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LAND PATENTS: ARE THEY AN ESCAPE FROM FORECLOSURE?

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Caveat: The re-filing of land patents and the attempt to "bring up" original land patents in another's name is a developing situation. Many cases are being appealed and there may be court decisions not addressed in this paper which have an impact on the subject. Ohio Ag Law is currently developing an in-depth law review article which will be completed this summer and hopefully published this fall.

Landowners having fallen on hard times are grasping at almost anything that sounds promising in their search to find something to help them begin their struggle to recovery. Recently some landowners have filed a "declaration of land patent" with Ohio County Recorders, hoping to forestall the loss of their property through foreclosure. Unfortunately, the repercussions of this action may jeopardize much more than just their property.

There is an organization that is selling a "brief" for $25 to $100 urging landowners to file a land patent. There are also seminars being conducted throughout the United States advocating the filing or re-filing and maintaining that you have little to lose and possibly much to gain by filing both an original land patent and a "declaration of land patent". This paper examines land patents and what they do, focusing upon the potential

consequences of filing a land patent.[1]

BACKGROUND

A land patent is simply a document proving that a parcel of land is no longer publicly owned, but is now privatly owned. A patent for land from the federal government is the highest evidence of title.[2] The land patent was and still is the deed given by the United States governmwent to a private citizen. The only function it serves is to give notice that the land is no longer publicly owned. [3]

A "declaration of land patent" is a document filed with the original land patent in an attempt to bring the land patent "up in the current owner's name." Many individuals have called the "declaration of land patent" a self-serving document. Some of the documents have a statement attached which fixes a time period in which some type of action must be taken.

The two documents have completly different functions; one is recognized by the law (a land patent), the other is legally questionable at best (the "declaration of land patent".)

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

There are three basic steps generally followed when transferring land. First, the owner's title is researched. Secondly, a written instrument is prepared as a deed and delivered or given to the purchaser or lender. Finally, the transaction is recorded. Improvement of Conveyancing by Legislation, Simes and Taylor, Ann Arbor, 1960.

[2]"As a deed, its operation is that of quitclaim, or rather of a conveyance of such interest as the United States possesses in the land ..." Beard v. Federy, 70 U.S. 478, 491 (1865).

[3]The land patent passes the legal title to the land to the patentee. Roads v. Symmes, 1 Ohio 281 (1824).

Except for certain tracts of land reserved by the states of Connecticut and Virginia, the United States government acquired title from Great Britain to the land mass called the Northwest Territory. Therefore, the majority of the land in Ohio, as it was carved from the NW Territory, was federal public land. The United States government had perfect title to the public lands and the exclusive right of possession to those lands.

The government's primary method of disposing of the public land was through Congressional Acts. On May 18, 1796, during the 1st session of the 4th Congress, an Act "... providing for the sale of the lands of the United States in the territory NW of the river Ohio, and above the mouth of the Kentucky river"[4] was passed. The act recognized that some of Ohio land had already been conveyed, but for the most part Ohio land had not been claimed. The President of the United States was "... authorized to grant a patent for the lands." [5] Many other Acts of Congress have addressed the sale of land in Ohio and there is a common thread in each act of the provision: a patent is the means by which the Federal government transferred the land from the public domain to private ownership.

Except when Congress grants the land directly, nothing "... but a patent passes a perfect and consummate title."[6] The primary concern in the first step of researching an owner's title is whether the land was conveyed from the government, either by grant or land patent. If there is no evidence of

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[4]Fourth Congress, 1st Sess., Ch. 29 (1796).
[5]Fourth Congress, 1st Sess., Ch. 29,(1796).
[6]Wilcox v. Jackson, 13 Peter 498 (1839).

either, then the land is still technically the governments since the federal government can not be adversly possessed[7]. In other words, claim to ownership of governmental land by a private citizen can not give ownership or title to the private individual. If there is record of either a land patent or a grant, then the title searcher checks for adverse possession and for transactions which may have affected the quality of the title subsequent to the issuance of the patent or grant. The title searcher may make other searches as well.[8]

After legal title passes to a private owner, he may alienate the lands as he sees fit; by either an absolute conveyance or a mortgage or in any other authorized manner. [9]

WHAT IS THE REASONING BEHIND FILING

Filing a land patent today is almost the same as presenting your military discharge papers to the County Recorder for recording; it is merely recorded. However, a new filing of a land patent, ignored by some individuals will cause consternation in others. Because land patents are so rare today, they are not understood and this increases the risk of questions about clear and marketable title. Without clear title, the value and marketability of the land is greatly reduced. In any event, the unnecessary filing of a land patent today may place the person

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[7]Adversly possession is a method of acquisition of title to real property by possession of the the property without permission and using the property openly, notoriously, and openly for a period of time prescribed by the state.

[8]"Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the government in reference to the public lands declares the patent to be the superior and conclusive evidence of legal title." Bagnell v. Broderick, 13 Peter 436 (1839).

[9]U.S. V. Budd, 144 U.S. 154 (1891).

filing in the posture of being subject to litigation which is risky as well as costly.

The intent of the filing person becomes the major issue. Most of the new filings today, particularly those which also file a "declaration of land patent" are intended to cloud the title of the property, to avoid foreclosure, or to gain one more day, month or year on the land. Even though the filing of a land patent has no legal effect,[10] it may affect the marketability of the title.

MARKETABLE TITLE

Marketable title is more than merely title which is in fact free of title defects. It is title which also appears free of such defects. A 'Buyer cannot be compelled to purchase a lawsuit' even if he is likely to be successful in vindicating his title in such a lawsuit.[11] Marketable title is a title which is free from reasonable doubt and will not expose the party who holds it to the hazards of litigation.[12] If a willing purchaser is discouraged by the evidence of a recently filed land patent or a "declaration of land patent", even though legally it may not be a cloud on the title, the title may not be considered as a marketable title.

THE MARKETABLE TITLE ACT

After more than 150 years of transactions, real estate

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[10]Assuming that an original land patent was issued; it would be rare to find a parcel of land without an original patent being recorded.

[11]Edward H. Rabin, Fundamentals of Modern Real Property Law, at 976 (1974).

[12]Tri-State Hotel Co. v. Sphinx Investment Co., 212 Kan. 234 510 P.2d 1223, 1230 (1973).

records and errors in the chain of title become so numerous that the risk of an imperfect title becomes high. In 1961 Ohio enacted the Marketable Title Act.[13] The Act became effective September 29, 1961 and Ohio Courts have ruled that it is to be liberally construed.[14] The purpose of the Act is to simplify and facilitate land title transactions by allowing persons to rely on a record chain of title.[15] It is designed to clear the record title of all defects which existed previous to the 40 year period.

The Marketable Title Act operates to estinguish interests and claims in existence prior to the effective date of the root of title.[16] In Ohio, a landowner measures root of title by looking back 40 years and then using the last title transaction prior to the 40 year period as the starting point or basis for the marketability of title.[17] When one person has a clear record title to land , inconsistent claims or interests which arose before that period are estinguished unless the person claiming the adverse interest seasonably records a notice of his claim or interest.[18]

The filing of a "declaration of land patent" or of a previously recorded land patent is an attempt to place a notice in the record of title of a claim which existed when the land was

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[13]Ohio Revised Code 5301.47 - 5301.61.

[14]Semachko v. Hopko, 35 Ohio App.2d 205, 301 N. E.2d 560, 563, (1973).

[15]Semachko v. Hopko

[16]Toth v. Berks Title Insurance Co., 6 Ohio St.3d 338, 342, 453 N.E.2d 639 (1983).

[17]Ohio Revised Code 5301.47.

[18]L. Simes & C. Taylor, The Improvement of Conveyancing by Legislation, (1960).

first conveyed. One theory which has been presented is a land patent filing may defeat the purpose of the Marketable Title Act and revitalize the entire chain of title including all defects. The filing at least will cause anyone searching the title to pause and consider whether the title is marketable.

LEGAL CONSEQUENCES

There are at least three possible legal risks a property owner takes when filing a previously filed land patent or a "declaration of land patent". 1) If the landowner is already under a court order for either bankruptcy or foreclosure, they may be held in contempt of court. 2) There may be an action for fraud or misrepresentation taken by the holders of a mortgage deed. 3) Owners of land which may have been conveyed originally by the same land patent may have an action for slander of their land titles.

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

The actions based upon fraud or misrepresentation or deceit

could include: 1) money damages for deceit if O knew his statement was false or if O was consciously ignorant of the truth; 2) negligence, if O made the representation without reasonable care to learn the truth; or 3) a contract action for breach of warranty, which regards the statement as part of the contract and therefore requires only proof that it was made and then relied upon by L making O strictly liable; 4) A suit in equity to rescind the sale; 5) A restitution action at law; Both actions 4 and 5 will lie even if the claim is an innocent one. 6) An action for misrepresentation; 7) A claim for recoupment of damages.[19] This could happen if we assume that land patents provide some debt release in the law that has been overlooked for more than 150 years.

But land patents do not legally have any such consequence. Although Ohio has a provision for filing a land patent[20] it does not have any provisions for filing a "declaration of land patent"; there is no provision to declare that the patent is now in your name. The intent of the statute is to make provisions for land patents issued today upon the sale, today, of public lands. The patent issued back in the early 1800's was not issued to anyone living today and it can not be ammended to reflect the current owner of the land.

The actions for fraud and misrepresentation still exist even though land patents are of no effect on the foreclosure. If a landowner misrepresents his property at a Sheriff's sale by informing potential bidders that his land patent prevents the

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[19]William L. Prosser, Law of Torts, 5th ed. (1981).
[20]ORC 5301.48.

sale he could be charged with fraud. It is possible that a landowner even in attempting to file a "declaration of land patent" could be charged with attempted fraud.

After the patent is filed the next door neighbor, whose land is also under the same land patent, could file an action against the land patent filing landowner for "disparagement of his property" or slander of title.[21] An action may be brought against anyone who falsely and maliciously defames the property of another, causing some monetary damage.

RECENT HOLDINGS

Recently the California Court of Appeal, Second District, imposed a penalty of $5,000.00 upon a person who claimed ownership to a parcel of land through an alleged "federal land patent".[22] The person was charged with slander of title and interference with contract by the landowners. The Court found the appeal made by the person filing the land patent was "unquestionably frivolous, vexatious and without merit."[23] The appeal caused "considerable legal expense and needless concern" to the landowners as well as "unjustly impos(ing) a waste of public funds upon the taxpayers of California." The Court stated the expenses incurred, the cost to the taxpayers and the cost to the Court of Appeal far exceeded the penalty imposed for the "totally frivolous" action brought by the land patent filer.[24]

A federal court, the United States District Court for the

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[21] Buehrer v. Provident Mutual Libility Insurance Co., 37 O App 250, 174 NE 597, affd 123 OS 264, 175 NE 25 (1931).
[22] Sui v. Landi, 209 Cal.Rptr. 449 (1985).
[23] Sui v. Landi, @451.
[24] Sui v. Landi.

Northern District of Indiana, addressed the refiling of a land patent accompanied by a "declaration of land patent" in a decision on April 19, 1985.[25] The defendant bank had made a loan to debtors which was secured by a mortgage on real property. The bank was forced to foreclose and evicted the debtors who then claimed a superior title to the land based upon a "Land Patent" which they drafted, signed and recorded with the county recorder.

Judge William C. Lee in a sua sponte[26] analysis held that by simply filling out a document granting yourself a land patent is a "self-serving, gratuitous activity and does not, cannot and will not be sufficient by itself to create good title."[27] Judge Lee found that the claim was frivolous and was "a blatant attempt by private landowners to improve title by personal fiat. Such lawsuits constitute a gross waste of precious judicial resources, for this court is forced to deal with patently frivolous lawsuits instead of addressing those suits on its docket which have merit and deserve close judicial scrutiny."[28] The court found that the case's frivolity demanded an impostion of a fine and gave "public notice to all future litigants who may seek to file lawsuits based upon the same type of self-serving, invalid 'land patent' and " that the court would issue sanctions for such lawsuits.[29]

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[25]Hilgeford v. Peoples Bank, Portland Indiana, 607 F. Supp. 536 (D.C.Ind. 1985).
[26]sua sponte - Of his own will or motion; voluntarily; without prompting or suggestion. Black's Law Dictionary 1277 (5th ed. 1979).
[27]Hilgeford, @ 538.
[28]Hilgeford, @ 539.
[29]Hilgeford, @ 539.

CONCLUSION

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

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

Practically, filing a land patent today may reduce the money received from a Sheriff's sale by causing some potential bidders to not place their bids in fear that a cloud on the title exists. While there is the possibility that a landowner may gain a little time by engaging in litigation, the risk of action being taken against the landowner who files a land patent with the intent to cloud his or someone else's title is very high. The risk of legal action against the filing landowner is considerable and does not outweigh the extra time one may gain to spend on the land.