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THESIS ON REAL PROPERTY

- by -

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In those primordial ages when the Great Creator weaved from out the warp and woof of impenetrable darkness, the silver threads of golden light and converted black chaos into cosmos, He fashioned at the same time an abode for man. There, inherent in the world's creation, is marked the ultimate ownership

of property, and there, it is predicated, that the earth and all it contains is the general property of all mankind as the gift of Him who created it.

It is quite a reasonable supposition to postulate, in the primitive periods of man's existence, the common ownership of all property - both movæables and immovæables. Such a community of ownership, however, would not necessarily entail a community of rights and interests as understood in modern times, but rather the reverse; for such communion of goods could never be applicable to anything save the substance of things. Doubtless such is the true conception of the most primitive "form" of ownership, but such a theory of a race or common property in the mere body or substance of things distinguishable from the notion of rights and interests, is too abstract a conception in which to found a theory as to the origin of proprietary right, either individual or collective. We must, therefore, search elsewhere for this, and base our enquiries on something, in its essence, more practical.

In tracing the historic origin or proprietary right, the first conceptions of it appear to be revealed in the doctrine of primitive use and occupation. "Occupatio" or occupancy, is the "advisedly taking possession of what is at the time, the property of no man (res nullius) with a view to acquiring property in it for himself." He who first came into possession of a thing by force or strength or skill in handicraft, acquired therein a certain right of ownership, in its essence transient, yet which lasted so long only as the duration of the first possession. Thus the right of possession was inseparably dependent on the act of possession, and from this it would appear that the "usufruct" was the first estate (if such we may call it) enjoyed by man. In the old Roman Law, title by occupancy was considered to be based on the "jus gentium" or the law common to all nations.

This would be a sufficient proprietary right for nomadic tribes and races, but as population increased, things of a

necessity were bound to assume a more permanent status, and proprietary title to become a more substantial quality of right than that afforded by a mere usufructuary property in things. Ownership and possession began to depend not on the immediate use only, but also on the appropriation of the "corpus rerum" as well. This phase of permanent dominion would naturally attach itself to movables long before any proprietary right whatever had been acquired in lands and immovables, as the primitive needs of the race would require first, a permanency of possession in chattels. The art of cultivation of the soil became an institution of industry only, as the civilizing process of social development increased. This is amply illustrated in the comparatively recent history of our North American Indians. Who can doubt but that his first right of property was to be had in his tomahawk, his bow and quiver, or his buffalo skin, and that too, but a transitory right coincident with actual possession.

In reviewing ethnological history, one circumstance has shown itself to be standard, namely, that of the period of migration. In that ancient migratory movement over westward, we trace the origin of proprietary right in immovables. It betokened compression of population on territorial subsistence, to relieve which it was necessary to migrate to unoccupied lands. Natural subsistence had to make way for artificial cultivation and with the development of the primitive husbandman came the introduction of a more permanent dominion in the soil. Thus necessity seems to have been the father to proprietary right; but whether civil society was organized subsequently to insure its security, or whether society as a combined unit existed antecedent to the individual right to property, is a matter of conjecture. But I submit that the origin of proprietary right in general seems undoubtedly to have sprung from the ancient usufruct, whether we view it from the stand-point of the community or the individual, and having passed through the graduating stages of a varied permanence, ultimately realized

itself in the dominion of the "corpus rei cum jure". Savigny, the greatest of modern jurists, holds all property to be founded in adverse possession ripened by prescription.' Occupancy would appear, therefore, to be the origin in the first instance of a usufructuary proprietary right, while "usucapion" or prescription seems to have been the medium through which initial permanence was established.

Some authors hold against the theory of occupancy as the primary basis of proprietary right, holding that joint ownership is the truly archaic institution and that to arrive at the right conception we must view the forms of property as associated with the inseparable rights of the tribe or family. Such authorities repudiate the testimony of Roman law on the ground that its channels of observation had become colored by the philosophy of the lex naturae, or the law of nature, whereby the impression was left that individual ownership was the initial and normal state of proprietary right. However this may be, it affects not the present issue as to the nature and origin of proprietary right in general, whether such original right were individual or composite as to its subjective possession. For it is, in the issue, immaterial, whether the primal state of society recognised as the unit the proprietary right of the individual or the group; in as much as the primary original of the right was nevertheless acquired by occupancy - be the form of possession what it will. It is not here in place to enter upon a discussion as to the organization of primitive society or its probable constitution and status at its original formative period. Whatever that, it appears an irrefutable sequence which jumps with Savigny's dictum that proprietary right is based on adverse possession perfected by usucapion.

With the advance in society property in things assumed a more permanent aspect. Mutual convenience led to the displacement of title by use and occupation and gave rise to sale and transfer - de emptione et venditione. Where the holder had secured a more or less permanent title in a thing which he felt

he could do without and yet might not feel like abandoning it entirely, while at the same time having the desire to possess something which another might have, and for which he would be willing to make an exchange - a proposition of barter would be the natural and logical outcome. This mode of exchange would first assume the form of barter until mutual convenience, the cause of its origin, again modified and perfected it into a more workeable system of sale and transfer through a common medium of exchange.

This leads to the question of the extent of an estate in realty and the tenures by which such might be holden. Two distinctive and opposite systems appear to have prevailed at different times, in the various modes of land tenures, namely: the allodial and feudal systems. The former was closely akin to the old Roman Domainia, and both were in marked contra-distinction to the feudal tenure in that they were of the nature of an absolute grant. In the forward march of history the German Allod and the Roman Domainia became supplanted by the fiefs of the feudal system. The great allodial proprietors made themselves into feudal lords by conditional alienations of portions of their land to dependents. This transformation was one of slow growth and did not reach completion till the latter part of the twelfth century.

Feudalism appears to have had its origin in the beneficiary gifts of marauding chieftains invading Roman territory. These were lavishly distributed by Charlemagne, and consisted of grants of Roman provincial lands to be holden by the beneficiary on terms primarily conditional upon military service. The great allodial proprietors do not seem to have fough in company with their Sovereign - his entourage being at first made up of personal dependents. This, as the system gained strength, assumed larger proportions till finally the Sovereign ruled over all and the ultimate title to all lands within his dominion rested in him.

In the latter days of the Empire, there is traceable in Roman law a species of land tenure which affords a satisfactory

explanation of the feudal fiefs. Barbarous incursions into Roman territory were bound to have a resultant influence on the rude laws and customs of the invading tribes through contact with the refined jurisprudence of Rome. At this time there existed in the Roman provinces a form of land tenure known as Emphytensis, from which the feudal fief of the middle ages is supposed to have sprung. The Emphyteusis consisted in the practice of farming out the "agri vectigales" of municipalities to free tenants at fixed rentals and under certain conditions. This method was afterwards adopted extensively by individual proprietors, and the Emphyteuta, or tenant, finally obtained recognition by the Praetor, of a qualified proprietorship. The original lessor had the right of re-entry on default in payment, as also right of pre-emption in case of sale. Thus a form of double proprietorship was established, bearing a striking analogy to that existing under feudalism. It is highly probable, therefore, that the organization of feudalism among the Celtic nations, the Goths and the Franks, was the direct outcome of their contact with the workings of the maturer Roman Customs and jurisp rudence, and that its rapid spread was due to the great inherent advantages it possessed as a rule of government best adapted to a warlike and disorganized state. It is known to have been adopted approximately at this period and many of the duties incident to the relation of lord and tenant bear a strong similitude to the relations existing between the Roman patron and freedman.

The system of feudal tenures was especially fitted for the Celtic races which adopted it, as it laid the foundations of an autocratic system of government by the chieftain over his barbarous hordes, that could have been effected in no other way. The constitution of feuds as on the continent of Europe arose directly out of the military policy of these Celtic nations. Large parcels of land were farmed out by the chieftain to his officers, and these again to sub-officers, etc. Such allotments were called feoda, feuds, fiefs or fees, and were of

of a stipendary nature, conditional on military service and the oath of fealty. Springing thus from conquest, all were mutually bound together to defend the others possessions. It was thus a system of government based on the potent factor of self-interest which of necessity carried in its wake law, order, and subordination to authority. Every feudatory was bound when called on to fight for his lord; and so the system resolved itself into a primitive mode of military conscription. All nations formerly Roman came to adopt the feudal system of tenures, whereas before, they were allodial and independent of any superior lord.

It was not until the time of William the Conqueror that feudalsim found its way so far west as England. With the Norman invasion came many foreign customs, most prominent among which was feudal law. The introduction seems to have been gradual, at first being applied by Norman Barons to estates escheated by forfeiture, and re-granted by Royal favor to baronial vassals. Such grants were not given freely but leased out to hold of the King subject to conditional duties incident to ownership. The King was still considered in some sense the proprietor, and was called the lord paramount. The mode of the grant was dedi et concessi, being words of pure donation to perfect which, it had to be followed by the ceremony of corporeal investiture.

These grants from lord to feudatory appear to have been at first mere leases at the will of the grantor for short terms of two or three years, followed by continued renewals according as the conditional duties and oath of fealty were kept. Then as society advanced and husbandry obtained estates for life were granted, and in process of time, as children usually succeeded to their fathers, such estates became hereditary - the heir paying a fine called a relief, to be re-established in the inheritance. In this way estates came to be granted to a man and his sons, each one taking equally, followed on his death without issue by reversion to the lord of the manor.

Finally, grants were made to a man and his heirs and the inheritance then descended to all lineals of the first feudatory. Patrimonial partition, however, caused a corresponding weakness in feudal services, which fact, together with impossibility of division in honorary titles, now a customary concomitant to large grants of realty, caused a centralization of the inheritance in the eldest son, thus establishing the fixed law of prime-geniture.

Feudalism in England developed many and various kinds of tenures dependent on whether the annexed services were free, base, certain or uncertain. The lay tenures were in frank tenement or villienage. The former comprised the knight's service which was free but uncertain; and the free socage which was both free and certain. The tenure by villienage included pure villienage, where the service was base and uncertain; and the villion socage in which the services were base yet certain. The majority of these tenures have been reduced to that tenure which is one of the great relics of Saxon liberty, viz.- that of free and common socage.

No matter what the extent of a man's estate was, or the tenure by which it was holden, he could not always alienate it with the same freedom exercisable by landed proprietors of today.

Movables were the primary subjects of alienation, since they could as a general rule be transferred by mere tradition and with very little ceremony. However, this was not always the case in ancient times as the earlier Roman law testifies. There, property was classified into res mancipii and res nec mancipii, the former constituting the highest class of property, transfer of which had to be effected through the formal and ceremonious contract "per aes et libram". This primitive conveyance was not a written one but was acted out with numerous crude formalities before a number of witnesses. It bears an analogy to the ceremony to be found in early English law where the feoffment could not be transferred without the livery of

seizin. The res nec mancipii were a class of things that did not require as an essential to their valid transfer, the crude formalities of the mancipation, but were alienable by tradition or mere delivery. The same distinction, based on the superiority of certain kind of property, to a less marked degree is traceable in English law, for here we find chattels real classed as personalty though no doubt their rareness and seeming valuelessness to the early feudal law.

Restrictive alienation of realty has been a marked characteristic of English law. Alienations inter vivos enjoyed more freedom than transmissions by inheritance, yet even these were for a long time encumbered with ceremonious formalities, as well as by other restrictions, such as the wife's right to dower, etc. The earliest form of transfer known to English law was the feoffment with livery of seizin, which consisted of a symbolic sale occurring immediately upon or within view of the lands about to be transferred, according as it was a livery in deed, or a livery in law - it being necessary that both principals, the feoffor and the feoffee be present be present at the time. In the latter case it was imperative that the feoffee enter into possession during the life-time of the feoffor, otherwise the feoffment was rendered nugatory. In addition to the livery of seizin, it was necessary to mark out or limit the estate to be taken. If granted to the feoffee "during the term of his natural life" it gave an estate for life; if limited to him "and the heirs of his body" he became a donee in tail - the words "heirs of his body" being words of procuration. Again, if made to a "man and his heirs" it granted a fee simple, which constitutes the largest estate possible under British law. Before the power of alienation had developed a complete freedom, if the grant did not contain words of limitation, it passes only a life estate. Now, however, the unrestrained transfer of estates inter vivos is complete, so that the one time vital necessity of limiting grants by words of procuration is no longer a matter of any moment. The formal

delivery of seisin accompanying a feoffment rendered it a conveyance of intrinsic assurance. This is exemplified in the fact that such a transfer made by an idiot was not void but only voidable, whereas a conveyance in any other form by such a person was absolutely void ab initio. In the reign of Henry VIII a further requisite was attached to this mode of conveyance by the famous Statute of Uses which rendered a consideration imperative unless the grant were expressed to be made "unto and to the use of" the feoffee. Writing was not, however, necessary so the wording were correct and witnesses present who could afterwards attest to it.

Writing in early times was an occasion of considerable solemnity as it was an accomplishment not generally possessed even by the gentry, so that sealing a written document came to be the customary practice and prima facie imported a consideration.

By the Statute of Uses every use was converted into a legal estate. Then arose the practice of conveying by means of a use upon a use, and as the Statute had expended all its power in the conversion of the first use into a legal estate, Equity held the second use to grant the beneficial interest and considered the possession of the legal estate under the Statute, the trustee of the estate, for the benefit of the possessor of the second use, or the cestui qui trust. This gave rise to estates in equity. Such an estate was not liable to escheat to the Lord of the Manor on failure of heirs of the cestui qui trust, as being entirely a creature of equity, it was not holden by any tenure.

Estates both at law and in equity were and still are liable to involuntary alienation for payment of the owner's debts.

The greatest instrument of alienation lies in testamentary succession. The existence of wills is distinctly traceable from the early infancy of society, right up to the present day. True, their forms and effects have been subjected to many changes and restrictions, yet the testament as a medium

of prolongation of the testator's identity after death, has always had a place sui generis in the social history of all nations.

The popular idea of a will is that it is a secret document, taking effect after death only. There was, however, a time when none of these characteristics belonged to it. It is claimed that the prototype of the modern will was one which took effect immediately on execution, was irrevocable, and public. This is to be found away back in the early Roman law. It appears that the Roman will at first was only allowed to take effect on failure of all persons entitled to the inheritance by right of blood, cognate or agnate or by arrogation. For if a testator attempted to disinherit his children, they could set aside the testament by bringing an action "de inofficioso testamento." This, however, was only resorted to when by all other means it was impossible to obtain the inheritance.

The will, which it is claimed is the parent of our modern testament, was a Plebian will of the nature of a conveyance inter vivos and consisted in a complete alienation of the inheritance to some person (usually a cbllusive heir) known as the emptor familiae. The ceremony took place before five witnesses and a functionary known as the libripens, and was finally ratified by the testator in a set phrase called the nuncupatio. This mancipatory testament was in its origin anterior to the art of writing, and so was conducted by means of symbolic gestures. It was an irrevocable conveyance, public, and had the effect of immediately vesting the inheritance in the emptor familiae.

From so crude a beginning the Roman testament passed through many changes, from the Praetorian Will, which developed the equitable doctrine of regarding the intent rather than the form, to the Justinian Will which required the seals of seven witnesses, and which passed the inheritance in toto and not merely the "bonorum possessio".

The conception of a will as being an instrument of disinheritance is one nascent with the later feudalistic period,

for the Romans viewed it as a medium of patrimonial transmission

The first modern wills were not instruments possessing absolute freedom and power of disposition. They were hampered by the attaching rights of the widow and children. In the latter case the Roman ~~proprietors~~ propositions governed, and in the former, the canonical law applied, as it was due to the efforts of the church that the right of dower was engrafted on common law of western Europe. Later, movables became absolutely disposable by will, and the law of primogeniture, in immovables soon rendered the duty of equality in distribution abortive. It has caused the entailing of landed estates in England to become the customary practice and so in a measure perpetuated remnants of feudalism.

In contradistinction to the English custom, all grants of realty in Manitoba are in fee simple. This is the greatest estate possible under British law, for the impress of feudalism is still apparent in the fiction which negates the possibility of absolute ownership - no man being in law the absolute owner of his lands; he can only enjoy an estate in them, while the ultimate ownership is still presumed to be in the Crown.

A person owning lands in Manitoba may hold them under a title as governed by "The Registry Act" or as under "The Real Property Act". In the former case he holds by virtue of a Patent direct from the Crown, or mediately through a connective chain of title, from the original allottee. In the latter case he holds under a Statutory Certificate of Title, unimpeachable, save in case of fraud or of rightful adverse possession. The one is known as the Old System, and the other as the New or Torrens System.

The advantages of a Torrens title are many. The title cannot be set aside save by order of cancellation on very exceptional grounds, though it may be attacked, and damages secured out of the statutory Assurance Fund. On the other hand, the Crown Patent is not invincible evidence of title, though by present statute, ten years undisputed issue will operate as such. An abstract title is very often extremely complex, being

affected by difficulties which cause irregular breaks in the chain of ownership. But when a title has been torrensed, it is at once simplified and capable of comprehension by the most casual observer. Complications can scarcely arise under the New System, owing to the restrictive method of registration enforced, as no instruments can be filed purporting to deal with a particular piece of land for which a Certificate of Title has issued, unless they eminate directly or indirectly from the registered owner. No such thing as title by possession is possible as against property brought under the Act. Another great advantage especially favorable to mortgagors, is the impossibility of sales under powers contained in a mortgage, without notice thereof being duly served upon all parties interested. Such a procedure can be done away with only on express consent of the District Registrar - a thing not likely to be obtained without the adducement of some sound and valid reason why the contrary should be permitted.

The Torrens system possesses whatever of benefit there is in the older system, without its liabilities and complexities, as well as conjoining therewith manifold and various advantages, entirely statutory in their origin. Probably its greatest fault to the professional mind would lie in its retrenchment of the solicitor's fees, though no doubt, this would be an additional and meritorious advantage in the eyes of the lay public.

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