Chapter 6

Land and the American Revolution

In 1835, the French philosopher, Alexis de Tocqueville, wrote in his historic work, *Democracy in America:* "Laws and customs are frequently to be met with in the United States, which contrast strongly with all that surrounds them. These laws seem to be drawn up in a spirit contrary to the prevailing tenor of American legislation; and these customs are no less opposed to the general tone of society. If the English colonies had been founded in an age of darkness, or if their origin was already lost in the lapse of years, the problem would be insoluble."[1]

Though it is not definitely known, De Tocqueville might have had in mind the retention and acceptance of the antiquated English land laws. Land tenure as initiated in the colonies, albeit with some modifications, was continued during and after the Revolution. In some areas it was the persistence of a power and privilege which left an aristocratic trace in the veins of the nation's body politic, which, despite democratic gains, it has never been able to eliminate.

We have already seen in the previous chapters that the attempts to introduce a feudal system of land tenure in the American colonies largely resulted in failure, and quitrents demanded of settlers were ignored or evaded through general connivance or open revolt. Yet in some areas, particularly in the South and Southwest, ownership of large estates, supported by some of the laws relating to land tenure transferred from the old countries of Europe, was an emblem of political

[1]Vol. I, pp. 44–45.

prestige and preference. In fact, in several of the states, years after the Revolution, real estate ownership was a requirement of political suffrage, as originally set down in the colonial laws.[2] Moreover, landownership was restricted to citizens and not open to aliens.

Writing on this topic, De Tocqueville remarks:

> In most of the States situated to the southwest of the Hudson, some great English proprietors had settled, who had imported with them aristocratic principles and the English law of inheritance. . . . In the South, one man, aided by slaves, could cultivate a great extent of country; it was therefore common to see rich landed proprietors. But their influence was not altogether aristocratic as the term is understood in Europe, since they possessed no privileges; and the cultivation of their estates being carried on by slaves, they had no tenants depending on them and consequently no patronage. Still, the great proprietors south of the Hudson constituted a superior class, having ideas and tastes of its own, and forming the centre of political action. This kind of aristocracy sympathized with the body of the people, whose passions and interests it easily embraced; but it was too weak and too short-lived to excite either love or hatred for itself. This was the class which headed the insurrection in the South, and furnished the best leaders of the American Revolution.[3]

Perhaps, as De Tocqueville indicates, it was respect for law and customs which, despite the awakened democratic tendencies that followed the Revolution, led to the retention of a system of land tenure not entirely compatible with political and economic equality.

The Abolishment of the Law and Custom of Primogeniture

The laws of inheritance as applied to land, in the case of primogeniture and entail, at the time of the American Revolution were as obnoxious to Britains of liberal thought as they were to many of the American colonists. But the sway of British aristocracy, based on a landed nobility, prevented action for their elimination or moderation. How-

[2]For a discussion of property qualifications for voters at the time of the Constitutional Convention, see Charles A. Beard, *An Economic Interpretation of the Constitution of the United States,* Chap. IV.

[3]*Op. cit.,* Vol. I, p. 58.

ever, when the colonies were freed from the yoke of the mother country, they took measures, in some cases without much delay, to be rid of these social evils. Thus Daniel Webster, in an address delivered at Plymouth, Massachusetts, on December 22, 1820, remarked that though "the character of political institutions of New England was determined by the fundamental laws respecting property," the states, by abolishing the right of primogeniture, by curtailing entails, long trusts, and other processes for fettering and tying up lands, and by the enactment of facilities for the alienation of estates for public registries and simplified forms of conveyance, had fixed the future frame and form of government in New England. "The consequence of all these causes," he said, "has been a great subdivision of the soil and a great equality of condition, the true basis, most certainly, of a popular government."

It has been pointed out by John Fiske that the succession to property at the time of the Revolution was regulated in New York and the southern states by the English rule of primogeniture.[4] In New Jersey, Pennsylvania, Delaware, and the four New England states, primogeniture was modified by allowing to the eldest son a double share in the distribution of landed property among heirs. Georgia was the first state to abolish this rule of primogeniture after the Revolution by decreeing the equal distribution to direct heirs of intestate property, and between 1784 and 1796 her example was followed by all the other former colonies. At about the same time, the law and custom of entail was either definitely abolished or the obstacles to their discontinuance were removed. Likewise, in New York, the manorial privileges of the patroons were abolished, and in Maryland and the Carolinas the manorial system, as previously stated, after a slow period of disintegration, was allowed to expire and the unallotted lands of the proprietors forfeited to the state. Pennsylvania, the Carolinas, and Georgia also abolished the colonial proprietorship system after the Revolution, but Pennsylvania indemnified the Penn family to the amount of $500,000.

Jefferson's Influence on Land-Tenure Reform

Thomas Jefferson is given credit for putting through, while governor,

[4] *The Critical Period of American History,* pp. 70–71.

the abolition of primogeniture and entail in Virginia. In view of the large and influential class of large landholders in that state at the time, this undoubtedly was not an easy task.

Jefferson's opposition to primogeniture and entail, along with his dislike of land engrossment, was based on his concept of political equality. He had the examples of France and Britain before him, nations in which the acquisition and accumulation of property, particularly in land, brought about a domination of political power and destroyed the basis of political equality. As stated by Marshall Harris, "He led the fight against entails because the maintenance of large estates in the same family did not meet his standards of equality. He uprooted the practice of primogeniture, or even the Hebrew idea of a double portion for the eldest son, in favor of equal devolution. Then he helped formulate the plans for distributing the public domain, which provided for placing the land in the hands of many persons in units suitable to the typical farm family."[5]

But Jefferson did even more! In a letter to the Reverend James Madison, written from France in 1795, he actually suggested what was in effect both homestead tax exemptions and graduated land taxes. In his letter Jefferson stated:

> The descent of property of every kind . . . to all the children, or to all the brothers, sisters, or other relations in equal degree is a politic measure and a practical one. Another means of silently lessening the inequality of property is to exempt all from taxation below a certain point and to tax the higher portions of property in geometrical progression as they rise. . . . It is not too soon to provide by every possible means that as few as possible shall be without a little portion of land. The small land holders are the most precious part of the state.[6]

The power and individuality of Jefferson's thinking are reflected in the idea of taxing large holdings of land "in geometrical progression." The extent to which the economic rent of land is taxed is fully as important as the type of ownership of land. Moreover, as land taxation

[5] *Origin of the Land Tenure System in the United States,* p. 347.

[6] *Jefferson's Writings,* ed. by Ford, Vol. 7, p. 36.

approaches the full economic rent of land, we come ever closer to the situation of which John Locke wrote when he explained how it is possible "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 [i.e., all men]."

As history shows, Jefferson's influence was not strong enough to cause a complete abolition of entails and primogeniture throughout all the American colonies. According to Henry William Spiegel, in Maine, Massachusetts, Delaware, and Rhode Island, entails are still admitted, though the holder is entitled to convey the property in fee simple.[7] Other states do not have any provisions relating to the subject. However, as stated by Dr. Spiegel, there is not much doubt that the courts of these states would decline to recognize entails, though the statute *de Donis* of 1285, whose last relic was abolished in Great Britain in 1925, seems to be in force there. Today, entails and a number of other curiosities of ancient land tenure have merely an historical interest, but we have seen they were planted here in the colonial era, and the continued existence of some large estates in New England and New York until the middle of the nineteenth century could be attributed to them.[8]

The Continental Congress and Land—The Northwest Ordinance

As questions of land tenure were matters of the several states, the Continental Congress, save in connection with the western territory taken from or granted by the British Crown, was not concerned with

[7] *Land Tenure Policies at Home and Abroad,* pp. 25–26.

[8] It may be interesting to know, in view of the general opposition to the relics of feudal land tenure after the Revolution, as represented by primogeniture and entail, that the movement was not altogether by the aristocratic-minded members of certain sections. Thus, as noted by Professor Richard Morris in his book, *Studies in the History of American Law,* a philosopher of the cotton kingdom, George Fitzhugh, published a book in Richmond, Va., in 1854, entitled *Sociology for the South,* in which he advocated the creation of entails and the reintroduction of primogeniture. Also, in later years, because the tendency toward successive division of farms among heirs owing to the equal inheritance laws has led to undersized farms, there have been proposals both in the country and abroad for substitutes of the customs of entail and primogeniture in order to insure the continuation of family-sized farms. For a discussion of this topic, see Henry Spiegel, *Land Tenure Policies at Home and Abroad,* pp. 26–27.

such matters. In the Ordinance of 1787, the first definite legislation that set up a government for the newly acquired Northwest Territory, the Congress, then sitting under the Articles of Confederation, gave its sanction to the abolition of primogeniture on the following terms:[8a]

EXTRACT FROM GENERAL LAWS, UNITED STATES

1. Be it ordained by the United States in Congress assembled, That, &c.
2. Be it ordained by the authority aforesaid, That the estates both of resident and non resident proprietors in the said territory dying intestate shall descend to and be distributed among their children and the descendants of a deceased child in equal parts the descendants of a deceased child or grand-child to take the share of their deceased parent in equal parts among them; and where there shall be no children or descendants, then in equal parts to the next of kin in equal degree and among collateral the children of a deceased brother or sister of the intestate shall have, in equal parts among them, their deceased parent's share; and there shall in no case be a distinction between kindred of the whole and half blood; saving in all cases to the widow of the intestate her third part of the real estate for life.

Land in the Constitutional Convention

The Property Qualifications for Congressmen. It appears that the Constitutional Convention was little concerned with the matter of landownership and land distribution. Many of its members were large landowners and men of affluence, and property protection was of great concern to them. But the topic of qualification for voters and for members of the legislature did receive some consideration. At the session of July 26, 1787, George Mason of Virginia, owner of large estates and a speculator in western lands, moved "that the Committee of Detail be instructed to receive a clause requiring certain qualifications of landed property & citizenship of the U. States, in members of the Legislature, and disqualifying persons having unsettled Acc.ts with or being indebted to the U.S., from being members of the Nat.l Legislature." The motion

[8a] Worthington C. Ford, *et al*, editors, *Journals of the Continental Congress* (Washington, 1904–1937), Vol. XXXII, pp. 334–35.

was seconded by the delegate from South Carolina, Charles Pinckney, who, like Mason, was a large landowner. But it was opposed by Gouverneur Morris of New York, himself a large landowner, who said that if qualifications were proper he would "prefer them in the electors rather than in the elected."

It should be borne in mind that, in this period, property qualifications for local voters were almost universal, and the practice continued in several states for a number of years following the establishment of the national government. Morris cautioned against "minutious regulations in a Constitution. The parliamentary qualifications quoted by Col. Mason, had been disregarded in practice; and was but a scheme of the landed ag.st the monied interest." Rufus King, of New York, "observed that there might be great danger in requiring landed property as a qualification since it would exclude the monied interest, whose aids may be essential in particular emergencies to the public safety."

James Madison, whose *Journal of the Proceedings of the Constitutional Convention* we are quoting, in commenting on Mason's proposal, "moved to strike out the word *landed,* before the word 'qualifications,' " remarking that "Landed possessions were no certain evidence of real wealth," and adding that

> Many enjoyed them to a great extent who were more in debt than they were worth. The unjust Laws of the States had proceeded more from this class of men, than any others. It had often happened that men who had acquired landed property on credit, got into the Legislatures with a view of promoting an unjust protection ag.st their Creditors. In the next place, if a small quantity of land should be made the standard, it would be no security; if a large one, it would exclude the proper representatives of those classes of Citizens who were not landholders. . . . The three principal classes into which our citizens were divisible, were the landed the commercial, & the manufacturing. The 2.d & 3.d class, bear as yet a small proportion to the first. The proportion however will daily increase. We see in the populous Countries in Europe, now what we shall be hereafter. These classes understand much less of each others interests & affairs, than men of the same class inhabiting different districts. It is particularly requisite therefore that the interests of one or two of them should not be left entirely

> to the care, or impartiality of the third. This must be the case if landed qualifications should be required; few of the mercantile, & scarcely any of the manufacturing class chusing whilst they continue in business to turn any part of their Stock into landed property. For these reasons he wished if it were possible that some other criterion than the mere possession of land should be devised. He concurred with M.r Gov.r Morris in thinking that qualifications in the Electors would be much more effectual than in the elected. The former would discriminate between real & ostensible property in the latter; But he was aware of the difficulty of forming any uniform standard that would suit the different circumstances & opinions prevailing in the different States.[9]

Madison's arguments prevailed and Colonel Mason's motion was rejected unanimously. The outcome of the debate was that the qualifications of the electors were left to be decided by the states, each for itself.[10]

Landownership Proposed as a Voting Qualification

When the time came for the Constitutional Convention to debate the qualifications of voters in national elections (August 7, 1787), there were sharp differences of opinions. The draft of this section of the Constitution, which fixed the qualifications of voters in each state for the House of Representatives as the same as "those of the electors in the several States, of the most numerous branch of their own legislatures," was set before the convention. Gouverneur Morris moved to have it struck out so that some other provision might be substituted which would "restrain the right of suffrage to freeholders," i.e., landowners. This move precipitated a sharp discussion. Morris contended that to give the votes to people who had no property would lead them to sell their votes to the rich, who would be able to buy them and thus foster "aristocracy." Colonel Mason answered this argument, asking: "Does no other kind of property but land evidence a common interest in the

[9]See James Madison, "Journal of the Constitutional Convention of 1787," in Gaillard Hunt, editor, *The Writings of James Madison,* Vol. IV, pp. 73–76.

[10]See George Bancroft, *History of the United States,* Vol. VI, pp. 271–74. According to Bancroft, George Mason and the Pinckneys would have a qualification of landed property for the Executive and the Judicial, as well as members of Congress.

proprietor? . . . Ought the merchant, the monied man, the parent of a number of children whose fortunes are to be pursued in his own Country to be viewed as suspicious characters, and unworthy to be trusted with the common rights of their fellow Citizen?"

Madison, the Virginia gentleman, though expressing the view that "freeholders of the Country would be the safest depositories of Republican liberty," pointed out: "In future times a great majority of the people will not only be without landed, but any other sort of property. (These will either combine, under the influence of their common situation . . . or . . . they will become the tools of opulence & ambition, in which case there will be equal danger on another side.") He saw danger in a restricted franchise based on property as well as in an unrestricted franchise, but favored the unrestricted. Benjamin Franklin, on the other hand, urged that "we sh.[d] not depress the virtue & public spirit of our common people" who had contributed so much to the success of the Revolution, and recommended a liberal franchise. This and other arguments against limiting the suffrage to landowners won out, and the provision regarding qualifications of electors for members of Congress was to be fixed by each state as applied to the most numerous branch of the state's legislature.[10a] This provision stands today.

Land Taxation in the Constitutional Convention

Land as a subject for federal taxation was not specifically discussed in the Constitutional Convention. But as land and slaves constituted the chief items of wealth in the colonies—and they were items that could be "directly" taxed as wealth—in debating the taxing powers of the federal government, particularly with reference to distributing the burden among the several states, the question arose whether wealth, population, or representation in the Congress should be the basis of "direct taxation." As might be expected, the states in which property values were higher in proportion to population were favorable to direct taxation on the basis of population, whereas those states which were only partially settled and where slaves formed a considerable portion of the inhabitants opposed this basis. On the whole, there was consider-

[10a] *Writings of James Madison,* Vol. IV, pp. 109–29.

able opposition by some delegates to giving any power of direct taxation to the federal government. The controversy was finally settled by apportioning representation and "direct taxation" among the states in accordance with population, but slaves ("all other persons") were to be counted only as three fifths.

Commenting on the outcome of the debates on qualifications of voters and members of Congress in the Constitutional Convention, Charles A. Beard, the American historian, in his well-known study, *An Economic Interpretation of the Constitution of the United States,* remarks:

> Propositions to establish property restrictions were defeated, not because they were believed to be inherently opposed to the genius of American government, but for economic reasons—strange as it may seem. These economic reasons were clearly set forth by Madison in the debate over landed qualifications for legislators . . . when he showed, first, that slight property qualifications would not keep out small farmers whose paper money schemes had been so disastrous to personalty; and, secondly, that landed property qualifications would exclude from Congress the representation of "the classes of citizens who were not landholders," *i.e.* the personalty interests. This was true, he thought, because the mercantile and manufacturing classes would hardly be willing to turn their personalty into sufficient quantities of landed property to make them eligible for a seat in Congress.[11]

Beard went on to say: "The fact emerges, therefore, that the personalty interests reflected in the Convention could, in truth, see no safeguard at all in a freehold qualification against the assaults on vested personalty rights which had been made by the agrarians in every state."[11a]

[11] Pp. 165–66.
[11a] *Ibid.*