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Land Patents: Are They an Escape from Foreclosure

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LAND PATENTS: ARE THEY AN ESCAPE FROM FORECLOSURE?

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I. INTRODUCTION

Landowners fallen on hard times are grasping at almost anything that promises to aid their struggle to recovery. Recently some landowners have

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filed a declaration of land patent[1] with county recorders, hoping to forestall the loss of their property through foreclosure. Unfortunately, the repercussions of this action may jeopardize much more than their property and will provide no relief to their current financial stress.

Organizations are selling a "brief" and offering "seminars" for $20[2] to $100[3] urging landowners to file a land patent. These organizations maintain that you have little to lose and possibly much to gain by filing both the original land patent and a declaration of land patent. This Article examines land patents and what they do, focusing on the potential consequences of filing a land patent.[4]

II. Historical Background

A. *What is a Land Patent?*

A land patent is simply a document of title proving that a parcel of land is no longer publicly owned, but is now privately owned. A land patent from the federal government is the highest evidence of a private deed.[5] The land patent was and still is the deed given by the United States government to a private citizen. It serves to give notice that the land is no longer publicly owned.[6]

Patents are issued only by sovereign powers, while deeds are executed

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1. A "declaration of land patent" is a document drawn up by a party purporting to establish an original land patent in the new party's name.

2. Foreclosure Seminar featuring Carol Landi urging the refiling of land patents and the filing of declarations of land patent, Maria Stein, Ohio, April 25, 1986 [hereinafter seminar].

3. 14 Acres U.S.A. No. 11, at 27 col. 3 (Nov. 1980).

4. The sale of land is not treated in the same manner as the sale of a loaf of bread, since land is fairly permanent and is not consumed as bread is. When we buy a loaf of bread, the grocer is not required to show that he owns the bread; but when interests in land are sold or used as security for a loan, assurance of ownership is required.

There are three basic steps generally followed to obtain this assurance. First, the owner's title is researched. Secondly, a written instrument is prepared as a deed and delivered or given to the purchaser or lender. Finally, the transaction is recorded in a place where anyone can check to see who is the real owner. *See generally* Simes & Taylor, Improvement of Conveyancing by Legislation (1960).

The primary concern of determining the origin of the title to the property has been relegated to a minor position in the search by many states which have statutorily implemented "Color of Title" acts. The filing of a declaration of land patent and the refiling of the original land patent with an attempt "to bring up" the land patent in the filing party's name is an attempt on the part of the filer to confuse the first step in the transfer of the property.

5. The United States Supreme Court held that the operation of a land patent is "that of a quit-claim (sic), or rather of a conveyance of such interest as the United States possessed in the land . . . ." Beard v. Federy, 70 U.S. (3 Wall.) 478, 491 (1865).

6. The land patent passes the legal title to the land to the patentee. "The patent is not the foundation, but the consummation of the title. Until it emanates, the legal power of the government over the subject is not at an end. Upon its emanation that power terminates, and the right of the grantee is perfected." Roads v. Symmes, 1 Ohio 281, 314 (1824).

by persons and private individuals.[7] Congressional legislation determines the status of public lands remaining in the public domain (owned by the United States) until a patent is issued for a parcel of land. As a general rule, issuance of the patent is necessary to divest the United States of legal title and to vest the title in another entity.[8]

A declaration of land patent is a document filed in conjunction with the original land patent in an attempt to bring the land patent "up in the current owner's name."[9] In other words, the individual filing the patent draws up a paper and purports to replace the original land patent holder's name with his own.[10] The holder then appears to possess a fresh patent from the government, when, in fact, nothing is new.

The two documents have completely different functions. A land patent is a legally-recognized document. The legal effect of a declaration of land patent is questionable at best.

B. *Congressional Authority for Issuing Land Patents*

Congress derives its power from the United States Constitution. The Constitution grants Congress "the power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[11]

Except for certain tracts of land reserved by the states of Connecticut and Virginia, the United States government acquired title from Great Britain to the land mass called the Northwest Territory through the international principles of war. In 1777, the Continental Congress urged all States to seize and dispose of land owned by Loyalists.[12] It was unclear at the time how the title to land was to be documented.

After the war with Great Britain, the boundaries were set by treaty. Congress called for the States to relinquish their claims to land outside of their borders. Seven states made claim to areas lying north and west of their present boundaries and stretching as far as the Mississippi River.[13]

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7. 73A C.J.S. Public Lands § 134 (1984).

8. *Id.* at § 135.

9. S. Stewart, Land Patents - Memorandum of Law - History, Force, and Effect of the Land Patent, 64 (1984) (unpublished manuscript) [available upon request from the Drake Law Review].

10. Some of the "declarations" have attempted to establish a time period during which some legal action must be taken or the lender or whoever might attempt to foreclose will allegedly be estopped from instituting any legal action. Brief for Appellant's request for certiorari, Sui v. Landi, 163 Cal. App. 3d 383, 209 Cal. Rptr. 449, *cert. denied* 106 S. Ct. 138 (1985).

11. U.S. CONST. art. IV, § 3, cl. 2.

12. UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, HISTORICAL HIGHLIGHTS OF PUBLIC LAND MANAGEMENT 7 (1962) [hereinafter HISTORICAL HIGHLIGHTS OF LAND MANAGEMENT].

13. UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, PROJECT TWENTY-TWELVE (1960) [hereinafter TWENTY-TWELVE].

New York ceded its claims in 1780; Virginia surrendered the region north of the Ohio River in 1781; Massachusetts acquiesced in 1784; Connecticut in 1786; South Carolina in 1787; North Carolina in 1790; and Georgia in 1802.[14] All of these ceded claims and unexplored territory to the west constituted the public domain, the nucleus which amounted to about 237 million acres.[15] Congress appointed two committees under the chairmanship of Thomas Jefferson to study and report on the problems of land sales and government of the public domain.[16] Out of the committees came the Land Ordinance of 1785, which established the rectangular system of cadastral surveys[17]and the Northwest Ordinance of 1787.[18] The Northwest Ordinance provided the basis for territorial self-government and the framework for admitting new states to the Union. Under the Land Ordinance of 1785, a system of sales at public auction of federal land, with the land being sold at a fixed price, was established[19] and the first land patent was dated March 4, 1788.[20]

Two early land sales generated enormous public criticism; one a contract for 822,000 acres to the Ohio Company and the other to John Symmes, who obtained 248,540 acres for $165,963.[21] Congress consequently engaged in serious and often heated debate on the general land question. Alexander Hamilton was directed to submit a plan to Congress "for the uniform sale of the public lands."[22] Congress also resolved that the federal government would receive the majority of the revenues from the land sales to retire the federal debt.[23]

An Act on May 18, 1796 explicitly provided for the issuing of patents.[24] This Act authorized the President of the United States to "grant a patent for lands . . . ."[25] It also provided "for the sale of the lands of the United

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14. HISTORICAL HIGHLIGHTS OF PUBLIC LAND MANAGEMENT, *supra* note 12, at 7.

15. *See Id.*

16. *Id.* at 8.

17. Cadastral survey is a method of recording property boundaries in an official way and is used primarily in ascertaining property taxes.

18. HISTORICAL HIGHLIGHTS OF PUBLIC LAND MANAGEMENT, *supra* note 12, at 8.

19. UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, THE PUBLIC LANDS: A BRIEF SKETCH IN UNITED STATES HISTORY (1960) [hereinafter THE PUBLIC LANDS: A BRIEF SKETCH].

20. *See* TWENTY-TWELVE, *supra* note 13.

21. THE PUBLIC LANDS: A BRIEF SKETCH, *supra* note 19, at 4.

22. HISTORICAL HIGHLIGHTS OF PUBLIC LAND MANAGEMENT, *supra* note 12, at 11.

23. Act of August 4, 1790, ch. 34, 1 Stat. 138. "That the proceeds of the sales which shall be made of the lands in the western territory now belonging, or that may hereafter belong, to the United States, shall be, and are hereby appropriated towards sinking or discharging the debts, for the payment whereof the United States now are, or by virtue of this act may be holden, and shall be applied solely to that use until said debts shall be fully satisfied." *Id.* at 144.

24. Act of May 18, 1796, ch. 29, 1 Stat. 464.

25. *Id.* at 468.

States in the territory North West of the river Ohio, and above the mouth of the Kentucky river . . . ."[26] Thus, this Act is the starting point for most of the land transactions involving territory outside of the original states. This Act made land available to the individual settler for the first time.

Congress instituted a land credit system under the Harrison Act, or the Land Law of 1800.[27] The Harrison Act provided that after paying fees for surveying, a settler could place one-fourth of the purchase price ($2.00 per acre) down, pay the next one-fourth in two years, another one-fourth in three years and the final one-fourth in four years.[28]

In 1803, the Louisiana Purchase added nearly 560 million acres to the public domain.[29] In 1819, Spain ceded Florida and other lands which added another 46 million acres.[30] In 1846, amid shouts of "fifty-four-forty or fight" the United States and Great Britain established the northern boundary which added 183 million acres.[31] The Mexican Cession of 1848 added 339 million acres, the Texas Purchase, 9 million and the Gadsen Purchase an additional 19 million acres.[32] The Purchase of Alaska in 1867 was the last great purchase of land for the public domain.[33]

Congress further reduced the minimum amount of land and reduced the minimum price by the Land Law of 1820.[34] Due to a severe depression and the failure of the credit system, the new law required a cash payment at the time of the sale.[35] This is the law most often cited by those individuals who are attempting to refile patents today.

C. *Ohio as the Test State*

Ohio was the first state admitted to the Union after the Revolutionary War. The majority of the land in Ohio, as it was carved from the Northwest Territory, was federal public land. Ohio became the test tube of experimentation for the passing of land from the public domain. Many theories of survey and conveyance were used in the initial settlement of the state.[36]

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26. *Id.* at 464.
27. Act of May 10, 1800, ch. 55, 2 Stat. 73.
28. *Id.* at 74.
29. TWENTY-TWELVE, *supra* note 13, at 7; A Convention Between the United States of America and the French Republic, April 30, 1803, 8 Stat. 206, T.S. No. 86-A.
30. TWENTY-TWELVE, *supra* note 13, at 7; Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty, February 22, 1819, 8 Stat. 252, T.S. No. 327.
31. TWENTY-TWELVE, *supra* note 13, at 7; Oregon Treaty, June 15, 1846, United States-United Kingdom, 9 Stat. 869, T.S. No. 120.
32. TWENTY-TWELVE, *supra* note 13 at 7; Treaty of Guadalupe Hidalgo, February 2, 1848, 9 Stat. 922, T.S. No. 207; Gadsen Treaty, December 30, 1853, 10 Stat. 1031, T.S. No. 208.
33. TWENTY-TWELVE, *supra* note 13, at 6-7.
34. Act of April 24, 1820, ch. 51, 3 Stat. 566.
35. *Id.*
36. Ohio was the first state to be carved from the Northwest Territory when it became

The United States government had perfect title to the public lands and the exclusive right of possession to those lands. Since Ohio was the first state admitted to the Union, other than the original colonies, and it has just about every type of legal land description possible, it will be the state used in this Article for an examination of the effect of the filing of land patents today. Ohio, which has property statutes similar to those of most other states, has encountered a proliferation of new land patent refilings coupled with "declarations during the mid 1980's."

D. *Disposing of the Public Domain*

The federal government's primary method of disposing of the public land was through Congressional Acts. On May 18, 1796, during the first session of the Fourth Congress, an Act "providing for the sale of the lands of the United States in the territory NW of the river Ohio, and above the mouth of the Kentucky river" was passed.[37]

The Act recognized that some Ohio land had already been conveyed, but for the most part, Ohio land had not been claimed. The President of the United States was "authorized to grant a patent for the lands."[38] There is a common thread in every act of Congress addressing the sale of public lands: a patent is the means by which the federal government transfers the land from the public domain to private ownership.

III. Procedures for Validating Land Titles

Except when Congress grants the land directly, nothing "but a patent passes a perfect and consummate title."[39] The primary concern in the first step of researching an owner's title is whether the land was conveyed from the government, either by grant or land patent. If there is no evidence of either, then the land is still technically the government's since the federal government cannot be adversely possessed.[40] In other words, claim to owner-

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the seventeenth member of the Union in 1803.

37. Act of May 18, 1796, ch. 29, 1 Stat. 464, 464.

38. Act of April 24, 1820, ch. 51, 3 Stat. 566, 566.

39. Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 516 (1839). The United States Supreme Court held that there are only two ways to pass a perfect title to public lands: either through a patent issued by the President or by a Congressional grant. *Id.* at 513. The Court held that when a patent has not been issued for a part of the public lands, a state has no power to declare any other title valid for that land. *Id.* at 516-17. This case also established that when property has passed from the United States government, through a Congressional grant or most commonly through a land patent, then the property is subject to state legislation. *Id.* at 517.

40. 28 U.S.C. § 2409a(g) (1982). Adverse possession is a method of acquisition of title to real property by possession of the property without permission and using the property notoriously and openly for a period of time prescribed by the state. *See, e.g.*, State *ex rel.* A.A.A. Inv. v. City of Columbus, 17 Ohio St. 3d 151, ___, 478 N.E.2d 773, 776 (1985). *Wilcox v. Jackson* held that a state has no power to declare any title valid against a claim of the United States. Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 517 (1839). This holding would extend to titles ob-

ship of governmental land by a private citizen cannot give ownership or title to the private individual.

Most title searchers no longer check back to the original patent issuance; the reason will be addressed later in this Article.[41] If there is record of either a land patent or a grant, the title searcher looks for adverse possession and for other transactions or events which may have affected the quality of the title subsequent to the issuance of the patent or grant. But, the ultimate base for any search is the patent—the superior and conclusive evidence of legal title.[42]

A. *The Reasoning Behind Refiling Land Patents*

> People saddled with mortgages may treasure the idea of having clear title to their farms and homes. The usual way to obtain clear title is to pay one's debts. Some have decided that it is cheaper to write a 'land patent' purporting to convey unassailable title, and to file that 'patent' in the recording system.[43]

One of the theories espoused in support of this procedure "is that because the original patent from the United States conveyed a clear title, no state may allow subsequent encumbrances on that title."[44]

Another possible reason is that few persons understand land patents and therefore filing or refiling will create confusion and may allow the filing person more time on the land. A new filing of a land patent, while ignored by some individuals, will cause consternation in others. Because land patents are so rare today, they are not understood and this increases the risk of questions about clear and marketable title. Without clear title, the value and marketability of the land is greatly reduced. In any event, the unnecessary filing of a land patent today may place the person filing in the posture of being subject to risk-fraught, costly litigation.[45]

The intent of the filer becomes the major issue. Most of the new filings today, particularly those which also file a declaration of land patent, are intended to cloud the title of the property, to avoid foreclosure, or to gain one more day, month or year on the land. Even though the refiling of a land patent has no legal effect,[46] it may affect the marketability of the title.

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tained through adverse possession.

41. *See infra* notes 58-67 and accompanying text.

42. Bagnell v. Broderick, 38 U.S. (13 Pet.) 436, 450 (1839). "Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the government in reference to the public lands declares the patent to be the superior and conclusive evidence of legal title." *Id.*

43. Wisconsin v. Glick, 782 F.2d 670, 671 (7th Cir. 1986).

44. *Id.* at 672.

45. *Id.* (defendant prosecuted by state attorney general for criminal slander of title).

46. This is assuming that an original land patent was issued. It is rare to find a parcel of land with is privately owned without an original patent being recorded; but, federal statutes

A federal statute, 43 U.S.C. section 175, (repealed in 1976 by the Federal Land Policy and Management Act)[47] provided that "no lands acquired under provisions of homestead laws . . . shall in any event become liable to satisfy any debt contracted prior to issuance of the patent thereof."[48] This seems to be one theory used to justify refiling, even though the United States Supreme Court has held that this exemption extends to indebtedness incurred before the issuance of a final receipt or certificate and before the issuance of a patent.[49]

The State of Wisconsin has filed criminal complaints against several individuals filing "home drawn 'patents.' "[50] The state's theory is that 'patents' are frivolous documents that confuse the system of recording interests in real property.[51] The charges were criminal slander of title.[52] One theory of refiling the land patent is just that—to slander your own title so that it is not marketable.

B. *Marketable Title*

"Marketable title is more than merely title which is in fact free of title defects. It is title which also *appears* free of such defects."[53] A "buyer cannot be compelled to purchase a lawsuit even if he is likely to be successful in vindicating his title in such a lawsuit."[54] " 'A marketable title is a title which is free from reasonable doubt and will not expose the party who holds it to the hazards of litigation.' "[55]

If a willing purchaser is discouraged by the evidence of a recently filed land patent or a declaration of land patent, even though legally it may not be a cloud on the title, the title may not be considered marketable. If a former land owner posts his land with signs which indicate the land is under a land patent, this may destroy the marketability of the title. If, during a sheriff's sale, the former land owner informs potential buyers that the land is under a land patent and the sale is illegal, this may also destroy the marketability of the land. Marketable title is an intangible; it cannot be firmly affixed and there are legal uncertainties whenever it is brought into question.

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provide procedures to follow in the event that a land patent was not issued properly. 43 U.S.C. § 1068 (1982).

47. Act of Oct. 21, 1976, Pub. L. No. 94-579, 90 Stat. 2827.
48. 43 U.S.C. § 175 (1982).
49. Ruddy v. Rossi, 248 U.S. 104, 107 (1918).
50. Wisconsin v. Glick, 782 F.2d at 672.
51. *Id.*
52. *Id.*
53. RABIN, FUNDAMENTALS OF MODERN REAL PROPERTY LAW at 976 (1974).
54. *Id.*
55. Tri-State Hotel Co. v. Sphinx Inv. Co., 212 Kan. 234, ____, 510 P.2d 1223, 1230 (1973) (quoting Darby v. Keeran, 211 Kan. 133, ____, 505 P.2d 710, 715 (1973)).

1. *An Example of a Tangled Chain of Title*

After more than 150 years of transactions, real estate records and errors in the chain of title may become so numerous that the risk of an imperfect title becomes high. The situation in *Matthews v. Rector*,[56] an Ohio case decided in 1873, is an example. On July 24, 1805, Alexander Gibson, the assignee in a direct line of George Turner, a soldier of the Virginia line during the Revolutionary War, entered 100 acres of land in the County of Pickaway. The entry was based on a military land warrant issued to George Turner for military services. On December 31, 1827, the taxes for the tract of land were delinquent, and the property was sold by the County auditor to Guy Doan, who immediately took possession of the 100 acres. In October 1834, Doan filed an action in the Court of Common Pleas of Pickaway County to quiet title to the tract of land. Doan obtained a decree against Gibson to pay Doan, within 40 days, $20.75 or default to Doan all the right, title and interest which Gibson might have or set up to the land. The land had been surveyed on May 30, 1834. Gibson did not pay Doan, and died in March 1837.

On October 2, 1872, a patent was issued to Margaret Matthews, the daughter of Alexander Gibson. On October 12, 1872, Margaret Matthews commenced an action in the Court of Common Pleas of Pickaway County against Rector and Ziegler, who were the grantees of Doan. Rector, who was relying upon title acquired by Doan, was in possession of the 100 acres.

The Ohio Supreme Court held that Gibson, who was the assignee of George Turner, had an equitable right to the land, and the United States held the naked legal title in trust for him.[57] Doan, by his tax purchase, and the decree of the court, acquired the same equitable right to the land that Gibson had. Upon the acquisition of this right, the naked legal title was held in trust for Doan by the United States. The patent acquired by Margaret Matthews, founded upon the equitable right of her father (Gibson) must therefore inure in equity to the benefit of Doan, and cannot be made available to her, against Doan's grantees, to recover possession of the land. Note that more than 100 years have passed since this case was decided. This could further compound the confusion through more land transactions.

2. *The Marketable Title Act*

In 1961, Ohio enacted the Marketable Title Act.[58] This Act became effective September 29, 1961, and Ohio courts have ruled that it is to be liberally construed.[59] "The purpose of the act is to simplify and facilitate land

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56. 24 Ohio St. 439 (1873).
57. *Id.*
58. OHIO REV. CODE ANN. 5301.47-.61 (Anderson 1974).
59. Semachko v. Hopko, 35 Ohio App. 2d 205, 209, 301 N.E.2d 560, 563 (1973).

title transactions by allowing persons to rely on a record chain of title."[60] It is designed to clear the record title of all defects which existed prior to the forty year period set by the Ohio statute.[61]

In Ohio, a landowner measures root of title[62] by looking back forty years and then using the last title transaction prior to the forty year period as the starting point, or basis, for the marketability of title.[63] The Marketable Title Act operates to "extinguish . . . interests and claims, existing prior to the effective date of the root of title."[64] When one person has a clear record title to land, inconsistent claims or interests which arose before that period are extinguished unless the person claiming the adverse interest seasonably records a notice of his claim or interest.[65]

In Ohio and many other states, it is necessary to search the records prior to the root of title to determine that a patent is of record covering the land and that no subsequent transaction invalidated the patent.[66] Most title searchers in Ohio do not make this search. Although such interests as land patents, joint ownership and mineral rights are usually older than the root of title, and are not disclosed in the records subsequent to the root of title, they are not extinguished by the Marketable Title Acts. "Any interest or defect which is referred to specifically in a muniment within the marketable record title of [a] parcel of property" is included in this exception.[67]

The filing of a declaration of land patent or of a previously recorded land patent is an attempt to place a notice in the record of title of a claim which existed when the land was first conveyed. A possible theory is that a land patent filing may defeat the purpose of the Marketable Title Act and revitalize the entire chain of title including all defects. The filing will, *at least*, cause anyone searching the title to pause and consider whether the title is marketable.

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60. *Id.* at ___, 301 N.E.2d at 563.

61. OHIO REV. CODE ANN. §§ 5301.47-.61 (Anderson 1974). "The purpose of these acts is to eliminate old title defects and interests automatically with the passage of time and thereby to shorten the necessary title examination." Barnett, *Marketable Title Acts—Panacea or Pandemonium*, 53 CORNELL L. REV. 45, 47 (1967).

62. The Ohio Code provides:

> 'Root of title' means that conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was most recent to be recorded as of a date forty years prior to the time when marketability is being determined.

OHIO REV. CODE ANN. § 5301.47(B) (Anderson 1974).

63. OHIO REV. CODE ANN. § 5301.47(A) (Anderson 1974). *See also* §§ 5301.49-.50 (exceptions to the general statute).

64. *Id.* "The effective date of the 'root of title' is the date on which it is recorded." *Id.*

65. L. SIMES & C. TAYLOR, THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION 4-10 (1960).

66. OHIO REV. CODE ANN. §§ 5301.47-.61 (Anderson 1974).

67. Toth v. Berks Title Ins. Co., 6 Ohio St. 3d 338, 341-42, 453 N.E.2d 639, 642 (1983).

IV. Legal Consequences of Refiling a Land Patent

There is little authority in this area, but there seem to be at least three possible legal risks a property owner takes when refiling a previously filed land patent or a declaration of land patent. These are as follows: 1) If the landowner is already under a court order for either bankruptcy or foreclosure, he or she may be held in contempt of court; 2) there may be an action for fraud or misrepresentation by the holders of a mortgage deed; and 3) other owners of land which may have been conveyed originally by the same land patent may have an action for slander of their land titles.

Suppose that a land patent does do what some proponents claim; that is, it prevents anyone from foreclosing on the land. In a scenario, which is familiar to almost every member of the agricultural community, L (the lender) loans O (the owner) money based upon O's statement that he owns the land. Of course L does a title search, but since O has not filed his or her declaration of land patent, the title is clear. The agreement is entered into voluntarily and is placed in writing. If O later files a declaration of land patent and then violates the mortgage agreement (assuming that the filing precludes foreclosure), L has the possibility of at least seven different potential actions against O based upon misrepresentation or fraud.

The actions based upon fraud, misrepresentation or deceit could include: 1) a tort action for money damages for deceit if O knew his statement was false or if O was consciously ignorant of the truth; 2) a tort action for negligence, where O made the representation without exercising reasonable care to learn the truth; 3) a contract action for breach of warranty, which regards the statement as part of the contract and therefore requires only proof that it was made and then relied upon by L, making O strictly liable; 4) a suit in equity to rescind the sale or mortgage; 5) a restitution action at law;[68] 6) an action for misrepresentation; and 7) a claim for recoupment of damages.[69] The possible causes of action by a lender could be filed if it is assumed that land patents provide a legal debt release which has been overlooked for more than 150 years. That is not the case, but that fact does not preclude the filing of the identified causes of action.

Land patents do not legally have any such consequence. Although Ohio has a provision for filing a land patent,[70] it does not have any provision for filing a declaration of land patent. No provision exists giving legal effect to a declaration that the patent is now in the current owner's name. The intent of the statute is to make provisions for the issuance of land patents upon the sale of public lands today.[71] The patents issued in the early 1800's were

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68. Both actions 4 and 5 will be heard even if the claim is an innocent one.

69. W. Keeton & W. Prosser, The Law of Torts §§ 105-06, at 725-40 (5th ed. 1984).

70. Ohio Rev. Code Ann. § 5301.38 (Anderson 1974).

71. Op. Att'y Gen. Ohio 006 (Feb. 20, 1986)(a declaration of land patent does not fall within the provisions of O.R.C. 5301.38 and therefore Ohio county recorders do not have the authority to record them).

not issued to anyone living today and are not meant to be amended to reflect the current owner of the land.

The actions for fraud and misrepresentation still exist even though land patents are of no effect on the foreclosure. If a landowner misrepresents property at a sheriff's sale by informing potential bidders that a land patent prevents the sale, he arguably has purposefully defrauded all those present. It is possible that a landowner even attempting to file a declaration of land patent could be charged with attempted fraud.

After the declaration of land patent is filed, a neighbor whose land is under the same land patent has standing to file an action against the filer of the declaration for "disparagement of his property" or slander of title.[72] "An action may be brought against anyone who falsely and maliciously defames the property . . . of another, causing him some pecuniary damage."[73] "The nature of the action for slander of title is peculiar, being based upon a defamatory attack upon property."[74] "Three elements are necessary for the maintenance of such a suit. The words must be: 1) false; 2) maliciously published; and 3) result in some special pecuniary loss."[75]

A. *Recent Court Cases*

1. *California*

In 1985, the California Court of Appeals for the First District, imposed a penalty of $5,000 on a person who claimed ownership to a parcel of land through an alleged "federal land patent."[76] Carol Landi was charged with slander of title and interference with contract by the landowners.[77] She had recorded land patents and a declaration of land patent against the Suis' properties.[78] She then sent "notices to the Suis and their tenants claiming that she owned their properties."[79] She then filed eviction notices and unlawful detainer actions.[80] "The court issued a temporary restraining order. . .

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72. *See generally* Buehrer v. Provident Mut. Liab. Ins. Co., 37 Ohio App. 250, 174 N.E. 597, (1930), *aff'd*, 123 Ohio St. 264, 175 N.E. 25 (1931); Annotation, *Allowance of Punitive Damages in Action for Slander of Title or Disparagement of Property*, 7 A.L.R. 4th 1219 (1981); Annotation, *Special Damages in Slander of Title Action*, 4 A.L.R. 4th 532 (1981); Annotation, *Recording of Instrument Purporting to Affect Title as Slander of Title*, 39 A.L.R. 2d 840 (1955).

73. Buehrer v. Provident Mut. Liab. Ins. Co., 37 Ohio App. at ____, 174 N.E.at 599, (1930), *aff'd*, 123 Ohio St. 264, 175 N.E. 25 (1931) (citing NEWELL, ON SLANDER & LIBEL, § 160, at 195 (4th ed.)).

74. Int'l Visible Sys. Corp. v. Remington-Rand, Inc., 65 F.2d 540, 542 (6th Cir. 1933).

75. *Id.*

76. Sui v. Landi, 163 Cal. App. 3d 383, ____, 209 Cal. Rptr. 449, 449-51, *cert. denied*, 106 S. Ct. 138 (1985).

77. *Id.* at ____, 209 Cal. Rptr. at 449.

78. *Id.* at ____, 209 Cal. Rptr. at 449.

79. *Id.* at ____, 209 Cal. Rptr. at 449.

80. *Id.* at ____, 209 Cal. Rptr. at 449-50. A criminal complaint was then filed by Suis

and a preliminary injunction. . . which prohibited Landi from entering the Suis' properties, annoying the residents. . . , recording documents concerning the Suis' property, and filing further actions concerning the properties."[81]

The court found the appeal made by Landi was "unquestionably frivolous, vexatious and without merit."[82] The appeal caused "considerable legal expense and needless concern" to the landowners as well as well as "unjustly impos[ing] a waste of public funds upon the taxpayers of California."[83] Furthermore, the supreme court noted that "[i]n addition to the expenses incurred by the respondents, the cost to the taxpayer of processing this totally frivolous appeal. . . far exceeds the penalty we impose."[84]

Landi, the defendant in this case, conducted a seminar (one of several being held across the United States) in Maria Stein, Ohio on April 26, 1986.[85] When asked about the case, *Sui v. Landi*, she replied, "it was easy to get a judgment, but hard to collect."[86]

Landi's failure to request preparation of the reporter's transcripts makes it difficult to establish all of the facts or to ascertain her legal arguments, but Landi's arguments may be deduced from her request for certiorari.[87] This case is similar in several respects to an Indiana case[88] and a Wisconsin case[89] discussed *infra*. In all three cases, the argument was presented in propria persona.[90]

The plaintiff's goal in this type of case is to either bring the action in federal court or to somehow remove it to federal court. The California court noted, "Landi's brief contains no coherent argument. . . . She contends the trial court lacked subject matter jurisdiction over the case because it involves federal land patents and copyrights."[91] Landi's brief requesting certiorari stated, "[t]he origin of petitioner's title to the property in dispute is not in issue. As pointed out in the opinion below, what is at issue is the

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"against Landi, alleging slander of title and interference with a contract, and seeking cancellation of the recorded instruments." *Id.* at ____, 209 Cal. Rptr. at 450.

81. *Id.* at ____, 209 Cal. Rptr. at 450.

82. *Id.* at ____, 209 Cal. Rptr. at 450.

83. *Id.* at ____, 209 Cal. Rptr. at 450.

84. *Id.* at ____, 209 Cal. Rptr. at 450.

85. Seminar, *supra* note 2.

86. *Id.*

87. Brief for Appellant, Request for Certiorari, Sui v. Landi, 163 Cal. App. 3d 383, 209 Cal. Rptr. 449, *cert. denied*, 106 S. Ct. 138 (1985). *See infra* note 92 and accompanying text.

88. Hilgeford v. Peoples Bank, 607 F. Supp. 536 (N.D. Ind.), *aff'd* 776 F.2d 176, (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1644 (1986). *See infra* notes 104-18 and accompanying text.

89. Wisconsin v. Glick, 782 F.2d 670 (7th Cir. 1986). *See infra* notes 139-53 and accompanying text.

90. "In one's own proper person; or pro se - for himself; in his own behalf, as in the case of one who does not retain a lawyer and appears for himself in court. BLACK'S LAW DICTIONARY 404 (5th ed. 1983).

91. Sui v. Landi, 163 Cal. App. 3d at , 209 Cal. Rptr. at 450.

petitioner's federal land patents and recorded copyright declaration of land patent."[92]

The story does not end with the imposition of sanctions or contempt of court. The former tenant (Landi), previously evicted by her former landlord (Sui), along with a co-plaintiff filed a civil rights action in federal court pursuant to 42 U.S.C. section 1983 against the state court judge who had issued the preliminary injunction.[93] The state court judge had issued preliminary injunctions prohibiting Landi from recording further land patents as well as orders to stop otherwise disturbing property.[94]

It is not clear whether this action was a class action, although Landi claims to represent a class composed of all the citizens of California.[95] She is the director of the co-plaintiff, Universal Bar Association National (UBAN), which is apparently a non-profit corporation with the purpose of performing " 'land patent research to assist landowners . . . to secure their homes and properties from foreclosures in the present economic national depression.' "[96]

The United States Court of Appeals for the Ninth Circuit affirmed the decision of the District Court for the Northern District of California.[97] The court of appeals held: 1) even if plaintiff was correct in her contention that disputes involving federal land patents fell exclusively within the jurisdiction of federal courts, it does not mean that state courts cannot entertain such a claim;[98] 2) the federal courts have no basis upon which to enjoin state courts from hearing disputes concerning federal land patents;[99] and 3) whatever the extent of plaintiff's possessory rights to property, she was required to vindicate those rights in state court.[100]

Landi also maintained that her claims were based upon treaty law and therefore the United States had a continuing interest in the property.[101] The court disagreed, maintaining that although the United States Supreme

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92. *Id.*

93. Landi v. Phelps, 740 F.2d 710, 712 (9th Cir. 1984).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 714.

98. *Id.* at 713. "Federal courts do not have exclusive jurisdiction over litigation involving property rights deriving from federal land patents." *Id.* (citing Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 676-77 (1974)).

99. *Id.* "When disputes involving real property deriving from federal land patents do not even implicate federal question jurisdiction, it follows *a fortiori* that federal courts have no basis upon which to enjoin state courts from hearing such disputes." *Id.*

100. *Id.* at 713-14. "Once patents issue, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts, and in such situations, it is normally insufficient for 'arising under' jurisdiction merely to allege that ownership or possession is claimed under a United States patent." *Id.*

101. *Id.* at 713.

Court in *Oneida Indian Nation v. County of Oneida*[102] found that federal law had a continuing interest in protecting the Indian's possessory rights to tribal lands, the United States has no continuing interest in the property on which Landi filed her land patents.[103]

2. *Indiana*

The United States District Court for the Northern District of Indiana addressed the refiling of a land patent accompanied by a declaration of land patent in *Hilgeford v. Peoples Bank.*[104] The defendant bank had made a loan to debtors which was secured by a mortgage on real property.[105] The bank was forced to foreclose and evicted the debtors who then claimed a superior title to the land based upon a "land patent" which they drafted, signed and recorded with the county recorder.[106]

Judge William C. Lee, in a sua sponte[107] analysis, held that simply filling out a document granting yourself a land patent is a "self-serving, gratuitous activity and *does not, cannot* and *will not* be sufficient by itself to create good title."[108] Judge Lee found that the claim was frivolous and was "a blatant attempt by private landowners to improve title by personal fiat. Such lawsuits constitute a gross waste of precious judicial resources, for this court is forced to deal with patently frivolous lawsuits instead of addressing those suits on its docket which have merit and deserve close judicial scrutiny."[109]

The court, possibly looking to a future case discussed *infra*,[110] found that the case's frivolity demanded the imposition of a fine, and gave "public notice to all future litigants who may seek to file lawsuits based upon the same type of self-serving, invalid 'land patent.' "[111] The court assured future litigants that it would issue sanctions for such lawsuits.[112]

On appeal, the United States Court of Appeals for the Seventh Circuit held that: 1) quiet title actions challenging mortgage foreclosure did not present federal questions merely because mortgagors derived their interest in land from a federal land patent; and 2) such mortgagors were subject to

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102. 414 U.S. 661 (1974).

103. *Id.* (Landi's claims do not come under a federal interest based solely on the fact that "they are based on a treaty").

104. 607 F. Supp. 536 (N.D. Ind.), *aff'd* 776 F.2d 176 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1644 (1986).

105. *Id.* at 538.

106. *Id.*

107. "Of his own will or motion; voluntary; without prompting or suggestion." BLACK'S LAW DICTIONARY 742 (5th ed. 1983).

108. Hilgeford v. Peoples Bank, 607 F. Supp. at 538.

109. *Id.* at 538-39.

110. *See infra* notes 119-31 and accompanying text.

111. Hilgeford v. Peoples Bank, 607 F. Supp. at 539.

112. *Id.*

sanctions for frivolous actions and appeals.[113]

The court stated that while it holds a pro se litigant's brief to a lower standard than those prepared by counsel, the Hilgeford's brief was woefully inadequate.[114] The court found that the brief was sufficient, along with the record, however, to determine the only issue on appeal, that of jurisdiction.[115] The court found no federal jurisdiction and awarded the imposition of sanctions based on the vexatious litigation.[116] The court could find no reason for the appeal other than delay, harassment, or sheer obstinacy.[117] The bank was awarded $500 in damages for the frivolous appeal in addition to costs allowed by Federal Rule of Appellate Procedure 39.[118]

Judge Lee heard another case[119] testing his ruling and warning issued in *Hilgeford*. This case was another pro se action.[120] The plaintiff, Nixon, was a defendant in a mortgage foreclosure action and moved to dismiss that foreclosure action on the basis of a "land patent" which he drafted, executed, and recorded in the county recorder's office.[121] This action was filed to have the federal court declare the plaintiff's rights under the "land patent."[122]

Judge Lee found that the land patent in the *Hilgeford* case and the land patent in this case were identical in every respect except for the names and property description contained in each.[123] Repeating what was said in *Hilgeford*, Judge Lee stated that "[t]he court [could not] conceive of a potentially more disruptive force in the world of property law than the ability of a person to get 'superior' title to land by simply filling out a document granting himself a 'land patent' and then filing it with the Recorder of Deeds."[124]

Judge Lee provided Nixon with a copy of the *Hilgeford* decision and specifically alerted him to the possibility of sanctions by the court in a telephone conference.[125] "In blatant disregard of such notice, the plaintiff has persisted in this litigation despite its obvious lack of merit, including the filing of a motion for an emergency injunction and a request for oral argument."[126] The court found that "this type of activity in the face of clear warnings justifie[d] the imposition of sanctions" and awarded the two de-

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113. Hilgeford v. Peoples Bank, 776 F.2d 176, 178-79 (7th Cir. 1985).
114. *Id.* at 178.
115. *Id.*
116. *Id.* at 179.
117. *Id.*
118. *Id.*
119. Nixon v. Individual Head of St. Joseph Mortgage Co., 612 F. Supp. 253 (D. Ind. 1985).
120. *Id.* at 254.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* (quoting Hilgeford v. Peoples Bank, 607 F. Supp. at 538).
125. *Id.* at 255.
126. *Id.*

fendants $250 each for attorney's fees.[127]

The court went a step further and reiterated its warning in *Hilgeford*.[128] The court found that "the identical language of the 'land patent' in this case and in the *Hilgeford* case suggest[ed] that some party [was] responsible for the broad dissemination of the obviously false and frivolous legal concepts which [had] led to [the two suits]."[129] The court stated that, if in fact someone had provided the spurious materials and arguments, the plaintiff would have a solid claim for damages in the amount of the sanctions issued for the misrepresentations which resulted in the frivolous lawsuit.[130] The court hoped that a "clear signal will discourage others from following such false prophets."[131]

3. *Wisconsin*

In *United Savings and Loan Association v. Misenko*,[132] Samuel Misenko drafted a declaration of land patent purporting to clear the title to an acre of land of all encumbrances.[133] Misenko's theory was that because the original patent from the United States conveyed clear title, no state could allow a subsequent encumbrance on that title.[134] The appeal was from an order of confirmation following a foreclosure and sheriff's sale of Misenko's property.[135]

The court found that an appeal "is frivolous when a party knew, or should have known, that the appeal was without reasonable basis in law or equity and could not be supported by a good faith argument. . . ."[136] Misenko's arguments were "wholly unsupported by legal authority or equitable considerations. . . ."[137] The court remanded the case for an evidentiary hearing to determine and assess the savings and loan's reasonable costs and fees for the frivolous appeal.[138]

In *Wisconsin v. Glick*,[139] five pro se cases arising from "home-drawn 'patents,'" all similar to Misenko's, were consolidated.[140] The cases arose as criminal complaints charging the filers with criminal slander of title.[141] Wis-

127. *Id.* at 255-56.
128. *Id.* at 256.
129. *Id.*
130. *Id.*
131. *Id.*
132. No. 85-0626 (D. Wisc. Jan. 22, 1986) LEXIS, States library, Wisc. file).
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. 782 F.2d 670 (7th Cir. 1986).
140. *Id.* at 672.
141. *Id.*

consin's theory was "that the patents' [were] frivolous documents that confuse the system of recording interests in real property."[142] Each party moved to remove the case to federal court by invoking 28 U.S.C. section 1443.[143] Of the five appellants, only Glick, who is white, asserted that he was the victim of racial discrimination.[144] The district court remanded to the state court and the appellants sought review of that decision.[145]

The United States Court of Appeals for the Seventh Circuit noted, "[i]f self-drafted 'land patents' are frivolous gestures, as we held in *Hilgeford*, then the removal of the state's prosecutions is frivolity on stilts."[146] The court held that "[n]o federal statute authorizes the filing of bogus 'land patents' that confound recording systems. There is no colorable argument for removal" and the cases were properly remanded to state court.[147]

The court went further and examined the possibility of imposing sanctions in a criminal case against criminal defendants who assert frivolous positions.[148] The court found no case suggesting that an award of fees, or of damages under Federal Rule of Appellate Procedure 38 was prohibited.[149] The court stated, "[a]n argument in the teeth of the law is vexatious, and a criminal defendant who chooses to harass his prosecutor may not do so with impunity."[150] The court stated, "[w]hen a defendant makes an argument so empty that no responsible lawyer could think the argument supportable by any plausible plea for a change in the law the court may reply with a penalty."[151] The court found that "because the appellants [would] not be sentenced in federal court, the court [could not] impose costs of prosecution as part of the sentence."[152] The court found nothing to prohibit assessing attorney's fees and damages under Rule 38, however, and assessed each defendant $500 in damages plus double costs.[153]

Six days later, the Seventh Circuit affirmed the dismissal of an action[154] brought by Andrew F. Glick, one of the defendants in *Wisconsin v. Glick*.[155] Andrew and Susan Glick purchased land from John and Marian Gutbrod on March 28, 1978, pursuant to a land contract, which stipulated that the Glicks would pay all real estate taxes.[156] The Glicks failed to pay the taxes

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142. *Id.*
143. *Id.* ([[1443 provides for removal of civil rights cases to federal court).
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 673.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 674.
153. *Id.*
154. Glick v. Gutbrad, 782 F.2d 754, 757 (7th Cir. 1986).
155. *See supra* notes 139-53 and accompanying text.
156. Glick v. Gutbrod, 782 F.2d at 754.

and the Gutbrods began a foreclosure action.[157] Judge Fred H. Hazlewood of the Circuit Court of Manitowoc County, Wisconsin, granted the Gutbrods' motion and issued a writ of assistance to put the Gutbrods in possession of their land.[158] On appeal, the Wisconsin Court of Appeals affirmed and the Wisconsin Supreme Court denied a petition for review.[159]

The Glicks filed suit against the Gutbrods, the lawyers involved in the case, and Judge Hazlewood, alleging violation of their civil rights under 42 U.S.C. sections 1983, 1985 and 1986, and also alleging a conspiracy against them under the Racketeer Influenced and Corrupt Organizations Act (RICO)[160] seeking damages of $28,268,011.64.[161] On appeal from summary judgment for the defendants, the Seventh Circuit Court of Appeals considered two issues: "1) whether the district court properly dismissed the action against Judge Hazlewood, and 2) whether the court properly dismissed the complaint as to all defendants on the basis of the abusive behavior by [the Glicks]."[162]

The court held that the appeal was frivolous.[163] "The suit in federal court was an attempt to vacate a prior correctly decided state court decision. On appeal, the appellants failed to provide any real legal or factual support for their arguments. Moreover, they have ignored the district court's encouragement for the appellants to secure competent legal counsel."[164] The court was persuaded that "this is vexatious litigation and an appropriate case for the imposition of sanctions."[165] It awarded attorneys' fees incurred in defending the frivolous appeal in addition to the costs allowed by Rule 38 of the Federal Rules of Appellate Procedure.[166]

4. *Minnesota*

One of the simplest opinions dealing with the filing of a declaration of land patent arose in the Court of Appeals of Minnesota.[167] Gregory and Jill Peters occupied a residence and claimed a right to possession pursuant to a "Notice of Declaration," a "Declaration of Land Patent," and a document

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157. *Id.*
158. *Id.*
159. *Id.*
160. 18 U.S.C. §§ 1961-68 (1982).
161. Glick v. Gutbrod, 782 F.2d at 755.
162. *Id.* at 756.
163. *Id.* at 757.
164. *Id.*
165. *Id.*
166. *Id.* The court referred to both Rule 38 and Rule 39, but it is clear from the text of the Rules that the court was applying Rule 38, which states: "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." FED. R. APP. P. 38. Rule 39 outlines the types of costs that may be assessed and to whom they may be allowed. *See*, FED. R. APP. P. 39.
167. Leibfried Constr., Inc. v. Peters, 373 N.W.2d 651 (Minn. Ct. App. 1985).

entitled "Absolute Conveyance."[166] "Peters simply ordered certified copies of land patents and then drafted documents declaring [himself] fee owner."[169] Judge Nierengarten's decision referred to Peters' action as "[i]ngenious but of no legal meaning or effect."[170]

B. *Opinions of State Attorneys General*

1. *Kansas*

The Kansas Attorney General wrote that a register of deeds is required to file a "land patent" when it is presented.[171] The opinion stated that it is not clear what purpose these documents can have, but the apparent purpose is to provide some ill-defined protection to the property.[172] The attorney general noted that the document in question declares that property with title derived from the government land patent is " 'impervious to collateral attach(sic) by the City, County, State, or Federal Governments.' "[173]

The opinion maintained that while the legal effect of such documents is questionable at best, the Register of Deeds should not be placed in the position of deciding that issue.[174] "A far more difficult question is presented if such an instrument should be presented for filing by one person on property owned by another. In such a case the only apparent purpose of seeking to file such a document is to harass the legitimate owners of the property."[175]

The opinion concluded "that where apparently spurious instruments are brought to a register of deeds, the proper remedy cannot come from a refusal to file. The party or parties filing such documents may be subject to legal action and money damages, but such relief must come from the courts."[176]

2. *South Dakota*

The South Dakota Attorney General took the position that, given the purpose of the recording and filing statutes, "the register of deeds has a duty to refuse to accept for recording or filing any instrument that on its face appears to have no legal authorization."[177] This opinion examined an instrument entitled "Title Deed Allodium Freehold At 'Common Law.' "[178]

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168. *Id.* at 652.
169. *Id.*
170. *Id.*
171. Op. Att'y Gen. Kan. No. 84-48 (June 5, 1984).
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. Op. Att'y Gen. S.D. 175 (1984).
178. *Id.*

The Attorney General found that the instrument appeared to be "nothing more than a bald assertion by apparent owners of real property that they are the absolute owners of the property and that their ownership cannot be contested regardless of other recorded or filed instruments by any governmental body."[179]

3. *North Dakota*

The office of the Attorney General of the State of North Dakota addressed two questions in reference to declarations of land patent: "[w]hether a county register of deeds may refuse to file a Declaration of Land Patent document . . . [and] [w]hether the Declaration of Land Patent . . . is a valid document and, if so, the effect of such a document on other parties holding interest to the real property."[180]

The Attorney General stated that "a county register of deeds may not refuse to file a Declaration of Land Patent unless it is not properly acknowledged or otherwise proved pursuant to [North Dakota law]."[181] "The initial test for determining whether or not an instrument may be recorded is whether it affects the title to, the possession of, or creates a lien upon real property."[182] The opinion stated that the effect of any one document is determined by its relationship to other documents in the chain of title and its effect must be determined on a case-by-case basis.[183]

The opinion applied this reasoning to the validity and effect of a declaration of land patent and determined that it, too, must be determined on a case-by-case basis.[184] "Every document in the chain of title, whether a standard customary deed, or a unique instrument not usually seen in North Dakota, may or may not have an effect on the title to the land in question."[185] The Attorney General also addressed a statement within the declaration of land patent limiting the time period to sixty days for challenging the validity of the declaration, and stated that no statutory authority for the sixty-day notice existed.[186] The North Dakota opinion concluded by noting that "the 1985 Legislative Assembly enacted an amendment of N.D.C.C. § 47-19.1-09 concerning persons who file slanderous notice of marketable record title."[187]

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179. *Id.*
180. Op. Att'y Gen. N.D. 142 (1985).
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* The amendment provides that:

No person shall use the privilege of filing notices under this chapter or recording any instrument affecting title to real property for the purpose of slandering the title to real estate or to harass the owner of the real estate and in any action brought for the

4. *Ohio*

The Ohio Attorney General opined that "a county recorder does not have the authority to record a declaration of land patent that does not fall within the provisions of [Ohio statutes]."[188] The Ohio statute[189] provides for recording land patents issued by the United States and the opinion stated that the declaration of land patent is not a patent issued by the United States and therefore cannot be recorded in Ohio.[190]

V. Conclusion

Land patents are the means by which the federal government conveys title of public lands to private parties. Legally the refiling of a land patent which was issued when the land was transferred from the federal or state government to private ownership has no consequence, but the refiling may result in a cause of action against the filer.

A declaration of land patent is a document filed for the purpose of "bringing up" the land patent in the current landowner's name. The filing of a declaration of land patent may cause considerable litigation and places the filing landowner in a position of high legal risk.

There is no valid claim under a land patent which supports federal court jurisdiction. "Once patent issues, the incidents of ownership are, for the most part, matters of local property law to be vindicated in local courts, and in such situations it is normally insufficient for 'arising under' jurisdiction merely to allege that ownership or possession is claimed under a United States patent."[191] "[T]he habit of the court has been to defer to the decisions of [the] judicial tribunals [of the several States] upon questions arising out of the common law of the State, especially when applied to the title of lands."[192] The grant of a land patent carries with it no guarantee of continuing federal interest; there is no indefinitely redeemable passport into federal court, since land conveyed by land patent becomes subject to state law.[193]

The validity of a deed to real property is determined in accordance with

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purpose of quieting title to real estate, if the court shall find that any person has filed a claim for the purpose of slandering title to such real estate or to harass the owner of the real estate, the court shall award the plaintiff all the costs of such action, including attorney fees to be fixed and allowed to the plaintiff by the court, and all damages that plaintiff may have sustained as the result of such notice of claim having been filed for record or the instrument having been recorded.

Id.

188. Op. Att'y Gen. Ohio No. 86-006 (Feb. 20, 1986).

189. Ohio Rev. Code Ann. § 5301.38 (Anderson 1981).

190. Op. Att'y Gen. Ohio No. 86-006 (Feb. 20, 1986).

191. Oneida Indian Nation v. County of Oneida, 414 U.S. at 676-77.

192. Beauregard v. City of New Orleans, 59 U.S. (18 How.) 497, 502 (1855).

193. *See generally* Los Angeles Farming & Milling Co. v. City of Los Angeles, 217 U.S. 217 (1910).

the law of the place where the property is located. The only question, in either state or federal court, which concerns federal property law is whether a title to land, once the property of the United States, has legally been passed.

The methods of conveyancing and the character of the estates thereby created are entirely within the control of state legislatures. Provided that the state does not violate constitutional guarantees, it has an inherent right to regulate the alienation of real estate within its borders. This state right is never subject to federal jurisdiction unless the question is the validity of the issuance of the land patent itself.

An instrument such as the self-serving refiled land patent, and any document purporting to 'bring up' an ancient original patent in a party's name, is ineffective to convey title and is inadmissible in constituting a foundation for title. As a general rule, in order to constitute a foundation for title or a link in a chain of title, such documents must be valid and executed according to the laws in force at the time of their execution. Attempting to rely on a superseded 1820 statute for an 1986 filing is beyond the bounds of all reason.

After legal title passes to a private owner, he may alienate the land as he sees fit by either an absolute conveyance or a mortgage or in any other authorized manner.[194] The theory postulated by advocates of refiling land patents that the issuance of a land patent precludes mortgaging the property is not valid. When the land is owned privately, the land may be conveyed by any legal means.

Practically, filing a land patent today may reduce the money received from a sheriff's sale by causing some potential bidders to not place their bids in fear that a cloud on the title exists. There is also the possibility that a landowner may gain a little time by engaging in litigation, but the risk of action being taken against the landowner who files a land patent with the intent to cloud his or someone else's title is very high. Every case found dealing with the refiling of land patents and/or the filing of a declaration of land patent has resulted in court sanctions and/or fines assessed against the declarant.

194. *See generally* United States v. Budd, 144 U.S. 154 (1891). "The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement, the acting for another in the purchase." *Id.* at 163.