

LC Abstract

Provision of the Wisconsin Constitution Regarding Feudal Tenures



*Wisconsin
Legislative
Council*

One East Main Street
Suite 401
Madison, WI 53703-3382

P.O. Box 2536
Madison, WI 53701-2536

Phone: (608) 266-1304
Fax: (608) 266-3830
www.legis.state.wi.us/lc

January 3, 2003

CONTENTS

Introduction	1
The Wisconsin Constitutional Conventions	2
<i>Introduction</i>	<i>2</i>
<i>Editorials and Letters to the Editor Related to the 1846 Constitutional Convention</i>	<i>2</i>
<i>Debates of the 1846 Constitutional Convention.....</i>	<i>3</i>
<i>Letters to the Editor, Editorials, and Debates in the Territorial Legislature Relating to the Adoption of the Constitution of 1846.....</i>	<i>3</i>
<i>Editorials, Letters to the Editor, and a Summary of the Debate Related to the Constitutional Convention of 1848</i>	<i>3</i>
<i>The Constitutional Conventions--Summary and Conclusions.....</i>	<i>3</i>
Legal History	4
<i>Organic Law Prior to Statehood</i>	<i>4</i>
<i>Wisconsin Court Cases.....</i>	<i>5</i>
<i>Legal History--Summary and Conclusion.....</i>	<i>8</i>
Historical Context	9
<i>Introduction</i>	<i>9</i>
<i>Feudal Tenures--The English Origins</i>	<i>9</i>
<i>Feudal Tenures in New York</i>	<i>10</i>
<i>Wisconsin in 1848</i>	<i>11</i>
Summary and Conclusions	12
BIBLIOGRAPHY	13
<i>Primary Materials</i>	<i>13</i>
<i>Secondary Materials.....</i>	<i>13</i>
<i>Wisconsin Court Cases.....</i>	<i>13</i>

This **LC Abstract** describes a particular aspect of Wisconsin law in effect as of the date printed on the document cover. The abstract is a general discussion and should not be used as legal advice for fact-specific situations. This LC Abstract was written by Mark C. Patrosky, Senior Staff Attorney. The document is available on-line at www.legis.state.wi.us/lc/reports_by_topic.htm. Additional paper copies are available by contacting the Legislative Council office and requesting document LCA 03-1.

Provision of the Wisconsin Constitution Regarding Feudal Tenures

INTRODUCTION

This Legislative Council Abstract presents an analysis of the term “allodial” as it is used in the first sentence of art. I, s. 14 of the Wisconsin Constitution. The entire text of art. I, s. 14, is as follows:

Feudal tenures; leases; alienation. All lands within the state are declared to be allodial, and feudal tenures are prohibited. Leases and grants of agricultural land for a longer term than fifteen years in which rent or service of any kind shall be reserved, and all fines and like restraints upon alienation reserved in any grant of land, hereafter made, are declared to be void.

A 1978 Legislative Council study committee recommended the repeal of this provision on the grounds that it no longer serves any purpose. The recommendation, 1979 Assembly Joint Resolution 78, failed to pass the Legislature. The provision of the New York Constitution that provided the source for art. I, s. 14, was eliminated in 1962.

It appears from questions referred to the Legislative Council staff that some individuals have referred to dictionary definitions of “allodial” (i.e., “real estate held in absolute independence without being subject to any rent, service or acknowledgement of a superior”; Webster’s 3rd New International Dictionary) and have asked whether the Wisconsin Constitution by its use of “allodial” forbids government taxation of private property or regulation of the uses of private property. This viewpoint has also been asserted in some of the court cases that discuss feudal tenures (described below). There is not a simple and obvious answer to this question, and the question merits a thorough discussion in this Abstract.

The information that relates to the meaning of “allodial” indicates that art. I, s. 14, places restrictions on the methods of private land ownership and has no bearing on government regulation or taxation of land. This Abstract summarizes the information related to art. I, s. 14, and provides an analysis of and conclusions regarding that information. This Abstract discusses:

- The 1846 and 1848 Constitutional Conventions in Wisconsin.
- The legal history related to this provision, including Wisconsin’s organic law (other than the state constitution) and the Wisconsin court cases.
- The historical context of land ownership in the United States prior to and at the time of Wisconsin statehood, focusing on the New York experience.

THE WISCONSIN CONSTITUTIONAL CONVENTIONS

Introduction

Wisconsin has had two constitutional conventions, in 1846 and 1848. The first convention produced a document that was rejected by popular vote, apparently on the grounds that some of its provisions were too progressive. The provision on feudal tenures was proposed in the convention, but was not included in the final draft of the 1846 Constitution.

The State Historical Society published four volumes that reproduce the manuscript proceedings of both constitutional conventions, as well as contemporaneous newspaper editorials and letters printed in newspapers. These materials total approximately 3,000 pages.

This part of the Abstract describes the documentation from the constitutional conventions that relates to feudal tenures. This part of the Abstract also describes statements made in the proceedings of the conventions related to land ownership issues that have antecedents in the English feudal era and that suggest the concerns that led to the incorporation of art. I, s. 14, into the 1848 Constitution.

This part of the Abstract is organized according to the four volumes of the State Historical Society publications. The full citations are provided in the attached bibliography.

Editorials and Letters to the Editor Related to the 1846 Constitutional Convention

Cite: Quaife, Vol. XXVI

Page 155: The Declaration of Whig Principles called for a “restriction of the land monopoly,” to be accomplished by a cap of 640 acres on the amount of land that could be owned by any individual. The stated purpose was so that “the soil of the state may not pass from the many to the few, accompanied with a landed aristocracy and a ruined and oppressed tenantry.”

Page 223: A letter urged that school lands (one of the types of public lands to be sold by the State of Wisconsin) be sold outright with deeds to the purchasers in fee simple, rather than leased by the state. The letter also requested that partial financing of the purchase be furnished by the state. (Note: “fee simple” is the most extensive ownership interest in land, in which the owner is entitled to the entire property, with unlimited power to dispose of the property during his or her life and with descent of the property to his or her heirs.)

Page 363: A letter urged abandonment of the federal policy of leasing mineral lands and to be replaced by a policy of sale of those lands. The author of this suggestion claimed that this would increase prosperity in the mineral regions. The writer criticized the concept of leasing government-owned land:

The character of landlord and tenant, as between the government and its citizens, is contrary to the genius and tendency of our political institutions; it partakes in its very nature of the federal [sic, feudal] tenures--it reminds us constantly of the king, or conqueror parceling out his acquired country to his soldiers, by them to be held not as allodial, but for stipulated service, either personal, in money, or in kind.

The writer noted that a lessee could expend a great deal of labor to improve lands only to lose them at some future public sale “by a cold-hearted speculator and monopolist.”

Debates of the 1846 Constitutional Convention

Cite: Quaife, Vol. XXVII

Page 449: A speaker discussed proposed limitations on the duration of agricultural leases (later included in art. I, s. 14). Expressing opposition to all leases, the delegate “wanted every man to hold what he lived upon as his own.”

Page 517: A draft of the bill of rights included a provision declaring the ownership of land to be allodial and prohibited feudal tenures. An attempt was made to amend the draft to replace foreign or technical legal terms with terms in idiomatic American English. “Allodial” was one of the terms proposed for replacement. Mr. Elmore, one of the delegates, proposed an amendment to replace “allodial” with “owned by the owners thereof on their own hook, with the right of disposal.” Mr. Elmore then had second thoughts and modified his amendment by striking “on their own hook” and substituting “in their own right.” The amended motion failed.

Letters to the Editor, Editorials, and Debates in the Territorial Legislature Relating to the Adoption of the Constitution of 1846

Cite: Quaife, Vol. XXVIII

Page 275: There was no discussion of feudal land ownership in this volume. The only mention of “feudal” arose in an extensive discussion of married women’s property rights, specifically, whether married women should be allowed to own separate property. A representative in the territorial legislature referred favorably to the protections of married women’s property rights that were developed under the feudal system in England and contrasted this with the lesser protections than available in the United States.

Editorials, Letters to the Editor, and a Summary of the Debate Related to the Constitutional Convention of 1848

Cite: Quaife, Vol. XXIX

Page 77: The only mention of “feudal” in this volume occurred in a brief discussion of legal reforms. The issue was a proposal to abolish the old common law pleadings in court, which required complex, formal recitations grounded in ancient legal history that often failed to serve the needs the parties and often left plaintiffs without remedies. “Feudal” was used to describe what were perceived as undesirable parts of the common law.

The Constitutional Conventions--Summary and Conclusions

There is scant evidence that allodial land and feudal tenures were discussed in connection with the 1846 Constitution. Although a provision on feudal tenures was debated, the provision was not included in the 1846 Constitution, with no indication of why this provision was not included. Wisconsin Constitution, Article I, Section 14, was included in the 1848 Constitution without any discussion of why this provision was deemed to be important.

By 1848, the system of feudal land ownership had evolved in England so that only remnants were present in that country. Feudalism as a military and social system reached its peak in the 13th Century in England, a time when the relationship between lord and vassal was paramount, and all land in private hands was owned by the lords, by leave of the king. (The church also had extensive land holdings, with a different form of ownership.) From that time on, this classic feudal relationship gradually declined and was replaced by independent land ownership, with the tenant's personal feudal duties (military service, working the lord's land, etc.) replaced by cash rents. As will be discussed in the final part of this Abstract, it was the unpopularity of these rents, payable to large landowners, that led New York to adopt in 1846 a constitutional prohibition on feudal tenures and a statement that all land ownership is allodial. New York's lead was followed in Wisconsin two years later.

However, while it is disappointing that the proceedings of the Wisconsin Constitutional Conventions do not contain more pertinent information about the concerns that led to art. I, s. 14, this lack of information can support other conclusions. For example, there is no evidence that the delegates were concerned that the ancient feudal system of England would be created in Wisconsin. Also, there is no evidence that "allodial" was linked with a concern about governmental taxation of private property or regulation of the uses of land.

LEGAL HISTORY

Organic Law Prior to Statehood

Several legislative acts established the fundamental law applicable to the Wisconsin Territory and to the Northwest Territory prior to that.

The Northwest Ordinance of 1787 was an act of Congress for the government of the Northwest territory. The Northwest Ordinance contained no provisions related to private land ownership. However, it is interesting that the second article of the Northwest Ordinance contained an extensive provision abolishing primogeniture. This was one of the reforms related to land ownership advocated by Thomas Jefferson. Primogeniture was established during the feudal era, and provided that the property of any person dying without a will passed to the first-born son. In England, this had been a means of avoiding fragmentation of landholdings and was consistent with a policy of encouraging the shift of population (primarily, the younger sons) to urban centers. Jefferson's effort was intended to upset the policies that allowed privileged families to retain large estates for successive generations. The intention was to replace an economy and a society based on the stability of cultivated land with one based in part on land as an article of commerce (i.e., land bought and sold with relative ease and frequency).

Besides the Northwest Ordinance, several other laws established the Wisconsin territory and provided for its governance. These laws included the following:

- The Virginia Act of Cession, a Virginia statute of 1783, which ceded the Virginia territory west of the Ohio River to Congress.
- The act of Congress in 1836 that established the territorial government of Wisconsin.
- The act of Congress of 1846 that authorized the people of Wisconsin to form a constitution and state government.

None of these laws contained any provision regarding the private ownership of land.

Wisconsin Court Cases

A number of cases that discuss the first sentence of Wis. Const. art. I, s. 14, have reached the Wisconsin Supreme Court or the Wisconsin Court of Appeals. The full citations are provided in the bibliography. These cases are described below.

Barker v. Dayton (1871)

The defendant Jeremy Dayton allegedly mistreated his wife, causing her to abandon the home, take the household furniture with her and seek a divorce. Prior to the divorce judgment, Dayton conveyed the homestead to his father, contrary to the state statute which required the spouse's signature in order to convey homestead property. The effect of this conveyance, if valid, would have deprived Mrs. Dayton of her share of the value of the homestead, which was estimated to be worth from \$600 to \$900. Both the trial court and the supreme court held that the conveyance was invalid as against Mrs. Dayton and that she was entitled to her share of the value of the premises.

Counsel for Mr. Dayton made a variety of arguments, including an argument that the statutory requirement of the spouse's signature for conveyance of homestead was unconstitutional pursuant to Wis. Const. art. I, s. 14.

The court admitted that the defendant's argument was "ingenious and plausible," but noted that it depended entirely on the meaning of allodial, "as defined in the books." The court stated that the word allodial by itself made it more difficult to argue that counsel was wrong. However, the court read the word allodial in the context of the entire first sentence of Wis. Const. art. I, s. 14, and found that this provision was not an absolute prohibition of government regulation of transfers of land, as advocated by counsel by the defendant. In the context of the first sentence, the court stated that "it means little more than if the framers had said 'free,' or 'held in free and absolute ownership,' as contradistinguished from feudal tenures, which are prohibited in the same sentence" The court went on to state that "it would seem absurd to hold that the framers of the constitution intended that the legislature should have no power or control whatever over the sale or disposition of real property" This statement was followed by a list of forms of conveyance that are prohibited by statute. Although not necessary for the holding of the case, the court added that Wis. Const. art. I, s. 14, also could not mean that the Legislature could enact "positively no restrictions founded on motives of public or private convenience or policy, or to remedy or prevent public or private mischiefs or wrongs."

Ferguson v. Mason (1884)

This case involved the conveyance of homestead property. The conveyance attempted to retain full possession of the property by the husband and wife until both of them had passed away, with the conveyance to take effect thereafter. The common law of England had placed a number of complex restrictions on the ability to create and convey a future interest in land. The Wisconsin Legislature had already abolished most of these common law restrictions on the conveyance of future interests. However, the author of the court's opinion seemed compelled to express a judicial opinion on this subject, even though the matter was settled by the statute: "We should be strongly inclined to uphold that right [to convey land] as a necessary incident to allodial tenure, were there no statute expressly conferring it."

Regarding allodial land ownership, the court quoted the constitution and added its own commentary:

That is to say, the owner of land in this state holds the same of no superior. He has absolute dominion over it, owing no rent, service, or fealty to any, on account thereof. His obligation of fealty to the government is an obligation arising out of his citizenship, and is no greater or different because he is a proprietor also. Even the government may not condemn his land to the public use without paying him a just compensation therefor. Why has not the owner of land, held by a tenure so absolute, the right to

convey it on such terms and under such restrictions as he chooses to impose, so long as he contravenes no public policy or positive rule of law? And what policy or rule of law is contravened, if, instead of making his conveyance take effect immediately, he stipulates that it shall take effect at the end of a month or a year, or on the happening of some future event? [*Ferguson*, p. 385.]

It is ironic that the court uses “fealty,” the central duty of the feudal relationship, to describe the obligations of a citizen to the government.

Frame v. Thormann (1899)

This case involved a challenge, by the legitimate daughter of the decedent, to invalidate his will to the extent that it conveyed property to his illegitimate children. The plaintiffs arguments were primarily technical arguments related to recognition of Louisiana court judgments in Wisconsin. The Wisconsin Supreme Court noted art. I, s. 14, and held that this provision allowed the decedent to dispose of his property, by will, as he wished, so long as he infringed no law of this state. The court’s citation of art. I, s. 14, appears to be superfluous, because the case did not involve any sort of attempt to restrain the decedent’s conveyances of property. The case could have been decided solely on grounds of giving full faith and credit to the judgments of the courts in New Orleans.

Black v. The State (1902)

This case involved a challenge to the constitutionality of Wisconsin’s estate tax. The challenge was based on the grounds of equal protection, because the tax rates differed according to the size of a person’s estate. The court characterized the inheritance tax as a tax on the right of disposing of property by will. The court discussed and repudiated this hypothetical argument: if the inheritance tax is a tax on the right to dispose of property by will, the government could take the entire amount of the estate as a tax. One of the justices wrote a dissent in which he argued strongly that the right to transmit property by will is a natural, individual right, that flows from the nature of property ownership. The dissenting justice noted that land ownership in this state is allodial under the constitution. The dissenter took strong exception with the argument, even though the argument was merely hypothetical, that the state might conceivably take the entire estate by an inheritance tax. The dissenter did not quarrel with the ability of the government to levy an inheritance tax, but merely the suggestion that the entire estate might be taken. The dissenter argued vigorously that the constitution protects the right to transmit property by will.

Will of Kavanaugh v. Watt (1910)

The heirs of Kavanaugh challenged his will, which left his entire estate to the Catholic Church for the celebration of masses. The will was challenged on a number of grounds, including that it was vague, that it was unenforceable by civil law, and that the trust created was for a private charity, contrary to statutes then in effect. The court, in the majority opinion, examined the intention of Kavanaugh, finding that the bequest for masses was in fact a charitable bequest, and that the will was valid.

One of the justices, in a concurring opinion, took issue with an argument that had been made in the case regarding Wis. Const. art. I, s. 14. The heirs of Kavanaugh had argued that the constitutional provision that all lands are allodial prohibits all obstacles to the free conveyance and use of real estate. Kavanaugh’s heirs argued that the will could not place real estate in trust to support charitable purposes, because that would restrict the ability to convey the property in the future. This argument had not been addressed in the majority opinion, and the concurring justice emphatically rejected the argument:

Properly understood the allodial character of title to real estate, instead of suggesting incapacity to convey the same to charitable uses, rather suggests absolute freedom in that regard. The contrary idea advanced during the discussion of this case as inimical to the validity of the trust in question would, of course, defeat any trust in real estate whether for a limited period or in perpetuity. It would strike the public as passing strange if they were confronted with a judicial

declaration that no man could hold or transfer any other than an unrestricted title to real estate characterized by unrestricted right of disposition. [*Kavanaugh*, p. 113.]

The dissenting justice would have invalidated the trust, on the grounds that it created a type of tenure common in the feudal era, tenure in frankalmoign. The church held land in this manner, but it was not a feudal tenure, because the church held the land of the donor forever, without owing fealty or service to anyone. The church's only obligation was prayer for the souls of the donors and to his heirs. The dissenting justice felt that "feudal" in the constitution should be read broadly to prohibit *Kavanaugh's* trust.

Under such a constitutional provision we surely are not at liberty to revive a species of tenure which the foregoing quotation from Blackstone shows to have been long obsolete even in his day. Conditions, rents, and services may no doubt be exacted as a consideration for a lease, but a grant in fee of the whole land or of the use thereof cannot be upon any such tenure. Some one must own the land as an allodium. [*Kavanaugh*, p. 109.]

**Mutual
Federal
Savings and
Loan Assn. v.
Wisconsin
Wire Works
(1973)**

This case related to an "acceleration clause" in a mortgage that made the entire balance of the note due if the mortgaged premises was conveyed without consent of the holder of the mortgage. Among the arguments raised regarding this issue, the court mentioned Wis. Const. art. I, s. 14. It is likely that this issue was raised by counsel, but the court does not indicate how the issue came before it. The court summarily concluded that art. I, s. 14, "does not affect the type of transaction under consideration." The court explained its holding in a footnote which cited *Barker v. Dayton* favorably. In the footnote, the court indicates its attention was focused more on the last clause of art. I, s. 14, related to "fines and like restraints upon alienation." The court noted that fines are an element of feudal law that required payment to the feudal lord when a tenant transferred the property to another.

**County of
Dane v. Every
(1986)**

This unpublished limited precedent opinion* involved a complex fact situation and litigants (Mr. and Mrs. Every) who represented themselves. The Every's disputed the ownership of a parcel of land and the property taxes owing on that parcel. The Every's raised a number of arguments, including one in which they asserted that Dane County lacked authority to impose property taxes or take a tax deed on the grounds that the property was allodial. The trial court did not discuss this issue, apparently because it was difficult to determine, based on the confusing legal papers submitted by the Every's, that this argument had been raised. The court of appeals held that this was harmless omission by the trial court, and ruled on the issue as a matter of law. The court of

* This and the following opinions of the court of appeals are unpublished limited precedent opinions. These opinions are not published in the official reporters and, under Supreme Court rules, these opinions have "no precedential value and for this reason may not be cited in any court of this state as precedent or authority..." [s. 809.23 (3), Stats.] One of the reasons for this rule is set forth in the Judicial Council note to legislation that created the Court of Appeals in 1978:

"An unpublished opinion is not new authority but only a repeated application of a settled rule of law for which there is ample published authority."

These cases are described in this Abstract to show how a number of judges have responded to arguments made in cases before them regarding Wis. Const. art. I, s. 14.

appeals quoted favorably from *Barker v. Dayton*, and added its own summary of this issue:

Article I, section 14, of the Wisconsin Constitution protects against the establishment of feudal tenures because that system of land ownership prevented easy transfer of land. It does not prohibit Dan County from taxing the Everys' land, nor from taking a tax deed if real estate taxes are not paid, nor from evicting the Everys from Dane County's real estate. *County of Dane*, p. 37.

**Dunn County
v. Harold E.
Svee (1987)**

Mr. Svee failed to pay property taxes and the county took a tax certificate. The defendant did not redeem the certificate, and the county executed a tax deed, later selling the property at public auction. The defendant was subsequently evicted from the property. The defendant made a number of arguments, including an argument that the tax deed procedures violate Wis. Const. art. I, s. 14. The court of appeals summarily rejected this argument, based on *Barker v. Dayton* and *Mutual Federal Savings and Loan Association v. Wisconsin Wireworks*. The court of appeals characterized the argument made by the plaintiff in *Barker v. Dayton* as an "absurd claim," and noted that "the power to tax is an absolute necessity to sovereignty." *Dunn County*, p. 6.

**Juneau
County v.
Walter
Baritsky
(1994)**

The defendant in this case lost title to his property for failure to pay property taxes and was evicted. In the court proceeding, the defendant raised several arguments, including that as holder of allodial title, as described in the Wisconsin Constitution, he could not be taxed without consent and that title to the property could not be transferred by a tax deed. The court of appeals noted that Wis. Const. art. VIII, s. 1, expressly authorizes the collection of real estate taxes and does not require a taxing authority to obtain the property owner's consent to tax. The court also rejected the argument regarding the unconstitutionality of tax deeds, based on the precedent of *Barker v. Dayton*.

Legal History--Summary and Conclusion

The legal history of art. I, s. 14, does not include any cases in which a landowner attempted to create an actual feudal tenure. It is reasonable to conclude that property owners since statehood have been able to meet their objectives for commerce in land by means of sales in fee simple or ordinary commercial leases, and the old feudal devices that might have generated more revenue for the landowners were no longer necessary. This suggests that art. I, s. 14, served more to state in the constitution what had already been accepted by landowners than to constrain the transactions in land at that time.

Four of the cases address specific methods of conveying real estate, but not feudal tenures per se. In these cases, the court held in favor of the freedom of landowners to convey property in the manner they choose. Although allodial land was discussed in the arguments before the court, the court's decision in each case would have been the same without art. I, s. 14.

The remainder of the cases involve argument by the defendants, primarily in property tax delinquency cases, that to government lacks the authority to levy taxes on allodial land. The defendants in these cases have not persuaded the courts that "allodial" means "free from regulation."

HISTORICAL CONTEXT

Introduction

Land tenure was a minor issue in the Constitutional Conventions of 1846 and 1848. One subject related to land that is mentioned frequently is the sale of public lands. Wisconsin would acquire 500,000 acres upon achieving statehood to be sold for the benefit of the school fund. There was a great deal of concern about the lack of capital available for individuals to purchase land and the high interest rates charged by Eastern bankers. The opinion appeared to favor sale of the public lands in fee simple, rather than leasing the lands, and for the state to loan part of the purchase price to the settlers. The main rationale for favoring sale of public lands in fee simple appeared to be that the owner of the property would be more inclined to make improvements, thus increasing the value of the property, than a person who leased the land.

Feudal Tenures--The English Origins

It is impossible to give a brief summary of feudalism without conveying incorrect impressions. The feudal system was certainly not systematic and, in fact, encompassed a great deal of diversity in customs. Feudalism evolved as the English government and economy changed. English feudalism commenced with the immediate need after the Norman Conquest in 1066 to establish a stable political system based on the personal obligations of large landowner's to the king and the need to maintain a military force. The English feudal system reached its highest state of development in the late 13th Century, whereupon it began a decline and was virtually extinguished by the end of the 17th Century, nearly two centuries prior to Wisconsin statehood.

Feudalism was a complex system that achieved a number of objectives, including:

- A hierarchy that bound the manorial lords to the King based on an oath of fealty and a similar oath between the tenants and their lords.
- A military system that required the lords to produce soldiers and supplies for military service.
- A method of providing income for the church.
- A means of assuring that most of the populace had a place to live and could earn a living from the soil.

A variety of forces commencing in the 13th Century eroded feudal institutions and eventually contributed to their demise. For example, the judges who were appointed by the King tended to favor the free alienation of land because it loosened the feudal bonds of tenants to the manorial lords, thus weakening the power of the lords compared to the King. Also, the growth of villages was outside of the feudal system, because feudal land ownership could only function in an agricultural economy and could not be applied to urban areas.

For most purposes, feudalism ended in 1660 in England when Parliament adopted the Tenures Abolition Act. This statute apparently did not apply in the American Colonies and some lands in the original states were held in subordinate tenure even after the revolution, with the state substituted as sovereign in place of the crown.

Feudal Tenures in New York

Wisconsin Constitution, Article I, Section 14, was taken directly from the New York Constitution of 1846, with minor changes in wording. The New York Constitution of 1846 was one of the final steps in New York in the process of eliminating remnants of feudal land ownership.

Much of New England in the colonial era was occupied by villagers and farmers living on land that they owned in fee. However, large areas of New York along the Hudson, Delaware, and Schoharie Rivers were occupied by tenants of the great landowners who acquired these lands under Dutch colonial grants. The largest of these, the Rensselaerwyck Manor, extended for 24 miles along the Hudson and 24 miles back on each side of the river.

In New York, these large land holdings were criticized in the 19th Century. The manors were developed slowly because tenants could not be persuaded to make substantial improvements to the land. Rather than leasing these lands, settlers sought land they could buy in their own right. Further, the existing tenants grew increasingly unhappy with their situation and began to mount organized and occasionally armed resistance to the landlords' efforts to collect rents. The tenants also became a political force and were treated sympathetically by several governors and the state legislature. Governor Young's annual message of 1848 mentioned 1.8 million acres still held under old manorial leases, with 260,000 occupants.

The disorders known as the "rent wars" occurred between 1839 and 1845. Ironically, these were triggered by the leniency of one of the landlords, who had allowed rents to go in arrears for many years and apparently gave the impression to tenants that these rents would never be collected. When that landlord died, he bequeathed the back rents to his estate in trust to be applied to his considerable debts. His son's efforts to collect the back rents triggered an escalating series of incidents that culminated, in 1845, in the murder of a deputy who was attempting to conduct an execution sale on a farm by members of an armed mob of 200 tenants. This incident helped turn public opinion against both the anti-rent mobs and the old manorial leases.

The tenants viewed their situation as "feudal" and argued for abolition of feudal tenures. The tenants had a variety of grievances, including the following:

- There was considerable doubt that the landlords had good title to the manors, due to the way that the manors had been acquired from the American Indians. If the landlord did not have good title, the rents were invalid. However, under common law, tenants are precluded from challenging the landlord's title.
- The landlords used a device called a "durable lease," which granted the land in perpetuity but required perpetual rents to the landlord. In other words, a tenant could transfer his or her interest to another, but the value of the land would be reduced by the amount of rent due the landlord.
- Although the durable lease gave the tenants an ownership interest that could be sold to another, the landlord had also reserved what was called a "quarter sale." This meant that each time the farm was sold, 1/4 of the price had to be paid to the original manorial lord. The quarter sale originated in the feudal relationship, in which the landlord could approve or disapprove the tenant's transferee. The quarter sale reduced the landlord's approval right to a cash payment.
- If rent was not paid, the landlord had a legal remedy known as "distress." This allowed the landlord to recover the rent owed by obtaining a court order to enter the premises and seize not only the land but any personal property found there belonging to the tenant or anyone else.

- Although the landlord received rent payments, the landlord did not have an interest in land that was subject to taxation. Therefore, in addition to the payments to the landlord, the tenants had to pay the taxes on the land.

Although there was substantial sympathy to the tenants in the New York Legislature, attempts to provide the tenants with a statutory or constitutional remedy were thwarted by the Contract Clause, art. I, s. 10, U.S. Const. Legislation related to land transactions could affect rights or remedies created after the legislation, but any attempt to restrict the existing property interests of landlords or their existing contractual rights were prohibited under the U.S. Constitution. There was even some debate in the 1840s in the New York Legislature about taking the landlord's interests by eminent domain. Other remedies were also discussed in the Legislature, such as taxing the interests of the landlords and restricting the remedies (i.e., distress) available to landlords. As a result of this discussion, the following reforms were implemented:

- Landlord's interests were taxed as personal property commencing in 1846.
- The New York Constitution was amended in 1846 to abolish feudal tenures and declare land ownership to be allodial (although this applied only prospectively).
- Future agricultural leases were limited to 12 years and quarter sales on grants of land made in the future were prohibited.

The New York Attorney General attempted to sue the large landowners and have their titles declared invalid, although these attempts failed. The end of the New York feudal system came in the 1850s when the large manors were broken up and sold. The changing economy, with the expanding industrial sector and the availability of cheap land on the frontier, had undermined the value of the manors. The landlords sold their rights at deep discounts, some for as low as \$0.05 on the dollar. Presumably, these rights were purchased by the tenants, who could thereby consolidate their land holdings into a fee simple interest. This chapter of history was closed in 1962 when the provision in the New York Constitution regarding feudal tenures and allodial land ownership was repealed.

Wisconsin in 1848

The proceedings of the Wisconsin Constitutional Conventions showed a great interest in promoting the sale of land to small-scale farmers and protecting these owners from some of the risks inherent in land ownership. The issues that preoccupied the tenants of the great landholders in New York were reflected in the Wisconsin constitutional debate. Some of these concerns arose in discussions of the following issues:

- The exemption of the homestead from forced sale to satisfy a judgment obtained by creditors.
- The sale of public lands and whether that sale should convey title in fee simple or whether the state should lease the lands.
- Limits on the amount of land that any individual could own, with either 640 or 320 acres most often proposed as the maximum allowable land ownership.

Although the reasons for including art. I, s. 14 in the Wisconsin Constitution were barely discussed, it is clear that these provisions were intended to avoid the situation that had occurred in New York. The following is a typical view, from a discussion of Whig principles in a newspaper article:

The country has long seen and felt the evils of a landed aristocracy. New York has suffered from it, and she still suffers. Other states in the Union feel it a clog upon their prosperity, paralyzing the energy and crippling the industry of their yeomanry. If the people of Dane County

are indifferent to their interests and the interests of our new state they, too, may reap the bitter fruits of a powerful yet legalized aristocracy. The Whigs are opposed to its existence and ask that it never shall be allowed to breathe the free air of Wisconsin! [*Quaife v. XXVII*, p. 163.]

SUMMARY AND CONCLUSIONS

The history of the large estates in New York and the responses of the New York Legislature and constitutional convention shows that “allodial” and the prohibition of feudal tenures in the Wisconsin Constitution was meant to prevent the retention of certain types of ownership interests by the grantors of real property. This conclusion is supported by the remainder of art. I, sec. 14, which limits agricultural leases to 15 years, and prohibits “fines,” which require payment of part of the sale price of land to the former owner. (This is the quarter sale discussed above under the heading, “Feudal Tenures in New York.”)

However, it seems unlikely that Wis. Const. art. I, s. 14, had any effect on land ownership in Wisconsin. It appears that the abundance of land in Wisconsin at the time of statehood made the acquisition of large speculative land holdings uneconomical. A large land holding would have value only as it could produce income or could be sold. Land was available from the government to small landowners at the same price that it was available to speculators.

The situation in New York highlighted for the delegates to the Wisconsin Constitutional Conventions the basic conflict between large landholders and their tenants. It is important to understand this issue as one of competing interests. The large landholders had a legitimate interest in being able to sell their property subject to whatever qualifications they chose to impose. This is the essence of fee simple ownership. However, the consequences of the restrictions imposed by the large landowners in New York had caused great problems for their tenants and had impaired the economic viability of those regions.

Wisconsin Constitution Article I, Section 14, restricts the ability of all landowners to impose conditions when they sell land. The delegates to the constitutional conventions appear to have assumed that these restrictions would have the greatest effect on large landholders and would serve to discourage speculation and favor ownership in small parcels. By adopting the restrictions in art. I, s. 14, the people of Wisconsin expressed a belief that the restraints imposed upon the free alienation of land were modest in relation to the overall benefits achieved in the ready availability of land and the increase in wealth of the new state.

Wisconsin Constitution Article I, Section 14, may still serve a purpose in preventing the reservation of certain payments or the imposition of future conditions by the grantor when land is sold. However, there are a variety of other statutes that also have a bearing on attempts by grantors to restrict future land transactions. These statutes are direct and clear, unlike the vague and uncertain prohibition in the constitution.

Although there is very little direct evidence regarding what this provision meant to the framers of the constitution, the court cases and the historical context related to the settlement of the frontier makes this provision reasonably clear. This is not to say that “allodial” or any other provision of art. I, s. 14 might not some day be construed by a court to have another meaning. Constitutions are living documents subject to ongoing judicial interpretation as new situations arise. However, until a case is presented to it and the State Supreme Court construes part or all of this provision as applying to something other than private restrictions on land ownership, this provision appears to mean only that feudal forms of land ownership are prohibited, in favor of free ownership of land.

BIBLIOGRAPHY

Note: These are the key materials, both primary and secondary sources, that were consulted in the preparation of this memorandum. A great deal has been written on the subject of land tenure in the United States and these materials represent only a small fraction of the sources that are available.

Primary Materials

Quaife, Milo M., *The Attainment of Statehood* (Publications of the State Historical Society of Wisconsin Collections, vol. XXIX, Constitutional Series, vol. IV, 1928).

Quaife, Milo M., *The Convention of 1846* (Publications of the State Historical Society of Wisconsin Collections, vol. XXVII, Constitutional Series, vol. II, 1919).

Quaife, Milo M., *The Movement for Statehood 1845-1846* (Publications of the State Historical Society of Wisconsin Collections, vol. XXVI, Constitutional Series, vol. I, 1918).

Quaife, Milo M., *The Struggle Over Ratification* (Publications of the State Historical Society of Wisconsin Collections, vol. XXIII, Constitutional Series, vol. III, 1920).

Secondary Materials

Bond, Jr., Beverly W., *The Quit-Rent System in the American Colonies* (Gloucester, Mass.: Peter Smith, 1965).

Brown, Ray A., "The Making of the Wisconsin Constitution," *1949 Wisconsin Law Review* 648.

Kempin, Jr., Frederick G., *Historical Introduction to Anglo-American Law* (St. Paul: West Publishing Co., 1990).

Moynihan, Cornelius J., *Introduction to the Law of Real Property*, 2nd ed. (St. Paul: West Publishing Co., 1987).

Sokolski, Aaron M., *Land Tenure and Land Taxation in America* (New York: Robert Shalkenback Foundation, 1957).

Sutherland, Arthur E., "The Tenantry in New York Manors," *41 Cornell Law Quarterly* 620 (1956).

Wisconsin Court Cases

Barker, receiver, etc., v. Dayton and another, 28 Wis. 367 (1871).

Ferguson v. Mason, 19 N.W. 420, 60 Wis. 377 (1884).

Frame v. Thormann, 79 N.W. 39, 102 Wis. 653 (1899).

Black v. The State, 89 N.W. 522, 113 Wis. 205 (1902).

Will of Kavanaugh v. Watt, 143 Wis. 90, 126 N.W. 672 (1910).

Mutual Federal Savings and Loan Assn. v. Wisconsin Wire Works, 205 N.W.2d 762, 58 Wis. 2d 99 (1973).]

County of Dane v. Thomas O. Every and Elanor Every, 131 Wis. 2d 592, 393 N.W.2d 799 (Ct. App. 1986); unpublished court of appeals decision.

Dunn County v. Harold E. Svee, 142 Wis. 2d 942, 419 N.W.2d 360 (Ct. App. 1987); unpublished court of appeals decision.

Juneau County v. Walter Baritsky, 187 Wis. 2d 292, 523 N.W.2d 208 (Ct. App. 1994); unpublished court of appeals decision.