CONSTRUCTIVE ADVERSE POSSESSION OF ALLODIAL TITLE: MERE COLOUR OF TITLE?

Gary Lilienthal, LL.B. (Sydney University, Australia), Grad. Dip. Legal Pract. (College of Law, Sydney, Australia), M.Psychoanalytic Studies (Deakin University, Australia), Ph.D., (Curtin University, Australia).
Associate Professor of Law, Symbiosis Law School, Symbiosis International University, Pune, India.
Email: glilienthal@me.com

and

Nehaluddin Ahmad, MA, LL.B., LL.M. (Lucknow University, India), LL.M. (Strathclyde University, UK), LL.D. (Meerut University, India).
Professor, Faculty of Law, Sultan Sharif Ali Islamic University, Brunei
Email: ahmadnehal@yahoo.com

Abstract. The objective of this research is to analyse critically the British colonial understanding of allodial title. Its significance is its substantive grounding in prior Yale, Harvard, and other highly authoritative research, however with entirely new syntheses. Noy stated the rule that any custom should not be construed so as to allow a person to do a wrongful act. Thus, importing a legal maxim such as the bases for English land title into a foreign country by force, as a wrongful act, could well have been a nullity. The research question is whether a colonial regime could ever lawfully seize the lands of prior undocumented owners, capriciously and without natural justice and procedural fairness, based on imported legal maxims. Argument tries to show that colonisers' claims never exceeded the status of defective applications by way of colour of allodial title. The research will show that the entire English colonial system of land law was grounded in a system of foreign customary doctrines. Further, introducing a foreign custom to a new land would always fail for lack of the kind of prescription set out by Noy. Torrens title was an attempt to cure defects in customary title that had subsisted only in England since ancient Anglo-Saxon times. The real prospect of mal-administration of the register would make the objects of Torrens title difficult to achieve. In Australia, the crown had tried to introduce English custom in Australia as local law, but they did it by committing serious wrongs. This would nullify introduction of their legal maxims into Australia. Their claims to acquisition of allodial title to Australian lands would thus be sufficiently defective to reduce their holdings to mere colour of title. Their mala fides in their attempts at land acquisition would defeat any claim to convert their colour of title into a successful claim for adverse possession.

Keywords: allodial title, custom, legal maxim, colour of title, Torrens title, mala fides, adverse possession.

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Introduction

The objective of this research is to analyse critically the English colonial understanding of the bundle of rights comprising allodial title,[1] by reference to the machinations of the North American post-revolution States' in their various attempts to rid themselves of feudal tenure and successfully declare their lands allodial. Its significance is its substantive grounding in prior Yale, Harvard, and other highly authoritative research, as close to the subject time periods as possible, however with entirely new syntheses.

To begin to state the problem, just as in other countries such as Canada, the United States and Australia, Aboriginal land rights had been a seminal issue in the Philippines, where they endured the rigors of the two colonial regimes of Spain and the United States. The Philippines colonial land-grab problem could be traced back to the customary legal fiction known as the "Regalian doctrine", by which any private title to land had to be traced back to some grant, either express or implied, from the Crown of Spain.[2] This sounded to have the same effect as the English feudal legal maxim *nulle terre sans seigneur*, meaning there can be no land without a lord.[3]

In this respect, Noy defined custom as a second or underlying law, which could be either of the following two kinds. The first was general customs, in use throughout the realm, called maxims. The second was particular customs used in some certain county, city, town or lordship. He added that every maxim was a sufficient authority in itself, and only the courts could finally determine what operated as a maxim. This was because maxims were known only to the learned. He stated that a maxim should be construed strictly. However, a particular custom should be pleaded and tried by twelve men, unless it was a record in some court. He also stated that Cr Jac 80 was authority for the rule that any custom should not be construed so as to allow a person to do a wrongful act, and the rules for the requirements of a good custom could be found at Co Lit 110, 113b, 1 Bl Com. 77,

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[1] JC Gray, *Rule Against Perpetuities*, 3rd edn, Little Brown, Boston, 1915, p. 17, note 1; RL Fowler, *History of the law of real property in New York; an essay introductory to the study of the N.Y. revised*

[2] J Prill-Brett, 'Indigenous Land Rights and Legal Pluralism among Philippine Highlanders', *Law & Society Review*, vol. 28, no. 3, 1994, pp. 687-698, p. 691.

[3] The legal maxim was "there is no land in England without its lord": *nulle terre sans seigneur*, G-A Guyot, *Institutes Feodales, ou Manuel des Fiefs et Censives, at Droits en Dependans*, Saugrain, Paris, 1753, p. 28.

Dav 31 B.[4] Thus, importing a legal maxim into a foreign country by force, as a wrongful or criminal act, could well have been a legal nullity. In the Philippines, some impartial local court would need to have determined whether the Spanish maxim, embedded in Spanish local custom, operated in the Philippines.

In 1521, Ferdinand Magellan invoked the Regalian doctrine and claimed the Philippines for the Spanish crown. He did this by planting a cross on only one of the thousands of islands now comprising the nation-state of the Philippines. According to the Regalian legal fiction apparently transmigrated by this public cross-planting ceremony, all archipelago lands thereafter belonged to the Spanish crown.[5] This appeared to have the same effect as the British flag-planting ceremony at Farm Cove in Sydney in or about 1788, whereby all Australian lands were claimed capriciously as British, even although British colonisers had not yet mapped the continent, or even seen then explored the land's interior.

Since the Spaniards could never subjugate the Philippino Cordillera hill people, the Cordillera aboriginal land rights were hardly affected, except where Christian churches were built, symbolically traced back to the fiction inherent in Magellan's earlier cross planting ritual. This was arguably cognate to the specious use of the international law doctrine of terra nullius in Australia, a doctrine whose relevance in Australia is now thoroughly abrogated by the High Court of Australia in its Mabo decision.[6] While claiming the Australian lands through the doctrine of terra nullius, British soldiers were killing these "non-existent" Australian Aboriginal people on Australian soil.

However, most Philippine native groups in the hills controlled their lands until the time of the Philippine Republic.[7] Similarly, in Australia, many native warriors withdrew from immediate conflict with the colonising British, and were never subjugated.[8]

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[4] W Noy, *The Grounds and Maxims and also an Analysis of the English Laws*, Riley, Middletown, 1808, pp. 39-41.
[5] The Spanish crown owned some land only on paper, for several indigenous groups were never subjugated by Spain and were still in actual control of their lands; some still control their lands today (e.g., in the central Cordillera) but are now being threatened by state laws like P.D. 705.
[6] Mabo and Others v. Queensland (No. 2) (1992) 175 CLR 1 FC 92/014. High Court of Australia. The High Court held that the Australian land title system was based on socage.
[7] J Prill-Brett, 'Indigenous Land Rights and Legal Pluralism among Philippine Highlanders', *Law & Society Review*, vol. 28, no. 3, 1994, pp. 687-698, p. 691.
[8] *Hunter Valley Quaker Meeting*, submission no. 3535, < http://www.recognise.org.au/wp-content/uploads/shared/uploads/assets/html-report/9.html>, retrieved 7th June 2016.

To continue with our Philippines analogy, because arguably it applies in its own way to the Australian circumstance, in the 1909 Philippines appeal case of Carino v. Insular Government, the United States Supreme Court held that whenever Philippine land was occupied since time immemorial, it was presumed that it never was public land. The Court also held that land held by undocumented native titles was preserved by due process, and also, by the just compensation clauses of the Philippine Bill Act of 1902, holding as follows.

> [E]very presumption is and ought to be against the government in a case like the present.... [W]hen, as far back as testimony and memory goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the way from before the Spanish conquest, and never to have been public land.[9]

In this 1909 Supreme Court of the United States decision, Mr. Justice Holmes up-ended the Regalian doctrine by confirming the appellant's customary land rights and eschewing capricious administrative acts of land-grabbing. War reparations agreements might have achieved the same outcome.

Thus, assuming the Spanisg Crown was little different to the English Crown, in their vicious overseas encroachments, the question arises as to whether a colonial regime could ever lawfully seize the lands of prior undocumented owners, capriciously and without natural justice and procedural fairness. Throughout this article, we try to show that the colonisers' land claims never exceeded the status of defective applications by way of colour of allodial title.[10] Further, almost no colonial regime now possesses, or ever possessed, a judicature of sufficient impartiality, and free of apprehended bias,[11] to judge these kinds of cases. They were essentially disputes between two sovereignties inter se. Thus, and for this specific reason, rather than accepting a mere analysis of the current state of the positive law, this article adopts as its methodology a meta-legal critical inquiry, synthesising meta-law from all the available, contemporary, and most authoritative arguments. In this way, the article can propose synthesised new law. To clarify the difficulties with post-colonial land title systems, the article's argument critically examines what happened in post revolution American States, as they tried

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[9] Carino v. Insular Government, 460.

[10] Colour of title apparently has all the requirements of title. However because of some patent defect, it will not convey lawful title. Wright v. Mattison, 18 Iow. 56; Hall v. Law, 102 U. S. 466; Walls v. Smith, 19 Ga. 8; Veal v. Robinson, 70 Id. 809.

[11] GI Lilienthal & N Ahmad, 'Australian Aboriginal Human Rights and Apprehended Bias: Skirting Magna Carta Protections', *Denning Law Journal*, vol. 27, no. 1, 2015, pp. 552-565.

unsuccessfully to extinguish tenure and start again by declaring allodial title. It relates these attempts with defects in the contemporary system of Torrens title.

The paper is structured to begin with a section on the Anglo-Saxon period of English real property law, in order to identify defects in transfer of title of the various kinds of customary systems of land holdings in those ancient times. These defects suggested a brief critical analysis of the concept of color of title, followed by a section critically examining the doctrine of constructive possession under colour of title. Subsequently, a short section on defects in Torrens title will suggest that this kind of government registry title could never create any more than colour of title. This will be demonstrated in the two following sections, namely the quest for tenure in the United States, and American attempts to create allodial title, in which argument shows the near impossibility of several colonial post-revolution regimes attaining a level of allodial title to their lands by legislative manoevre. Finally, the paper draws conclusions and works through new syntheses.

The research will show that the entire English colonial system of land law was grounded in customary doctrines, foreign to Australia. Further, introducing a foreign custom to a new land would always fail when lacking the kind of prescription set out by Noy. Torrens title was arguably an attempt to cure defects in customary styles of land title that had subsisted only in England, not Australia, since ancient Anglo-Saxon times. The real prospect of mal-administration of the register would make the stated objects of Torrens title difficult to achieve. In Australia, the crown had tried to introduce the English customs of common law into Australia as local law, but they did it by committing egregious wrongs on the population. This would nullify introduction of their legal underlying substantive legal maxims into Australia. Their claims to acquisition of allodial title to Australian lands would be sufficiently defective to reduce their holdings to mere colour of title. Their mala fides in their capricious attempts at land acquisition, by forced land grabbing, would defeat any claim to convert their colour of title into a successful claim for adverse possession of Aboriginal allodial title.

The Anglo-Saxon Period of English Real Property Law

Ancient forms of land title in Britain appear to have several impediments to free alienation. To characterise private land holdings, there were *bocland* and *folcland*. For bocland, Anglo-Saxon charter books were mainly grant instruments of significant tracts of

land, which kings made to bishops, or to other aristocrats. This meant that alienation of bocland would be subject to the king's agreement to amend the charter book. This grant of land was called "bookland". Lords of bookland could create smaller bookland holdings by forming grants to their dependents. Grants of bookland existed through royal favour, and were unrelated to the customary rule for holding land. Folcland appears to have been a form of unwritten land holding under customary law, suggesting difficulty in alienation. Certain surviving local customs, after the Norman Conquest, suggested that both village consent and family approval were necessary preconditions for sale. Thus, it is uncertain that folcland was alienable at all, even by will.[12] It appears that Anglo-Saxon-era wills were in a form more like today's will than today's deed. However, they were the wills of those great magnates, who could witness kings' charters, arranged for their own wills to be confirmed or witnessed by bishops or kings, and held their own charters.[13] There is no clear evidence that the lands devised in these wills were folcland, or that there was unfettered freedom to alienate by will in Anglo-Saxon times.[14]

After the Norman conquest of 1066, a distinction arose from the new regime's form of feudalism separating real and personal property. Nevertheless, there was no disjunctive division between bocland and folcland, because there were many allodial estates before title deeds had been invented, suggesting opportunities for disagreement as to how to characterise the title. For example, there were other estates conveyed by giving a token such as a horn or a clod of grass. Grants for religious endowments were executed in this way, as land could be conveyed without any writing, while "lawful men of the hundred" were eyewitnesses.[15] "Livery of seisin" may have arisen from this public oral conveyance. It was a Norman designation, a ceremonial conveyance effected by words of gift before witnesses. The conveyor, later known as the feoffor, put into the conveyee's, or feoffee's, hand either a clod of earth or a stick. He said words to the following effect: "I liver this to you in the name of seisin of" the described land "to have and to hold to you and your heirs forever".[16]

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[12] F Pollock, AE Randall & AL Goodhart, *The Law Quarterly Review*, vol. 22, Stevens and Sons, London, 1906, p. 87.
[13] Will, Or Testament, *Encyclopedia Britannica*, 9th edn, vol. 24, <http://www.libraryindex.com/encyclopedia/pages/cpxlclumxh/testament-wills-testator-property.html>, retrieved 27th May 2016.
[14] AHF Lefroy, 'Anglo-Saxon Period of English Law', *The Yale Law Journal*, vol. 26, no. 5, 1917, pp. 388-394, p. 392.
[15] ibid.
[16] RS Deans, *The Student's Legal History*, 3rd edn, Stevens and Sons, London, 1913, p. 6.

According to this preliminary taxonomy, there were three kinds of estates, allodial, folcland and bocland. The allodial proprietor held his land of no lord. He swore no oath of homage. He was said to be free. However, despite this so-called freedom, he was subjected to the *trinoda necessitas*: the duty of building bridges and castles; and, serving as a soldier to defend the community, *pontis et arcis aedificatic et expedition.* The folcland tenants had the *trinoda necessitas*, as well as an extensive liability "to have strangers, messengers, horses, hawks, and hounds quartered on them by government; the duty of entertainment and sustaining the king and his officers and servants on their journeys, and of providing them with carriages and horses, and several others."[17] These *trinoda necessitas*, and the other folcland obligations, would have been of significant value to the king, and thus, alienation would undoubtedly have been subject to his agreement and his terms thereto.

Even before the Norman conquest, either by subinfeudation or by commendation, much of the country's land was in feudal tenure. The old universal allodial tenure was receding to two classes of tenants. The first was only a few great magnates too strong to be removed. The second was a class of land owners too weak to cause trouble.[18] Thus, these two types of freeholder, also called "socmen", existed in Anglo-Saxon times. Their socage rights meant absolute land ownership along with the *trinoda necessitas*. However the Norman kings retained only the name "socage", altering its substantive meaning to the genus of land ownership subject to a lord.[19] This Norman discretionary expansion of socage obligations to the king could only fetter free alienation of land.

In the period right before the Norman conquest, there were also many ground tillers dependent on their lord. They owed their lord rents and services. Many of them, it was said, were personally free men. This land, held of a superior, was named "laenland".[20] The "laen", or loan, of land responded to the demands of the conquering Normans. The *laen* was structured as either a temporary loan or a temporary gift for the duration of one or more lives, often three lives. The grantee might be bound to serve the lord, or pay rent

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[17] W Stubbs, *Select Charters and Other Illustrations of English Constitutional History from the Earliest Times to the Reign of Edward the First*, Clarendon Press, Oxford, 1905, p. 7.
[18] ibid., p. 13; AHF Lefroy, 'Anglo-Saxon Period of English Law', *The Yale Law Journal*, vol. 26, no. 5, 1917, pp. 388-394, p. 393.
[19] RS Deans, *The Student's Legal History*, 3rd edn, Stevens and Sons, London, 1913, p. 5.
[20] F Pollock & FW Maitland, *The History of English Law Before the Time of Edward I*, vol 2, 2nd edn, Cambridge University Press, Cambridge, 1898, p. 61.

or a lump sum to the lord, in return for the land lent to him.[21] The bocland form of title continued for a time after the Norman conquest. It was merged into the feudal tenure system during the twelfth century. Although bookland title appeared very similar to a relationship between feudal superior and inferior long before the Norman conquest, there is little evidence that Anglo-Saxon law was capable of formally memorializing that as a fact,[22] suggesting uncertainty in particularising a land transfer. In the result, arguably most Anglo-Saxon land title transfers contained a defect, and these customary defects must have continued into Norman feudal times.

It is difficult to understand how such customary defects in passing title, embedded as they were in the unique development of English local custom and policy, could ever become any more than a semblance of custom in another jurisdiction across the other side of the world.

Color of Title

Color of title to land ostensibly had all the attributes of title, however because of some defect, it did not convey any lawful title.[23] In the 1864 case of Brooks v. Bruyn,[24] the court said:

> Any instrument having a grantor and grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title to the lands described. Such an instrument purports to be a conveyance of the title, but because it does not, for some reason, have that effect, it passes only color or the semblance of a title. It makes no difference whether the instrument fails to pass an absolute title because the grantor had none to convey, or had no authority in law or in fact to convey one, or whether such want of authority appears on the face of the instrument or aliunde.[25] The instrument fails to pass an absolute title for the reason that the grantor was not possessed of some one or more of these requisites, and therefore it gives the semblance or color only of what its effect would be if they were not wanting.[26]

Claim of title, and color of title, are distinguished from each other. The possession pertaining to colorable title extends to the boundaries of the instrument by which the

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[21] WS Holdsworth, *A History of English Law*, Methuen, London, 1922, p. 60.
[22] F Pollock & FW Maitland, *The History of English Law Before the Time of Edward I*, vol 2, 2nd edn, Cambridge University Press, Cambridge, 1898, pp. 62, 63; AHF Lefroy, 'Anglo-Saxon Period of English Law', *The Yale Law Journal*, vol. 26, no. 5, 1917, pp. 388-394, p. 394.
[23] Wright v. Mattison, 18 Iow. 56; Hall v. Law, 102 U. S. 466; Walls v. Smith, 19 Ga. 8; Veal v. Robinson, 70 Id. 809.
[24] 35 Ill. 392.
[25] Not part of, or derivable from, the document or instrument itself.
[26] 35 Ill. 392; HC Black, 'Color of Title', *The American Law Register*, vol. 35, no. 7, 1887, pp. 409-419, p. 409.

claim is made, absent the true owner's real possession.[27] Possession by someone entering and holding by a mere claim of title is restricted to the land the claimant actually occupies.[28] Thus, a claimant to title without colour to support the claim, possesses no further than the land circumscribed by a *pedis possessio*.[29] If the claimant has colorable title, the actual occupancy of a part of the land claimed is extended constructively to the entire tract described by the instrument, which confers colour.[30] The main purpose of color of title is to confer constructive possession. It always includes claim of title, and the converse would be not true. Adverse possession must, to become actual title, commence under either colour of, or claim to, title.[31]

From the decisions, color of title can exist without any instrument to convey title, provided there is a bona fide title claim as well as a record, a public and notorious act, by which the exact extent of the claim is particularized. Thus, in the 1856 case of McClellan v. Kellogg,[32] Scates CJ held as follows. "Color may be given for title without a deed or writing at all, and commence in trespass; and when founded upon a writing, it is not essential that it should show upon its face a prima facie title, but that it may be good as a foundation for color, however defective".[33]

A written instrument cannot imply color of title unless it says it conveys the title. It must carry either a semblance or the appearance of transferring the legal title. A mere promise to convey will not suffice.[34]

An instrument may confer color of title by disclosing its own invalidity. The claimant's

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[27] To possess is to have absolute power of dealing with the thing oneself and absolute power of excluding the action of everybody else. This condition, so far as actually established, may be a consequence of physical strength, as when the tiger in the zoo guards the raw meat between his paws, or of physical barriers, as when one locks up his valuables against thieves or fortifies a city against an enemy, or of concealment, as when the thing possessed is hidden in order that no one else may deal with it, or of superior agility, as when a dog runs away with a glove, - or it may depend wholly, so far as power to exclude the action of others is concerned, upon a deference to the will of the possessor imposed by habit, the moral sentiment, religion, or law. AS Thayer, 'Possession', *Harvard Law Review*, vol. 18, no. 3, 1905, pp. 196-213, p. 196.

[28] Creekmur v. Creekmur, 75 Va. 430; HC Black, 'Color of Title', *The American Law Register*, vol. 35, no. 7, 1887, pp. 409-419, p. 409.

[29] Actual possession by walking around the property. This is distinct from how this doctrine later applied almost exclusively to mine prospecting and operating disputes.

[30] E Washburn, *A treatise on the American law of real property*, Little Brown, Boston, 1876, vol 3, p. 137.

[31] HC Black, 'Color of Title', *The American Law Register*, vol. 35, no. 7, 1887, pp. 409-419, p. 410.

[32] 17 Ill. 501.

[33] ibid; HC Black, 'Color of Title', *The American Law Register*, vol. 35, no. 7, 1887, pp. 409-419, pp. 410, 411.

[34] Dunlap v. Daugherty, 20 Ill. 404; Rigor v. Frye, 62 Id. 507; Kilburn v. Ritchie, 2 Cal. 145; Osterman v. Baldwin, 6 Wall. 116; King v. Travis, 4 Heyw. 280; HC Black, 'Color of Title', *The American Law Register*, vol. 35, no. 7, 1887, pp. 409-419, p. 411.

good or bad faith may affect the possession. By way of comparison with the old Roman systems, the corpus and the animus of possession are distinguished. The corpus of the possession indicates the fact of occupation. The animus indicates the intention towards ownership. No prescription could imply a complete title unless the claimant possessor intended to claim the thing as his. Thus according to Washburn, in the English law, the intent both to claim and to possess the land is essential to any successful disseisin.[35] Merely going onto the land and remaining there without intending to claim it as his own, would not oust the true owner. This is because intention guides the claimant's entry and generates its character.[36]

According to the ancient Roman law, possession must be founded upon a *justus titulus*.[37] The *titulus* must be *justus*, meaning some event must have taken place, enough to pass property. This event had to be *verus*, meaning the base legal transaction must have been completed in fact. This kind of honest belief must be based on probable error existing from the outset.[38] The claimant's belief in his title must be in error, or he would have no need of prescription. The error must be one that a prudent person might make. In the common law, if the grantee knows the deed conveys no title, it will not confer colour on him.[39] In Davidson v. Coombs, the court held "In order that a claimant be entitled to a presumptive occupancy to the extent of the claimed boundary, he must enter and occupy under the belief that his title is good".[40]

The rule was the conclusion reached by Lumpkin J, in the 1851 case of Beverly v.

[35] The privation of seisin. It takes the seisin or estate from one man and places it in another. It is an ouster of the rightful owner from the seisin or estate in the land, and the coinmencement of a new estate in the wrong doer. It may be by abatement, intrusion, discontinuance, or deforcement, as well as by disseisin, properly so called. Every dispossession is not a disseisin. A disseisin, properly so called, requires an ouster of the freehold. A disseisin at election is not a disseisin in fact but by admission only of the injured party, for the purpose of trying his right in a real action. Disseisin may be effected either in corporeal inheritances, or incorporeal. Disseisin of things corporeal, as of houses, lands, etc., must be by entry and actual dispossession of the freehold; e.g., if a man enters, by force or fraud, into the house of another, and turns, or at least, keeps him or his servants out of possession. Disseisin of incorporeal hereditaments cannot be an actual dispossession, for the subject itself is neither capable of actual bodily possession nor dispossession. Lectric Law Library, <http://www.lectlaw.com/def/d181.htm>, retrieved 5th June 2016.

[36] E Washburn, *A treatise on the American law of real property*, Little Brown, Boston, 1876 , vol 3, p. 139.

[37] justus titulus is a fact which implies, in acquisitions by a derivative mode, the reciprocal intention of alienating and of acquiring ownership, or, in acquisitions by an original mode, the lawful intention to acquire. F Bernard, *The First Year of Roman Law*, Oxford University Press, New York, 1906, p. 221.

[38] FJ Tomkins & HD Jencken, *A Compendium of the Modern Roman Law founded upon the treatises of Puchta, Von Vangerow, Arndts, Franz Moehler, and the Corpus Juris Civilis*, Butterworths, London, 1870, p. 160; F Mackeldey, *Handbook of the Roman Law*, vols 1-2, T & JW Johnson, Philadelphia, 1883, §289; 1. 11 Dig. 41-4; 1. 5, §1, Dig. 41, 10; HC Black, 'Color of Title', *The American Law Register*, vol. 35, no. 7, 1887, pp. 409-419, p. 418.

[39] Waterhouse v. Martin, Peck. 392; Saxton v. Hunt, 20 N. J. L. 487; Moody v. Fleming, 4 Ga. 115.

[40] Davidson v. Coombs (Ct. of App. Ky.) 18 Reporter 15; Nieto v. Carpenter, 21 Cal. 455.

Burke,[41] holding as follows. "Color of title may be defined to be a writing, upon its face professing to pass title, but which does not do it, either from want of title in the person making it, or from the defective conveyance that is used - a title that is imperfect, but not so obviously that it would be apparent to one not skilled in the law".[42]

Thus, if British colonial settlers in Australia produced documents or confirmatory ceremonies setting out their radical, or allodial, title to Australian land, the transfer would be defective because, first, of the imaginary nature of the organic dialectic development of British lordship in Australia, and second, because the documents and ceremonies would be persuasive to Australian Aborigines unskilled in English law. These transfers would give the British no more than colour of title, not allodial title.

Constructive Possession under Colour of Title

Acquiring real property by adverse holding generally is limited to the *pedis possessio*, indicating the claimant's actual occupation.[43] However, adverse possession is sometimes applied to unoccupied lands, held under colour of title. This constructive possession was developed in the United States and Canada, to be used to satisfy the needs of apparently unsettled regions.[44] England had severely limited this doctrine, so that in the 1909 English decision in Glynn v. Howell,[45] the court declared that constructive possession was to be inferred only to give effect to a contractual obligation.[46]

Constructive adverse possession is constituted by several widely agreed attributes. First, there must be colour of title,[47] with some instrument required.[48] Decisions allowing colour of title without a written instrument are actually holdings on sufficient actual possession.[49] The writing must accurately particularise the property and have the purpose of conveying title.[50] Second, there must be a claim of ownership in addition to colour of title, with the instrument purporting to convey a fee.[51]

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[41] 9 Ga. 443.
[42] HC Black, 'Color of Title', *The American Law Register*, vol. 35, no. 7, 1887, pp. 409-419, p. 419.
[43] Norris v. Ile, 152 Ill. 190.
[44] Simpson v. Downing, 23 Wend. (N. Y.) 315; McKinnon v. McDonald, 13 Grant Ch. (N. C.) I52.
[45] 100 L. T. R. 324 (Ch. Div., May 1, 1909).
[46] ibid.
[47] (Ch. Div., May I, I909). 4 Wright v. Mattison, I8 How. (U. S.) 50.
[48] Allen v. Mansfield, Io8 Mo. 343.
[49] Hodges v. Eddy, 38 Vt. 327; Allen v. Holton, 20 Pick. (Mass.) 458.
[50] Humphries v. Huffman, 33 Oh. 395; Deffback v. Hawke, II5 U. S. 392.
[51] Bakewell v. McKee, 101 Mo. 337; Dewey v. McLain, 7 Kan. 126.

Third, there must be actual possession of a part of the land suggesting a further claim, to give both notice of the adverse claim and a ground for a possessory action.[52] Thus, it is insufficient that actual possession is only of the claimant's land.[53] Any conclusive alienation of the *pedis possessio* is fatal to the claim.[54] Fourth, the claimant must honestly believe in his title's validity.[55] Fraud in securing the colour of title constitutes mala fides.[56] The legal fiction of constructive adverse possession might be justified only when the disseisee had notice of the full extent of the claim. If evidence of the colour of title is at hand to the true owner, he is taken to have notice of the claim's extent.[57]

The legal fiction of constructive adverse possession was controversial among the British jurisdictions, and thus, was not settled. In Australia, constructive adverse possession depended on the colonisers' ability to particularise the lands, at a time when they had never seen the interior of the country. Their adverse possession could not possibly be constructed to cover the entire unseen continent.

Defects in Torrens Title

A former Premier of the British Colony of South Australia noted the ease with which title to ships was administered in the ships registries. He designed an administrative land titles system based on ships registries, with the public rhetorical promise of ease of indefeasibility, and simplicity in transfer. He reasoned that a government department could guarantee what title insurance could not. Torrens title became universal in Australia, and several other British colonies such as Malaysia. Nineteen states of the United States of America introduced it, but ultimately, most repealed it.

Those advocating the former California Torrens Title system argued most strongly that Torrens title was conclusive. A large proportion of California cases under the Torrens Act had disproved this commonly adopted notion.[58] In the 1923 case of Petition of Furness,[59]

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[52] Bailey v. Carleton, 12 N. H. 9; Steedman v. Hilliard, 3 Rich. (S. C.) 101.
[53] ibid; 'Constructive Possession under Color of Title', *Harvard Law Review*, vol. 23, no. 1, 1909, pp. 56-57, p. 56.
[54] Cunningham v. Frandtzen, 26 Tex. 34.
[55] Godfrey v. Dixon, 228 Ill. 487; Smith v. Young, 89 Ia. 338. Contra: Humbert v. Trinity Church, 24 Wend. (N. Y.) 587; Roe v. Tenn. Ry. Co., 50 So. 230 (Ala.).
[56] Foulke v. Bond, 41 N. J. L. 527, 54I.
[57] Bailey v. Carleton, supra.
[58] In addition to the cases discussed in this note, the following cases have arisen under the act in California: In re Scott (1916) 172 Cal. 363, 156 Pac. 872, (1920) 182 Cal. 83, 187 Pac. 9; Hindle v. Warden (1920) 50 Cal. App.356, 195 Pac. 428; Hayes v. Handley (1920) 182 Cal. 273, 187 Pac. 952, Fry v. Title Insurance & Trust Co. (1921) 187 Cal. 168, 201 Pac. 115 Stewart v. Logan (1921) 185 Cal. 435, 197 Pac. 55; In re

the owner of a parcel of land applied for Torrens Act registration, and the court decreed the title be certified. However, the description of the land in the court's decree did not correlate with the application's description, as it included some land belonging to a neighbour. On appeal, the decree was held to be void, and subject to collateral attack. The adjoining owner could have the decree set aside, in a collateral proceeding.[60]

Thus, an original court decree certifying title could be attacked. Title might be subject to post-registration encumbrances, not appearing on the record. In both cases, the defect might not be discoverable when examining the register. If the title was defective at registration, a court decree could often cure the defect. Otherwise, the title would be defective and the decree could be impeached by direct or collateral attack

For example, the California code states that if a civil action summons is not properly served, the defendant might appear and answer, to set it aside, within one year of the judgment.[61] The appellate court has held this applies also to Torrens proceedings, and that therefore a Torrens decree is subject to direct attack by a defendant not properly served, at any time within one year.[62] The court decree might also be appealed just like any other civil action judgment.[63]

Similarly, a Torrens Title decree is also just as susceptible to collateral attack as is any ordinary judgment. For example, a defrauded person has the same remedies available as at common law.[64] If he was a party to the proceeding he might not attack the decree collaterally. If he was neither a party nor a privy, the decree is void in respect of him.[65] Torrens decrees cannot be collaterally attacked in cases of mistake.[66]

A decree certifying Torrens Title may be attacked collaterally, when statutorily required notice is absent. Thus, if in the original proceeding, notice is defective on the person in

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Green (1922) 37 Cal. App. Dec. 118; Mapel v. Canady (1922) 64 Cal. Dec. 152, 208 Pac. 280, Frances Investment Co. v. Superior Court (1922) 63 Cal. Dec. 682, 208 Pac. 105 Title Guarantee & Trust Co. v. Griset (1922) 64 Cal. Dec. 157, 208 Pac. 673- In re Cox (1923) 41 Cal. App. Dec. 717

[59] 6 (July 3, 1923) 41 Cal. App. Dec. 561, 218 Pac. 61.

[60] ibid; TRM, 'Property: Registration of Land Titles: Inconclusiveness of a Torrens Title', *California Law Review*, vol. 12, no. 1, 1923, pp. 49-53, p. 49.

[61] Cal. Code Civ. Proc. § 473.

[62] Beggs v. Riordan (1919) 44 Cal. App. 230 186 Pac. 187.

[63] Land Title Law, § 15 Cal. Stats. 1915, p. 1936.

[64] ibid., § 106, Cal. Stats. 191S, p. 1950, Cooper v. Buxton (1921) 186 Cal. 330, 199 Pac. 6 (dictum); In re Sackett (1921) S3 Cal. App. S92, 200 Pac. 742 (dictum).

[65] Freeman on Judgments, § 336; Black on Judgments, §§ 290, 293.

[66] Cooper v. Buxton, supra, n. 10; In re Sackett, supra, n. 10; TRM, 'Property: Registration of Land Titles: Inconclusiveness of a Torrens Title', *California Law Review*, vol. 12, no. 1, 1923, pp. 49-53, p. 50.

actual occupation and in enjoyment of an easement, this person is not bound by the court's decree. He might assert the easement against a bona fide purchaser of the registered Torrens title.[67]

Finally, Torrens Title transfers are subject to just as much mal-administration as in any other government department. The most serious defect in Australian Torrens title is the possibility of mal-administration. As the Australian lands were seized by committing the local crimes of murder and genocide, and, as no custom could be constructed to allow the commission of a wrong, the claimed transfers of title were pursuant to an absence of natural justice and procedural fairness. They are arguably a nullity.

The Quest for Tenure in the United States

Vance observed that there was no question there was land tenure in colonial lands, noting that tenure subsisted even after the statute of 12 Car. II, c. 24.[68] However, none of the familiar symbols of English land tenure seemed to subsist. There was no homage, swearing oaths of fealty, reliefs, rent service or distress in case of grants in fee, or escheat to the original grantor. This did not derogate from the feudal origin of escheat, as the state succeeded the Federal Government as chief lord of the fee, in the same way as the state of Texas succeeded the Government of Mexico when it declared independence.[69]

Gray thought it improbable that such a fundamental change in property theory as abolishing tenure could be the result of a change in political sovereignty.[70] Kales was of the same view.[71] Many of the North American states used their new independence to abolish all feudal tenures by legislation declaring all lands were allodial.[72] Other states, apparently recognizing the subsistence of tenure, declared that all future land tenure

[67] Follette v. Pacific Light & Power Corp (1922) 64 Cal. Dec. 7, 208 Pac. 295.
[68] 12 Car. II, c. 24; WR Vance, 'The Quest for Tenure in the United States', *The Yale Law Journal*, vol. 33, no. 3, 1924, pp. 248-271, p. 248.
[69] Etheridge v. Doe (1851) 18 Ala. 565; Crane v. Reeder (1870) 21 Mich. 24; JG Woerner, *A Treatise on the American law of Administration (including Wills)*, vol 1, Little Brown, New York, 1923, p. 459; Hamilton v. Brown (1895) 161 U. S. 256, 263; WR Vance, 'The Quest for Tenure in the United States', *The Yale Law Journal*, vol. 33, no. 3, 1924, pp. 248-271, p. 248.
[70] JC Gray, *Rule Against Perpetuities*, 3rd edn, Little Brown, Boston, 1915, sec 22. Professor Kales was of the same opinion.
[71] AM Kales, *Conditional and Future Interests and Illegal Conditions and Restraints in Illinois*, 1920, Reprinted by Cornell University Library, New York, 2009, p. 9.
[72] Connecticut, Act of I793, (Rev. Sts. 1821, tit. 56, ch. 1, sec 1); Conn. Gen. Sts. 1918, sec 5080; Virginia Sts. 1779, ch. 13; WW Hening, *The Statutes at Large being a Collection of all the Laws of Virginia*, vol 10, Cochran, Richmond, 1821, chap 13, sec 6.

would be allodial.[73] This expression has raised many concerns in some writers,[74] thinking that the term "allodium" was the negative of "feud", and thus, also of tenure.[75] The 1861 Georgia Code define allodial tenure as follows.

> Allodial Tenure. The tenure by which all realty is held in this state is under the state or original owner; it is without service of any kind, and limited only by the right of eminent domain remaining in the state.[76]

Some eminent writers,[77] and some courts, declared that the statute Quia Emptores' abolition of tenure between grantor and grantee made impossible any such legal right as reverter.[78] Many English and American judges disagreed, holding that it did exist.[79] Most lawyers were of the view, that, it made little practical difference whether tenure subsisted, or not, with Kent saying "The question has now become wholly immaterial in this country, where every real vestige of tenure is annihilated".[80] Blackstone and Lewis disagreed and observed as follows.

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[73] New Jersey, Act of I795, (Rev. Laws, 1821, 166); 2 N. J. Comp. Sts. 1910, Conveyances, sec 9.

[74] JC Gray, *Rule Against Perpetuities*, 3rd edn, Little Brown, Boston, 1915, p. 17, note 1; RL Fowler, *History of the law of real property in New York; an essay introductory to the study of the N.Y. revised statutes*, Baker Voorhis, New York, 1895, p. 80.

[75] WR Vance, 'The Quest for Tenure in the United States', *The Yale Law Journal*, vol. 33, no. 3, 1924, pp. 248-271, p. 249.

[76] Delaware and North Carolina appear never to have legislated on the subject of tenure. An ancient statute of South Carolina, enacted in 1712, declaring all land tenure to be in free and common socage, appears to have remained unnoticed and unrepealed from that date to the present time. Act of Dec. 12, 1712, sec. 5 (Grimke, Public Laws, 1790, at p. 99). It was not until 1861 that a zealous code commission in Georgia thought it desirable to incorporate in the ambitious code adopted in that year the following declaration: Ga. Code, 1861, sec 2200.

[77] JC Gray, *Rule Against Perpetuities*, 3rd edn, Little Brown, Boston, 1915, sec 13, 31-34, 744 *et seq*; AM Kales, *Conditional and Future Interests and Illegal Conditions and Restraints in Illinois*, 1920, Reprinted by Cornell University Library, New York, 2009, sec 13, p. 302; JM Zane, 'Determinable Fees in American Jurisdictions', *Harvard Law Review*, vol. 17, no. 5, 1904, pp. 297-316, pp. 297, 299 et seq; Sweet's note in HW Challis, *The Law of Real Property, Chiefly in Relation to Conveyancing*, 2nd edn, Butterworth, London, 1911, p. 439; WD Edwards, *A Compendium of the Law of Property in Land and of Conveyancing Relating to Such Property*, 5th edn, Sweet & Maxwell, London, 1922, p. 32.

[78] DePeyster v. Michael, (1852) 6 N. Y. 467, p. 505. See also Van Rensselaer v. Dennison, (1866) 35 N.Y. 393, p. 399; Van Rensselaer v. Slingerland (1863) 26 N. Y. 580; Van Rensselaer v. Ball (1859) 19 N. Y. 100; and dictum of Jessel MR, in Collier v. Walters (1873) L. R. I7 Eq. 252, 261.

[79] The cases were reviewed in RRB Powell, 'Determinable Fees', *Columbia Law Review*, vol. 23, no. 3, 1923, pp. 207-234, p. 207. More recent cases holding possibilities of reverter as valid interests are Halpin v. School Dist. No. 9 (1923, Mich.) 194 N. W. I005, and Bristol Baptist Church v. Conn. Baptist Con. (1923) 98 Conn. 677, 120 Atl. 497.

[80] J Kent, *Commentaries on American Law*, vol 4, 9th end, Little Brown, Boston, 1858, Lecture LV, *24. We are justified in inferring that if a case should arise in which the existence of "tenure" vitally affected the parties' rights, no American court would allow historical consistency to lead it on to archaic and unfit results. Wallace v. Harmstad, (1863) 44 Pa. 492; Kavanaugh v. Cohoes Power & Light Corp., (1921, N.Y.) 114 Misc. 5. "Though our property is allodial, yet feudal tenures may be said to exist among us in their consequences and the qualities which they originally imparted to estates". Lyle v. Richards (1823, Pa.) 9 Serg. & R. 322, 333, per Gibson J; Kavanaugh v. Cohoes Power & Light Corp. (1921, N. Y.) 114 Misc. 590; Wallace v. Harmstad (1863) 44 Pa. 492; WR Vance, 'The Quest for Tenure in the United States', *The Yale Law Journal*, vol. 33, no. 3, 1924, pp. 248-271, p. 250.

> In those States in which, by express legislative enactment, lands have not been declared allodial, while tenure exists it is only in theory. . . . Though there are some opinions that tenures fell with the Revolution, yet all agree that they existed before, and the better opinion appears to be that they still exist.[81]

"Tenure" in English law is a subjective concept, and people inherently are disposed to objectifying their concepts. Pollock and Maitland observed the mediaeval mind's "thinglike-ness" of incorporeal property rights.

> To the mediaeval Englishman these rights "are thinglike rights and their thing-likeness is of their very essence.... "The line between the corporeal and incorporeal thing is by no means so clear in mediaeval law as we might have expected it to be."[82]

A 14th century lawyer might well say that the Seigniory lord was seised of the services, specifically because the terre tenant was seised of the land.[83] In this way, the vassal's tenement in land was his relationship, or estate, to the lord and the whole world. This relationship meant the land itself, and the lawyer would say the tenement owed the services,[84] from which came the following observation.

> This, when regarded from the standpoint of modern jurisprudence, is perhaps the most remarkable characteristic of feudalism:-several different persons, in somewhat different senses, may be said to have and to hold the same piece of land." Ibid. "We cannot leave behind us the law of incorporeal things, the most medieval part of medieval law, without a word of admiration for the daring fancy that created it, a fancy that was not afraid of the grotesque.[85]

However, in fact, those possessory interests in land, called corporeal estates, were equivalent in every way to non-possessory interests considered incorporeal, except without body.[86] Huebner opined as follows.

> Nowhere do we find more sharply marked than in the law of things that feature which above all others characterized the Germanic medieval law; namely, the endeavor to give a tangible embodiment to legal relations that actually existed only

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[81] W Blackstone, WD Lewis, *Commentaries on the Laws of England: In Four Books*, Book 2, R Welsh, Philadelphia, 1898, *78.

[82] F Pollock & FW Maitland, *The History of English Law Before the Time of Edward I*, vol 2, 2nd edn, Cambridge University Press, Cambridge, 1898, p. 124 et seq. This is equally true of Germanic Law. R Huebner, *A History of Germanic Private Law*, Little, Brown and Company, Boston, 1818, p. 184.

[83] F Pollock & FW Maitland, *The History of English Law Before the Time of Edward I*, vol 2, 2nd edn, Cambridge University Press, Cambridge, 1898, p. 152. So a thief could be seised of his theft. ibid., p. 160.

[84] F Pollock & FW Maitland, *The History of English Law Before the Time of Edward I*, vol 1, 2nd edn, Cambridge University Press, Cambridge, 1898, p. 237.

[85] F Pollock & FW Maitland, *The History of English Law Before the Time of Edward I*, vol 2, 2nd edn, Cambridge University Press, Cambridge, 1898, p. 149.

[86] WN Hohfeld, *Fundamental Legal Conceptions*, Yale University Press, Newhaven, 1923, p. 29; WD Edwards, *A Compendium of the Law of Property in Land and of Conveyancing Relating to Such Property*, 5th edn, Sweet & Maxwell, London, 1922, p. 1.

in the human mind.[87]

In the medieval lawyer's view, all estates were alike as combinations of legal relations the lord, vassal or villein had with the whole world. A person's goods were simply named as his property, and his land named as his real estate.[88]

It was similarly imagined with "tenures". Littleton looked at tenure as a thing with its own existence, susceptible to extensive and minute classification.[89] Blackstone adopted the same taxonomical procedure, observing that tenure was generally attended by fealty.[90] Pollock and Maitland agreed, but also explained homage.

> Very generally the mere bond of tenure is complicated with another bond, that of homage and fealty; the tenant either has done homage and sworn fealty, or is both entitled and compellable to perform both these ceremonies.[91]

Fealty typically was demonstrated by the tenant's duties to render services and do homage. Thus, tenures easily could be classified by the nature of the services the tenant had to render. After setting out the kinds of tenures, came the subset incidents of each kind of tenure.[92]

Tenure is a label on various groups of differing legal relationships, between the occupier of land and the immediate or original grantor. This immediate or original grantor generally would be the sovereign, as either the king or the state. These legal relationships were arranged either by contract, by custom or by positive legislative enactment. They would change along with the social order controlling the land, according to governmental needs or interests, reflected in policy.[93] In mediaeval times, the feudal system represented

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[87] R Huebner, *A History of Germanic Private Law*, Little, Brown and Company, Boston, 1818, p. 184.

[88] WR Vance, 'The Quest for Tenure in the United States', *The Yale Law Journal*, vol. 33, no. 3, 1924, pp. 248-271, p. 251.

[89] Coke, Littleton, 64a-141b. Bracton, approaching the matter from the standpoint of remedies, and to whom they are available, classified tenants rather than tenures as such. H de Bracton, *Henrici de Bracton de Legibus & consuetudinibus Angliæ Libri quinq : in varios tractatus distincti, ad diuersorum et vetustissimorum codicum collationem, ingenti cura, nunc primũ typis vulgati: quorum quid cuiq; insit, proxima pagina demonstrabit*, Apud Richardum Tottellum, London, 1569, ff7, 7b, 208b; F Pollock & FW Maitland, *The History of English Law Before the Time of Edward I*, vol 1, 2nd edn, Cambridge University Press, Cambridge, 1898, p. 389 et seq.

[90] W Blackstone, WD Lewis, *Commentaries on the Laws of England: In Four Books*, Book 2, R Welsh, Philadelphia, 1898, *59-*102.

[91] F Pollock & FW Maitland, *The History of English Law Before the Time of Edward I*, vol 1, 2nd edn, Cambridge University Press, Cambridge, 1898, p. 296.

[92] WR Vance, 'The Quest for Tenure in the United States', *The Yale Law Journal*, vol. 33, no. 3, 1924, pp. 248-271, p. 252.

[93] Our own national history has been affected by our land policy more, perhaps, than by any other single phase of our governmental activity. If one were asked to name the most important institution in American life up to the end of the nineteenth century he would not go far wrong if he were to name the Prairie

the governments' contemporary needs and interests.[94]

Changes in the feudal system arose from slow changes in custom, forcing legislation. Magna Carta modified the rules as to aids,[95] and the marriage of vassal wards.[96] The statute De Donis,[97] known as de donis conditionalibus, was the chapter of the 1285 English Statutes of Westminster II, which originated the law of entail. The statute Quia Emptore,[98] prevented tenants from alienating their lands to others by subinfeudation. Instead, it required all tenants desiring to alienate their land to do so by substitution.[99] The 1660 statute 12 Car. II, C. 24, formally abolished some feudal obligations of lay tenants. The English Law of Property Act of 1922[100] abolished copyhold and customary tenures, making the lands into so-called "freehold land". It also abolished escheats.[101]

The New York 1787 Act Concerning Tenures,[102] duplicated the English statutes of Quia Emptores and 12 Car. II, c. 24, It saved "any rents certain or other services incident or belonging to tenures in common socage, due or to grow due to the people of this state, or any mean lord, or other private person, or the fealty or distresses incident thereunto". It declared all grants by the state of New York should be held in tenure "allodial and not

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Schooner, not so much for what it was as for what it symbolized. It symbolized the joining of man and nature-the making of effective contacts between population and land, than which nothing could be more fundamental. The establishment of allodial tenure in the northwest territory by the ordinance of 1787 was quite as important in giving character to our national life as the better known provision prohibiting slavery and guaranteeing a republican form of government. This popular system of land tenure made land the private property in fee simple of the individual to whom it was deeded by the government. This kind of land tenure satisfied the land hunger of the adventuring, pioneering type of man more fully than a less popular and individualistic form of tenure could possibly have done. It there- fore tended to stimulate westward migration as no other policy could possibly have done. T. N. Carver, 'International Phases of the Land Question', *The Annals of the American Academy of Political and Social Science*, vol. 83, 1919, pp. 16-21, p. 16.

[94] WR Vance, 'The Quest for Tenure in the United States', *The Yale Law Journal*, vol. 33, no. 3, 1924, pp. 248-271, p. 252.

[95] Cap. 12, 15.

[96] Cap. 6.

[97] (1285) 13 Edw. I, st. I.

[98] (1290) 18 Edw. I, st. I, cc. 1-3.

[99] The transferee is substituted for the original party in the contractual relationship due to his acquisition of that land. That puts the transferee into privity of estate with the other party to the covenant, a relationship that is close enough to include the right of enforcement or the obligation of performance. RB Brown, *The Phenomenon of Substitution and the Statute Quia Emptores*, Nova Southeastern University, Shepard Broad Law Center, 2002, p. 700.

[100] (1922) 12 & 13 Geo. V, c. 16, sec 128-144.

[101] ibid., sec 148. Lands of one dying intestate and without heirs go to the Crown, or the Duchy of Lancaster, or the Duke of Cornwall, as bona vacantia (1922) 12 & 13 Geo. V, c. 16, sec 150, (I), (vii); WR Vance, 'The Quest for Tenure in the United States', *The Yale Law Journal*, vol. 33, no. 3, 1924, pp. 248-271, p. 253.

[102] 2 Jones & Varick's Revision, Laws of New York, I789, p. 67.

feudal".[103] By the Act's 1830 revision of,[104] it provided that:

> . . . the people of this state, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the state; and all lands to which the title shall fail from a defect of heirs, shall revert or escheat to the people.[105]

The act proceeded to declare such lands allodial, which it defined thus:[106] "so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners, according to the nature of their respective estates".[107] It abolished "All feudal tenures of every description, with all their incidents", in the same terms as in the Act of 1787. These provisions were incorporated in the Constitution of the State of New York of 1846,[108] and remain to this day.[109]

Some of the post revolution legislatures appeared unable to declare allodial title free of escheat. Others failed to abolish tenure. Arguably socage continued, implying a government fiat to levy obligations on the land at any time. Just as the Normans changed the meaning of socage, the post-revolution legislatures appeared to change the meaning of allodial. All the while, they failed to perceive the bundle of rights inherent in American Indian land holding from time immemorial. They failed to trace the title from time immemorial, as if it didn't exist, and thus, their attempts at creating allodial title were inherently defective.

American Attempts to Create Allodial Title

The quit-rent is a leftover of feudalism.[110] During the Middle Ages, English villeins converted their food and labour payment obligations into an annual payment to the lords

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[103] ibid.
[104] 1 N.Y. Rev. Sts. 1830, p. 718.
[105] ibid., sec 1.
[106] ibid., sec 3.
[107] ibid.
[108] Art. I, sec. 11, 12, 13.
[109] Constitution of 1894, art. T, sec. 10, 11, 12; WR Vance, 'The Quest for Tenure in the United States', *The Yale Law Journal*, vol. 33, no. 3, 1924, pp. 248-271, p. 261.
[110] The quit-rent was a survival of feudalism. During the Middle Ages the villeins of England gradually commuted their food and labour dues to an annual money payment which came to be known as a quit-rent, because by it the land was freed from all feudal dues except fealty. This quit-rent became an annual fixed and heritable charge upon the land, and created a socage tenure. Paul Vinogradoff, *Villainage in England: Essays in English Mediaeval History*, Cambridge University Press, Cambridge, 1892, pp. 291-292 and 306-307. The statute Quia Emptores, the scarcity of labour resulting from the Black Death, and the fall in the value of land due to the rise of trade and industry, accelerated the process of converting the varied feudal dues into fixed quit-rents, and by the beginning of the sixteenth century money rents had become general. WF Finlason, *The History of Law of Tenures of Land in England and Ireland*, Stevens & Haynes, London, 1870, p. 54; F Pollock, *The Land Laws*, Macmillan, Edinburgh, 1883, p. 72.

known as a quit-rent. In return for this money payment, the lords agreed to free the land from all feudal dues. The one exception, that could not be converted to money, was the swearing an oath of fealty to the lord, by which the tenant swore to be a loyal vassal. Quit-rent became a yearly fixed and heritable charge upon land. It created a tenure in socage.[111] By the early sixteenth century, quit-rents had become the generalised rule.[112]

Quit-rent was the British crown's general colonial policy,[113] with the tightening of imperial control of the feudal relationship between the colonies and the crown. Thus, with the 1632 grant of Maryland, also including those of Maine, the Carolinas, and Pennsylvania, proprietary charters transferred expressly to the crown a right to quit-rent. These charters waived the statute Quia Emptores, and thus, restored subinfeudation.[114]

The French jurist, Ortolan, inferred from a patrician revolution in the Roman Senate that political revolutions wrought few immediate changes in the forms of laws and political institutions, but they set the scene for later large-scale change.[115] This same observation appeared to apply to New York post-revolution land law.[116] The revolutionary government resolved simply to transfer the "seigniory"[117] and the "quit rents" of the

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[111] P Vinogradoff, *Villainage in England: Essays in English Mediaeval History*, Cambridge University Press, Cambridge, 1892, pp. 291-292, 306-307.

[112] WF Finlason, *The History of Law of Tenures of Land in England and Ireland*, Stevens & Haynes, London, 1870, p. 54; F Pollock, *The Land Laws*, Macmillan, Edinburgh, 1883, p. 72. It is interesting to note the early commutation of the feudal dues into quit-rents in the palatinate of Durham, whose form of government furnished the model for the proprietary provinces. W Page, ed, *The Victoria History of the County of Durham*, vol 2, Archibald Constable, London, 1907, p. 183; BW Bond, Jr, 'The Quit-Rent System in the American Colonies', *The American Historical Review*, vol. 17, no. 3, 1912, pp. 496-516, p. 496.

[113] BW Bond, Jr, 'The Quit-Rent System in the American Colonies', *The American Historical Review*, vol. 17, no. 3, 1912, pp. 496-516, p. 497.

[114] FN Thorpe, *The Federal and State Constitutions, Colonial Charters, and the Organic Laws of the State, Territories, and Colonies; Now or heretofore Forming the United States of America*, Government Printing Office, Washington DC, 1909, vol II. p. 771; vol III pp. 1633, 1638, 1641; vol V pp. 2749-2750, 2768, 3042; BW Bond, Jr, 'The Quit-Rent System in the American Colonies', *The American Historical Review*, vol. 17, no. 3, 1912, pp. 496-516, p. 497.

[115] J-L-E Ortolan, *The History of Roman Law*, ID Prichard, trans, Butterworths, London, 1871, p. 87.

[116] RL Fowler, 'The Modern Law of Real Property in New York', *Columbia Law Review*, vol. 1, no. 3, 1901, pp. 165-179, p. 166.

[117] Seignory, or Seigniory, in English law, the lordship remaining to a grantor after the grant of an estate in fee-simple. There is no land in England without its lord: "Nulle terre sans seigneur" (G-A Guyot, *Institutes Feodales, ou Manuel des Fiefs et Censives, at Droits en Dependans*, Saugrain, Paris, 1753, p. 28), is the old feudal maxim. Where no other lord can be discovered, the crown is lord as lord paramount. The principal incidents of a seignory were an oath of fealty; a "quit" or "chief" rent; a "relief" of one year's quit rent, and the right of escheat. In return for these privileges the lord was liable to forfeit his rights if he neglected to protect and defend the tenant or did anything injurious to the feudal relation. Every seignory now existing must have been created before the Statute of Quia Emptores (1290), which forbade the future creation of estates in fee-simple by subinfeudation. The only seignories of any importance at present are the lord-ships of manors. They are regarded as incorporeal hereditaments, and are either appendant or in gross. A seignory appendant passes with the grant of the manor; a seignory in gross—that is, a seignory which has been

Crown to the State.[118] These lands continued to be held by the State as the Crown's successor, and as well, by the tenure of free and common socage.[119] In 1787, only those portions of land, newly granted under the great seal of the State, were declared allodial.[120] In 1830, the Revised Statutes abolished tenure, declaring all lands allodial.[121] Before 1830, reforms made to the common law of real property were not radical, except the abolition of primogeniture, and the legislation of new canons of descent.[122] Fees tail were converted by 1782 legislation into fees simple.[123] But that act only did what could be done by a disentailing assurance.[124]

It has been noted "that the most elementary conceptions of the English law of real property carry us back to the relations of lord and vassal, and cannot be understood without reference to them".[125] At the time of the first constitution of the State of New

severed from the demesne lands of the manor to which it was originally appendant—must be specially conveyed by deed of grant. Freehold land may be enfranchised by a conveyance of the seignory to the freehold tenant, but it does not extinguish the tenant's right of common (Baring v. Abingdon, 1892, 2 Ch. 374). By s. 3 (ii.) of the Settled Land Act 1882, the tenant for life of a manor is empowered to sell the seignory of any freehold land within the manor, and by s. 21 (v.) the purchase of the seignory of any part of settled land being freehold land, is an authorized application of capital money arising under the act. H Chisholm, ed, Encyclopædia Britannica, online, 11th edn, Cambridge University Press, Cambridge, 1911, <http://encyclopedia.jrank.org/SCY_SHA/SEIGNORY_or_SEIGNIORY_Fr_seigne.html>, retrieved 28 May 2016.

[118] New York State Legislature, *Journals of the Provincial Congress, Provincial Convention, Committee of Safety and Council of Safety of the state of New-York: 1775-1776-1777*, vol I, Printed by T. Weed, printer to the State, Albany, 1842, p. 554; I J. & V., 44, sec 14.

[119] Tenure in free and common socage was the form of free tenure that eventually came to be of the greatest importance, displacing the other free tenures. Those who held their lands by this kind of tenure were freemen who were obliged to render service, other than military, in labour, money, produce or attendance at the lord's court. Pollock and Maitland (F Pollock & FW Maitland, *The History of English Law Before the Time of Edward I*, vol 2, 2nd edn, Cambridge University Press, Cambridge, 1911, pp. 100-105), described this tenure as appearing, when it had attained its full compass, as the great residuary tenure, being non-military, non-servential, and non-eleemosynary. The distinguishing characteristic of this type of tenure came to be the certainty of the services required. Gradually, the services required of the tenant in socage, which had been, in the main, agricultural services, were commuted into money payments. J. John Lawler, Gail Gates Lawler, A Short Historical Introduction to the Law of Real Property, Beard, Washington DC, 1940, p. 13.

[120] 2 J. & V., 67.

[121] 1 R. S., 718, sec 3.

[122] I J. & V., 245. C. 2, Laws of 1782. C. I2, Laws of 1786

[123] C. 2, Laws of 1782; C. 12, Laws of I786.

[124] The fee tail was created in 1285 by the Statute De Donis Conditionalibus. It is a form of trust established either by deed or settlement. It is an estate, which passes, under the ancient rules of heirship, to the direct descendants of the original tenant in tail. Each tenant in tail was able to dispose of no more than a life estate in the land. In the United Kingdom, the disentailing assurance was created by statute, in the Fines and Recoveries Act 1833 (United Kingdom), sec 15, for disentailing the estate into fee simple by enrolled deed. The requirement for enrolment was abolished by the Law of Property Act 1925 (United Kingdom), sec 133.

[125] Feudalism Feudal System, *Encyclopedia Britannica*, 9th edn, vol. 9, <http://www.libraryindex.com/encyclopedia/pages/cpx19kxhuk/feudalism-feudal-system-land.html>, retrieved 25th May 2016.

York,[126] the feudal English land law was overtaken by theories of "contract" overcoming old legal obligations based on "status." Maine's thesis was "that the movement of all progressive societies has been a movement from status to contract".[127]

The first constitution of the State of New York did not recognise land as common law property. A tenant of land only had an estate or interest in land, with the king being the only allodial owner. Colonial estates had become assets for creditors, because of the British Act 5 Geo. II, c. 7, by virtue of simple contracts. Until 1774 in New York heirs or devisees were not liable for the specialty debts of their ancestors after alienation of the estates.[128]

The Act 12 Car II, c. 24 was said to have abolished most of feudal tenure. The Act had seven active sections devoted to this apparent objective. The key part of section I, was as follows.

> . . . all Tenures by Knights service of the King, or of any other person and by Knights service in Capite, and by Soccage in Capite of the King and the fruits and consequents thereof happened or which shall or may hereafter happen or arise thereupon or thereby be taken away and discharged Any Law Statute Custome or Usage to the contrary hereof any wise notwithstanding, And all Tenures of any Honours Mannours Land? Tenements or Hereditaments of any Estate of Inheritance at the common Law held either of the King or of any other person or persons Bodyes Pollitique or Corporate are hereby Enacted to be turned into free and common Soccage . . .[129]

This effectively abolished Knights service, and it also abolished the feudal hierarchy of land-owners, unless subsisting by virtue of a statute, custom or other usage, and converted all such land proprietorships into the so-called "free and common socage".

Section V allowed as follows.

> PROVIDED neverthelesse and be it Enabled That this Act or any thing herein contayned shall not take away nor be construed to take away any Rents certaine Herriots or Suites of Court belonging or incident to any former Tenure now taken away or altered by vertue of this Act, or other Services incident or belonging to tenure in common Soccage due, or to grow due to the Kings Majestie or mesne Lorde or other private person, or the fealty and distresses incident thereunto, And that such releife shall be paid in resped of such Rents as is paid in case of a death of

[126] April, 1777.
[127] HS Maine, *Ancient law: its connection with the early history of society and its relation to modern ideas*, John Murray, London, 1861, p. 165; RL Fowler, 'The Modern Law of Real Property in New York', *Columbia Law Review*, vol. 1, no. 3, 1901, pp. 165-179, p. 167.
[128] Chap. 12, N. Y., Laws of 1774.
[129] 12 Car. II, c. 24, sec I.

a Tennant in common Soccage . . .[130]

Thus, Charles's intent was never to abolish any rents, including quit-rents, due to any incumbent lord within the feudal hierarchy. Section VI preserved fines for alienation of the land.[131] Section 7 of the Act was in the following terms.

> PROVIDED alsoe and be it further Enacted that this Act or anything therin contained shall not take away or be construed to take away Tenures in Franke Almnoigne or [to] subject them to any greater or other services then they now are, nor to alter or change any Tenure by Copy of Court Roll or any services incident thereunto nor to take away the honorary services of Grand Sergeantie other then of Wardship Marriage and value of Forfeiture of Marriage Escuage Voyages Royall and other charges incident to Tenure by Knights Service and other then Aide pur faier fitz Chivalier and Aide pur file marrier.[132]

It appears this preserved the ability to re-create all the ostensibly abolished services by means of the simple device of an order of the court.

The first radical change in the law of real property was the restricted elimination of "tenure" by a New York Act of 1787,[133] after which all lands the State granted under its Great Seal were allodial. However, all occupied lands granted or held from the Crown, continued as the old tenure of free and common socage.[134] This suggested that, by the common law, rights and obligations as incidents of "tenure" were continued. After 12 Car. II, c. 24,[135] which abolished military tenures and converted these tenures to tenure by free and common socage, most of feudal tenure was gone. The term "tenure" still meant the feudal relationship between a lord and a tenant, connoting certain legal rights and obligations. For example, where there was tenure, "fealty" was due, and the lord could distrain.[136] The partial abolition of tenure required amending this principle, or the allodial proprietor would have no remedy for his unpaid rent. When the courts held that the right of distraint for socage services was not linked to tenure,[137] legal obligations based on status were abolished in New York. Now they depended on contract. This led to the provisions in the Revised Statutes abolishing all incidents of tenure, making all lands

[130] ibid., sec V.
[131] ibid., sec VI.
[132] ibid., sec VII.
[133] 2 J. & V., 67.
[134] RL Fowler, 'The Modern Law of Real Property in New York', *Columbia Law Review*, vol. 1, no. 3, 1901, pp. 165-179, p. 168.
[135] 12 Car. II, c. 24.
[136] Cow. 652.
[137] Cornell v. Lamb, 2 Cow. 652.

allodial by default.[138]

Those who drafted the Revised Statutes of New York, expressly made all lands allodial. They wanted to put all land conveyances on the same footing as other common law specialty contracts and conveyances. Thus, they abolished future conveyances by feoffment with livery of seisin, and replaced them by a grant or deed under seal.[139] This was cognate to the former deeds of bargain and sale.[140] Deeds or grants were appropriate methods for the transfer of all kinds of property, movable and immovable.[141] Then, the delivery of the deed, and, all contracts alienating property in writing, became more significant in the law of conveyancing.[142] At common law the delivery date of the deed of land was of no consequence, because title arose only from the time of delivery of seisin.[143] After the Statute of Uses[144] a mere covenant to stand seised could be effective without delivery of the deed,[145] introducing the possibility of even more defects and uncertainties in transfer of title.

The continuation of free and common socage defeated the creation of allodial title. The Australian Mabo decision declaring Australian land title to be based on socage, suggested title was based on mere administrative government policy. This uncertainty of title would enure through a conveyance, creating a defect reducing the transfer of title to the mere creation of colour of title.

Conclusion

In Anglo-Saxon times, before the Norman conquest, alienation of bocland would be subject to the king's agreement to amend the charter book. Also, it is uncertain that folcland was ever alienable. The division between bocland and folcland was blurred, because there were allodial estates as well, without written title deeds. This suggested

[138] RL Fowler, 'The Modern Law of Real Property in New York', *Columbia Law Review*, vol. 1, no. 3, 1901, pp. 165-179, p. 169.
[139] R. S., 738, sec. 137.
[140] R. S., 739, sec. 142; RL Fowler, 'The Modern Law of Real Property in New York', *Columbia Law Review*, vol. 1, no. 3, 1901, pp. 165-179, p. 171.
[141] Blewitt v. Boorum 142 N. Y., p. 360.
[142] R. S., 732, sec 738; Chauncey v. Arnold, 24 N. Y. 330, 335; People v. Bostwick, 32 N. Y., 445; Mitchell v. Bartlett, 5I N. Y. 447.
[143] HW Challis, *The Law of Real Property, Chiefly in Relation to Conveyancing*, 2nd edn, Reeves, London, 1896, p. 83.
[144] 27 Hen. VIII, c. 10. However, the whole Act was repealed by section 207 of, and Schedule 7 to, the Law of Property Act 1925. The repeal of the Statutes of Uses did not affect the operation thereof in regard to dealings taking effect before the commencment of the Law of Property Act 1925, sec 1(10)
[145] RL Fowler, 'The Modern Law of Real Property in New York', *Columbia Law Review*, vol. 1, no. 3, 1901, pp. 165-179, p. 172.

disagreements on to how to characterise titles, with resultant uncertainties in types of title. Arguably, this would have been convenient to the king. The *trinoda necessitas*, and the additional folcland obligations, would have been of substantial value to the king. Any alienation of apparently uncertainly characterised title would have been under the king's supervision. The later Norman expansion of socage obligations to the crown could only fetter free alienation of land. Although bookland title (bocland) represented a relationship between feudal superior and his vassal, long before the Norman conquest, Anglo-Saxon law suggested great uncertainty in particularising a land transfer. In the result, arguably most land title transfers contained a defect. After the Norman conquest, the obligations attaching to socage became essentially whatever the government policy might be, from time to time. Arguably, this would be a continuing defect in any conveyance of title, reducing all apparent land titles to mere colour of title. However, this development of the law was organic to England, arising from customs and maxims indigenous to England. There would be no prescription for their introduction elsewhere.

Colour of title was a writing, professing to pass title, which did not succeed in doing it due to some defect. This defect could be from bad transferor title, or from an uncertain conveyance. To constitute mere colour of title, such an imperfect title would have to be apparent to a person unskilled in law. Adverse possession by a mere claim of title was restricted to whatever land the adverse possessor actually occupied. A claimant to title, without supporting colour of title, possessed the land no further than his *pedis possessio*. If the claimant had colourable title, possession was extended constructively to the entire plot described by the document conferring colour of title. Colour could be conferred for title without any writing at all, and it could begin in trespass. In English law, a dual intent to claim and possess the land was the precondition to a completed disseisin. At common law, if the grantee knew the deed conveyed no title, it would not confer on him colour of title. Any alienation of the *pedis possessio* would be fatal to the claim of adverse possession. Fraud in securing the colour of title would constitute mala fides and defeat the claim. The legal fiction of constructive adverse possession was justified only when the disseisee had notice of the entirety of the claim. If evidence of the colour of title was at hand to the true owner, he is taken to have had due notice. With defects in title apparent to governments, the Torrens title system was enacted into law, based on the system used in shipping registries. It allowed a government department, subject to all the usual instances

and possibilities of mal-administration and ultra vires administrative actions, to say that it guaranteed land title.

In the former California Torrens Title system, now repealed, proponents argued that Torrens title was conclusive. However, an original court decree certifying title could be attacked. Title might be subject to encumbrances after registration, not entered onto the record. These defects might not be evident on the register. If notice was defective on the person in actual occupation and who was enjoying an easement, this person would not be bound by the court's decree. He could assert the easement against a later bona fide purchaser of the registered Torrens title. As for the register, Torrens Title transfers could suffer mal-administration, just as in any other government department. As Torrens title was based on socage, according to the High Court of Australia decision in the Mabo case, tenure must have subsisted within the Torrens system, allowing the concept of radical (allodial) title. However, as seen above, socage simply meant land-owner obligations set by government policy. The continuing and capricious uncertainty of these obligations would represent a defect in title transfer.

Tenure was a label on certain groups of legal relationships, between occupiers of land and the immediate or original grantor. This immediate or original grantor would be the sovereign, as the king or the succeeding state. These legal relationships were by contract, custom or by legislation, changing with the controlling social order. It appears certain that tenure subsisted after the strictures of 12 Car. II, c. 24, because it did not derogate from the feudal origin of escheat. The American States succeeded the Federal Government as Chief Lord of the lands. Many of the North American states used this new independence to try to legislate the abolition of all feudal tenures, declaring all lands allodial, despite their positions as Chief Lords of the fee. Other states, apparently realising the underlying continuation of tenure, declared that only future land tenure would be allodial, again despite their positions as Chief Lords of the fee. The state of New York simply legislated that lands be held in tenure "allodial and not feudal". By its 1830 legislative revision, it provided that the people were deemed to possess the original and ultimate property in all lands within the state, except reversions or escheat back to the people. Clearly, this was not ultimate property ownership, allodial title, but only property in feudal tenure.

Quit-rent came from feudalism, when villeins converted their food and labour payment obligations into an annual lump sum payment to their lords. As a consequence of tenure,

it was a continuation of the British crown's general imperial colonial policy, rather than common law. In post-revolution New York, the government resolved to transfer the crown's seigniory and quit rents to the State. Lands continued to be held by the State as successor to the Crownin free and common socage. When the New York courts held that distraint for socage services was not connected with tenure, legal obligations began to depend on contract. The New York Revised Statutes then purported to abolish all specified incidents of tenure, but not tenure per se, making land titles allodial by default. With tenure remaining in place, true allodial title would be an impossible object.

American post revolution legislatures were unable to create true allodial title in America, partially because they failed to trace the title to time immemorial, and partially because they were racially bound to their English heritage and its inviolate customs. Thus, arguably for the same reasons, so too was the crown at the point of both American and Australian colonisation. The entire colonial English system of land law rested on a doctrine virtually indistinguishable from the over-turned Regalian doctrine, dismembered by Holmes for its inherent capriciousness. Further, introducing a foreign legal custom to a new land would always fail for lack of prescription. Torrens title was an attempt to cure defects in customary title that had subsisted since ancient Anglo-Saxon times in England - but never in Australia. The prospect of mal-administration of the register would make the object of Torrens title difficult to achieve. In Australia, the crown had tried to introduce English custom in Australia as local law, by ceremony and persuasion, to blur the realities of their murderous land grab. However, they did it by committing egregious wrongs defeating the introduction of their customs, and thus, their acquisition of allodial title to Australian lands was sufficiently defective to reduce their holdings to mere colour of title. The mala fides involved in their attempts at land acquisition would defeat any claim to convert their colour of title into a successful claim for adverse possession.