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CHAPTER 1

The Background of Governmental Intervention

THE primary impact of government on real estate finance is through the law of real property, the main body of which is rooted in the law of medieval England. Aside from the stamp of French law on the law of Louisiana, and the remnants of Spanish usage still found in a few of the southwestern states, the English legal tradition is the dominant influence on the relationship between government and real estate and the financing of real estate in this country.

Most of the legal terms that we apply to real property are of English origin. Many of them had been invented and had begun to acquire their present meanings by the end of the thirteenth century. Present forms of land ownership had evolved by that time. Procedures for passing title, granting leases, and giving and taking a mortgage were already well developed. It is not essential to discuss the origins of these concepts, forms, and practices, or to trace in detail their pre-colonial development.[1] It is essential, however, to recognize that they were the expression of a society in which economic and political institutions were closely related, in which the dependent nature of the ownership of real property was well established, and where the law of property had been shaped by the agrarian interest.

With varying emphasis, these characteristics have remained influential to the present time, sometimes because of the obstacles that they presented to changing economic requirements and sometimes, quite to the contrary, because of the very force that an

[1] For an account of the development of the legal background, see C. Reinold Noyes, *The Institution of Property* (New York, 1936) Chapter 3 and, for more extended treatment, Sir Frederick Pollock and Frederic William Maitland, *History of English Law Before the Time of Edward I* (Cambridge, 1923); Frederic William Maitland, *Domesday Book and Beyond* (Cambridge, 1897); and Kenelm Edward Digby, *An Introduction to the History of the Law of Real Property* (Oxford, 1897).

ancient tradition, revived and refurbished, gave to a new trend in government policy.

The Agrarian Bias

Perhaps the most continuously present of the influences that determine current financial practices is the agrarian bias of the law of real property. The law was nurtured in an agricultural society. The mark of the landed interest is clear from the recording of tenures in the Domesday Book of William the Conqueror to the restrictions on alienation in the Magna Charta, the clarification of transfer procedures and contingent responsibilities in the Statute of Quia Emptores (1290), the legalizing of valid equitable rights in land by the Statute of Uses (1535), and the abolition of military tenures in the Statute of Charles II (1660). This interest was fundamentally noncommercial in outlook, and the idea of realty as an article of commerce was foreign to it. Its law was concerned with the determination and fixing of the holding of real property, and was designed to insure the holder in his tenure, to define his rights and duties, and to protect him from fraudulent dispossession. Consistent with these attitudes, the transfer of real property came to be surrounded by an elaborate and tedious procedure involving search and verification, observance of forms and use of language.

This procedure may not have been badly suited to a society in which transfers were comparatively few, in which landholding represented at least as much the assumption of responsibility as it did the prospect of income, and in which trading in land in any modern sense was repugnant, if not unknown. But a number of innovations in transfer procedure accompanied the growing commercialization of society and the increasing mobility of the population and turnover in property ownership. The Statute of Frauds (1677) required transfers of ownership, as well as leases for more than three years' duration, to be in writing,[2] and from the earliest settlements in this country provision was widely made for the recording of deeds.[3] Justice Story notes the relative simplicity of

[2] The requirement of a "sufficient writing" applies also to grants of life interests and other estates less than a freehold and now generally to all leases of more than a year's duration, the term of lease to which the requirement applies varying among the states. See Herbert Thorndike Tiffany, *A Treatise on the Modern Law of Real Property* (new abridged ed., Chicago, 1940) pp. 64 and 670 ff.

[3] George L. Haskins, "The Beginnings of the Recording System in Massachusetts," *Boston University Law Review*, Vol. 21, No. 1, January 1941, p. 281.

American land transfer procedures compared with those of the England of his time, indicating an effort to adapt the law to the requirements of a more fluid society.[4] The rectilinear survey system, as adopted in the Ordinance of 1785,[5] further simplified transfer by reducing the task of legal description; and, for city lots, simplification came also from reference to recorded subdivision plats.

These measures facilitated the transfer of real property and reduced the risk of fraud and error in such transactions. At the same time new difficulties were introduced. Dispersion of ownership and frequency of turnover added to the bulk and complexity of the records and to the task of assuring the validity of claims to rights in real property. The necessity for laborious title investigation still remains, and every time the property is transferred or mortgaged, each link of the chain, normally extending for fifty or sixty years, must be reviewed.

Complexity of Title Procedures

It is in the process of transfer that the ancient lineage of the law is manifested most plainly. Are there easements or rights-of-way that must be honored? Have dower rights been released? Is there any delinquency in taxes? Do undischarged liens of any sort exist? Is there an unexpired lease binding on the purchaser or a life interest that would deprive the purchaser of the possession of, or revenue from, the property? Is the property zoned to permit the type of use intended? Are there other governmental regulations that would interfere with its development? Does the seller actually have the power to grant a title, or is his interest less than a freehold, being limited to a life interest or subject to the agreement of others who share in his rights?

Few if any such involved considerations apply to the transfer of other types of property; and the precautions that must be taken and the tedious process at each transfer of title put real estate in a special place among the articles of commerce. The buyer of realty

[4] Joseph Story, *Commentaries on the Constitution of the United States* (Boston, 1891) Vol. 1, § 174.

[5] For a description of the rectilinear system, see Thomas Corwin Donaldson, *The Public Domain, Its History With Statistics* (Washington, 1884) Chapter 7; also, Frank M. Johnson, *The Rectangular System of Surveying* (Land Service Bulletin, Washington, April 1918).

must satisfy himself by an investigation of all the wills, marriages, deeds, liens, judgments, covenants, subdivisions, devises, and other events and documents through which the property has been transferred, mortgaged, or leased over a long period of time to make sure that the chain of title is unbroken and no probability of an adverse claim exists. Since the process is long and laborious, transfer cannot be rapid and, since it is intricate, it always contains an element of risk.

While this system has provided a living for a legion of attorneys, abstractors, and title insurers, it is less satisfactory to the sellers and buyers of real estate. It has been estimated that the cost of such services as appraisal, survey, title search, title insurance, legal counsel, recording and filing, notary, and so forth, will average from 2 to 3 percent of the price of a typical residential property and, proportionately, the cost is heaviest on small transactions.[6]

Furthermore, the whole process takes much time, even months, during a period of great activity.[7] Because of the uncertainty of title until an investigation has been completed, two steps are required: first, a binding contract of purchase and sale must be entered into, contingent only on proof of title, and then, after the investigation is complete and the evidence acceptable, a deed, which supersedes the contract, is executed and the actual transfer takes place.

The substitution of a system of official title registration for the present systems of private title examination has been advanced as a means for reducing the cost and speeding up the process of transfer. Generally known as the Torrens System, title registration provides that, once registered, title defects cannot result in damage or loss to the titleholder, and that any person who has been deprived of a valid interest in the property because of registration is reimbursed from a fund created under the statute. Such methods of registration are widely used in Central Europe, Australia, New Zealand, Canada, in parts of England and Ireland, and in other areas of the British Empire. In the United States, twenty states and Hawaii have authorized title registration systems, but the enabling legislation has been repealed in four states, and, in a fifth, no sys-

[6] Miles L. Colean, *American Housing* (The Twentieth Century Fund, New York, 1944) p. 216.

[7] Horace Russell, "Private Housing Legal Problems," *Housing, the Continuing Problem* (National Resources Planning Board, Washington, December 1940) p. 62.

tem has been established under the authorization.[8] In all cases the registration systems have been permissive rather than compulsory and, in general, have been very little used. The mere permissive use of such a system, of course, can produce no great result. Since the initial registration is both tedious and costly, there is little inducement to take the first step. It is generally held that title registration could be satisfactorily established only if the system were made compulsory and at least part of the initial cost borne by the state.[9]

In the meantime, the ancient methods generally continue in force; and the risk, the cost, and the loss of time imposed by them exert a special influence on the financing of real property. Real estate financing becomes a process requiring special knowledge and judgment and it is kept apart from the general stream of capital operations. As we shall more and more see, it is also kept at a frequent disadvantage with other forms of activity in its competition for investment funds.

The slowness of legal development has aroused more concern in urban than in rural real estate financing. With the former, an inexpensive and fast-moving procedure is especially needed in order to reduce cost (particularly in the financing of small houses) and to bring real estate operations into the tempo of other commercial and industrial enterprise. At the outset of inquiry, therefore, we find an important impediment to financing arising from a governmental relationship.

The Bias Toward Individual Ownership

In the United States the agrarian bias has from the beginning been supplemented by a strong predisposition toward individual, fee simple ownership. Much groundwork for the evolving American

[8] Richard R. Powell, *Registration of the Title to Land in the State of New York* (New York, 1938).

[9] Proponents of the Torrens System claim that, after initial registration, transfer of title is both quicker and less expensive than the present method (see H. T. Tiffany, *op. cit.*, Chapter 32, also H. Russell, *op. cit.*, pp. 64-65). This position is challenged by R. R. Powell (*op. cit.*, p. 74), who concludes, after an analysis of experience under the Torrens System, that it "involves difficulties, expenses, and personnel problems more troublesome and more irremediable than those encountered in recordation." As an alternative, he suggests a system of registration of a possessory title by the person in possession, which could be done with little cost or formality. After a specified period of years for filing adverse claims, this possessory title would become a registered ownership.

policy had already been laid in England. Prohibitions on alienation had been ended for 400 years, and feudal services were abolished by the time settlement got in full swing (1660). Despite efforts to re-establish the anachronism of feudal tenures in the proprietary colonies, none of these plans met with success.[10] Story notes as a remarkable circumstance the almost total absence of leasehold estates in our colonial history.[11] Only in the Hudson Valley was anything strongly resembling the manorial system successfully re-established for any length of time. Even in the South, where large estates were most often found, the plantation operated directly by the owner displaced the manor operated through an elaborate system of tenancy.

By the end of the Revolution, with the general abolition of entailed estates and primogeniture, further steps toward the dispersion of fee simple ownership were taken.[12] The Ordinance of 1787,[13] which organized the Northwest Territory, carried the movement immeasurably further. This ordinance set the foundation for the law of real property in the states formed from the Territory by preventing primogeniture, determining the method of inheritance, and providing for devices by will. The principles it enunciated were not only widely adopted in public land states, but also influenced modifications of the law in the older states. "This statute struck the keynote of our liberal land policy," comments Joseph S. Wilson (Commissioner of the Land Office, 1860-61): "The doctrine of tenure is entirely exploded; it has no existence. Though the word may be used for convenience, the last vestige of feudal import has been torn from it. The individual title derived from the Government involves the entire transfer of the ownership of the soil. It is purely allodial, with all the incidents pertaining to that title . . ." [14]

Although Commissioner Wilson's enthusiasm on the score of

[10] T. C. Donaldson, *op. cit.*, pp. 467, 469; Alfred N. Chandler, *Land Title Origins* (New York, 1945) Chapter 17.

[11] J. Story, *op. cit.*, Vol. 1, § 172.

[12] T. C. Donaldson, *op. cit.*, p. 159. An entailed estate, according to Bouvier's Law Dictionary, is a "fee abridged or limited to the issue, or certain classes of issue, instead of descending to all the heirs."

[13] Congress of the Confederation, July 13, 1787. See *Documents of American History*, Henry Steele Commager, ed. (New York, 1943) Vol. 1, pp. 128 ff; T. C. Donaldson, *op. cit.*, pp. 153 ff.

[14] Quoted in T. C. Donaldson, *op. cit.*, pp. 158-59.

completely unconditional ownership requires some qualification, the importance of the Ordinance to all subsequent law and policy relating to real property cannot be overestimated. Only one influence was more profound: the existence of a vast, unexploited national domain.

With the cession of the western lands to the federal government during and after the Revolution, the means were at last granted for embodying the ideal of a nation of individual freeholders. For nearly a hundred years, under the spur of such leaders as Jefferson, Benton, and Andrew Johnson, the main force of governmental intervention in the field of our interest was aimed at making land available to all who were hardy enough to take it. No other single influence has more profoundly affected the environment and course of real estate finance in the United States. The land policy largely determined the kind of security and the type of borrower with which the financial system would have to deal. In doing so, it not only made its impress on the system itself but also shaped the development of future attitudes and action on the part of government. It is necessary, therefore, to trace the growth of American land policy in some detail.

The ideal of individual freeholds did not come full-blown, however, nor was it even approached without overcoming natural and political impediments. The transformation of a wilderness into a productive community required labor, capital, organization, and promotion. Outside of New England, colonial governments did little to aid settlement, this task being mainly left to private endeavor. Later, when the national government took jurisdiction over the public domain, the same situation largely obtained. Aside from protection—usually inadequate—against hostile Indians, provision for surveys, and reservation of salt springs for general use, there was no coddling of the settler. For a long time, even the land office was remote from places of settlement. Public improvements fostered by the government usually followed rather than preceded settlement.

The lack of governmental preparation for, and supervision of, settlement created a place for land companies—speculative associations created for profit in promoting settlement. Whatever the fairness of complaints laid against them, land companies undoubtedly performed an important function in the actual promotion of

settlement.[15] These loosely organized associations assumed the task of exploration and were often able to direct settlers to better lands than they could find themselves. They supplemented the public survey system; they settled title claims; they sometimes made provision for defense.

In addition to performing such functions, the land companies and other large purchasers had another attraction for the early federal government—they supplied revenue. The argument that wilderness land was no-rent land, without value until settlement had taken place, appealed at first only to the settlers themselves. The new federal government took a different view. Although wilderness land had to some extent previously been granted without cash consideration, the sale of crown, proprietary, and charter land for a price had been common during the colonial period.[16] For the infant republic, land was the resource that appeared most readily transmutable into revenue; and large buyers seemed more likely to yield the needed cash than individual settlers.

The principle of sales for revenue was embodied in the first public land act, the Ordinance of 1785.[17] It was so explicitly enunciated in 1790 by Alexander Hamilton in his *Report on Public Lands* that it prevailed as a governing influence on the land policy even beyond the Jacksonian revolution.[18] The Land Act of 1796,[19] the first enacted under the Constitution, strongly favored the large grantee in its high minimum price of two dollars an acre, its high minimum purchase of 160 acres, and its abandonment of the re-

[15] Shaw Livermore, *Early American Land Companies* (The Commonwealth Fund, New York, 1939). See also Benjamin H. Hibbard, *A History of the Public Land Policies* (New York, 1924) Chapters 3, 4, 12, and 28; and Ray Allen Billington, *Western Expansion* (New York, 1949) especially Chapters 8-12.

[16] T. C. Donaldson, *op. cit.*, p. 467; Roy M. Robbins, *Our Landed Heritage—The Public Domain, 1776-1936* (Princeton, 1942) p. 7.

[17] Congress of the Confederation, May 20, 1785. *Journals of the Continental Congress,* John C. Fitzpatrick, ed. (Washington, 1933) Vol. 28, pp. 375 ff.

[18] Alexander Hamilton, *Report on Public Lands,* American State Papers—Public Lands (Washington, 1832) Vol. 1, p. 8; T. C. Donaldson, *op. cit.*, p. 198; B. H. Hibbard, *op. cit.*, Chapter 1. Hamilton's objectives in this issue have often been too narrowly interpreted. R. M. Robbins, *op. cit.*, p. 14, states: ". . . . it would seem that Hamilton desired not only to use the public domain as an important source of revenue for the United States Treasury, but also to dispose of it in such a way as to guarantee a stable economic order." Hamilton proposed that lots of no more than 100 acres be sold at 30 cents an acre (much less than the finally established price) with larger tracts at a higher figure—*ibid., passim.*

[19] Stat. 464 (1796).

quirement of settlement, which had been characteristic even of large grants in colonial times.

The long debate over the questions of grants for revenue as against grants primarily for settlement, and of grants to wholesale purchasers as against small plots to settlers, continued for more than half a century. During that period the weight of the argument gradually shifted. In a succession of measures the price was reduced, the minimum size of the plot was decreased, and the terms of purchase were varied, all with the purpose of favoring the settler over the wholesale buyers.[20] Particularly important in this development was the Preemption Act of 1841,[21] which set four principles as guides to future land policy: (1) the settlement of the public domain was more desirable than revenue; (2) the domain should not fall into the hands of those already amply possessed of land; (3) the domain should be settled in small farms; and (4) the settler should be "protected from all intrusion and allowed a reasonable time to earn or gather together a sum sufficient to buy the land." [22]

Government policy, however, was never wholly consistent. Throughout the main period of land disposal, large grants continued to be made to wholesale buyers; to individuals and states to compensate for internal improvements; to states for the support of education; and to states for general purposes.[23] It was not until the passage of the Homestead Act [24] in 1862 that free land for the settler became a fact. Yet even with the hard-sought goal thus finally established in law, the practice of making large grants was

[20] For an account of the various land acts, see B. H. Hibbard, *op. cit.*, Chapters 4, 15, 17; T. C. Donaldson, *op. cit.*, Chapters 8-30; and Thomas Hart Benton, *Thirty Years' View* (New York, 1854) Vol. 1, Chapters 4 and 70.

[21] 5 Stat. 453 (1841).

[22] R. M. Robbins, *op. cit.*, p. 91.

[23] T. C. Donaldson, *op. cit.*, Chapters 8, 10, 13, 14, and 16.

[24] 12 Stat. 392 (1862). The term "free" as used in connection with the Homestead Act does not imply that settlement, even in absence of a payment to the government, was without expense. The minimum cost of settling an average farm in the middle states in the 1850's has been estimated at $1,000—Clarence H. Danhof, "Farm-Making Costs and the 'Safety-Valve'; 1850-1860," *Journal of Political Economy*, Vol. 49, No. 3, June 1941, p. 325. This estimate takes into account the cost of acquisition, preparation for cultivation, fencing, clearing and breaking land, and the purchase of draft animals, livestock, seed, and implements. Bernard DeVoto (*The Year of Decision, 1846*, Boston, 1943) sets $700 to $1,500 merely for the cost of the family outfit required for crossing the Great Plains.

not abandoned but actually greatly expanded with the inauguration of grants to railway companies.[25]

Effectuation of a Policy

Aside from the argument over revenue, opposition to free land was continuously offered by the eastern manufacturing interests, who deplored the dissipation of the labor supply and, later, by the southern slaveholding interests, who feared the growing predominance of the nonslave area. The political crisis of 1860, which took the southern states out of the union and thrust the eastern interests into combination with the West, removed the last barriers to free entry into the public domain. Within thirty years, the Bureau of the Census could report that the frontier was closed, and that all that remained was the filling in of gaps in a settlement broadly spread over the whole area.[26]

At no time during this development was there effective opposition to a rapid and unrestricted exploitation of the public domain, although concern was frequently expressed over the potentially ill effects of unlimited dispersion. Washington feared land sales beyond the possibilities of remunerative settlement, and Jefferson advocated restraint, but neither had much faith that a policy of control could be maintained against popular demand for unlimited access to the public domain.[27] John Quincy Adams, the last exponent of a system of progressive settlement, had to admit its impracticability in face of the political forces of his time.[28]

The land policy, as it was administered, was one of disposal and diffusion. On the whole, little attention was given to the possibility that excessively diffused and rapid exploitation of the land might in the end create serious problems for both the settler and the

25 B. H. Hibbard, *op. cit.*, pp. 241 ff; T. C. Donaldson, *op. cit.*, Chapter 20.

26 See Frederick Jackson Turner, *The Frontier in American History* (New York, 1921) Chapter 1.

27 B. H. Hibbard, *op. cit.*, Chapter 28. The most serious debate on the subject of orderly settlement along a definite frontier as against unrestricted settlement occurred in connection with the Act of 1796. The requirement of survey before settlement is an indication that the former point of view carried some weight. The more liberal features of the Act of 1800, however, rendered any such control ineffective. See Samuel Eliot Morison and Henry Steele Commager, *The Growth of the American Republic* (New York, 1937) Vol. 1, pp. 258-62 and 337.

28 F. J. Turner, *op. cit.*, p. 26.

country as a whole. "On the contrary," says Hibbard,[29] "there seemed to be substantially no apprehension that the settlement could be done in the wrong way, granted only one thing: the ownership of the land should, in the minds of all, be widely diffused. Every other consideration pertaining to the condition of the settler, once he got on to the land, was subordinated, or ignored."

Subsequent changes in the Homestead Act kept the idea of individual family ownership to the fore. "In all these various modifications . . . . ," says Proudfit, "the primary conception of the home as the only basis of State and national permanence has been kept intact." [30] Even the practice of making large grants did not seriously interfere with the pursuit of this policy. In almost all cases the major part of the grants to private land companies and to the railroads was rapidly dissipated. The same policy of diffusion of ownership was followed by the older states in the disposal of their own lands and by the new states in respect to the lands distributed to them from the public domain. Further strengthening of the individual ownership concept resulted from the extension of the principle of homestead exemption. Originally designed to preserve the homestead from attachment for debts other than taxes and debts secured by a lien against the premises,[31] the principle has been expanded in thirteen states (up to 1938) to exempt from property taxation all or part of the value of the homestead property.[32] A late reaffirmation was given by President Truman early in 1947: "The long-range agricultural policy of the Government should be aimed at preserving the family-sized farm. . . ." [33] The pattern of farming by independent, if often insecure, small landholders has thus definitely been marked upon the country.

29 B. H. Hibbard, *op. cit.*, p. 551. The effectiveness of using the public domain as an antidote to present and future economic ills received some contemporary questioning. See Arthur M. Schlesinger, Jr., *The Age of Jackson* (Boston, 1946) pp. 345-46.

30 S. V. Proudfit, *Public Land System of the United States* (Washington, 1924) p. 5. The Homestead Act of 1860 provided for a maximum free plot of 160 acres. As the difference in farm requirements in semi-arid regions was recognized, the acreage was enlarged to 320 acres (Act of 1909—35 Stat. 639) and then to 640 acres (Act of 1916—39 Stat. 862).

31 See Christopher Gustavus Tiedeman, *The American Law of Real Property* (St. Louis, 1924) pp. 154-55, or H. T. Tiffany, *op. cit.*, pp. 883-94, for details of the common exemption statutes.

32 H. Russell, *op. cit.*, p. 69.

33 *First Economic Report to the Congress,* January 1947.

Collateral Aspects of the Land Policy

In its concentration upon the diffusion of ownership the law has been hostile to any development that appeared harmful to individual ownership, and it has, at least until recently, been comparatively neglectful of any feature of real estate activity not directly related to the prime objective.

Note has already been taken of measures adopted in colonial and revolutionary days against the perpetuation, if not against the building up, of huge landed estates. The successful resistance to the reinstitution of feudal tenures, the generally unfavorable attitude toward the maintenance of large estates, and the law of descent which was adopted for the Northwest Territory and accepted in the states created from it, all contributed to the advancement of the main policy. Serving the same end was the early, widespread hostility of the law to the ownership of land by corporations—a hostility that found its precedent in the ancient English Statutes of Mortmain that forbade the transfer of land to the church without a license from the sovereign.[34] This policy, first designed to maintain the King's feudal benefits and controls, was later broadened on social and economic grounds to discourage the accumulation and perpetuation of incorporated estates.

It became a settled principle of American jurisprudence that a corporation might not be created for the purpose of acquiring and holding real property unless the statute under which it is to be organized expressly authorized corporations for such purposes.[35] Consequently both state constitutions and state incorporation acts were generally very specific as to the conditions and limitations under which corporations could hold land. In some cases the restrictions have been drastic. Until recent years in Massachusetts and Illinois, corporations organized for the purpose of buying, selling, or operating real property for profit were forbidden,[36] and

[34] 7 Edward I, c. 2. This statute was preceded by a less effectual ordinance, 9 Henry III, c. 36, and was followed by successive laws: 13 Edward I, c. 32; 15 Richard II, c. 5; 23 Henry VIII, c. 10. In England, present practice is regulated by the Mortmain and Charitable Uses Act of 1888, as amended by the Act of 1891.

[35] William Meade Fletcher, *Cyclopedia of the Law of Private Corporations* (Chicago, 1920) Vol. 1, p. 245. It may be noted that the early "land companies" were not chartered companies or corporations, but were associations of a rather informal character. See S. Livermore, *op. cit.*

[36] This prohibition gave rise to the device of the Massachusetts Trust, a form of

even now such a landholding corporation cannot be formed in the District of Columbia.[37] The Maryland and Delaware statutes echo the early doctrine of mortmain in their specific limitations on religious corporations; and in Pennsylvania the doctrine is applicable under the common law of the state.[38]

The variety of specific limitations has been very great. In some states, where landholding corporations are now permitted for urban property, they are still banned in agricultural areas. Or, they may be prohibited for agricultural purposes but not for mining, timbering, or cattle raising. Several states limit the number of years during which land may be held, or the area that may be held or cultivated by a corporation. As a general rule, corporations are prevented from holding more land than is essential for carrying out their corporate purposes, a limitation that prevents corporate land operations except by specific charter provision.[39]

Within the present century there has been some relaxation in the American practice of opposing the ownership of land by corporations, particularly for nonagricultural uses. Corporate ownership, consequently, has become widespread in urban income-producing property, both residential and commercial; and agricultural corporations have become at least a minor factor in farm ownership.[40] It is significant, however, that realty corporations were in

association under which the grant is made to trustees in trust for the several designated members and a certificate of such right to a proportionate part of the beneficial interest is issued by the trustees to the several members. The beneficiaries of such trusts have been held to have the same immunities as shareholders in a corporation. This form of association, until modification in the corporation statutes, was particularly popular in the states mentioned. See W. M. Fletcher, *op. cit.*, Vol. 9, Chapter 66.

37 District of Columbia Code, tit. 29, § 201. Contrary to frequent practice, the District Code grants very liberal landholding privileges to religious bodies.

38 Maryland Code, 1935, art. 38 of the Declaration of Rights; Delaware Revised Code 1935 (General Corporation Law) c. 65, § 2 (4). See W. M. Fletcher, *op. cit.*, Vol. 2, p. 2051; and William Mack and Donald J. Kiser, *Corpus Juris Secundum* (Brooklyn, 1940) Vol. 19, § 1089, p. 639.

39 W. M. Fletcher, *op. cit.*, Vol. 2, pp. 2051-54; *Corpus Juris Secundum,* Vol. 19, pp. 1088-89. For digests of state constitutional provisions and laws covering corporate powers, see *The Corporation Manual,* J. B. R. Smith, ed. (New York, 1944). Corporations are generally permitted to take real estate in enforcing payment of a debt but are usually limited as to the period during which such property may be retained.

40 There is evidence of this in the income tax statistics. However, there are no satisfactory statistics on the characteristics of realty ownership, so that an adequate valuation of the importance of urban real estate and agricultural corporations cannot be made.

the greatest disfavor during the middle and latter parts of the nineteenth century, the main period of development of the corporate device. This disfavor may account in part for the failure of the corporation to become as common in realty ownership as in other types of economic activity, and it has certainly contributed to the dominance of small individual ownership, particularly of farm lands.

Aside from the gradual removal of restrictions against the corporate ownership of urban land, there is little evidence of specific governmental interest in urban real estate ownership and financing prior to the 1930's, except for the confirmation of titles to town land located in the public domain and provision for the reservation and sale of town sites.[41] The states intervened only to grant charters. Although the government was not directly concerned with urban settlement, the same sentiments regarding individual ownership and the close relationship that prevailed between the farm and the urban subdivision gave urban realty much the same long-term investment characteristics as were true of farm land.

The small holding, whether acquired for speculation or direct use, has, therefore, generally remained characteristic of urban as well as farm land. It is true, of course, that great holdings have frequently been assembled in the towns and cities; but they have been created mainly for profit from sales rather than for income from use, and rarely have endured for more than relatively short periods. The important estates that have endured are usually in accidentally strategic locations in the older cities and date from the early period of urban expansion, before modern transportation broke the limitations previously imposed upon urban dispersion. In short, large capital has not been widely attracted to investment in real property. Of the great American fortunes today, only a few have been derived from, or mainly retained in, real property.[42]

[41] For county seat and town-site acts, see Revised Statutes of the United States, §§ 2258, 2286, 2289, 2380-90. See also T. C. Donaldson, *op. cit.*, Chapter 25 and Paul Wallace Gates, *The Illinois Central Railroad and its Colonization Work* (Cambridge, 1934) Harvard Economic Studies, Vol. 42, Chapter 7.

[42] Of the sixty wealthiest families listed by Ferdinand Lundberg in *America's 60 Families* (New York, 1937) pp. 26-27, only five are classed as deriving their wealth in any considerable proportion from real estate investment. It is notable that in all five cases (Field, Astor, Green, Taft, and Higgins) urban rather than farm property was the source of wealth. The effectiveness of the land policy is evident in the disappearance of most of the early landholding families from the front ranks of the wealthy (except as their fortunes were transferred to other fields).

The basic law has, of course, created obstacles to the growth and preservation of such fortunes; but probably more influential than this is the fact that the pecuniary inducements to accumulation of real estate, by comparison with other investment opportunities, have been slight. The availability of land permitted overextension of settlement in relation to the markets for agricultural products and over-expansion of cities in relation to the need for urban sites, thus giving an uncertain prospect for sustained profits. Small operators were willing to take the great chances that these circumstances imposed; investors who sought more calculable risks looked elsewhere.

The Speculative Attitude

Great risks, long chances, the prospect of large rewards, and the frequency of staggering losses are all inherent in colonization and settlement. In this country, at least in the beginning, the chance of gain or loss was left to the participants in the enterprise. Except for making the opportunity possible and, with varying degrees of effectiveness, policing the process, government stood aside. No attempt was made to moderate the risk through governmental intervention until long after the main policy was established. On the contrary, it is probable that by its policy of unrestricted expansion the government actually contributed to the risks that individuals were forced to take.

From the earliest days, consequently, the speculative point of view was deeply impressed upon American land development. It actuated the bold land company enterprises of the colonial period [43] and continued to be a motivating force for as long as the disposal of the public domain was a political issue. Time and again voices were raised against land speculation. Gallatin, both as congressman and as Secretary of the Treasury, attempted to stop it.[44] Benton continually inveighed against it.[45] Speculative acquisition was not limited to the wholesale purchasers. Settlers themselves had the speculative fever; and the practice of taking up more land than could be individually cultivated was common even among small

[43] S. Livermore, *op. cit.*, Introduction by Julius Goebel, Jr., pp. xxiv-xxv.

[44] See B. H. Hibbard, *op. cit.*, pp. 70, 73, and Chapter 12 for a balanced discussion of the contributions as well as the evils of land speculation.

[45] T. H. Benton, *op. cit.*, Vol. 1, particularly Chapters 4 and 70.

buyers. Belief in the inevitable increase in land value early became a key dogma in the American economic credo. Since the holding of land for a rise in price was considered an assured—or nearly assured —means of obtaining wealth, settlers did not hesitate to extend themselves to the limit.[46]

Optimism often outran capacity to pay, as settlers outran the prospects of profitable cultivation. Settlement was at best a grim business, and both its monetary and spiritual rewards were often meager. The prospect of effortless gain through increase in land value took away some of the bitterness of a hard life. Though speculators, particularly the large ones, were constantly denounced, it is not too much to say that speculation helped to make the frontier endurable.

The risks that speculation added, however, were grave. It tended to put more land into private hands than could be profitably utilized. The land was generally purchased on credit, and even when cash was paid, or when, under the Homestead Act, the land was obtained free of cost, it was often mortgaged to pay for improvements. Between unlimited entry on the one hand and extensive borrowing on the other, the land structure from the start was economically unstable. Investment in a true sense was extremely hazardous, and, in the speculative sense, losses ran a close race with profits.[47]

In the towns and cities speculation has undoubtedly been on a much wider scale than in rural lands. Town lots became the currency of speculation. Repeated liquidation occurred, but the ardor could be dampened only for short periods.[48] Instability was thus

[46] B. H. Hibbard, *op. cit.*, Chapter 12. P. W. Gates, *op. cit.*, pp. 110-13 analyzes the types of speculators and their motives as follows: small farmers with more land than they could cultivate; small business and professional men investing on the side; eastern capitalists "who wanted to take a flyer," and professional speculators, individuals and corporations, who often took an active part in encouraging settlement and obtaining public improvements. Speculation seems to have been the common denominator of all forms and locales of settlement. See R. A. Billington, *op. cit.*, Chapters 5, 7, 10, 12, and 14.

[47] Witness the wholesale defaults on government land contracts by 1820, and the repeated waves of foreclosures, culminating in the twenty-year depression in farm values following World War I (see Chapter 3).

[48] Aaron Morton Sokolski, *The Great American Land Bubble* (New York and London, 1932); also Homer Hoyt, *A Hundred Years of Land Values in Chicago* (Chicago, 1933). According to Hoyt (p. 42), the effect of the 1836-42 panic was "to ruin most of those who had bought land in Chicago prior to 1836." A disaster almost as bad occurred in 1858 (*ibid.*, p. 80). In the 1920's, the subdivision, apartment, and

built into the urban as well as the rural land structure, producing a constant hazard to investment and a constant threat to the security of real estate loans.

The speculative attitude, reared as it was on the concept of unrestricted ownership, added waste and indifference to instability. In agricultural areas, it tended to an extravagance with land resources by owners who frequently found moving cheaper than conservation, and by tenants whose interest in a particular plot was even less than that of the owner. In cities, it justified an intensification of use that was limited only by the rapidly expanding potentials offered by building science and, more markedly than in the country, bred unconcern for the general welfare. Some of these forces might have spent themselves with relatively little harm, or, indeed, never have been so fully developed, had they not operated in conjunction with a rate of population increase new in the world's history. Between 1800 and 1860 rural population quadrupled and urban population grew twenty-four fold. Between 1860 and 1900, rural population doubled and urban population quadrupled.[49] Such growth and expansion created an optimism for the future that blinded people to the difficulties that were steadily being engendered.

The Resurgence of Social Control

Thus, through the nineteenth century the main role of government was what might be called intervention in reverse. The federal land acts, through which the public domain was dissipated, state and federal grants for roads and canals, and railroad grants were all parts of a policy of induced exploitation which, as we shall observe, left its mark on every phase of real estate investment. Primarily, it decreed an investment system based on numerous small holdings, the holders of which were constantly in need of credit. Secondly, the policy was carried out with a minimum regard for economic considerations and often in flagrant disregard of its social implications.

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office building booms characteristic of Miami, Detroit, Chicago, Los Angeles, New York, etc., provide still vivid evidence of the ardor for, as well as the losses from, realty speculation.

[49] See Arthur Meier Schlesinger, *Paths to the Present* (New York, 1949) Chapter 11; also, by the same author, *The Rise of the City, 1878-1898,* A History of American Life (New York, 1933) Vol. 10.

The stage was now set for a revival of the dormant concept of the superior rights of the state to those of individual owners, for the purpose both of giving them protection and of guiding their activity. This gradual reassertion took numerous forms. The law of nuisance and the police power underwent a great transformation. The power of the state as landlord was belatedly brought into positive application in areas where recourse to it was still possible; and the power of eminent domain was expanded to achieve ends never before considered to be within the meaning of public purpose. The numerous ways in which government may exert influence and control over credit and lending institutions were brought into play so as to make of credit an all-purpose instrument for the control of real estate investment and development. The taxing power, always of profound influence on real estate activity, was applied as a means of directing the course of activity. The spending power was lavishly used to the same end. Finally, the development and application of the doctrine of reserved emergency powers furnished the means through which purposes might be achieved that were beyond attainment by the exercise of the powers previously listed. The remaining chapters of this study deal with these developments as they brought about within a short space of time a union of the political and economic systems as thorough, if not always as happy, as that which prevailed when the basic concepts of real property first found effective expression.