

Deprivation of land ownership



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“ The surest way to deprive a peasant of his land is to give him a secure title and make it freely negotiable.”

R Schickele 1962 , cited in Tim Hanstad , “ Designing Land Registration Systems for Developing Countries” Am. U. Int’l L. Rev. 13 (1997) 667 .

Discuss.

Some see land dispossession as the cornerstone of the past colonial key economic and political policies that has led to the capitalism as we see it. Land dispossession is not only established on land grab by use of force but also has been intensified by new innovative types of property and property regulation, confirming some of the Loakean philosophies of property and its relationship to society and its diverse make of ethnicity and race.

Furthermore the title also suggests that there is a relationship between dispossession and social and economic standing within society. This article shall examine the broader implication of the above quotation and try to examine the relationship between the “ powerfals” (those who are economically and or socially superior to the other) ability to deprive the lesser from their land and whether or not there are any obstacles in their way, or has the whole structure been set up been set up as the title suggest to make it easier.

To understand the above assertion it may be necessary to understand a capitalist approach to land and dispossession and before that we need to understand registration in context of this question and its historical development. Does this question suggest that dispossession of land is an exclusive relation between the rich and the poor, or is the relation more

complex and less sinister than is been suggested. To make sense of this the article will try to first break it down to its component parts and then try to piece it together.

Nevertheless ownership of land is a natural phenomenon in our societies, however in the scheme of human history this is a new development. , in the long sweep of human existence, it is a fairly recent invention. Many question arise from this statement, that where did these ideas originate, what is really ownership of land, and how can it be that a line drawn on the land by a sword can denote ownership and control. These assertion in our modern society are alien, as land ownership is so ingrained into our psyche. Surely before you are dispossessed or deprived if something you must have owned it or had rights to it first.

Pre-Registration

Before title registration there was John Locke. In his writings “ Two Treaties of Government”[1]Locke summarise prehistory on land and ownership as a God (the god of the Abrahamic religions) given inheritance to the “ Children of Men”[2]in common, this is a superstition that in this scenario one can or has a right to own land or a right to own land. However this is not John Locke’s view on ownership of land. His starting position is that man has an ownership in himself[3]which is exclusive to him against all others. Then he states that that a man’s physical labouring and what he creates from his own hands is also his own exclusive ownership. What Locke then goes on to summarise profoundly that then what he toils on the land and what he produces then becomes his own property too and becomes excluded from

common ownership[4]. In summary what Locke can be summed up to say is that if man build a house on the land it is his house and if he works the land because of his labour it is his land, and thus the philosophy of Locke can be used to ascribe prehistory ownership of land. Agriculture made the man's connection to the earth more intense. Tilling the soil, making homesteads and communities all contributed to a more direct investment in the land. Nonetheless this was not the ownership of land as we know it.

Historical context is incredibly significant, in particularly with concerns to land ownership, this is important and history of land entitlement started in the United Kingdom and was exported to its colonies. This history is important to the context of this article as the histories of many dispossessed people are from the former colonies. While land was owned by the Anglo-Saxon in England prior to the invasion of England in 1066, it was William the First that usurp the land and redistributed it to his loyalist in favour for services rendered and to be rendered[5]. He devised tenures, the kings loyal man provided him with services which might be providing horsemen and other personal who did the kings business, tenure. The ownership of the land thus remained with the crown. This was the preserve of the “ Common Law”.

In Pottage's writing[6]The Measure of Land, he describes the archaic ways land conveyancing took place in the past (pre-registration documentation of land ownership). He describes the lengths to which potential owners would have to go to try and get good (or better) title to the land they wished to own. This could be by medieval turf cutting[7]with a sword, or to hold fate and events as to instil it into the memory of the local as a symbolic time so that the event could denote the day the land changed owners, this grew to a

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stage that to have good title would mean that the possessor would have as much historical documentation as trusts in writing to prove if there were a dispute that the possessor had better title, however any possessor could be dispossessed regardless of the quantity of documents at hand if someone put up a document that may show that they had had the better title by whatever means and that that hadn't to date been extinguished. Yes complicated and fraught with pitfalls. Possession at that time was the first evidence towards ownership, coin the phrase that “ possession was nine tenth of the law” accurate alluding to the fact that that one tenth could still dispossess you if you had not covered or collected all the information.

However the earliest ownership of the land is near enough historically impossible to prove, so long as you had enough retrospective history on the property in your possession you would be unlikely to be dispossessed of it. The prospective buyer would need to be satisfied the chain of ownership could be evidenced to a specific point in time, before 1875 this would have been 60 years[8], in genealogical terms approximately four generations.

Long lines of historical record to the ownership of land would cement the ownership of the land and the elite families that owned them. This supposition established the elite classes' ownership of estate. The longer these few families kept possession of the land the more it hid in some case highly contested and disputes over land[9].

Registration

In an article written by Keenan[10], she says that title registration has become recognised as “ a modern globalising trend” in land law. Keenan say <https://assignbuster.com/deprivation-of-land-ownership/>

that these measures are being readily and free being accepted by governments in greater numbers across a multitude of jurisdictions globally, and where it is not being done then the world bank and the International Monetary Fund are demanding it as parts of global deals whether the purpose it to unify or make easier land acquisition we can only speculate.

With the induction of the industrial revolution, came the need and the demand for more secure ownership of land. During the 1700s law relating to real property stagnated in statutory terms, however doctrine continued to evolve by judges in the courts, for example under judges like Lord Nottingham (from 1673-1682), Lord King (1725-1733), Lord Hardwicke (1737-1756), Lord Henley (1757-1766), and Lord Eldon (1801-1827) . As the industrial revolution took hold globally and trade expanded, the influence of new money of the business and industrial classes was also growing, and the once dominant wealth and political clout of the landed gentry was in decline. Adam Smith discussed in his book “ The Wealth of Nations” that “ the land owners were able demand and take rent from others for very little cost in monetary term . Through the 1800s there were many attempts at trying to replace the document based ownership to some kind of registration system.

The colonialist settlers living in the colonies had a different experience of societal and political experience than those who were back in England. At the time the settlements were being colonised in North America and Australia[11]by the British. As land was being possessed, occupied or settled in the colonies, a form of legal confirmation was needed in order to give the settlers security and title. So in 1857, Robert Torrens the prime minister of South Australia decided that he was going to dedicate his time in land reform

and in particular to develop a land registration system for transfer of land in the colonies. He had identified that on occasions the English system of land conveyance was sometimes more costly than the cost the land itself[12].

The Torrens System

In discussing the establishment system of title and the induction of Torrens, it is helpful study the background and direction of what Torrens wanted to establish once he finally established the system in South Australia[13]. There are important difference between what was happening in the past and the Torrens system, crucially the biggest change from the past was to create centralisation registration of the Title. The reason was to combat the past systems failing and in particular the skewed character of the old system and to create a safer alternative on the central system[14]. Torrens was of the opinion that the old system was completely redundant and not fit for purpose[15]and because of this Torrens set up the new and better and principally fair system. The idea Torrens based his system on was originated on the “ Mirror Principle”, “ Curtain Principle” and also the “ insurance Principle”[16]. The words may suggest the ‘ Mirror Principle’ in the reflection of the ground realities and the facts around the owners title, the ‘ Curtain Principle’ would hide any defects and therefore the purchaser could rely exclusively on the just having the registration document and finally the ‘ Insurance Principle’ underwriting any possible errors and providing compensation when a mistakes occurs[17], what this gave was provided was assurance of title and ease of use of the system. Torrens system was described as “ not being a system of registration of title, but being a case of title by registration”[18]. One of the cornerstones key to Torrens system was <https://assignbuster.com/deprivation-of-land-ownership/>

something called ‘indefeasibility’, meaning the new title owner would only be liable to interest registered at the time[19]. However at the being ‘deferred indefeasibility’, was accepted[20]. What this entailed was that in case of fraud to a bona fide buyer, indefeasibility was not granted until both and blameless owner and an blameless buyer were present. This was however later overturned in court[21]. The success[22]of the system comes down it simplicity. To avoid the difficulties for the buyer when doing legal searches, Torrens Mirror principle was established. This did not give any guarantee of validity but simply provided priority if valid[23].

As Keenan says in her article, on this same subject, that, the Torrens’s system made it simpler, cost effective and speedier for investors to re-sale the property for the investors then before the Torrens system was introduced.

English Land Registration

The first formal land registration system came about in the in England four years after the establishment of Torrens system in 1862. These were followed by two further Acts in 1875 and 1897[24]. Then in 1925, the Law of Property Act 1925 was passed and enacted. The big difference between the two systems was that PLA 1925 allowed for overriding interests, like easements[25], squatters rights[26], and lease with terms of 21 years or less[27], these were similar to some of the indefeasibility expressed in the Torrens system.

Dispossession By Torrens

Because of Torrens and the 'Curtain principle' any previous historical connections with interest in and any entitlement thereto were hidden behind the curtain once the land was registered. Once registered anything that came before vanished[28], the people who did have the said relationships could effectively become trespassers on the land that they freely roamed or lived in historically. The Torrens system found great favour by other colonialists and spread quickly through the colonies like an epidemic.

Dispossession

The idea of dispossession has been insidious in the writings of academics and campaigners who want to investigate, write detail of and confront ethnic capitalism. The cruelty of dispossession includes and is not restricted to, being dispossessed of property whether it is your land or your home, country, your tools and resources of survival, your historical background, language and your own person, your character, can describe in one way or a combination of ways a large number of the global population at the current times. The spread of imperialism across the world has not been forgotten. However the aftermath of imperialism or colonialism has left its bitter scars, but also has developed into modern forms too. Modern capitalism has its own incarnations of reasoning, influence and manifestations (collectively known as 'Cultures of Dispossession').

From what has already been described above this article can demonstrate how dispossession has become a common place which is not exclusively to economics, societal or the legal register. The various manifestations of dispossession demonstrate irregular effects of hundreds of years of

capitalist accumulation focused around action of the possessive personage and the consequent result of ever ready onto rationally and politically dispossessed of the ability suitably own or to be free. The sexual orientation/ gender and rascality is not merely dependent but are the construct of this article in the sense that these are features that are re-occurring theme in dispossession. Holistically this article is demonstrating that dispossession by title is just ones means by which dispossession happens.

By concentrating on means on the ways of dispossession as one of the clear modes of authority of colonial capitalist arrangement, in this article we have already looked at judicial machinery used to dispossess. In the alternative possession has to be in the realms of the judicial belongs ideologically to a spatial sphere, that takes into account current political and economic thinking in a verity of ways. However the focus of the nest section shall be on dispossession by design.

Foreclosure

K-Sue Park in the article Money Mortgages and Conquest of America, highlights a discussion of foreclosure, the modern phenomena of dispossession. When the colonialist settled in America they developed on the English law that they had inherited by virtue of their origins, to develop and create their own individual and unique model taking into account and adopting to the new ground realities of a conquered land[29]. Furthermore the development of mortgage in America, followed one fundamental constructive change across the settlers kingdom (the colonies) and that was the how simple foreclosure had become (was it by default or design?) on

land, bordering on land being dealt with in the same way as chattels, which was a contrast from the difference of land and chattel had be maintained in the old English system[30].

Academics have made it apparent that the everyday threat of repossession (the English word used for the America for dispossession) in the way mortgages are practiced by way of a uniquely American colonial notion[31]. The narrow window from which the American historian view their own historical prospective of property/mortgages dealings, illustrated ho that the transaction by enlarge occurs amongst white European / American during the late seventeenth century and early eighteenth century. The alterations in mortgage can be described as happening earlier then some historians mention, and the interpretation of that is to assume the acceptance that the relaxed and unimpeded, prevalent repossession first happened on connection with dispossession of the natives.

On the onset it has to be understood the originality of the American mortgage, and it is also crucial to realise that extremely lasting practice of protecting individual association to land in English property law before settlers left to colonise. The deeply held principle predilection was mirrored by limitations found uniquely in English mortgages. Before the seventeenth century, at the time the first British settlers setup colonies in America, it was near on impossible to detach someone from his land because of debt dealing through English law.[32]Previously the earliest documented use of land to secure debt was established an instrument known as the gage[33]. From the inception of debts incurring a cost of interest payments as a type of usury at this period, English lenders who are allowed to a gage, were allowed to

collect the rents and the fruit of the land[34]. The benefits granted to lenders at that time, is not without difficulty able to connect the right and duties that exist by law in estate currently, the benefits ordained to those lenders of the past emanate directly from the charged land. A chief justice of the king of England in the twelfth century, explained and identified two types of gages the living gage and the dead gage or the Vif gage and the Mort gage[35]. In the Vif gage the lend and adjoin the fruits and rents towards the debt with the expectation to reduce the debt. By contrast if you had the mort gage the leader is forbidden from collecting the fruit or other reciprocal benefits to reduce the amount of debt but can be accumulated as a profit to the amount of loan.[36]As the mort gage was the system that that avoided the prohibition on interest, it become the chosen gage[37]. At the beginning the right of the lender was surprisingly a feeble, but with the course if time have more likely have been able to possession for the duration of a loan.

Scholar of business institute are brought closer to affiliation with the law because of the closeness of the connection actions of the association and the drama intrinsic in the great efforts among and bounded by partners.[38]

Conclusion

It must firstly be stated that the study of dispossession id fraught with complexities, more difficult it such a complex area is from the myriad of information and the intricate and complex writing out there, it is difficult for the author to stay focus, rather than what is likely to occur of vying off at tangent only to rein oneself back in. The conclusion for this article has to come from the writing of one of the best pieces written work read by this

author, and that is from Sarah Keenan's *Smoke Curtains and Mirrors: The Production of race Through Time and Title Registration*[39]. Why? Because Keenan has been able to stay extremely focused on the theme through-out and written a great article. Nevertheless this author has the perilous task to follow that.

The main feature of this article has been the development of title registration systems and how they all seem to be linked and woven from the same cloth. Registration was developed by the forced necessity of an overly complex, convoluted system that still left the buyer at risk even after investing huge amounts of time and money. The irony of the old system is that it could dispossess some one of their title by default as the system had no safety net, there should have been a label on the old system that always read buyer be weary.

Secondly we discovered that the landed gentry liked the old system so much that we discovered to this they hold property in the old way, where it is passed down from generation to generation described by Keenan as a “ multi generational monopoly of estate ownership. We learnt that the same gentry that owned the land also were the politician that had to bring in law reforms. It took nearly eighty years from when the idea was first floated to the inception of the Law of Property Act 1925. The comparable and original practical system was introduced in South Australia by Torrens. While it was in principle and prima facia a good system, the undertones and its net affects were very dark indeed. Torrens system was easy to use, it was quick and it was cost effective. But in its creation was hidden the mechanism by which the aboriginal indigenous people would be dispossesses. Torrens was

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notably the same man who previously had dispossessed the poor Irish farmers in the Potato famine, and gave the titles cheaply to the gentry.

It may be easy to dispossess a poor man by giving him a title and then freely negotiating his property from him for next to no value. However why go through all the that when it can be done by a doctrine formulated by Torrens, this document was so popular in what it could do that it was adopted very quickly in the colonies and whole nations of indigenous people were dispossessed, whether in Australia, Canada, America, India or Africa.

A discussion was tried to be articulated in this article that there were other ways of easily dispossessing poor people, one being older than we might have thought, and that is by debt arrears and repossessions or as the Americans call it foreclosure.

Finally it is easy to say but harder to articulate in a limited article the many ways of dispossessing the poor.

[1]Page 327 Chapter V, “ Of Property” by John Locke; “ Two Treaties of Government” first published in 1960, from his original book and additional found manuscripts. https://moodle.bbk.ac.uk/pluginfile.php/590998/mod_resource/content/1/Of%20Property.pdf

[2]Page 327 Chapter V, “ Of Property” by John Locke; “ Two Treaties of Government” first published in 1960, from his original book and additional found manuscripts. https://moodle.bbk.ac.uk/pluginfile.php/590998/mod_resource/content/1/Of%20Property.pdf

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[3]Page 328 Chapter V, “ Of Property” by John Locke; “ Two Treaties of Government” first published in 1960, from his original book and additional found manuscripts. https://moodle.bbk.ac.uk/pluginfile.php/590998/mod_resource/content/1/Of%20Property.pdf

[4]Page 329 Chapter V, “ Of Property” by John Locke; “ Two Treaties of Government” first published in 1960, from his original book and additional found manuscripts. https://moodle.bbk.ac.uk/pluginfile.php/590998/mod_resource/content/1/Of%20Property.pdf

[5]<http://www.wvlia.org/LegalResources/UK/ID/258/History-of-Real-Estate-Law-The-Old-English-Landholding-System.aspx>

[6]The Measure of Land by Alain Pottage, The Modern Law Review 1994, Volume 57, pages 361-385

[7]The Measure of Land by Alain Pottage, The Modern Law Review 1994, Volume 57, page 361

[8]Smoke, Curtains and Mirrors: The Production of Race Through Time and Title Registration, Sarah Keenan, School of Law, Birkbeck, University of London, Malet Street, London WC1E 7HX, UK; Springer Science+Business Media Dordrecht 2016, Published 27 October 2016.

[9]Smoke, Curtains and Mirrors: The Production of Race Through Time and Title Registration, Sarah Keenan, School of Law, Birkbeck, University of London, Malet Street, London WC1E 7HX, UK; Springer Science+Business Media Dordrecht 2016, Published 27 October 2016.

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[12]Smoke, Curtains and Mirrors: The Production of Race Through Time and Title Registration, Sarah Keenan, School of Law, Birkbeck, University of London, Malet Street, London WC1E 7HX, UK; Springer Science+Business Media Dordrecht 2016, Published 27 October 2016.

[13]Kelvin F K Low, ‘ The Nature of Torrens Indefeasibility: Understanding The Limits Of Personal Equities’ [2009] 33 Melbourne University Law Review 205, 206.

[14]Kelvin F K Low, ‘ The Nature of Torrens Indefeasibility: Understanding The Limits Of Personal Equities’ [2009] 33 Melbourne University Law Review 205, 206.

[15]Kelvin F K Low, ‘ The Nature of Torrens Indefeasibility: Understanding The Limits Of Personal Equities’ [2009] 33 Melbourne University Law Review 205, 206.

[16]Richard Wu and Mohd Yazid Bin Zu Kepli; ‘ Expedition of Torrens system in the common law world and its Asian development in Singapore and Hong Kong’ ;(2012) 2 Property Law Review 99, 102.

[17]Richard Wu and Mohd Yazid Bin Zu Kepli; ‘ Expedition of Torrens system in the common law world and its Asian development in Singapore and Hong Kong’; (2012) 2 Property Law Review 99, 102.

[18]Breskvar v Wall (1971) 126 CLR 376, at 385 per Barwick CJ

[19]Tang Hang Wu, ‘ Beyond The Torrens Mirror: A Framework of The In Personam Exception To Indefeasibility’ (2008) 32 Melbourne University Law Review 672, 672.

[20]Roy A. Woodman, ‘ The Torrens System in New South Wales: One Hundred Years of Indefeasibility of Title’ (1970) 44 The Australian Law Journal 96.

[21]Frazer v Walker [1967] 1 AC 569.

[22]Lynden Griggs, ‘ In Personam, Garcia v NAB and the Torrens System – Are they Reconcilable?’ (2001) 1(1) Queensland University of Technology Law and Justice Journal 76, 86.

[23]Kelvin F K Low, ‘ The Nature of Torrens Indefeasibility: Understanding The Limits Of Personal Equities’ [2009] 33 Melbourne University Law Review 206.

[24]The Land Transfer Act 1875, 38 & 39 Vict, c 87; Land Transfer Act 1897, 60 & 61 Vict, c 65.

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[25]LRA 1925 s 70(1)(a).

[26]LRA 1925 s 70(1)(f).

[27]LRA 1925 s 70(1)(k).

[28]Smoke, Curtains and Mirrors: The Production of Race Through Time and Title Registration, Sarah Keenan