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PROTECTIONS OF FUNDAMENTAL RIGHTS

LAND RIGHTS AND OWNERSHIP

The greatest freedoms of life, liberty and property are exhibited in a nation in which private ownership of land is recognized and protected. The mainstay of human existence centers around and depends upon the land. Thus the right to own and use land is one of the more ancient rights of man.

Under the English system, the idea of *tenure* was imbued within the possession and use of land. Tenure was the mode of holding lands or tenements in subordination to some superior, which in England was ultimately the king.

> Tenure is inseparable from the idea of property in land, according to the theory of the English law. All the land in England is held mediately or immediately of the king. There are no lands to which the term tenure does not strictly apply, nor any proprietors of land, except the king, who are not legally tenants. * * * The king is, by fiction of law, the great lord paramount, and supreme proprietor of all lands in the kingdom, and for which he is not bound by services to any superior.[1]

The king, in his position as "the great lord proprietor," would often assign his lords or nobles to be proprietors over sections of land. Anyone who possessed or occupied the land was subject to render services or a tax to that proprietor. Their status was that of a "tenant," as they did not fully or

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1 James Kent, *Commentaries on American Law,* vol. 3, p. 487.

independently own the land. The land or estate so held was called a "feud," and the right to use and enjoy the land under such conditions was referred to as "feudem." This concept of land use and possession is known as *feudal tenure.*

The feudal law "was introduced into England at the Norman conquest, where it formed the entire basis of the law of real property."[2] The feudal system was established in the American colonies, as the King of England claimed title to all discovered lands. Much of this changed with the Revolution. In determining whether Pennsylvania titles were allodial or feudal, the State Supreme Court stated:

> We are then to regard the Revolution and these Acts of Assembly as emancipating every acre of the soil of Pennsylvania from the grand characteristic of the feudal system. Even as to the lands held by the proprietaries themselves, they held as other citizens held, under the Commonwealth, and that by a title purely allodial. All our lands are held mediately or immediately of the state, but by titles purged of all the rubbish of the dark ages, excepting only the feudal names of things not any longer feudal.[3]

The Court also stated that much of the confusion on the matter of land titles, is due to our retaining after the Revolution many of the feudal terms, such as fee, fee simple, freehold, heirs, rent-service, tenement, and allodium. The Court stated that all our lands are "purely allodial," which refers to "the land possessed by a man in his own right, without owning any rent or service to any superior."[4]

The nature of land rights may depend upon what the Pennsylvania Court meant by the land being "held mediately or immediately of the state." If by "state" it is meant the

2 *Black's Law Dictionary,* 2nd Edition, "Feudal," p. 493.

3 *Wallace v. Harmstad,* 44 Penn. 492, 501 (1863).

4 *McCartee v. Orphan Asylum Society,* 9 Cowen 437, 513 (N.Y.–1827), citing 2 Bl. Com. 104.

government, then the government merely took the place of the king as "supreme proprietor of all lands." It would be more correct and consistent with the purpose and effects of the Revolution that "state" means the people as a whole. With the passing of political sovereignty from the king to the people, so too did the independent title to land, as suggested by an earlier decision of the U.S. Supreme Court:

> For when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use.[5]

While some of the forms and terms of the feudal system remained with private titles to land, this is no different than when some of the forms and terms relating to the Crown or Parliament were applied to our republican government.

If America was established as a Christian nation then "the state" should be viewed as the people as proprietor of the land, with God as "the great lord paramount, and supreme proprietor of all lands." For it is true that at the Revolution we displaced our human king, replacing him with a divine king, as one popular slogan at that time was— "no king but King Jesus." By Christian theology, God is the "possessor of heaven and earth" (Gen. 14:19, 22); and we are to be His lords and nobles (kings and priests) in the earth.

Despite the feudal system, land possessed in England was regarded as private property, perhaps due to principles retained from old Saxon law. Thus the right to land was as much cherished and guarded as that of liberty. It was a maxim of English common law that *"Every man's home is his castle, and though the winds of heaven may blow through it, the king cannot enter."* There thus were many good principles on land rights which came from the English common law:

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5 *Pollard's Lessee v. Hagan,* 3 Howard (44 U.S.) 212, 229 (1845).

> By the laws of England every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he his liable to an action, though the damage be nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil.[6]

We find that such principles regarding land rights were clearly conveyed to and adopted in this country:

> Every person has exclusive dominion over the soil he absolutely owns; hence such an owner of land has the exclusive right of hunting and fishing on his land, and the waters covering it.[7]

The sound principles surrounding land rights, have, like most other individual rights, been encroached upon in recent times. With land this has occurred by way of "**zoning laws.**" The first comprehensive zoning ordinance was adopted by New York City in 1916.[8] The majority of such laws contravene basic property rights and common law principles:

> It is a trite observation to say that zoning ordinances are in derogation of an owner's rights under the Common Law.[9]

> Restrictions imposed by zoning ordinances are in derogation of the common law and of the liberties, rights and privileges guaranteed by the Constitution of the United States and the Constitution of Pennsylvania.[10]

Due to this nature of "zoning laws," many of them were declared to be unlawful when first implemented. Thus, where a city ordinance provided that no one shall erect a building on their land without first obtaining a permit from the city tax court, such a measure was held void:

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6 T.M. Cooley, *Constitutional Limitations,* 8th ed., p. 634; *Boyd v. U.S.,* 116 U.S. 616, 627 (1885), citing the old English case of *Entick vs. Carrington.*

7 *L. Realty Co. vs. Johnson,* 92 Minn. 363, 365, 100 N.W. 94 (1904).

8 83 *American Jurisprudence,* 2nd, "Zoning and Planning," § 1, p. 35.

9 *Milano v. Town of Patterson,* 93 N.Y.S.2d 419, 422 (1947).

10 *Appeal of Medinger,* 104 A.2d 118, 120; 377 Pa. 217 (1954).

> It cannot be pretended that the citizen has not the common-law right to acquire title to a lot of land, qualified or absolute, in a city, as elsewhere, and to build upon and improve it as his tastes, his convenience, or his interest may suggest, or as his means may justify, without taking into consideration whether his buildings and improvements will conform in "size, general character, and appearance" to the "general character" of the buildings previously erected in the same locality.[11]

In a case in South Dakota, a man was arrested and tried upon a complaint charging him with having willfully refused to take out a building permit and to pay the prescribed fee therefor, after being requested to do so by the building inspector of the city of Sioux Falls. The State Supreme Court held the ordinance requiring the permit void, stating:

> It is clear that the ordinance in controversy, upon its face, attempts to restrict the right of dominion which every individual possesses over his property, not according to any general or uniform rule, but so as to make the absolute enjoyment of his own property depend upon the arbitrary will of the city inspector, and therefore makes the right of the citizen to use his property subject to the will of such inspector.[12]

Judicial sanction is denied to citizens who are required to secure the consent of officials, who may give or withhold at their pleasure as by way of a permit, before he may do such things with his property as the following: "Build on his own land, keep horses, etc., on his own premises, set up steam engines, store petroleum thereon, or use a building for storing or sorting rags." All such acts of the citizen involve "the inherent right of the individual to assert his proprietary interest over his own possessions."[13]

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11 *Bostock v. Sams,* 52 Atl. 665, 668; 95 Md. 400 (1902).

12 *City of Sioux Falls v. Kirby,* 60 N.W. 156, 157; 6 S.D. 62 (1894).

13 *Cutrona v. Mayor and Council,* 124 Atl. 658, 664 (Del. 1924) cases cited. The use of a building permit "restricts the rights of dominion" which the owner possesses. *Hays v. City,* 173 S.W. 676,679, 263 Mo. 516 (1915).

There have also been attempts to limit property rights by dictating to citizens what type of building they may erect upon their land. The city of Denver had attempted to pass an ordinance to prohibit the erection of store buildings on a residence street, without consent of a majority of the property owners in the same block. The Supreme Court of Colorado said such a measure was not lawful:

> It is fundamental law that a municipality under our system of government may, by ordinance, require the owner of a lot to so use it that the public health and safety will be best conserved, and to this end its police power may be exercised; but it is also fundamental that such owner has the right to erect such buildings covering such portions thereof as he chooses, and put his property, as thus improved, to any legitimate use which suits his pleasure, provided that in so doing he does not imperil or threaten harm to others. * * * [A]ny law abridging rights to a use of property which does not infringe the rights of others, or which limits the use of property beyond what is necessary to provide for the welfare and general security of the public, cannot be included in the police power of a municipal government. * * * A store building is in no sense a menace to the health, comfort, safety, or general welfare of the public.[14]

The Court asserted that "one of the essential elements of property is the right to its unrestricted use and enjoyment," and to deny one of the use of his land "would clearly deprive him of his property without due process of law."

In New Jersey, a man had purchased a corner lot in a town to erect a store and dwelling thereon. His plans to build were denied due to a zoning ordinance which prohibited the type of buildings he desired to build. The State Supreme Court held that the ordinance was void as being violative of the rights of private property:

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14 *Willison v. Cooke,* 130 Pac. 828, 831; 54 Colo. 320 (1913). See also *People v. City of Chicago,* 103 N.E. 609; 261 Ill. 16 (1913).

> The right to acquire property, to own it, to deal with it, and to use it, as the owner chooses, so long as the use harms nobody, is a natural right. This does not owe its origin to Constitutions. It existed before them. The protection of this natural right is one of the reasons which prompted men to form governments. The protection of private property is the aim of every well-considered form of government. The right of private property has been called the keystone of the arch of civilizations. A government which fails to protect the right of private property cannot long endure.[15]

In a Minnesota case a man erected a small store on his land in a residential district, but an ordinance existed which prohibited commercial buildings in such areas. The State Supreme Court held the act to be unconstitutional, stating:

> [W]e have found no cases holding that the legislature, in the exercise of the police power, may prohibit the erection of an ordinary store building in a residential district. In the so-called billboard cases, it has uniformly been held that statutes or ordinances prohibiting the owner from erecting upon his property billboards or other structures for advertising purposes cannot be sustained under the police power, and are void as an unwarranted invasion of property rights (numerous cases cited). The cases are equally unanimous that restrictions upon the use of property cannot be imposed under the police power for purely aesthetic considerations.[16]

An ordinance providing that no building should be erected with its roof ridge less than 26 feet above the building foundation in a certain residential zone did not promote health, safety, and general welfare, and hence it was invalid.[17] Town zoning ordinances requiring lots to be a minimum size in square feet, or to have a minimum frontage width in order to build upon, are also an unconstitutional deprivation of

15 *Ignaciunas v. Risley,* 121 Atl. 783, 785; 98 N.J. Law 712 (1923).

16 *State ex rel. Lachtman v. Houghton,* 134 Minn. 226, 232-33, 158 N.W. 1017 (1916). Affirmed in *Volander v. Hokenson,* 145 Minn. 484, 175 N.W. 995.

17 *Baker v. Somerville,* 293 N.W. 326, 328 (Neb. 1940).

property.[18] Laws requiring a minimum floor area in homes that are to be built, which are not shown to promote the health, morals, safety or general welfare, unconstitutionally deny property owners of the right to erect a home.[19] An ordinance requiring surrounding land owners to be first notified and to testify as to the suitability of a proposed building before one is allowed to build on his land, is violative of the constitutional right of a citizen to use his own property as he sees fit, as he is not interfering with anyone's rights.[20]

It was during the 1920's that the courts started "taking more and more liberal views of the 'zoning power.'"[21] The power has become so pervasive that we are now no better off than when our ancestors were under the feudal system.

THE RIGHT TO LABOR, WORK & BUSINESS

The right to work fully encompasses the right to life, liberty and property. Every one is to have the *liberty* to engage in any lawful work, business, or avocation; a person's labor or business which he owns is regarded as his *property*; and one's ability to work, labor or pursue a business is a part of their right to *life* since they cannot sustain a livelihood without such things. The right to work is a God-given right, as Jesus said, *"a worker is worthy of his meat"* (Matt. 10:10).

There have been instances where the government has attempted to prescribe the number of hours per day or per

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18 *Land Purchasing Corp v. Grunewald,* 195 N.Y.S.2d 69 (1959); *Mandalay Construction, Inc. v. Eccleston,* 195 N.Y.S.2d 84 (1959). *Ritenour v. Dearborn Twp.,* 40 N.W.2d 137; 326 Mich. 242 (1949); 96 ALR2d 1376.

19 *Appeal of Medinger,* 104 A.2d 118; 377 Pa. 217 (1954). *City of West Palm Beach v. State,* 30 So.2d 491 (Fla. 1947).

20 *City of Dallas v. Mitchell,* 245 S.W. 944 (Tex. 1922). See also *Spann v. City of Dallas,* 235 S.W. 513 (Tex. 1921); *Hill v. Storrie,* 236 S.W. 234 (Tex. Civ. App. 1921).

21 19 *American Law Reports,* Annotation, 1395, 1397.