent to include grandchildren of deceased aunts and uncles of the decedent.

<sup>122</sup> KAN. GEN. STAT. ANN. § 59-509 (1949): "Each generation in the ascending or descending line shall be counted as one degree."

<sup>123</sup> D.C. CODE ANN. § 18-717 (Supp. 1959); MD. ANN. CODE art. 93, § 152 (1957). Under each of these codes degrees are reckoned by counting down from the common ancestor to the more remote.

of a trust. The devisees and grantees may take as tenants in common or joint tenants, depending upon the language of the will or deed. Also, if the devise or grant is to two persons who are husband and wife, they may take as tenants by the entirety. Likewise, if some of the devisees or some of the grantees are husband and wife, it is possible that as between themselves they may take as tenants by the entirety, although they may take as joint tenants or tenants in common with the other co-owners. Since most devises and inter vivos conveyances to two or more persons, whether named or as a class, create tenancies in common, this situation will be considered first, then joint tenancies, and finally tenancies by the entirety.

In order to make more readily alienable the land that is either devised or granted to two or more persons as tenants in common, the legal title to the land should be vested by statute in not more than four of the competent adult tenants in common, who would then hold this legal title as statutory trustees and in joint tenancy for themselves and any other tenants in common. This statutory trust would be similar to the situation where not more than four heirs desired to hold the intestate's land as statutory trustees, which has been explained previously. In the case of a devise or grant to more than four persons as tenants in common, the first four named who are adults and competent should be the statutory trustees. In a class gift to more than four persons, some other method would have to be used to select the four statutory trustees—for example, the two youngest and the two oldest adults who are competent might be the statutory trustees. It is likely that in most wills and deeds, trustees would be appointed and would be given power to sell land publicly or privately so that there would be few occasions when the statutory trusts would arise from a devise or inter vivos conveyance.

Under the proposed statutory changes, all tenancies in common created by descent, devise, or deed after the effective date of the statute would be equitable interests. Coparceny as a form of co-ownership would be abolished, and heirs would take the equitable title as tenants in common. There is no reason for continuing coparceny, because it is practically identical with tenancy in common.

If a devise or inter vivos conveyance created a joint tenancy as to not more than four persons, then under the proposed statutory changes, the joint tenants who were adults and competent would take the legal title as joint tenants and as statutory trustees for themselves and any other joint tenants. The equitable interests would be held in joint tenancy, subject to the power in each equitable joint tenant to destroy

the incident of survivorship as to his interest by an inter vivos conveyance, by a properly executed will, which, of course, would only be effective at his death, or by a written and signed statement that was properly recorded. For example, if a father devised the legal title to land to his three unmarried sons as joint tenants and one was a minor, the two adult and competent sons would take the legal title as joint tenants and statutory trustees for all three sons, who would be equitable joint tenants. If one of the adult sons by deed conveyed his one-third undivided equitable interest to the three children of his sister, these children would take this equitable undivided one-third interest as tenants in common. The two adult sons would continue to hold the legal title in joint tenancy and as statutory trustees. Any bona fide purchaser would need only deal with these two statutory trustees who would have power to convey the legal title free of the trusts and by private or public sale.

A tenancy by the entirety can arise only by a devise or inter vivos conveyance to two persons who are husband and wife. If the interest of one tenant by the entirety cannot be sold to satisfy his debts and if neither party can convey his interest, there seems to be little need for any form of statutory trust when there is only a devise to husband and wife as tenants by the entirety. Upon the death of one of the spouses, the surviving spouse will own the entire legal title; thus, any restraint on alienation is only for the joint lives of the husband and wife. Of course, if a husband and wife take their interest in land as tenants by the entirety as between themselves, but as joint tenants or tenants in common with other co-owners, then the tenancy by the entirety would be equitable, as previously explained.

As previously stated with respect to statutory trusts arising from intestacy, so in the case of any statutory trust whether from intestacy, devise, or deed, whenever the owners of half or more of the equitable interests would request the statutory trustee in writing to sell the land held in trust and to divide the net proceeds among all the equitable owners, the statutory trustee would be obligated to do so. If one or more equitable owners were unable to obtain a sufficient number of other equitable owners to join in requesting a sale by the statutory trustee, each equitable owner should have the right to petition the court to order a sale of the land on the ground that it would be prudent to do so and to distribute the net proceeds to the equitable owners. Of course all known owners of equitable interests should be notified of this petition. Unknown equitable owners and owners whose addresses are unknown

should be notified by publication. Certainly when a testator or grantor fails to establish a trust and by intestacy, devise, or deed makes two or more persons common owners of land, the law should provide a better method of alienation of the land as a unit than is now provided under the usual partition statute. The proposed statutory changes would provide this better method.

As a general rule, express trusts give the trustee broad powers to sell privately or publicly any land held in trust. But sometimes, by oversight or intentionally, the power of sale may be omitted from the trust document, and in some cases, the trustee may actually be forbidden to sell land held in trust. Whether the trust document fails to give the express trustee any power of sale with respect to land, gives him only a limited power, or prohibits sale, as to trusts created after adoption of the proposed statutory changes, the statutory trustee should have full power to sell the land privately or publicly.

## V

### TITLES ALREADY FRAGMENTED

The previously proposed statutory changes are prospective only in their operation. This leaves for further consideration the problem of titles that have already been fragmented. As previously stated, it is reasonable to assume that tenancy by the entirety currently presents no serious problems. This leaves joint tenancies, tenancies in common, and tenancies in coparceny. But for practical purposes, there are only joint tenancies and tenancies in common, because tenancy in common and in coparceny are substantially the same. The tenancies in common may have been created by descent, devise, or inter vivos conveyance. Joint tenancies, however, must have been created either by devise or inter vivos conveyance. But so far as the immediate problem is concerned, the manner of the creation of a joint tenancy or tenancy in common is immaterial.

It is reasonable to assume that today the average joint tenant or tenant in common is primarily interested in reducing his undivided interest to cash, and not in continuing as owner of an undivided interest in realty, or in receiving a part of this realty as his share. For this reason, the usual partition statute should be amended to provide that upon petition of any owner of an undivided interest in land, either as joint tenant or tenant in common, the land will be sold in units of proper size to produce the maximum selling price, unless, as stated

below, partition is expressly requested.<sup>124</sup> All known owners of undivided interests should be notified by registered mail, and all unknown owners and owners whose addresses are not known should be notified by publication. Since, as stated previously, a partial partition might prejudice the common owners who desire to receive the highest cash value for their interest, a total or partial partition of the land should be ordered by the court only when it has been specifically requested by one or more of the common owners *and when it would not reduce substantially the amount payable to each common owner for his undivided interest.*<sup>125</sup> As a general rule, it is not likely that any owner of an undivided interest will ask for partition; and, therefore, the land, whether it is 1,000 or 5,000 acres, will be sold in units of proper size by a person appointed by the court for this purpose. Any portion of the net proceeds payable to unknown owners should be paid to and invested by a trustee for ten years. The trustee would be appointed by the court and might be a public official such as the recorder of deeds. If the net proceeds held by the trustee for unknown owners are not claimed before the expiration of this ten-year period, then they should be paid by the trustee to the state where the land is located for its general use or for some special use, such as education. Of course, any unknown owners would be barred from making any claim to the net proceeds after the expiration of the ten-year period.

Likewise, whenever an owner of an undivided interest that was created prior to the effective date of the proposed statute dies intestate after its effective date, his personal representative, in connection with the administration of his estate, would have the right and the duty to petition for the sale of the entire title to the land, whether an individual or the state owned the undivided equitable interest.<sup>126</sup> With personal

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<sup>124</sup> Statutes that authorized the sale of land in partition actions when division of the land among the common owners would not be to their advantage have been held constitutional though applicable to co-ownership of land which arose prior to the enactment of the statute. *Richardson v. Monson*, 23 Conn. 94 (1854). SCURLOCK, *RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND* 332 (1953). "The right to partition is remedial rather than vested. Remedial rights may be modified, altered or entirely extinguished by legislative enactment even though they be retroactive in character and operation." *Hatch v. Tipton*, 131 Ohio St. 364, 367, 2 N.E.2d 875, 876 (1936).

<sup>125</sup> "The generally accepted test of whether a partition in kind would result in great prejudice to the owners, is whether the value of the share of each in case of a partition, would be materially less than his share of the money equivalent that could probably be obtained for the whole." *Kluthe v. Hammerquist*, 45 S.D. 476, 479, 188 N.W. 749, 750 (1922).

<sup>126</sup> Cf. "When the interest of a decedent or ward in real estate is fractional and undivided . . . the executor, administrator, or guardian, or the owner of any other frac-

representatives and individuals as owners of undivided interests petitioning for the sale of land held by common owners, within a generation, most of the titles that were fragmented at the adoption of the proposed statute will no longer be so.

In addition to the rights previously stated with respect to joint tenancies in existence at the adoption of the proposed statute, each joint tenant should have the power to destroy the incident of survivorship by recording a signed statement to this effect, by an inter vivos conveyance, or by specifically devising his undivided interest.<sup>127</sup>

## VI

### CONCLUSION

The proposed statutory changes with respect to common ownership are intended for adoption in each state. Of course, if a state does not recognize joint tenancy or tenancy by the entirety, then the proposed changes would have to be modified to meet the particular situation. With the substantial movement of the population from state to state, however, particularly toward the southern and western states,<sup>128</sup> and the increased uniformity of customs through increased communications and travel, there is less and less reason or need to preserve local real property laws. All of the proposed changes are evolutionary in that they are simply the application of a statutory trust to a situation where the prudent legal draftsman would use an express trust with broad powers of sale in the trustee. Since the proposals relate to the type of trust where management is not the primary objective, the emphasis is upon selling the land as quickly as possible and dividing the net proceeds. The emphasis in partition actions on the sale and not on the dividing of

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tional interest, or any lien holder may, by pleading filed in the cause setting forth all interests in the property and liens thereon, require that the action include the entire interest in the property, and the owner of said interests and liens shall receive his respective share of the proceeds of sale after payment has been made of the expenses of sale. . . ." OHIO REV. CODE § 2127.08 (Anderson 1953). "The statute [OHIO REV. CODE § 2127.08] not being destructive of vested property rights but merely modifying remedial rights is constitutional." *Hatch v. Tipton*, 131 Ohio St. 364, 368, 2 N.E.2d 875, 877 (1936).

<sup>127</sup> A statute authorizing the destruction of the incident of survivorship with respect to joint tenancies, whether created before or after the enactment of the statute, by the recording of a signed written declaration or by a devise should be constitutional because the incident of survivorship could always be destroyed by an inter vivos conveyance. See, SCURLOCK, *op. cit. supra* note 124, at 311-24.

<sup>128</sup> Newsweek, Dec. 14, 1959, pp. 48-49.

the land is consistent with the fairly common practice of selling land in partition actions instead of partitioning it.<sup>129</sup>

No effort has been made to suggest specific statutory language to bring about the proposed changes. If the general statutory proposals are approved, specific statutory language can then be prepared for consideration by the proper authorities. Of course, the suggestion of certain statutory changes with respect to common ownership in no way indicates that other changes in real property law are not needed.

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<sup>129</sup> "As a practical matter the modern practice is to decree a sale in partition actions in the great majority of cases, which usually involved single parcels of improved property incapable of actual partition." 2 *AMERICAN LAW OF PROPERTY* 114 (1952). "It is the author's considered judgment, unsupported by any actual statistical data, but amply supported by nearly forty years of practice, that division in kind has become actually infrequent of occurrence. Lip service is still given to the historical preference for physical division of the affected land, but sale normally is the product of a partition proceeding, either because the parties all wish it or because courts are easily convinced that sale is necessary for the fair treatment of the parties." 4 *POWELL, op. cit. supra* note 66, at § 612 (1954).