

Land ownership in America presently is founded on colors of title, and though people believe they are the complete and total owners of their property; under a color of title system this is far from the truth. When people state that they are free and own their land, they in fact own it exactly to the extent the English barons owned their land in Common-Law England. They own their land so long as some "sovereign", the government or a creditor, states that they can own their land. If one recalls from the beginning of this memorandum, it was stated that if the King felt it justified, he could take the land from one person and give such land to another prospective baron⁰. Today, in American color-of-title property law, if the landowner does not pay income tax, estate tax, property tax, mortgages or even a security note on personal property, then the "sovereign", the government or the creditor, can justify the taking of the property and the sale of that same property to another prospective "baron", while leaving the owner with only limited defenses to such actions. The only real difference between this and Common-Law England is that now others besides the King can profit from the unwillingness or inability of the "landowner" to perform the socage or tenure required of every landowner of America. As such, no one is completely safe or protected on his property; no one can afford to make one mistake or the consequences will be forfeiture of the property. If this were what the people in the mid 1700's wanted, there would have been no need to have an American Revolution, since taxes were secondary to having a sound monetary system and complete ownership

of the land. Why fight a Revolutionary War to escape sovereign control and virtual dictatorship over the land, when in the 1990's these exact problems are prevalent with this one exception, money now changes hands in order to give validity to the eventual and continuous takeover of the property between the parties. This is hardly what the forefathers strove for when creating the United States Constitution, and what they did strive for is the next segment of the memorandum of law, allodial ownership of the land via the land patent. The next segment will analyze the history of this type of title so that the patent can be properly understood, making it possible to comprehend the patent's true role in property law today.

SECTION III

LAND PATENTS AND WHY THEY WERE CREATED

As was seen in the previous sections, there is little to protect the landowner who holds title in the chain of title, when distressful economic or weather condition make it impossible to perform on the debt. Under the color-of-title system, the property, "one of those inalienable rights", can be taken for the nonperformance on loan obligations. This type of ownership is similar to the feudal ownership found in the Middle Ages.

Upon defeating the English in 1066 A.D., William the Conqueror pursuant to his 52nd and 58th laws, "...effectually

reduced the lands of England to feuds, which were declared to be inheritable and from that time the maxim prevailed there that all lands in England are held from the King, and that all proceeded from his bounty." I. E. Washburn, Treatise on The American Law of Real Property, Section 65, p.44 (6th ed. 1902). All lands in Europe, prior to the creation of the feudal system in France and Germany, were allodial. Most of these lands were voluntarily changed to feudal lands as protection from the neighboring barons or chieftains. Id. Section 56, at 40. Since no documents protected one's freedom over his land, once the lands were pledged for protection, the lands were lost forever. This was not the case in England.

England never voluntarily relinquished its land to William I. In fact, were it not for a tactical error by King Harold II's men in the Battle of Hastings, England might never have become feudal. A large proportion of the Saxon lands prior to the Conquest of A.D. 1066 "were held as allodial, that is, by an absolute ownership, without recognizing any superior to whom any duty was due on account thereof." Id. Section 54, at 39. The mode of conveying these allodial lands was most commonly done by a writing or charter, called a land-boc, or land allodial charter, which, for safekeeping between conveyances, was generally deposited in the monasteries. Id., Section 54, at 40. In fact, one portion of England, the County of Kent, was allowed to retain this form of land ownership while the rest of England

27

became feudal. Id., Section 55, at 40. Therefore, when William I established feudalism in England to maintain control over his barons, such control created animosity over the next 2 centuries. F.L. Ganshof, Feudalism, p. 114 (1964). As a result of such dictatorial control, some 25 barons joined forces to exert pressure on the then ruling monarch, King John, to gain some rights not all of which the common man would possess. The result of this pressure at Runnymede became known as the Magna Carta.

The Magna Carta was the basis of modern common law, the common law being a series of judicial decisions and royal decrees interpreting and following that document. The Magna Carta protected the basic rights, the rights that gave all people more freedom and power. The rights that would slowly erode the king's power.

Among these rights was a particular section dealing with ownership of the land. The barons still recognized the king as the lord paramount, but the barons wanted some of the rights their ancestors had prior to A.D. 1066. F. Goodwin, Treatise on The Law of Real Property, Ch. 1, p.3 (1905). Under this theory, the barons would have several rights and powers over the land, as the visible owners, that had not existed in England for 150 years. The particular section of most importance was Section 62 giving the most powerful barons letters of patent, raising their land ownership close to the level found in the County of Kent.

28

Other sections, i.e., 10, 11, 26, 27, 37, 43, 52, 56, 57, and 61 were written to protect the right to "own" property, to illustrate how debts affected this right to own property, and to

secure the return of property that was unjustly taken. All these paragraphs were written with the single goal of protecting the landowner" and helping him retain possession of his land, acquired in the service of the King, from unjust seizures or improper debts. The barons attempted these goals with the intention of securing property to pass to their heirs.

Unfortunately, goals are often not attained. Having repledged their loyalty to King John, the barons quickly disbanded their armies. King John died in 1216, one year after signing the Magna Carta, and the new king did not wish to grant such privileges found in that document. Finally, the barons who forced the signing of the Magna Carta died, and with them went the driving force that created this great charter. The Magna Carta may have still been alive, but the new kings had no armies at their door forcing them to follow policies, and the charter was to a great extent forced to lie dormant. The barons who received the letters of patent, as well as other landholders perhaps should have enforced their rights, but their heirs were not in a position to do so and eventually the rights contained in the charter were forgotten. Increasingly until the mid-1600's, the king's power waxed, abruptly ending with the execution of Charles I in 1649. By then however, the original intent of the

29

Magna Carta was in part lost and the descendants of the original barons never required, properly protected, free land ownership. To this day, the freehold lands in England are still held to a great extent upon the feudal tenures. See supra Washburn, Section 80, p. 48. This lack of complete ownership in the land, as well as the most publicized search for religious freedom, drove the more adventurous Europeans to the Americas to be away from these restrictions.

The American colonists however soon adopted many of the same land concepts used in the old world. The kings of Europe had the authority to still exert influence, and the American version of barons sought to retain large tracts of land. As an example, the first patent granted in New York went to Killian Van Rensselaer dated in 1630 and confirmed in 1685 and 1704. A. Getman, Title to Real Property, Principles and Sources of Titles-Compensation For Lands and Waters, Part III, Ch. 17, p. 229 (1921). The colonial charters of these American colonies, granted by the king of England, had references to the lands in the County of Kent, effectively denying the more barbaric aspects of feudalism from ever entering the continent, but feudalism with its tenures did

exist for some time. See supra Washburn, Section 55, p. 40. "[I]t may be said that, at an early date, feudal tenures existed in this country to a limited extent." C. Tiedeman, An Elementary Treatise on the American Law of Real Property, Ch. II. The Principles of the Feudal System, Section 25, p.22 (2nd ed. 1892).

30

The result was a newly created form of feudal land ownership in America. As such, the feudal barons in the colonies could dictate who farmed their land, how their land was to be divided, and to a certain extent to whom the land should pass. But, just as the original barons discovered, this power was premised in part of the performance of duties for the king. Upon the failure of performance, the king could order the grant revoked and grant the land to another willing to acquiesce to the king's authority. This authority, however, was premised on the belief that people, recently arrived and relatively independent, would follow the authority of a king based 3000 miles away. Such a premise was ill founded. The colonists came to America to avoid taxation without representation, to avoid persecution of religious freedom, and to acquire a small tract of land that could be owned completely. When the colonists were forced to pay taxes and were required to allow their homes to be occupied by soldiers; they revolted, fighting the British, and declaring their Declaration of Independence.

The Supreme Court of the United States reflected on this independence, in Chisholm v Georgia, 2 Dall. (U.S.) 419 (1793), stating: the revolution, or rather the Declaration of Independence, found the people already united for general purposes, and at the same time, providing for their more domestic concerns, by state conventions, and other temporary arrangements. From the crown of Great Britain, the sovereignty of their country

31

passed to the people of it; and it was then not an uncommon opinion, that the unappropriated lands, which belonged to that crown, passed, not to the people of the colony or states within those limits they were situated, but to the whole people;..."We, the people of the United States, do ordain and establish this constitution." Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a constitution by which it was their will, that the state governments, should be bound, and to which the state constitutions should be made to conform. It will be sufficient to observe briefly, that the sovereignties in Europe, and particularly in England, exist on feudal principles. That system

considers the prince as the sovereign, and the people his subjects; it regards his person as the object of allegiance, and excludes the idea of his being on an equal footing with a subject, either in a court of justice or elsewhere. That system contemplates him as being the fountain of honor and authority; and from his grace and grant, derives all franchises, immunities and privileges; it is easy to perceive, that such a sovereign could not be amenable to a court of justice, or subjected to judicial control and actual constraint. The same feudal ideas run through all their jurisprudence, and constantly remind us of the distinction between the prince and the subject. No such ideas obtain here; at the revolution, the sovereignty devolved on the people; and they are truly the sovereigns of the country, but they are sovereigns without subjects and have none to govern