

# 5

## Origin & Growth of the Land Law

**T**he law relating to land as it stands today is set out in a standard textbook as follows:

The basis of English land law is that all land in England is owned by the Crown. A small part is in the Crown's actual occupation; the rest is occupied by tenants holding, either directly or indirectly from the Crown. "*Nulle terre sans seigneur*" (no land without a lord): there is no *allodial* land in England, i.e. no land owned by a subject and not held of some lord.<sup>3</sup>

Allodium is a Frankish word meaning 'entire property' (O.E.D.). It is distinguished from a feu or fee, also Frankish, which lay at the heart of the feudal system, and it is from the feudal system and the Norman Conquest that our present-day land law derives. Although the feudal system existed in Anglo-Saxon England, the extent of it at that time is still a matter of controversy. The important point is that the 'entire property' in land - allodium - was simply not available to any individual either in Saxon times or after the Conquest, and this position remains the same today. Saxon kings would not grant land without the approval of the Witan. William I, by contrast, regarded

the whole of England as his by conquest, and accordingly granted lands to his followers as a reward for their services; but only upon certain conditions, which constituted rent, usually in kind or in service, but sometimes (and increasingly so) in money.

Those who held directly of the King were called tenants *in capite* (in chief). The land they themselves occupied was their demesne land: the rest they granted away on mesne tenure to tenants who held indirectly from the Crown on similar conditions, and the mesne tenants might in turn have tenants under them, in a line of sub-infeudation, but all rendering to their immediate lord rent-service or rent in money or in kind for the land they held. These tenants-in-chief and some of their mesne tenants who held by military tenure, were called 'barons', a word meaning simply 'the boys' or 'men' - the Conqueror's men, the Earl's men, and so on. Later, the word was confined to the King's men, viz. the tenants-in-chief. 'Baron' was not a title, and gave no indication of rank, although it did denote a powerful position as tenant in capite. The first barony created by patent as a rank was in 1387; the next (in 1431) was the beginning of regular creations of this kind. Even today the title purports to designate a connection with land: for example 'Baron Jenkins of Ashley Gardens'.

The one abiding addition to the tenures of Saxon land law made by the Conqueror was military tenure by knight service. The head tenant had to provide a certain number (usually in multiples of five) of armed horsemen to serve in the royal army for 40 days in the year. He might in turn exact knight service from or parcel out some of his own quota of service to his mesne tenants. This was the result

of the partitioning of England among a foreign (Norman) aristocracy organized for war. It only concerned the upper layers of landed gentry, who, as head tenants or mesne tenants, had to provide the service of so many knights for so many days when called upon to do so. Beneath this superimposed duty of military service, the old Saxon land law remained.

The same standard textbook (p. 24) puts the law at the present day succinctly:

There are thus two basic doctrines in the law of real property. These are known as:-

- (1) the doctrine of tenures: all land is held of the crown, either directly or indirectly, on one or other of the various tenures; and
- (2) the doctrine of estates: a subject cannot own land, but can merely own an estate in it, authorizing him to hold it for some period of time.

The 'various' tenures mentioned above were not finally established until after the Norman conquest. William I began his reign in the hope of associating Frenchmen and Englishmen in his government on equal terms. But it was not to be. Forfeitures of the estates of those who fought against him at Hastings, lapse of the titles of those who died in that battle, further forfeitures after the revolt prompting the Harrowing of the North in 1069 - 70, and a further revolt in 1075, meant that: "by the end of the Conqueror's reign all directive power within the English state had passed from native into alien hands. In 1087, with less than half a dozen exceptions, every lay lord whose possessions entitled him to political influence was a foreigner".<sup>4</sup>

Thus under the feudal system in England the most a man could have was an estate in land of which he had tenure (Lat. *tenere* - to hold) from a lord, to whom he rendered services or paid money, and who in his turn rendered similarly to his lord and so on up through a line of sub-infeudation headed by the Crown as supreme overlord.

The free services were four: spiritual (frankalmoin), military (knight service), personal (serjeanty), and miscellaneous (socage). These came under the protection of the common law. The unfree services were in villeinage (later called copyhold), consisting largely of labour. Unfree service was theoretically at the will of the lord of the unfree tenant, although in practice defined and protected by the custom of the manor as administered in the manor court. In the fourteenth century it began to be called 'copyhold' because the conditions of tenure were evidenced by a 'copy' of the manor court roll. In the fifteenth, the king's courts began to protect copyholders, and copyholders were more and more commuting their rent services into money.

Free tenure was also subject to *Incidents*, listed by Blackstone as aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheat. These need not be further described, but it is very important to stress that they constituted a considerable source of revenue, especially to the Crown - the supreme or head landlord - and that it was a revenue issuing out of the land. Accordingly although in the course of time the services due from the various kinds of free tenure came to be of very little value, they continued to exist so as to preserve

the incidents of those tenures, which were so very valuable to the king. Tenure by Knight-service, for example, was only abolished by a statute of 1660, although by the end of the 13th century, the service was no longer called for.

The whole system was bound together in a close structure by the Domesday Survey ordered in 1085, and completed within a year from information obtained at inquests before sworn juries all over the country. It was made into a book later. Domesday was a remarkable analysis of the economic resources available to provide the Crown with revenue. Unfortunately it was not kept up to date, and inevitably as time went by the exactions by the kings, in services and in money, bore less and less relationship to the true situation of the kingdom

Tenure [of land] carried with it reciprocal obligations and rights on the part of lord and tenant. The lord was bound to defend his tenant's title, and the tenant was bound to render to his lord certain services.<sup>5</sup>

This statement encapsulates the genesis of feudalism all over Europe in the early middle ages. It involved *commendatio* and *beneficium* - service in return for protection, in the face of migrant pressure from the East, and the local wars resulting from it. England, however, differed from the rest of Europe, because as an island it had sea to protect its frontiers against Europe, and because it had acquired a strong monarchy served by an efficient administration. Alone in Europe England had a state treasury and a national system of taxation (the geld). William took over both as his first action after Hastings. He continued after the conquest to levy the Saxon geld,

and relied on the existing Saxon administration. This later proved strong enough, following the death of Henry II in 1189, to survive and to continue with the essentials of government whilst kings were absent from the realm (Richard), involved in civil war and foreign invasion (John), less than ten years of age on accession and embroiled again in civil war (Henry III). Indeed that unsettled period saw many striking developments in administration.

The vitality of English institutions, resilient even during this period, is attributable to the fact that there had been established at an amazingly early date, an administration which was proof against disruptive shocks, and against swift changes in the political outlook. It is a matter of deep interest that even at this period trained men of the royal administration - the professional civil servants - remain at their posts, no matter whether kings or barons are in control.<sup>6</sup>

Sir William Holdsworth points to another important difference between England and the continent of Europe in the development of the feudal system. In England,

The doctrine of tenure is a doctrine of universal application in the land law. It was applied to the free tenures, and to unfree tenure, and to the relation of lessor and lessee for years ... The fact that this doctrine of tenure was applied universally to the land law is a purely English phenomenon. Other countries knew feudal tenure; but the law governing it was applicable only to noble or military tenure.<sup>7</sup>

Thus as developed in England, the tenure of land was,

by its services and incidents, the main source of public revenue. From the conquest to the thirteenth century, it provided the means of fulfilling most of the functions which we now consider to be functions of central government. The feudal tenant held the land in return for rendering services which were clearly of a public nature. Providing armed knights to serve in the royal army for forty days a year is only one example. The king's butler, sword-bearer, household officials, both high and low, held land in return for the services appropriate to their various functions. In the same way provision was made for the supply of such things as military transport, weapons, and victuals for the royal court and the royal army. The Church was similarly supported in all its activities out of services rendered in return for land. In short, the whole social, economic and political structure of England in Anglo-Saxon and Norman times, and to a lessening extent for long thereafter, was based on land. The land a man held determined his position in society, his political power, and the extent of his contribution to the public revenue.

After the conquest money payments increasingly took the place of services in discharging the dues inherent in feudal land tenure. This trend ran parallel with the growth of leasing. Military tenure by knight service in particular had become obsolescent before the end of the Conqueror's reign, and payment of scutage (shield-money) in lieu of actual service began before the 11th century ended. The kings preferred it. Rufus and Henry I hired mercenaries for their foreign campaigns. Henry II professed himself 'unwilling to trouble the rustic knights'.<sup>8</sup> A force of

knights who only had to serve forty days a year was useless in foreign campaigns, and at home a paid army was more useful in coping with baronial disorder.<sup>9</sup> Knights preferred to pay scutage rather than serve. Scutage thus, although a feudal due, became a kind of tax to finance wars. However it was not made into a regular tax. Its usefulness declined because the king was not strong enough to compel the barons to increase their money payment in line with inflation of the currency and the increases in the cost of soldiers and their equipment. Magna Carta put an end to John's attempts to do so. Scutage was remitted by Richard II, but because of the necessity to preserve the revenue from feudal incidents, was not abolished until 1660, by the Statute of Tenures.

Serjeanty (personal service) lasted longer. It provided all sorts of domestic service and minor government duties at court, and supplied the feudal army with light auxiliary troops, with attendance on the knights, with military material, and with transport. It decayed in the thirteenth, and especially in the fourteenth centuries, when contracts with hired servants took its place, and only a few services, mostly ceremonial, survived.

Meanwhile, the courts of common law gradually assimilated the law of copyhold (unfree tenure) to the law of free tenure. More and more land was being enclosed from the common fields into 'farms' - that is, lands held at a rent from the superior tenant. A series of nineteenth century statutes hastened the end of copyhold, and it was finally abolished by the Property Act of 1922.

The Statute of Tenures (1660) also abolished feudal incidents other than escheat and relief, and converted



knight service into tenure by socage. The net result of this slow process of change in the law is that there are today only two tenures by which an estate in land can be held: one feudal - socage, now called freehold; and one traditional, namely leasehold. The Crown's feudal revenue is no longer collected. Leasehold tenants pay rent. Freehold tenants do not. This, combined with the gradual freeing of the law's restriction on the alienation of land to be mentioned later, set the scene for speculation in land which became, and is now, a legitimate means of accumulating great wealth. Although legitimate, it nevertheless contravenes the Mosaic law, and is intuitively regarded by right thinking people as wrong, even when they cannot see why. The reason is that it expropriates the revenue naturally due to the Crown.

### **The Crown's Revenues**

The striking feature of this development of English law is that the Crown has over the years lost its revenue drawn from the land through feudal dues, feudal incidents, and gelds (a general tax on land according to its yield). We have thereby moved away from the situation where the Crown took its share of the nation's wealth from individuals according to the land they possessed - the land which gave them the means with which to pay. We have now arrived at a situation where the Crown has to seek revenue by taxing anything other than land which appears to be taxable. The list over the last three centuries includes, amongst other things: tea, coffee, spices, candles, gold wire, silver wire, salt, soap, paper, calico, starch, legal deeds, newspapers, pamphlets, hearths and windows,

drink, tobacco, personal incomes, theatre and cinema tickets, and sales of the vast majority of commodities (now called VAT). None of these taxes was directed to the individual's means to pay except insofar as some of the items taxed were not in any case within the range of consumption of poorer people. Taxes on motor vehicles, which are often a necessity for poor as well as rich, have been added to the list in recent times. Taxes assessed on land have occasionally been instituted, but only for the purpose of discovering incomes, and only in conjunction with assessments of movables and personal property for the same purpose. They have never remained substantial for very long, and have lasted only to carry the burden when the assessments of movables or personal property proved impracticable. The Poor Rate of Tudor times is an exception. It lasted until it became outdated for lack of reassessment, and had to be abolished in 1990. It was, however, not truly a land tax. It was a tax on real property - buildings and land assessed together as a 'hereditament'. The Council Tax which partially replaced it is similarly based on hereditaments and is not a true land tax.

To find the origin of this remarkable switch in the source of the Crown's revenue from land to movables, thence to personal property, or to personal property and land together, in an attempt to discover peoples' incomes, we have to go back to the thirteenth century and beyond. We shall in passing also mention the occasional infliction of poll taxes as an alternative - too unpopular to be retained for long.