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THE RELATIONSHIP OF THE STATE TO PRIVATE OWNERSHIP OF LAND.

Lyman Chalkley.*

ORIGINAL OWNERSHIP, PARCELLING AND TENURE.

1. The State is the original owner of all the lands, and all private titles must be derived from it.

No one is allowed to exercise the right and liberties of holding land except by the express authority of the state. By "State" in this connection is meant either the Federal power or the sovereignty of the Commonwealth. In every case of private ownership there has been an express grant by the sovereign power by way of a charter to some person who receives authority thereby to enter upon the boundary designated in the grant, and to exercise within that boundary such rights and privileges as are prescribed in the general laws.

This character of our American states as original owners of all the lands, and source of authority to possess and enjoy lands is to be traced to various origins. In some states it is asserted by the state's express assumption; in some it is considered as inherent in the state's sovereignty; in some it is sustained upon the principle of necessary construction; in some it is supposed to flow from the wording of the treaty of peace between England and the United States. In all the original thirteen states great numbers of tracts of land had been granted to private persons by the authority of the sovereignty of England before the states were independent. By the law of nations, a change of political sovereignty does not affect the mode of tenure of private holdings of land; and by that law the holders of lands already granted should be protected in their rights as they were defined by the law and existed at the time of the erection of the state. This would certainly be true if the revolution effected a transfer from the authority of one sovereignty to the authority of another sovereignty. The result in such cases is to substitute for the old a

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new sovereignty to which allegiance is due and from which protection may be demanded, but without affecting the terms upon which the lands are held. If the present territory embraced within the United States had all been derived from England, there would be very little confusion in tracing the origin of titles. But the prior titles to tracts within that territory are very varied indeed in their beginnings. The original thirteen states and the states formed from them look to England, and perhaps some of them to France; the Northwest Territory was ceded to the Federal government by certain of the original thirteen; Florida was acquired from Spain; the Louisiana section resulted from a treaty with France; Texas came into the union as an independent state, but traces its origin to Mexico and Spain; some of the Pacific coast and inferior states were from territory ceded by Mexico; Alaska was obtained from Russia; some titles in New York are to be traced to the original Dutch regime; in Georgia, Florida, Alabama and Mississippi there are further complications growing out of Indian titles. It is readily seen that in each state the question of the source of private titles will be unraveled from the history of that state, and in many instances all the titles in one state are not to be traced to a common single source.

In so great variety of origin it has become necessary to assert the sovereign right of each state over the territory within its own borders, and this has been done in most instances by substituting the present state for the sovereignty which issued the original grants. In many of the states the constitutions or statutes contain express assumptions of the original grants and a ratification of them through provisions that the state is deemed to be the original and is the ultimate owner of all the lands within its borders.

2. Some of the States assumed original ownership over the lands before the treaty closing the Revolution.

In the Kentucky case of Holloway v. Buck, 4 Litt. 293, a very interesting question arose in this way. In 1775 Henderson and Company claimed to be proprietors of large tracts derived by purchase from the Indians after the proclamation of 1763 prohibiting the settlement of the whites upon the western waters. Among the adventurers of Henderson and Company entitled to a share of these
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lands was Colonel Lutterel. In that year Colonel Lutterel made his will in which he devised the lands to which he was entitled as a partner in the company. In 1779 the legislature of Virginia enacted that all sales and deeds, as well those which had been made as those which should thereafter be made by any Indian or Indian nation for the separate use of individuals to be utterly void and of no effect. Colonel Lutterel’s devisee made claim under the will for these lands, but the court held that the will conveyed nothing, as Henderson and Company acquired no title from the Indians. “The competency of the Virginia legislature,” said the court, “to make such past sales and deeds void cannot admit of a serious question.” It will be noticed that the Virginia act was an assumption of sovereign right over the territory now Kentucky; after the declaration of independence, it is true, but before the treaty with England, by which that state relinquished its sovereignty. And the case is recognition by the Kentucky court that the sovereign right over the district was lodged in Virginia by its own assumption, both as to past transactions and as to future.

3. The first problem before the American Commonwealth was the parcelling of the public domain.

The parcelling of the uninhabited portions of the territorial domain became one of the first businesses and cares of the newly erected states after the revolution. Never in the history of the human race had such a problem been presented, unless in those incidents which led to the establishment of the feudal system on the continent of Europe. There was very little if any of the public spirit as we understand it which would impel the states to undertake systematically to induce foreigners to come with a view to increasing the wealth and strengthening the political power. There was no political organization to be the cultural ground of such a spirit. The only inducement that was urged was purely sentimental; that all persons who were suffering from oppression at home would receive a welcome here. The settlers believed that they were absolutely secure from attack from outside and therefore needed no increase of power. They were mostly of simple and severe tastes, and wealth was coming abundantly. They were in the state of mind of one given
wholly to the contemplation of the beauty of peace and security accomplished, and possessed by a generous impulse to share their blessings with all oppressed; their vision had been realized. Ability to read and write was far from universal. For generations, certainly since Cromwell’s time, they had hoped for a commonwealth of political freedom, of liberty, of religion, of civil equality, and of free landholding. For their ideas and for instruction in their ideals they depended upon their religious and political orators and oracles. The political leaders knew Magna Carta, English and French history, Vattel, Montesquieu, Blackstone, Lock, Virgil, Homer, Campbell, Cicero, and Demosthenes. The preachers thundered at them of hell and damnation, sin and salvation, using the imagery and allusion of the Bible, Milton, Bunyan, Butler and local sages. The ancestors of many of them had fought against the Stuarts with Cromwell; Jefferson was teaching them the principles of the French revolution. For generations they had been fed upon the horrors of tyrants and violations of a crude morality. Kings and feudal lords were reminders only of what was damnable. Their traditions were filled with hostility to the feudal system. All their conceptions were of hardihood of body and character, bluntness and openness of bearing, of free speech, simplicity of manner and conduct, freedom from administrative restraining, of individual initiative and responsibility, and absence of rule and method. Each man was of his own opinion, and sailed in his own boat on his own bottom. The historians will tell us that these objectives were only images firmly rooted in the settlers’ minds; not realizations in fact and practice. However that may be it is inconceivable that men who had been trained to a life made up of conflict with Indians and nature; whose energies were dominated and directed by such spiritual conceptions could have tolerated the idea of a system of landholding by which one man was retained as the henchman of another, and subject to him for slavish services. There was no superior, no king, no law, no church; they were all neighbors and called each other “Brother.”
4. After the State has parcelled the public domain by grant to private owners, it is yet charged with certain powers and duties in respect of the same lands.

The nearest analogy we have to the parcelling out of the territory embraced within the limits of the states which arose after the declaration of independence is the partition among the tribes by Joshua. What had been taken under his leadership they treated as a common possession, and, having divided in into districts, these they distributed. It seems plain that the original owner of the soil was the political sovereignty of the society of the people; and when individual ownership of parcels was recognized, the title was traced to that sovereignty as the original appropriator or purveyor. After the land had come into the possession of individuals, to each a designated boundary, whether there was a political organization to protect each in his holding and to protect the aggregate domain against foreign aggression, and to assure each in the quiet enjoyment of his own does not appear. Some form of political organization must have arisen as we find it carried into practice, and without it society could not have grown. It is apparent that in the course of its evolution society could be preserved only by a power constituted of the united resources of all; which power would be charged with the duty of protecting each individual in the enjoyment of his private rights of property against encroachment by members of the society within, and to preserve the individual and aggregate rights of the members from aggression from without. A relation would necessarily result between the political society or state and the member. The terms of this relation must be prescribed and must be punctiliously observed by both parties, otherwise there result tyranny, injustice, inequality, and anarchy within, and imposition from without. The individual owes to the state, that is, the organization composed of all the citizens, loyal allegiance and support; and the state owes to each citizen and to all its citizens the liberty of self determination and action as well in respect of his property as in respect of his personal rights. The duties of the state as regards land are: (1) To see to it that the territorial domain is kept together in its integrity, and preserved as a habitation and domicile for the political society forever. (2) To hold this common domain subject to the common necessity.
To take care that strife between individuals shall be avoided which will grow out of the claim by each that he is the original occupier of particular parcels. (4) To take care that strife shall be prevented by the assurance to each citizen that he shall have security in the enjoyment of his own parcel. (5) To see to it that strife shall be prevented when the tenancy of a particular parcel shall become vacant.

5. The State's assumption of original ownership is a device to prevent the strife which would occur if lands were freely open to occupation.

Whatever may be the true theory upon which to rest the right of separate property in land, the established theory of the American Commonwealths is that the state is the original occupier and first owner of all the lands within its territorial boundaries, thus removing the possibility of dispute between individuals as to which is entitled to proprietorship by priority of occupation; and that it is the exclusive prerogative of the state to allot to the inhabitants, to each a defined boundary of the common territory for a separate refuge and asylum, and for sustenance.

Writing with direct reference to the function and duty of the state to parcel out the lands held by it for the benefit of the inhabitants in common property, and noting incidentally that separate ownership of certain parcels or ascertained boundaries to the exclusion of other persons is to be distinguished from the mere right to the temporary use and enjoyment of the fruits of the land, Chief Justice Marshall says, in Johnson v. McIntosh, 8 Wheat. 595:

"It is supposed to be a principle of universal law that if an uninhabited country be discovered by a number of individuals who acknowledge no connection with, and owe no allegiance to any government whatever, the country becomes the property of the discoverers, so far at least as they can use it. They acquire a title in common. The title in the whole land is in the whole society. It is to be divided and parcelled out according to the will of the society expressed by the whole body, or by that organ which is authorized by the whole to express it.

"If the discovery be made, and possession of the country be taken under the authority of an existing government, which is acknowledged by the emigrants, it is supposed to be equally well set-
tled that the discovery is made for the whole nation, that the country becomes a part of the nation, and that the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the national domains, by that organ in which all vacant territory is vested by law.

“According to the theory of the British constitution, all vacant lands are vested in the Crown as representing the nation; and the exclusive power to grant them is admitted to reside in the Crown, as a branch of the royal prerogative. It has already been shown that this principle was as fully recognized in America as in the island of Great Britain. All the lands we hold were originally granted by the Crown.”

6. The British holdings in America at the commencement of the Revolution were to be divided into three classes:

The lands that were owned by the English in America at the time of the revolution were held under the prerogative of the king for the benefit of the whole people of the nation as a community. The power of parcelling or inducting individuals into the possession of separate tracts was in the king, as well as the title. This parcelling was accomplished in various ways: By patents or grants to large proprietors, as the Duke of York, William Penn, Lord Calvert, Lord Fairfax, and many others; and by grants directly to occupiers for varying numbers of acres. These latter were made upon different considerations, as for a money consideration, or for settlement, or for importation of colonists. Some of the larger patents, as that to the king’s brother, the Duke of York, carried with them the powers of administration of government. At the time of the commencement of the revolution, the British American possessions within the thirteen original states were to be divided into three separate classes: (1) Those which had been patented to the large proprietors and by them parcellled out to settlers who held of the proprietors; (2) Those which had been granted to occupying settlers or smaller proprietors under general laws applicable to the colonies; (3) A great partly unexplored domain of territory not yet appropriated to any great landed proprietor, nor to any separate individual ownership, and awaiting settlement. All three classes were held by the king as original owner and subject to his prerogative or supreme personal power to distribute it. Whether lands were granted by the king to the large
proprietors and by them in parcels to separate settlers, or directly by the king to the individual holders and occupiers of separate tracts, the ultimate object was to distribute the entire region to immigrants and occupiers.

7. The Revolution effected a transfer of the obligation of allegiance of owners of parcelled tracts, and proprietary ownership of unparcelled tracts to the State sovereignty.

The effect of the revolution in bringing about a change of sovereignty from the English nation to the several American states and in bringing about a change in the mode of holding land was also revolutionary, although it has received almost no notice at the hands of jurists and historians. Some of the early writers laid down a first impression. Professor Walker says (American Law):

"The effect of the revolution was to transfer to the United States all the rights which Great Britain had acquired by discovery or otherwise, and had not then parted with. Accordingly, in the treaty of peace, the king expressly relinquished, for himself and his successors, 'all claim to the government, proprietary, and territorial rights' of the thirteen states and every part thereof."

It is impossible that Professor Walker means to say that the king relinquished to the United States as we now have it, the lands which lay in Georgia, or in North Carolina, or in Virginia; especially as no such United States existed at the time of the treaty.

In Willow River Club v. Wade, 76 N. W. 273, the Supreme Court of Wisconsin remarked that the lands were originally granted to colonial governments, provincial establishments, proprietary governments or to individuals:

"And then upon the breaking out of the revolution and the organization of each of the colonies into a separate and independent state, confirmed by the treaty of peace in 1783, the title to such lands as were not held by private tenure together with all the powers of sovereignty, the prerogatives and regalities which had previously either belonged to the Crown or to Parliament, became immediately and rightfully vested in such state."
The substance of this observation is that the effect of the revolution was to invest the state with the unparcelled lands and with the rights of sovereignty which had belonged to the English people. This would be true if the treaty effected a transfer of rights from one sovereignty which conveyed them to another which accepted them. But neither was there any conveyance nor acceptance.

Justice Sharwood lays it down:

"All lands are supposed to be held mediately or immediately of the state, which has succeeded by the revolution to the feudal position of a paramount lord before that period occupied by the crown."

Certainly today no one would contend that the state is a feudal lord, even by analogy. And no one would maintain that, in order to justify the prerogative of the state as original owner and occupier, resort must be had to the feudal system for the analogy.

The Kentucky court said, in Elmendorf v. Carmichael, 3 Litt. 475: "There can be no doubt that the Commonwealth of Virginia, when it assumed its republican character, succeeded to the rights and privileges of the Crown of England as to her own domain." This statement might be true and yet not justify the conclusion that Virginia perpetuated the feudal system and feudal tenure.

8. In parcelling to private owners the State does not divest itself of sovereign powers.

Among all the numerous questions arising out of the changes in constitutional policy which resulted from the revolution none has given rise to greater discussion and none presents so great a difficulty as this: What is the character of the original ownership of the state as respects a specified boundary of land after the state has installed a private person in the possession and enjoyment of it?

Undoubtedly the private person is a "holder." But the word "hold" is feudal in its origin and association, and carries within its sense the notion of subjection to a superior in right under obligation of personal fealty and service. In its ordinary acceptance, it means to support and maintain against aggression and encroachment from outside. No one will base a contention upon either meaning that the
owner of a tract of land in one of the American states holds it with sovereign power over it. Since he is only an occupier for his lifetime at most, and the land came to him from a prior owner and will pass from him to a succeeding owner, the land itself he holds subject to consideration of the continuing rights of the prior owner if there are any; and of the prospective tenancy and rights of his successor. Has the American state any continuing proprietary rights in and control over a boundary of land after it has performed its function of parcelling to a private person? The most that can be said by way of explicit answer is that the state is the only sovereign, and every man holds his land subject to that sovereignty; that the state has asserted its position as original owner of all the lands, and the private owner enjoys only such privileges in respect of his land as he derives from the state; that the state has assumed the position as ultimate owner and as such is the residuary holder when there is no private person in whom the property right rests.

9. After the adoption of the Federal Constitution the view was taken that the relation between the State and the private owner was that of contract.

If the act of the state in installing a private owner is a pure donation, then no doubt the private owner holds under the state at sufferance. If the act is that of contract, and the state can bind its hands by contract, then the terms upon which the state grants are restraints upon its sovereignty as to any future regulation.

This is a matter of much importance to the landholder, since upon the nature of the answer hangs the whole problem of the right of the state to make changes from time to time in the terms upon which land is held; and, also, of the extent to which it may repeal, modify and enact police regulations. Thus could the state enact a valid law today by which the present holders of land shall forfeit their holdings unless each holder of one hundred acres or more cultivates ten acres of corn annually for each hundred acres? Could the state today repeal the law of descents or the statute of wills? Could the state today enforce a law to the effect that owners of town lots shall forfeit them to the public unless improvements are erected upon them in five years?
The earlier cases are very positive in laying it down that the relation between the state and the landholder is that of contract. But it is to be noticed that all those cases are confined to the consideration of that provision of the Federal Constitution which enacts: “No state shall pass any law impairing the obligation of contracts.” The later cases generally turn upon the question of the limits of the police power, or power of the state within constitutional limitations to regulate for the common welfare the liberty of the holder in the user of his individual property. The latter is a general power inherent in the state’s sovereignty, while the Federal Constitution is a limitation upon that sovereignty. In both the earlier and later cases the distinction between these two provisions has been frequently overlooked or misunderstood by both judges and lawyers, and the result is confusion.

10. As the States in their grants have not inserted express conditions of tenure, such conditions will exist only as part of the unwritten or customary law, if they exist at all.

In Bridge Company v. Dix, 6 How. 545, the Supreme Court of the United States said:

"Under every established government, the tenure of property (the court could not have meant feudal tenure, but only the abstract conception of the right to exercise dominion over land) is derived immediately or immediately from the sovereign power of the political body organized in such mode or exerted in such way as the community or state may have thought proper to ordain. It can rest on no other foundation, can have no other guarantee. It is owing to these characteristics only, in the original nature of tenure, that appeals can be made to the laws either for the protection or assertion of the rights of property. Upon any other hypothesis the law of property would be simply the law of force. Now it is undeniable that the investment of property in the citizen by the government, whether made for a pecuniary consideration, or founded on considerations of civil or political duty, is a contract between the state, or the government acting as its agent, and the grantee."

This statement is remarkable for the very low estimate put by the court upon the conception of the state’s sovereignty. The effect of the decision was that the state’s grant imparts a vested right of
property to the grantee which cannot be impaired by subsequent legislation. As the states in their grants have never inserted express conditions of tenure, such conditions will exist only as part of the customary or unwritten law. In the Bridge Company case, the court did not consider whether there were any such implied conditions. The opinion of the court cannot be taken as authority that there are no implied conditions; nor that the enforcement of implied conditions would constitute a violation of the constitutional provision as to the impairment of the obligation of contracts. It would be a very pertinent enquiry. Can the state officers grant land to different individuals upon different terms of holding? or is every grant from the state upon the same terms of holding, which terms are part of the unwritten constitution? and if the latter, what are those terms?

11. The Kentucky court has held that the State's grantee holds it untrammeled in the manner of using it; that the mode and manner of enjoyment are left to the volition of the grantee.

In Gaines v. Buford, 1 Dana 481, the Kentucky court held to be beyond the power of the state to enact a law which forfeited to the state every tract of land of one hundred or more acres theretofore granted, "unless the proprietor thereof should, if it be woodland, cause five acres to be cleared, fenced and tended, and ten acres for every thousand to be belted before August 1, 1825." The preamble of the act (passed in 1824) recited the deplorable condition of confusion resulting from the conflicting land laws, and the present and future calamities likely to result to the people, and continued:

"By all which considerations and by that solemn duty which every government owes to its citizens to prevent injustice and impending calamities, this Commonwealth is called upon reluctantly to exercise her sovereign power over the lands lying within her territorial jurisdiction, by exacting forfeiture for want of cultivation and improvement; which power she has hitherto forborne to exercise by substituting other acts of legislation which seemed to her councils more liberal and less severe; but which laws have been stigmatized breaches of good faith by those who knew not the situation of the country, nor the urgent circumstances, nor the spirit of forbearance which characterized them."
The reference here in the words "those who know not the situation" is to the Supreme Court of the United States speaking in the opinion in Green v. Biddle, 8 Wheat. 1, decided in 1823.

Gaines v. Buford was decided in 1833 by Judge Underwood, who had paid his respects to the legislature in 1829 by saying, in Davis v. Ballard, 1 J. J. Marsh, 563: "We grant that the representatives of the people are shepherds to protect the flock; but they are not exclusively such, although vested with great and extensive powers." In the former case, involving the construction of the statute of 1824, the same judge said:

"It thus appears that the legislature has, in the most deliberate manner, asserted the power to forfeit lands for a failure to cultivate and improve them as the legislature may from time to time direct. Under this power by the act in question, the legislature has undertaken to transfer the title of the claimant to the occupant unless the claimant agrees to terms.... Lands thus granted (he means grants by the state to individuals) become the absolute property of the grantee, in virtue of a contract made with the government of which the patent is the evidence. I know of no principle which will allow the government, any more than an individual, after fairly selling and conveying land, to take back the land and resume the title at its own pleasure against the assent of the grantee. Neither am I acquainted with any principle which will allow the government to annex new conditions unknown at the time of the original contract; and for a violation of them, seize the land, divest the citizen of his title, and retain the consideration which the citizen paid or rendered, without remunerating him therefor. Those constitutional provisions which were intended to secure the inviolability of contracts apply as well to contracts made between the government of a state and its citizen as to contracts between individuals.... The contract in the present case was this, that Harvie and his heirs and assigns should enjoy the land granted forever in consideration of so much paid to the state. The mode and manner of enjoyment; they were therefore left to the volition of the grantee. His dominion was not limited at the time of his purchase.... He had as a free man, all those rights and privileges which constitute the birthright of an American citizen. The effect of the act in question is to change the tenure and the contract.... No man purchases land either from the state or from an individual in fee simple without taking and holding it untrammeled in the manner of using it. The very object of making the purchase is to obtain the exclusive control, and to get clear of any control over it by the vendor."
This truly astounding rhapsody upon the absolutism of the freedom from governmental restraint which is supposed to constitute the birthright of an American citizen is sufficiently emphatic without the addition of comment. The same judge said, in Davis v. Ballard:

"I do not admit that there is any sovereign power, in the literal meaning of the terms, to be found anywhere in our system of government. . . . In the nature of things there is as much propriety, it seems to me, in forfeiting a horse to the government because his proprietor does not curry and rub him well, or break him to labor quietly in the gear, as there is in forfeiting land because the owner does not choose to clear and cultivate a part, and deaden the trees growing on another part."

12. The conception of the American people is that of Allodial tenure; and the principle of allodial tenure is accepted and practised in every American State.

The difficulties in the way of laying down any common law of tenure in the American states seems insuperable. The adjudicated cases are few, and they generally confuse the concepts of sovereignty, police power and feudal tenure in such way as to make the opinions almost valueless. Writers and judges have as a rule not been able to free themselves from the false preconception that the feudal system furnishes all our analogies. The statutes use the word "tenure" without defining it, and the feudal definition is inconsistent with our changed condition, and with the present practices and customs of the people. Invariably there is a failure to distinguish between tenure under the state and the holding by one private person of another private person. In Pennsylvania the early cases are most emphatic in holding that tenure does not exist in that state. In Virginia tenures of all kinds were abolished by statute in 1779. But it is to be remarked that those were the times of the new broom, when many old things were swept away. Yet only what was considered worn-out trash was affected; and when the statutes speak of abolishing tenure, they must be taken to mean such a conception of tenure as was in the minds of the people at the time; that is, feudal tenure. In South Carolina tenure in free and common socage exists. The Georgia stat-
The tenure by which all realty is held in this state is under the state as original owner; it is without service of any kind, and limited only by the right of eminent domain remaining in the state."

The New York statute of 1779 ordained: "The absolute property of all messuages, lands, tenements, hereditaments, and all prerogatives... escheats... which before the ninth of July, 1776, did vest in or belong to the Crown of Great Britain be and are declared to be... vested in the people of this state, in whom the sovereignty and seigniority thereof are and were united on and from the ninth of July, 1776." This statute declares expressly that the sovereignty and overlordship of lands is in the people of the state, which is the same as saying that those powers shall be exercised through the orderly machinery of the state as may be ordained by law.

In 1787, four years after the treaty of peace, a statute was enacted in New York (as cited in Gray’s Perpetuities) which provided that "the purchaser of lands shall hold them of the chief lord of the fee, but all tenures were turned into free and common socage; that the tenure of all grants made or to be made by the state should be alodial and not feudal, and in free and pure allodium only." About fifty years after the date of the latter statute, the New York legislature enacted: "All lands within this state are declared to be alodial, so that, subject to the liability to escheat, the entire and absolute property is vested in the owners, according to the nature of their respective estates; and all feudal tenures, of every description, with all their incidents, are abolished." It is to be noticed (1) Tenure as a principle is not abolished, but recognized; but feudal tenure is discontinued. (2) Alodial holding is substituted for feudal tenure. (3) Read in connection with the prior statute, the following propositions result: (a) Sovereignty and overlordship exist, but are reposed in the inhabitants, to be exercised through orderly procedure of law. (b) The entire property right is in the owner, subject to the ultimate ownership of the State. (c) The use of the term "alodial" introduces a conception which is not feudal by reference or analogy.
13. The relation resulting between the State and the private landowner can be discovered only in the tracings of the historical progress of the English and American peoples from Saxon times to the present.

According to the accepted view of the private landholder since the revolution, the grantee of the state is his own lord proprietor, and owns both the property right and the right to the enjoyment and use of the land. So simple a statement seems sufficient for "practical" purposes to the "practical" man—that astigmatic person—and may answer the needs of an owner of land in an isolated territory where the titles originated from the state only yesterday; for the subtleties which always attach themselves to the theories and doctrines of landholding in time, lurk yet in the grass abiding their opportunity. When he goes into court, however, to defend his title, he finds that his lawyer has to talk in terms of principles whose definitions he does not understand, and whose applications he does not appreciate. For the law proceeds upon lines of principles which are evolved out of experience and logical analysis, and that which obtains today is only a flash in the line of transition from what was yesterday to what will be tomorrow. Today's experience has no value nor realization until tomorrow, when it can be observed, analyzed, related and classified. The law of yesterday is the law of today until today is passed. Thus we are today struggling in the American courts to reduce to concepts and to invent terms for the products of the evolution that has been going on for generations in the law of landholding. The books are full of opinions, views and theories announced by judges and writers, but they exhibit such a deplorable lack of common viewpoint, and the use of common terms in the same sense that no satisfying conclusion can be gathered from them. The principles involved can only be apprehended through a consideration of original conceptions making their way through an experience of change and modification beginning in Saxon England, extending through feudal England, through our own colonial period, and through the period of independence; in all respects as the serpent became the subtlest beast by casting off one part, modifying another, and evolving new and additional parts and functions.
14. The true analogies by which to interpret the present-day customs of landholding in the American States are to be found in the Saxon customs of the Common Law of Kent.

No doubt is held out by the historians and jurists today but that under the Saxon system, prior to the conquest and the institution of the Norman feudal system in England, landholding from the king and lords upon terms of personal fealty and military service was unknown. Under the Saxons the owner held his land as his own, both in property right and in the enjoyment of the fruits. He was protected in his possession and enjoyment, but he did not owe the king or anyone else the performance of any peculiar duties as conditions of his holding. Professor Robertson says (Elementary Law, p. 76):

"This system of estates is the outgrowth of those landholding customs which prevailed in the agricultural districts of England during the Saxon and Norman periods of its history. The introduction of the feudal system gradually changed the village communities (of the Saxons) into feudal manors, in which the title to the land and the political supremacy were vested in a feudal lord; the villagers became his free or serf tenants." Mr. Digby says: "Land owned by a subject and not held of a lord is called allodial land, and a system of allodial ownership appears to have preceded the feudal system in England, the land then owned being termed, according to the mode of acquisition, 'book land,' or 'folk land.'" Upon this the author of the article, Real Property in Halsbury's Laws of England, comments: "Such ownership is assumed to have been—at any rate as to book land or land received by grant—absolute ownership, and the term 'allodium' is used to denote land owned absolutely." It is to be further remarked that the term "allodium" was probably not in use in Saxon times, but was introduced by the feudalists to make the distinction between an absolute or free holding and a vassal or feudal holding. In Clement v. Scudamore, 6 Mod. 120, the court said: "It appears (though Coke is said to be of a contrary opinion) that all the lands in England before the conquest, and for some time after, were generally Gavelkind." Lord Mansfield said in Doe v. Llandaff, 2 Bos. & Pul. (N. R.) 491: "The law of Gavelkind is unlike other customs. It is not good if it begins only just before the reign of Richard the First. This custom existed long before any such cus-
The Custom of Gavelkind, or Common Law of Kent had no features in common with the feudal system, but is more nearly in accord with the present customs in America. The main incidents of allodial holding of land are thus given in detail in 2 Corpus Juris 1152-1153: “Allodial lands were alienable..."
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at the will of the owner by sale, gift or last will. They were liable for his debts, and descended, if undevised, to his heirs without respect to primogeniture. They might be granted absolutely or for a limited interest, on any conditions or services the grantor thought proper, and for any estate, to take effect at once, or at a future time, or on the happening of some event. They were frequently entailed, and marriage settlements thereof were common. They were conveyed by the delivery of a symbol of possession, as a twig or turf, or by writing or charter, called a land boe, which was generally deposited in a monastery for safe keeping."

Professor Reeves states in his work on Real Property, sec. 299:

"It must be remembered that the feudal system mingled and confused property rights with political authority and responsibilities, and that the charters from the king to the colonial proprietors conveyed together without making any very clear distinctions between them, both governmental jurisdiction and territorial proprietorship. Political sovereignty and overlordship of all their lands were thus confused in the minds of the colonists. They made no clear distinction between the king as a feudal lord and the king as a hated despot. And when the despotism had been thrown off, it was natural for them to assume that the feudalism had been done away with. They had brought with them, it is true, and retained in their systems of jurisprudence most of the common and statute law of the mother country; but this they would inevitably modify as the nature of the times and the conditions of the country required. And feudalism as a system was out of harmony with the American spirit. We could have expected therefore, a priori, the result that followed, namely, that most of the old states and all of the new ones would declare by positive statute or judicial determination, or would tacitly assume, that all lands within their jurisdictions should be held and owned alodialy. . . . And it seems to be perfectly safe to assert that, in the other states and territories where no affirmative law upon the subject is to be found, it has been assumed and will always be maintained, that no real property within their jurisdiction is held under any feudal tenure or incidents."

Professor Walker says in American Law, sec. 141:

"Our citizens (he is speaking with special reference to the inhabitants of the Northwest Territory, and wrote in 1837) hold of no superior. What they own they own absolutely and inde"
All estates are in the broadest sense allodial. The only provision which bears the most remote analogy to the doctrine of holding of a superior is, that the people of the state, in their collective and sovereign capacity, have an ultimate right to all land within their jurisdiction, when it so happens that there is no other legal owner; in which case the law makes it escheat to them; and this right of escheat bears some resemblance to that of the lord paramount. But it has its origin in the most obvious considerations of public policy, and can in no sense be regarded as a relic of the feudal system. We do indeed still retain some of the legal terms to which that system gave rise. Thus we speak of the manner of holding as a tenure, of the thing holden as a tenement, and of the person holding as a tenant; but we use these terms in a modified sense. So we recognize a relation of landlord and tenant, respecting which some of the rules have taken their complexion from the feudal relation of lord and vassal. But this is all; and we may therefore dismiss the subject of tenure as having no other than a speculative interest for us.  

16. Although the present relationship between the State and the private landowner has no peculiar terms and definitions of its own, yet some principles and doctrines may be formulated and taken as established.

Out of the great mass of dicta by the courts and of opinion from text writers, many of them exhibiting a sad lacking of acquaintance with principles and their relations to each other, it is impossible at present to lay down the principles of an articulated system of landholding of the state. Until a case arises and there is an adjudication by the courts, it is submitted that the following may be taken as established. Feudal tenure is contrary to our institutions, and has been supplanted by the free or allodial holding of land which was the custom of the Saxon freeholders prior to the institution of the feudal system, and is the same as that recognized by the law of nations; that the feudal system as a political institution has been repudiated both by the common understanding and practice of the people, and by judicial decision and legislative enactment; that the American state did not assume the position of feudal lord paramount; that fealty or personal allegiance to the sovereign fell because no person was substituted for the king to whom it could be due; that allegiance to the state was substituted for personal fealty; that the states did not assume the prerogative to grant lands upon conditions
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of feudal tenure; that they did not establish as part of their constitutions the dogma that the sovereign is the owner of all the lands so as that a grantee became a tenant of the state; that the lands were vested in the state “in its sovereign capacity for the preservation and protection of public interests;” and of private rights as well, both those which had been acquired before the revolution and such as might be acquired afterwards; that the prerogatives and regalities of the Crown were extinguished by the accomplishment of the revolution; that the status of Crown grants and the parcelling of the public domain fell to the people to be regulated in such manner as they might prescribe; that citizenship and participation in the government were not based essentially upon the holding of land, nor did they have any necessary relation thereto; that holding of the state exists, but the relation is not feudal, but political only, importing no distinctive duties on the part of the state, and no distinctive obligation on the part of the holder; that this relation of landholding which exists between the state and the private citizen cannot exist between one private person and another; that the state cannot grant lands upon special terms, but only upon terms of free and common custom; that the terms of this relation, as far as they are defined at present, are the terms of the citizen’s allegiance to the state; that no forfeiture of lands to the state exists, even for treason; that the king, clergy and lords proprietors, to whose support feudal tenure was essential, have been abolished; that aspect of the clergy represented by the lawyers being saved by their circumspect bearing and zealous and efficient service in the republic; that the legislature has no power to restore the feudal system, or any of its features; that the state has no reversionary interest nor possibility of reverter in lands granted by it, nor is it the ultimate inheritor of lands made vacant by the death of the owner without heirs; that the colonists brought over with them and established a traditional fight against feudalism; that the only remains of feudal holding known to the American colonists were fealty to the king’s or lord’s person, and rent; that both fealty and rent were nominal and political only, being for the purpose of preserving the king’s prerogative, not affecting landholding except in respect of the theories of conveyancing; that the colonists after the revolution parcellled out the lands according to the theories of the
law of nations, and established a relation between the state and the landholder which was consistent in fact with the spirit of individual political freedom which they had won in fact; that after the feudal system had been eliminated, the essential characteristics of sovereignty emerged, and are recognized because of their being inherent in the sovereignty of every state, not because they were sanctioned by any feudal origin; that of these characteristic and sovereign powers, the following are fully recognized under the American system: War power, power to define and enforce allegiance, parcelling, eminent domain, escheat, police power. These are antecedent to and superior to any specialized organization, such as the feudal system. Their supremacy is essential to the existence of any special system.