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"A History of the Anglican Church—Part XII:

An Essay on the Role of Christian Lawyers and Judges within the Secular State"©

By

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TABLE OF CONTENTS

The ideas expressed in this Apostolate Paper are wholly those of the author, and subject to modification as a result of on-going research into this subject matter. This paper is currently being revised and edited, but this version is submitted for the purpose of sharing Christian scholarship with clergy, the legal profession, and the general public.

PREFACE

The organized Christian church of the Twenty-First Century is in crisis and at a crossroad. Christianity as a whole is in flux. And I believe that Christian lawyers and judges are on the frontlines of the conflict and changes which are today challenging both the Christian church and the Christian religion. Christian lawyers and judges have the power to influence and shape the social, economic, political, and legal landscape in a way that will allow Christianity and other faith-based institutions to evangelize the world for the betterment of all human beings. I write this essay, and a series of future essays, in an effort to persuade the American legal profession to rethink and reconsider one of its most critical and important jurisprudential foundations: the Christian religion. To this end, I hereby present the twenty-third essay in this series: "A History of the Anglican Church—Part XII."

PART XII. Anglican Church: English Law of Real Property, 1300 to 1600 A.D.

INTRODUCTION[1]

I first encountered the idea of "property ownership" in Sir Thomas Hobbes' *Leviathan* during the late 1980s or early 1990s, prior to entering law school. Hobbes contended that property rights are vested in private individuals absolute and against all other persons or entities, except, of course, the King of England, who reserved absolute power and authority as the sovereign (i.e., as the holder of

[1] The property-law issues facing the African American descendants and heirs of deceased Black farmers have touched my law practice in numerous ways. This essay is thus dedicated to the Black family farmers and landowners throughout the American South and to the several Black Farmers' Cooperatives throughout the American South which were organized since 1865 up through the 1980s. As a child, I had the privilege of witnessing the efforts of one such African American farmers' cooperative in rural, northern Florida. It organized, almost always meeting inside of local Baptist and Methodist Churches, for the leasing of farmland; the securing of farm loans and subsidies; and the purchase of farming equipment, fertilizer, seeds, irrigation, supplies, and for access to farmers' markets.

"allodium title" of all of the land within his realm). "Every man has indeed a propriety [in private property] that excludes the right of every other subject; and he has it only from the sovereign power; without the protection whereof, every other man should have equal right to the same. But if the right of the sovereign also be excluded, he cannot perform the office they have put him into; which is, to defend them both from foreign enemies, and from the injuries of one another; and consequently there is no longer a commonwealth."[2] From this idea, I concluded that, at least in Hobbes'17th Century England, the English crown actually owned all of the land throughout the entire kingdom (i.e., "allodium title"), and that English subjects simply held lesser estates granted or permitted to them under the laws of England.

In addition, I next encountered the idea of real property in the writings of John Locke, in his essay, *An Essay Concerning the True Original, Extent and End of Civil Government*.[3] Locke's reasoning about the origins of property rights limited Hobbes' absolutist theories of princely absolutism and sovereignty. In Hobbes' theory, I saw the possibility of slavery being legitimately imposed upon English subjects by the crown; whereas in Locke, I saw the Biblical foundations of constitutional limitations and freedoms—even the liberation which abolitionists such as William Lloyd Garrison and Frederick Douglass had fought for in the United States-- the right of private property, and the economic foundations of labor. Locke wrote:

> Whether we consider natural reason, which tells us that men being once born have a right to their preservation, and consequently to meat and drink and such other things as nature affords for their subsistence; or revelation, which gives us account of those grants God made of the world to Adam, and to Noah and his sons, 'tis very clear that God, as King David says, Psalm cxv. 16, 'has given the earth to the children of men,' given it to mankind in common. But this being supposed, it seems to some a very great difficulty how anyone should ever come to have a property in anything. I will not content myself to answer that if it be difficult to make out property upon a supposition that God gave the world to Adam and his posterity in common, it is impossible that any man but one universal monarch should have any property upon a supposition that God gave the world to Adam and his heirs in succession, exclusive of all the rest of his posterity. But I shall

[2] Edwin A. Burtt, *The English Philosophers From Bacon To Mill* (New York, NY: The Modern Liberty, 1967), pp.206-207.
[3] Ibid., pp. 413-423.

endeavor to show how men might come to have a property in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners. God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life and convenience. The earth and all that is therein is given to men for the support and comfort of their being. And though all the fruits it naturally produces, and beasts it feeds, belong to mankind in common, as they are produced by the spontaneous hand of nature; and nobody has originally a private dominion exclusive of the rest of mankind in any of them as they are thus in their natural state; yet being given for the use of men, there must of necessity be a means to appropriate them some way or other before they can be of any use or at all beneficial to any particular man. The fruit or venison which nourishes the wild Indian, who knows no enclosure, and is still a tenant in common, must be his, and so his, i.e., a part of him, that another can no longer have any right to it, before it can do any good for the support of his life. Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person; this nobody has any right to but himself. The labor of his body and the work of his hands we may say are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labor with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by this labor something annexed to it that excludes the common right of other men. For this labor being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others…. The same law of nature that does by this means give us property, does also bound that property too. 'God has given us all things richly' (1 Tim. Vi. 17), is the voice of reason confirmed by inspiration. But how far has He given it us? To enjoy. As much as anyone can make use of to any advantage of life before it spoils, so much he may by his labor fix a property in; whatever is beyond this, is more than his share, and belongs to others…. As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his property. He by his labor does as it were enclose it from the common. Nor will it invalidate his right to say, everybody else has an equal title to it; and therefore he cannot appropriate, he cannot enclose, without the consent of all his fellow-commoners, all

> mankind. God, when He gave the world in common to all mankind, commanded man also to labor, and the penury of his condition required it of him. God and his reason commanded him to subdue the earth, i.e., improve it for the benefit of life, and therein lay out something upon it that was his own, his labor.[4]

Words cannot express how deeply influential these and similar other of Locke's ideas on labor and property have been on my intellectual development, my understanding of the overlap between law and religion, and the development of my ideas of property rights, civil rights, labor economics and employment and labor legal theory. Moreover, Locke had placed property rights, labor rights, and constitutional liberty into a context that had natural law and the Christian faith as important foundations. As Locke had explained, the duty to labor was a *divine command*; and the fruits of all labor were a natural right and the source of private property to the laborer. All of this I saw in the fundamental arguments of Frederick Douglass and Abraham Lincoln. I would later read the writings of other sociologists, historians, economists, and jurists through the prism of Locke's political philosophies on labor, property, and private property rights. Locke's Christian ideas on "property ownership," I carried into my first-year law school courses on property law and theory, during the 1991-92 academic year.

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This essay provides a quick outline of the Christian influence on the development of Anglo-American property law. This property law was extracted from pagan sources (i.e., ancient Rome, Anglo-Saxon customs) as well as from the Christianized Code of Justinian and Catholic Norman feudalism[5]. But in England,

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[4] Ibid., pp. 413-415.

[5] "The formal start of an English law of real property came after the Norman Invasion of 1066, when a common law was built throughout England. The new King, William the Conqueror, started standardising England's feudal rules, and compiled a reference for all land and its value in the Domesday Book of 1086. This was used to determine taxes, and the feudal dues that were to be paid. Feudalism meant that all land was held by the Monarch. Estates in land were granted to lords, who in turn parcelled out property to tenants. Tenants and lords had obligations of work, military service, and payment of taxation to those up the chain, and ultimately to the Crown. Most of the peasantry were bonded to their masters. Serfs, cottars or slaves, who may have composed as much as 88 per cent of the population in 1086,[4] were bound by law to work on the land. They could not leave without permission of their Lords. But also, even those who were classed as free men were factually limited in their freedom, by the limited chances to acquire property. The Commons Act 1236 allowed the Lord of a Manor to enclose any manorial land that had previously been common, and the Statute of Westminster 1285 formalised the system of entail so that land would only pass to the heirs of a landlord. The Statute *Quia Emptores Terrarum* 1290 allowed alienation of land only by substitution of the title holder, halting creation of further sub-tenants. The civil liberties of the Magna Carta of 1215, and its reissue in 1297, were only meant for barons and lords, while the vast majority of

the Roman Church of England was charged with taking hold of the law of real property, providing it with definition and meaning, and administering it in a manner that comported with Christian social norms.

The Church of England's influence on the development English law of property was felt directly through its control over the ecclesiastical and chancery courts throughout the early, middle and late Middle Ages. Its priests and canon and civil lawyers were trained in the Roman Catholic canon law and the Roman civil law at colleges at the University of Paris, Oxford, Cambridge and other similar institutions. And it was the Roman civil law that these priests and lawyers relied upon to create the property law of Roman Church of England, secular institutions, and the family. "Most Western laws of real property (land and fixtures) and of personal property (tangible and intangible items not attached to land) were more heavily dependent on Roman civil law with its complex rules of private and public property and English common law with its feudal tenure origins…."[6]

In England, these laws were developed largely through the Chancery Courts and the Ecclesiastical Courts, because the Common Law Courts were often too rigid and inflexible in order to carry out the Christian mandate "to do equity, justice and judgment"[7] in certain unique circumstances. Since the early days of the First Crusade (1096- 1099 A.D.); the Second Crusade (1145- 1149 A.D.); and the Third Crusade (1189-1192 A.D.), the Roman Church of England was called upon to take hold of the estates of lords, knights and pilgrims and to administer decedent estates to heirs. The English common law courts had been staffed with priests, earls and sheriffs; the ecclesiastical courts had been staffed with priests and bishops; and, later, the Kings' Lord Chancellor (a bishop or archbishop) took charge of the Chancery Court: together, these courts developed and administered England's law of real property. However, over time, the Church of England exercised the most decisive influence over England's real property law, through its ecclesiastical courts and the King's Chancery Court, because the regular common law courts were too inflexible to meet the changing social and economic necessities of the times.

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people were poor, subjugated and dispossessed." *History of English Land Law* (https://en.wikipedia.org/wiki/History_of_English_land_law)

[6] John Witte, Jr. and Frank S. Alexander, *Christianity and Law: An Introduction* (Cambridge, UK: Cambridge Press, 2008)., p. 207.

[7] Christian moral theology guided the development of English common law and equity was the central message of Jesus of Nazareth to love ye one another (John 15:12); to do justice and judgement (Genesis 18:18-19; Proverbs 21: 1-3); to judge not according to appearance but to judge righteous judgments (John 7:24); and to do justice, judgment, and equity (Proverbs 1:2-3).

SUMMARY

Land ownership and the Church were both extremely important to England's medieval world. The Christian faith, together with land ownership and tenure laws, defined important social and feudal relations, from the Pope, King, Archbishops, Nobles, Barons, etc. down to the Knights, Gentry, Peasants, and Serfs. Mankind's position in society was directly related to land tenure. For this reason, the Roman Church of England played an important role in developing the legal theory of real property law, from land conveyance, inter vivos and intestate transfers, the probate of wills, establishing the parameters of joint tenancy, and trust creation and administration. The Roman Church of England and, later, the Reformed Anglican Church, exercised their profound influence over the development of England's property law largely through the Court of Chancery and its various ecclesiastical courts. The Roman Church of England also influenced the development property law through promoting the "spirit of Catholic charity"[8] throughout England. Hence, through the Anglican Church, prosperous landowners and merchants were reminded of Christ's teachings, to wit: "'[a] new commandment I give unto you: that you love one another, as I have loved you, that you also love one another. By this shall all men know that you are my disciples, if you have love one for another.' (John 13:34-35; cf. James 4:11)."[9] For this reason, the Christian doctrine of stewardship over property (i.e., the "spirit of Catholic charity"[10]) became the predominant theme of English equity and property law. The result was the development of important charitable institutions, such as cathedral schools, hospitals, and guilds (i.e., training centers). Today, many of these doctrines have survived and passed into the property-law jurisprudence of the United States.

Part XII. Anglican Church: English Law of Real Property, 1300 to early 1600s A.D.

A. Feudalism and Anglo-Saxon-Norman Property Law

Land ownership and labor were the primary sources of social standing in Medieval Europe and England. The power of the king and the great barons rested upon their large land holdings and the legal authority and power which they held

[8] Thomas E. Woods, Jr., *How the Catholic Church Built Western Civilization* (Washington, D.C.: Regnery Publishing Inc., 2005), p. 174.
[9] Ibid, pp. 174-175.
[10] Ibid. 174.

over subordinates. Men of lower rank owed fealty and service (i.e., labor) to a higher lord, and so forth up to the English crown. From this arrangement, the peasants, serfs and slaves stood at the bottom of the social hierarchy; and the Roman Church of England, from the Pope down to the parish priests, helped to glue together this hierarchal social structure. Fundamentally, this social structure was based upon land and feudal service (i.e., labor)—the English law of property (and, to a degree, also the law of master and servant). And the learned clergymen within the Roman Church of England defined and administered this law.

In first year law school courses on property law, many of the legal terms—such as "fee simple absolute"-- were derived from Medieval England as they were developed in England's ecclesiastical and common-law courts, and the chancery courts.

> The word 'fee is derived from fief, meaning a feudal landholding. Feudal land tenures existed in several varieties, most of which involved the tenant having to supply some service to his overlord, such as knight-service (military service). If the tenant's overlord was the king, Grand Serjeanty, then this might require providing many different services, such as providing horses in time of war or acting as the king's ceremonial butler. These fiefs gave rise to a complex relationship between landlord and tenant, involving duties on both sides. For example, in return for receiving his tenant's fealty or homage, the overlord had a duty to protect his tenant. When feudal land tenure was abolished all fiefs became 'simple', without conditions attached to the tenancy. [11]
>
> In English common law, the Crown has radical title or the allodium of all land in England, meaning that it is the ultimate 'owner' of all land. However, the Crown can grant ownership in an abstract entity—called an estate in land—which is what is owned rather than the land it represents. The fee simple estate is also called 'estate in fee simple' or 'fee-simple title', sometimes simply 'freehold' in England and Wales. From the start of the Norman period, when feudalism was introduced to England, the tenant or 'holder' of a fief could not alienate (sell) it from the possession of his overlord. However, a tenant could separate a parcel of the land and grant it as a subordinate fief to his own sub-tenant, a process known as sub-enfeoffing or 'subinfeudation.' The

[11] https://en.wikipedia.org/wiki/Fee_simple

> 1290 Statute of Quia Emptores abolished subinfeudation and instead allowed the sale of fee simple estates.[12]
>
> The concept of a ‘fee’ has its origins in feudalism. William Blackstone defined fee simple as the estate in land that a person has when the lands are given to him and his heirs absolutely, without any end or limit put to his estate. Land held in fee simple can be conveyed to whomsoever its owner pleases; it can also be mortgaged or put up as security. Owners of real property in fee simple have the privilege of interest in the property during their lifetime and typically have a say in determining who gets to own an interest in the property after their death.[13]
>
> Historically, estates could be limited in time. Common temporal limitations include life estate, a land ownership that terminates upon the grantee's (or another person's) death even if the land had been granted to a third party, or a term of years, a lease for a specified term, such as in an estate for years. A fee also could be limited through the method of its inheritance, such as by an "entailment", which created a fee tail. Traditionally, fee tail was created by words of grant such as ‘to N. and the male heirs of his body’, which would restrict those who could inherit the property. If no heirs could be found, then the property would revert to the original grantor's heirs. Most common law countries have abolished entailment by statute.[14]

Hence, from 1991 to 1995, for four years, I studied Anglo-American property-law case materials and theory, ultimately passing an American bar examination which included this subject. After reviewing my old course materials and current black-letter law on the subject of property law, I am amazed at how much of modern-day American property law was actually developed in the Christian chancery and ecclesiastical courts of Medieval and Early Modern England :

[12] Ibid.
[13] Ibd.
[14] Ibid.

Estates In Land:

Anglo-American Property Law Developed in Medieval and Early Modern England

A. Fee Simple Absolute: this the largest estate permitted under Anglo-American common law. It invests the holder of the fee with full possessory rights, now and in the future. The holder can sell it, divide it, or devise it; and if he dies intestate (without a will), his heirs will inherit it. The fee simple has an indefinite and potentially infinite duration.

"In English law, a fee simple or fee simple absolute is an estate in land, a form of freehold ownership. It is a way that real estate may be owned in common law countries, and is the highest possible ownership interest that can be held in real property. Allodial title is reserved to governments under a civil law structure."

"An estate in fee simple denotes the maximum ownership in land that can be legally granted; it is the greatest possible aggregate of rights, powers, privileges and immunities available in land. The three hallmarks of the fee simple estate are that it is alienable, devisable and descendible."

B. Fee Simple (Defeasible Fees): these are defeasible fees that are of potentially infinite duration that can be terminated by the happening of a specified event.

1. **Fee Simple Determinable** (And possibility of reverter): is an estate that automatically terminates on the happening of a stated even and goes back to the grantor.

2. **Fee Simple Subject to Condition Subsequent** (and right of entry): This is similar to a fee simple determinable, except the grantor must take certain affirmative steps to terminate the estate of the grantee if the stated event occurs. In other words, when the even takes place, the grantor must first exercise a power of termination.

3. **Fee Simple Subject to an Executory Interest:** this is an interest in an estate that, upon the happening of a stated event, is automatically divested in favor of a third person rather than the grantor.

C. Life Estates: this is an estate that is not terminable at any fixed or computable period of time, but cannot last longer than the life or lives of one or more persons. This estate may operate by operation of law or may be created by an act or agreement of the parties.

1. **For life of Grantee**: the life estate may be conveyed from the grantor to the grantee for the natural lifespan of the grantor.

2. **Life Estate Pur Autre Vie** (life of another): this is a life estate that is measured by the life of someone other than the life tenant.

D. Rights and Duties of Life Tenant

1. **Affirmative Wastes**: the life tenant may not consume or exploit natural resources on the property, except to the extent reasonable amounts are necessary to repair and maintenance of the land, or when the life tenant has been expressly given the right to do so. Other exceptions occur where the land was used for such exploitation prior to the grant or the land is suitable only for such exploitation (i.e., a mine).

2. **Permissive Waste**: this is prohibited. The Life tenant has an obligation to repair, pay interest on encumbrances, pay taxes and make any need improvements in order to preserve the estate.

3. **Ameliorative Waste**: consists of acts that economically benefit the property. This occurs when the use of the property is substantially changed, but the change increases the value of the property.

4. **Future Interests**: a future interest is an estate that does not entitle the owner thereof to possession immediately, but will or may give the owner possession in the future. A future interest is a present, legally protected right in property.

a). **Reversionary interests:** these consists of interests known as "possibility of reverter" and "rights of entry," where the grantor creates a lessor estate in the grantee, the residue left over being the "reversionary interest."

b). **Remainders:** when the grantor creates a lessor estate in the grantee, but gives the residue left over to a third party, this residue is called a "remainder."

(1). **Rule in Shelly's Case**: this English case essentially disallowed the grantor to give a "remainder" interest to his "own heirs." Instead, the Rule converted such a "remainder" into a "reversionary interest" in the grantor; or into a "contingent remainder" in the grantor's ancestors.

(2). **Doctrine of Worthier Title Against Remainders**: this is a restatement of the Rule in Shelly's case. Under this doctrine, a remainder limited to the grantor's heirs is invalid, and the grantor retains a reversion in the property.

E. Executory Interests: when the estate in land arises from a preceding interest that is not a life estate, then it is an "executory interests." Such interests "divests" the interests of another person while they are still living, upon the occurrence of a particular event.

1. **Shifting Executory Interest**: this cuts short the estate of a grantee to a third party to whom it "shifts" upon the occurrence of an event.

2. **Springing Executory Interest**: this cuts short the estate of the grantor upon the occurrence of an event, which causes the estate to "spring" to the grantee.

F. Rule Against Perpetuities: this rule states that any future interest in land must vest, if at all, not later than 21 years after one or more lives in being at the creation of the interest. This

means that the grantor may not create a remainder interest that has the possibility of vesting beyond a time period 21 years after the lives anyone currently alive. For example, creating a remainder interest in the unborn grandchildren of a person other than the grantee would violate this rule, because all of people currently alive could die, and more than twenty-one years could elapse, before a grandchild is born or come into existence.

G. Rule Against Restraint on Alienation: this restriction violates the common law and expressly prohibits the transferability of property.

H. Joint Tenants: this is an estate between two or more tenants and comes with a "right of survivorship." Conceptually, when one joint tenant dies, the property is freed from his concurrent interest; the survivor or survivors retain an undivided right in the property, which is no longer subject to the interest of the deceased co-tenant. The survivors do not succeed, as "heirs" to the decedent's interest; they old free of it.

1. **Tenancy By Entirety**: this is a marital estate akin to a joint tenancy between a husband and wife. It is distinct from a tenancy in common, because a tenancy by entirety has a "right of survivorship." No spouse can convey away this estate without the express authorization of the other spouse.

2. **Tenancy In Common**: a tenancy in common is a concurrent, undivided interest in property with no right of survivorship. This interest is freely alienable by inter vivos and testamentary transfer, is inheritable, and is subject to claims of the tenant's creditors. Each tenant is entitled to possession of the whole estate. A confidential relationship exists among co-tenants.

I. Covenants Running With the Land: A real covenant, normally found in deeds, is a written promise to do something on the land (e.g., maintain a fence) or a promise not to do something on the land (e.g., conduct commercial business). Real covenants run with the land at law, which means that subsequent owners of the land may enforce or be burdened by the covenant. To run with the land, however, the benefit and burden of the covenant must analyzed separately to determine whether they meet the requirements for running.

J. Equitable Servitudes: these may be in writing in the form of covenants running with the land or implied on the basis of a common scheme for development of a residential subdivision.

Land tenure originated within a rigid common law and feudalistic structure, but gradually gave way to the pressing needs of merchants and untenured laborers, particularly following the Black Death, during the late 14th and 15th centuries. Church lawyers and theologians were on the vanguard of these changes for a number of reasons—some of them altruistic and others opportunistic and materialistic. The Anglican archbishops and bishops of the 16th century slowly evolved their Christian ministries in order to accommodate the financial interests of mercantilism and merchants, whom the English kings relied more and more

upon for high-level government service. Also, during the late 16th century, clergymen were more and more being recruited from the ranks of the wealthy merchant classes. For these reasons, during the 16th century, the equity jurisprudence of the Chancery Court slowly unloosened England's rigid and feudalistic common law of property.[15]

B. Chancery and Ecclesiastical Courts

The Church of England directly controlled several institutions which gave it a decisive influence on the development of England's law of property. These were the major seats of learning, such as the cathedral schools, inns of court, the various colleges of Oxford and Cambridge. Second, the Church of England controlled the ecclesiastical courts which had jurisdiction over the Roman canon law and church property. The ecclesiastical courts exercised extensive power and it had a very vast jurisdiction over extensive tracts of land and buildings which it held in trust in perpetuity, for the benefit of the Church. Thirdly, the Church of England's archbishops and bishops served as judges and chief judges in nearly all of the major common law tribunals throughout the kingdom, including the office of the Lord Chancellor, who presided over England's chancery courts. The Lord Chancellor, as the Keeper of the King's conscience, could over-rule the common law courts, in matters where justice would be best served.

> Court of Chancery, in England, the court of equity under the lord high chancellor that began to develop in the 15th century to provide remedies not obtainable in the courts of common law. Today, the court comprises the Chancery Division of the High Court of Justice. Courts of chancery or equity are still maintained as separate jurisdictions in certain areas of the commonwealth and in some states of the United States.[16]

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[15] Competition between the Chancery courts and the Common Law courts became quite stiff during the late 16th and early 17th centuries. "The early Elizabethan period featured a dispute between the Court of Chancery and common-law courts over who held pre-eminence. It had been the practice under Henry VI that plaintiffs in the common-law courts could not execute judgments given by the common-law judges if the Lord Chancellor felt their claim was "against conscience". This had been vehemently opposed by the common-law judges, who felt that if the Lord Chancellor had the power to override their decisions, parties to a case would flock to the Court of Chancery.[25] The dispute over the pre-eminence of the Lord Chancellor continued into Elizabeth I's reign, with the judges increasing in strength; the Lord Chancellor was no longer a clergyman whom it was risky to offend, while the judges had grown in stature.[26] Sir Edward Coke cites in his *Reports* a case at the end of Elizabeth's reign which seems to indicate that the Chancellor's prerogative had been overturned, when the judges (without opposition from the Monarch) allowed a claim to proceed despite the Lord Chancellor's implied jurisdiction. At the same time, the common-law judges ruled that the Chancery had no jurisdiction over matters of freehold." "Court of Chancery," (https://en.wikipedia.org/wiki/Court_of_Chancery).

[16] "Court of Chancery," (https://www.britannica.com/topic/Court-of-Chancery).

In England the common-law courts became firmly established as the principal organs of royal justice by the 14th century. In earlier days they had exercised a wide jurisdiction in framing and applying the rules of the common law, but their most creative period was over. A large body of rules, many of them highly technical and artificial, had come into existence; the common law was increasingly rigid and inflexible. In civil cases the relief available was largely limited to payment of damages and to the recovery of the possession of land and chattels. The court refused to extend and diversify types of relief so as to meet the needs of new and more complex situations. In their insistence on the letter of the law, the courts often failed to deal fairly and equitably between the parties. Another cause of dissatisfaction was that, in the growing political chaos of the 15th century, powerful local lords were able to bribe or intimidate juries and defy court orders.[17]

Disappointed litigants consequently turned to the king and council with petitions for justice. These petitions were referred to the lord chancellor, who by the 15th century had begun to build up a series of equitable remedies, together with policies governing their operation. In the exercise of his equitable jurisdiction, the chancellor initially was not bound by precedent, as were the common-law judges. He had wide powers to do justice as he saw fit, and he exercised them with a minimum of procedural formality. The chancery was relatively cheap, efficient, and just; during the 15th and 16th centuries, it developed spectacularly at the expense of the common-law courts. During the 17th century, opposition developed from the common-law judges and Parliament; they resented chancery's encroachment upon the province of the common-law courts, and the chancellor was forced to agree not to hear any case in which there was adequate remedy, such as damages, at common law.[18]

By the early 16th century, the development of a system of precedent exercised another restrictive influence on the continued growth of equitable remedies. Although most of the early chancellors had been clerics, the later ones were usually lawyers who used the newly

[17] Ibid.
[18] Ibid.

> initiated reports of cases to begin shaping equity into an established set of rules. By the middle of the 17th century, the equity administered by the Court of Chancery had become a recognized part of the law of the land.[19]

Chancery's jurisdiction over English land law meant that the "Law of Christ" would leave its indelible mark upon the law of real property. "The Chancery had jurisdiction over all matters of equity, including trusts, land law, the administration of the estates of lunatics and the guardianship of infants. Its initial role was somewhat different, however; as an extension of the Lord Chancellor's role as Keeper of the King's Conscience, the Court was an administrative body primarily concerned with conscientious law."[20] This "conscientious law" was frequently applied to questions of real property and estates. As it turned out, the ecclesiastical courts and the chancery courts took jurisdiction over "trusts" and "probate and estates."

1. Trusts

The legal concept of "trusts" was perhaps first developed by Roman Catholic priests who needed a method to legally construct a relationship between persons who held legal title, and those persons who exercised equitable title, or administrative authority over estates, for the benefit of others.

> The idea of a trust originated during the Crusades of the 12th century, when noblemen travelled abroad to fight in the Holy Land. As they would be away for years at a time it was vital that somebody could look after their land with the authority of the original owner. As a result, the idea of joint ownership of land arose. The common law courts did not recognise such trusts, and so it fell to equity and to the Court of Chancery to deal with them, as befitting the common principle that the Chancery's jurisdiction was for matters where the common law courts could neither enforce a right nor administer it. The use of trusts and uses became common during the 16th century, although the Statute of Uses "[dealt] a severe blow to these forms of conveyancing" and made the law in this area far more complex. The court's sole jurisdiction over trusts lasted until its dissolution. [21]

[19] Ibid.
[20] "Court of Chancery," (https://en.wikipedia.org/wiki/Court_of_Chancery).
[21] https://en.wikipedia.org/wiki/Court_of_Chancery#Trusts_and_the_administration_of_estates

The Church of England and its clerics thus exerted a very important function in administering the law of land trusts during the period 1300 to 1600 A.D.

2. Estates Administration, Wills and Probate

England's Lord Chancellor, who was an Anglican bishop, and the Court of Chancery eventually assumed control over wills, probate, and estate administration from the common law courts. This is why many of the legal doctrines mentioned in the previous section, such as the "Rule in Shelly's Case," the "Doctrine of Worthier Title," and the "Rule Against Perpetuities," fell into the hands of Anglican priests and lawyers. They were developed within the context of Christian ideals of family, land, and inheritance, and under the purview of the Church of England.

> From its foundation, the Court of Chancery could administer estates, due to its jurisdiction over trusts. While the main burden in the 16th century fell on the ecclesiastical courts, their powers over administrators and executors was limited, regularly necessitating the Court of Chancery's involvement. Prior to the Statute of Wills, many people used feoffees to dispose of their land, something that fell under the jurisdiction of the Lord Chancellor anyway. In addition, in relation to the discovery and accounting of assets, the process used by the Court of Chancery was far superior to the ecclesiastical one; as a result, the Court of Chancery was regularly used by beneficiaries. The common law courts also had jurisdiction over some estates matters, but their remedies for problems were far more limited. [22]
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> Initially, the Court of Chancery would not entertain a request to administer an estate as soon as a flaw in the will was discovered, rather leaving it to the ecclesiastical courts, but from 1588 onwards the Court did deal with such requests, in four situations: where it was alleged that there were insufficient assets; where it was appropriate to force a legatee to give a bond to creditors (which could not be done in the ecclesiastical courts); to secure femme covert assets from a husband; and where the deceased's debts had to be paid before the legacies were valid. [23]

[22] Ibid.
[23] Ibid.

C. Christian Theory of Stewardship

It should be stressed that Anglo-American property law was derived from the Christianized Code of Justinian and the Roman canon law, and these two were extracted from pagan Greco-Roman law. However, Anglo-American property law also was developed, at least since the Norman invasion of 1066 A.D., under the purview of the Roman Church of England and, later, the Reformed Anglican Church. This ecclesiastical oversight ensured that Christian philosophy would guide the development of England's property law, particularly because both the Christian faith and land were so important to Medieval England. Perhaps the most important Christian doctrine was that land-ownership carried with it moral responsibilities to the community-at-large.

Hence, the duties not to waste or damage property, or to use property in a manner that impairs the value or usage of adjoining property, arose out of Christian stewardship doctrine. As Professor Frank S. Alexander has observed, "Stewardship is a conception of dominion which imports a sense of obligation."[24] "At the core of the theological context for human obligations to the land is the meaning of dominion set out in the creation mandate: 'Be fruitful and multiply, and replenish the earth and subdue it, and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moves upon the earth' (Genesis 1:28)."[25] "The ownership of most real property is shared in some sense. Both English and American law recognize in theory the possibility of the 'fee simple absolute' form of ownership in which a single person or entity possessed all the possible rights and privileges in the property together with absolute dominion and control over it. This fee simple absolute, however, exists only in theory. Even when one person or entity possesses all rights, and no other has any affirmative right in or to the land, this 'owner' does not possess absolutely the right to use the land as she pleases. The use of property in all jurisdictions is subject to two key limitations. Enforced through the legal doctrine of private and public nuisances, this affirms the often interrelated if not interdependent consequences of use of property. Second, the public at large (by and through the appropriate governmental entities) has the right to regulate, define, and limit the permissible uses of property. Grounded in implicit constitutional police power doctrines, public land use controls are experienced primarily in the form of zoning, housing and building codes, and environmental regulations."[26]

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[24] John Witte, Jr. and Frank S. Alexander, Christianity and Law: An Introduction (Cambridge, UK: Cambridge Press, 2008)., p. 215.
[25] Ibid.
[26] Ibid, p. 212.

1. Charity, Almsgiving, and Monasteries

The Roman Church of England further influenced property law through promoting the "spirit of Catholic charity"[27] throughout all of England. Through the church, England's prosperous landowners and merchants were reminded of Christ's teachings, to wit: "'[a] new commandment I give unto you: that you love one another, as I have loved you, that you also love one another. By this shall all men know that you are my disciples, if you have love one for another.' (John 13:34-35; cf. James 4:11). Saint Paul explains that those who do not belong to the community of the faithful should also be accorded the care and charity of Christians, even if they should be enemies of the faithful (c.f. Romans 12: 14-20; Galatians 6:10). Here was a new teaching for the ancient world."[28]

Hence, within the Christian kingdom of England, all men and women were considered to be members of the church—whether rich or poor—and hence subject to the "Law of Christ," which commanded charity and almsgiving. See, e.g., the "Parable of the Good Samaritan" (Luke 10: 25-37); the "Parable of the Friend in Need" (Luke 11: 5-8); the "Parable of the Rich Fool" (Luke 12:15-21); and the "Parable of the Rich Man and Lazarus" (Luke 16: 19-31). Moreover, many sons and daughters of the wealthy nobles and merchants opted to give up everything and to devote their lives to church service within convents and monasteries. And these institutions, which were set apart as distinct institutions within Medieval Europe and England, had a profound influence on the Medieval concept of "property," "property rights," and "charity." We may correctly surmise that, through the church, the Christian idea of stewardship was incorporated into England's law of property. This Christian stewardship essentially reminded the well-to-do that, through the "Law of Christ," they had moral obligations with respect to the use of their property. As sons and daughters of the church, they had a duty to not accumulate wealth without giving back to help the poor and the needy.[29]

> Almsgiving, as the term was used by earlier Catholic writers, denoted assistance given to people less fortunate than oneself through material gifts or services or advice and comfort, from avowedly religious motives. Its simplest form was a personal, mutually beneficial

[27] Thomas E. Woods, Jr., *How the Catholic Church Built Western Civilization* (Washington, D.C.: Regnery Publishing Inc., 2005), p. 174.
[28] Ibid, pp. 174-175.
[29] Ibid, p. 176 ("The early Church also institutionalized the care of widows and orphans and saw after the needs of the sick, especially during epidemics.").

> transaction between giver and receiver. Givers would acquire merit in the sight of God and obtain disproportionate rewards ("God is obliged to pay one hundred for one"; see Luke 8:5-15) if they gave cheerfully, compassionately, and without ostentation—so long as they drew on goods legitimately acquired and not, say, on the proceeds for the transfer of temporal wealth to eternity, would undertake to pray for their benefactors. More elaborately, it was possible by last will and testament to endow permanent foundations which would be administered by executors, trustees, or persons appointed by them, such as the wardens of hospices or almshouses. By that means testators could win for their souls the support of generations of grateful beneficiaries, witnesses to their good deeds, perhaps wearing their livery, perhaps solemn commemorative ceremonies on the anniversary of the benefactor's death. By the fourteenth and fifteenth centuries, bishops and magistrates acknowledged a duty to protect such arrangements against fraud and abuse—against the negligence of executors or administrators or the tricks of the idle poor.[30]

In addition, because of the widespread unequal distribution of wealth and resources throughout England, the church insisted that charity and mercy were essential to maintaining a Christian and just social order.[31] England's law of property had to take into account the general moral obligations of the church and mandates of a Christian commonwealth.

2. Hospitals

The monasteries of Medieval Europe and England were the leading charitable organizations. These institutions established cathedral schools, almshouses, guilds (i.e., training centers), and the first infirmaries and hospitals. In fact, the monasteries were the leading providers of organized medical care throughout Medieval England. "With regards to the establishment of institutions staffed by physicians who made diagnoses and prescribed remedies, and where nursing provisions were also available, the Church appears to have pioneered. By the fourth century, the Church began to sponsor the establishment of hospitals on a large scale, such that nearly every major city ultimately had one. These hospitals originally provided hospitality to strangers but eventually cared for the sick,

[30] John Witte, Jr. and Frank S. Alexander, *Christianity and Law: An Introduction* (Cambridge, UK: Cambridge Press, 2008)., pp. 186-187.
[31] Ibid., p. 188.

widows, orphans, and the poor in general."[32] What this development reveals is that fundamentally the Christian faith, through the church, directed the usage of land and labor toward charitable objectives which significantly influenced the legal parameters of "private property" as not being mutually exclusive but rather incorporated the conceptualization of "property" as an important social function involving Christian stewardship.

3. Poor Laws

Up to the reign of Henry VIII in England (1509 -1547), England's monasteries took charge of distributing support to the poor and the needy. Hence, the rich and the well-to-do donated funds and property to the church and to the monasteries, and the monasteries in turn redistributed resources to the poor. After the Reformation, Henry VIII confiscated the Catholic monasteries, thus causing an uproar and even a rebellion among many of the English poor. In lieu of these charitable distributions from monasteries, the Reformed Anglican Church and English crown turned to poor laws for assistance with providing aid and relief to the poor. This would become a key feature of Protestant Europe. "Between 1520 and 1580 some sixty European towns and a few states issued comprehensive legislation, in the form of statutes, church ordinances, and council decrees, designed to direct and control poor relief."[33]

Hence, the very foundations of social legislation and welfare in England and Western Europe trace their roots to the age of the Protestant Reformation, when the state took over from the church the duty of providing assistance and aid to the poor. At the core of this function was the problem of determining between rascals and loafers and who were truly needy and deserving of assistance; and of drawing the line between private property rights and Christian stewardship.

This problem of private property and the Christian duty of stewardship as to its usage later dominated my legal studies in law school. My focus shifted toward examining the law from the perspective of class and class consciousness, and this perspective was largely influenced by my readings of British, French, and German political theory and philosophy. Although the concept "Christian stewardship" was not within my lexicon during the early 1990s, I utilized the same idea and concept, which I conceptualized as "natural justice" and "natural law," and I defined it as an

[32] Thomas E. Woods, Jr., *How the Catholic Church Built Western Civilization* (Washington, D.C.: Regnery Publishing Inc., 2005), p. 178.
[33] John Witte, Jr. and Frank S. Alexander, *Christianity and Law: An Introduction* (Cambridge, UK: Cambridge Press, 2008)., pp. 195.

essential element of civilization (i.e., "ordered liberty" and "fundamental rights") which the United States Supreme Court was duty-bound to ascertain and apply, or else accept the consequences of social misery and decay. In my mind, as a result of my religious background and training, I had conceptualized the U.S. Supreme Court as being no different than Kings David and Solomon in the Old Testament.[34] I grappled with the constitutional dichotomy between "Church and State," because I could not let go of the notion that "[t]rial before a judge is a central means to re-establish God-given status of peace and justice."[35] Not only did I study the landmark constitutional cases, but I also studied 19th century constitutional history, labor economics, and the various social legislations which undergirded those Supreme Court cases. The central problem, as I conceived it, was this: to what extent can the government impair or modify private property rights, in order to promote the well-being of society as a whole (i.e., to impose the duty of Christian stewardship upon the owners of private property). A landmark U.S. Supreme Court case that I studied during law school, and which became a major part of my thesis *The American Jurist: A Natural Law Interpretation of the U.S. Constitution, 1787 to 1910*, was that of *Lochner v. New York*,[36] which struck down a state health and safety statute which was designed to curtail the dangerous working conditions of bakers, because it was believed that this law infringed upon freedom of contract and private property rights. This Lochner-era jurisprudence eventually gave way to state and federal workers' compensation laws, and other important social legislation. At the heart of these important, landmark questions, at least as I conceived them, was the duty of Christian stewardship of private property.

[34] In my mind, during my days in law school, the Christian religion and the Law of Moses had to have a practical effect in human affairs: "Trial before a judge is a central means to re-establish God-given status of peace and justice." "In the ancient Jewish world, justice ultimately remained an act of God, who is the righteous judge (Psalm 7:11; Jeremiah 12:1). Behind all human procedures, God judges each man according to his merits (1 Kings 8:32). If the king does not judge and punish the sins committed in his realm, God will take the king's place and render his own judgment. And in his anger, God will send devastation, war, diseases, and hunger upon the land for its failure to do justice—just as he had condemned Sodom and Gomorrah in earlier days (Deuteronomy 29:15-27; Leviticus 26)." John Witte, Jr. and Frank S. Alexander, *Christianity and Law: An Introduction* (Cambridge, UK: Cambridge Press, 2008)., p. 145.

[35] Ibid.

[36] 198 US 45 (1905).

CONCLUSION

The Roman Church of England influenced the development of property law through promoting the "spirit of Catholic charity"[37] throughout England. Hence, through the Anglican Church, prosperous landowners and merchants were reminded of Christ's teachings, to wit: "'A new commandment I give unto you: that you love one another, as I have loved you, that you also love one another. By this shall all men know that you are my disciples, if you have love one for another.' (John 13:34-35; cf. James 4:11)."[38] Thus, through the Church of England, the Anglo-American idea of Christian stewardship has become predominant in property law. Land ownership reflected important social relationships that were defined by duty and custom, which the Christian faith molded. The ecclesiastical and chancery courts raised these Christian standards to the status of law, and imposed stewardship standards, with regards to property rights and duties, upon land owners, trustees, and beneficiaries. Implicit within this standard was the Christian mandate "to do equity, justice and judgment"[39] between persons in relationship to property and property rights.

THE END

[37] Thomas E. Woods, Jr., *How the Catholic Church Built Western Civilization* (Washington, D.C.: Regnery Publishing Inc., 2005), p. 174.

[38] Ibid, pp. 174-175.

[39] Christian moral theology guided the development of English common law, and equity jurisprudence reflected the central message of Jesus of Nazareth to love ye one another (John 15:12); to do justice and judgement (Genesis 18:18-19; Proverbs 21: 1-3); to judge not according to appearance but to judge righteous judgments (John 7:24); and to do justice, judgment, and equity (Proverbs 1:2-3).

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