Title challenge

Paul Stafford explains why those who hold a manorial title, or those who challenge it, must examine the foundations on which the particular title stands

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Manorial law continues to be a distinct and significant branch of the English law of property.

The Law of Property Act 1922 abolished copyhold tenure, but in relation to former copyhold land preserved categories of manorial rights, including: the lord of the manor's rights to mines and minerals; his sporting rights; his rights to hold markets and fairs; and the lord's or tenant's liability for the construction, maintenance and repair of dykes, ditches, canals and other works. The lord's rights may also extend to ownership of manorial waste should lands constituting the waste have no existing owner.

However, the exercise of any right of lordship depends first on establishing or upholding title to the lordship; this is a more difficult task than is often recognised. Statute and common law have created obstacles to the continuation and transmission of manorial title. Moreover, they have done so to such an extent that those who hold such title, or those who challenge it, should examine afresh the historical and legal foundations on which the particular title stands.

Key issues

The key issues are whether the lordship exists and, if so, whether it has been lawfully vested in the person asserting ownership. No lordship in England can exist unless it was attached to a manor created before 1290, and has endured, with no substantive interruption, to the present. Strict proof of this requires a continuous documentary record spanning over 700 years but, faced with the almost impossible difficulty this presents, lawyers have relied on prescription. According to *Halsbury's Laws*, 'the usual method of claiming a manor is by prescription from time immemorial', and 'in a proper case the court will presume a lost grant to support the title to a manor' (*Halbury's Laws* (4th ed) vol 12(1) para 698). These statements need examination.

Prescription and presumption

The doctrines of prescription, and presumption of lost grant, are more usually found within the law of easements. Both are fictions.

Prescription from time immemorial means from 1189. If proof is given of actual enjoyment of an easement from as far back as living witnesses can speak, the court presumes the right has been enjoyed since 1189, so that title to the right in question is established. By analogy, if particular manorial rights have been exercised from as far back as living witnesses can speak, the presumption operates that those rights were appendant to a manor created no later than 1189.

The presumption of lost grant within the law of easements is relied on where there has been enjoyment of an easement for 20 years, but in circumstances where the easement must have come into existence after 1189. Evidence that no such grant was made will not rebut the presumption, although the presumption will not apply if no-one was capable of making the grant during the period of enjoyment, or if the grant would have been in contravention of a

The manor and its development after *Quia Emptores*

An understanding of the manor's historical development is important to the lawyer's ability to investigate its title and to evaluate the evidence. Although it had existed before 1066, the English manor had evolved by 1290 as a child of the Norman Conquest. By conquest all land belonged to the king. To control and exploit it, he made land grants to his supporters, the tenants-in-chief, who were bound to him as their lord by fealty (see box on p20) and the obligation to perform services (usually of a military kind). The land grants were extensive and were known as baronies or honours. They were capable of sub-division into smaller units, known as manors, held by tenants who were lords of their manor and bound to their superior lord by obligations similar to those owed by the tenants-in-chief to the king. Manors varied greatly in size. The lord's wealth came from its land and agricultural produce, and he was responsible for maintaining order within its boundaries.

There were three distinct categories of land within the manor. The first, *demesne*, was cultivable land kept by the lord, for his own use, where his manor house or caput stood. The second was land granted to tenants on free, or unfree, tenure. Free tenures were themselves of three kinds: military, such as knight service; spiritual, such as *frankalmoign* or 'free alms', where land was granted to an ecclesiastical corporation without services; or socage, where services were commuted to rent. Unfree tenure was *villeinage*, later known as copyhold, where the tenants held land at the lord's will and provided agricultural services. The third main category of land, uncultivated and untenanted, was the manorial waste on which tenants had rights of pasture.

The manor was also a unit of jurisdiction with its own courts:

> The principal court was the court baron, which amongst other things settled property disputes between the tenants of the manor. It also dealt with succession to copyhold land by recording changes of copyholder. The free tenants of the manor were the jury. The suitors were also drawn from among the free tenants. Since no one can be both suitor and juror, it followed that the court could not be held once the number of free tenants fell below two.
> (*Crown Estate Commissioners v Roberts* [2008]).

This picture of the manor, as it had evolved before 1290, continued to change steadily thereafter. The 14th and 15th centuries were notable for war, plague, famine, and the development of bastard feudalism where money was substituted for fealty and services. Together, these things accelerated the process of selling land for cash that *Quia Emptores* had facilitated. The 16th century saw the English Reformation, which involved the Crown's seizure of lands from ecclesiastical corporations and the re-grant of those lands to royal supporters, the re-vesting of Crown lands in the church between 1553 and 1558, and the undoing of that re-vesting under the Elizabethan religious settlement soon after.

By the start of the seventeenth century, the manorial system, as it had existed in 1289, had undergone massive change and decay. Landowners who were manorial lords could sell part, or all, of their demesne lands, their lands held by free or unfree tenants, or their waste. Land so disposed of was severed from the manor (*Delacherois v Delacherois* (1864)), and the manor itself may have been destroyed by merger, severance of services or acquisition of lands by the lord (*Halsbury's Laws*, vol 12(1) 698). Alternatively, if the lord's inheritance passed to coparceners, reorganization of the manorial holdings could lead to the creation of sub-manors. Going beyond *Quia Emptores*, the Court of Common Pleas held in 1585 that 'a manor cannot be created at this day, neither by a common person nor by the Queen' (*Morris v Smith and Paget* (1585)). The judges thought the point needed no further explanation. An authoritative extra-judicial explanation offered some years later by Sir Edward Coke was that 'time is the mother, or rather the nurse, of manors', and that the continuance of time did not come within the compass of the royal prerogative (*The Compleat Copyholder* (1650), s31).

statute (*Cheshire & Burn's Modern Law of Real Property* (17th ed. 2006). Within the context of title to the lordship of a manor, Cozens- Hardy J held in *Merttens v Hill* [1901] that 'if necessary, a lost grant from the Crown must be presumed'. However, it would seem in this case that the presumed grant was inferred from the particular facts, and that Cozens Hardy J's statement is not authority for a wider principle analogous to that of lost modern grant.

Importance of records

Even when there are records to document the pre-1290 existence of the manor, proof that a lordship survives today will rest on weak foundations unless the owner of a lordship title can show, at least in outline, that after 1289 the manor continued to operate through successive centuries to the present. The likelihood is that a manor will at least have left some documentary records of its existence post-1289, and the absence of such records after a particular date may suggest that the manor was extinguished, and the lordship with it. This leaves the owner, whether his title is registered or not, vulnerable to challenge in the light of facts uncovered by historical investigation. The relevant facts will be those that chart the development of the manor in terms of its ownership, extent, activity, and the acquisition, sale or transfer of lands. Those facts will need to be assessed in the context of statute and case law over the same period.

Quia Emptores and its consequences

The first and most important statute, which dominates the subsequent development of manorial law, is *Quia Emptores Terrarum*, enacted in 1289 and still in force. The statute prohibited tenants-in-chief, as well as other free tenants, from making grants in fee simple to transfer freehold land by subinfeudation (*Re Holliday* [1922]), whereby possession of their land was transferred to others in return for services or money (see box to the left). Future land grants would instead be made on the basis of substitution. Free

tenants could transfer their land without their superior lord's consent, and the transferee held the land on the same basis as the transferor, owing feudal services to his superior lord. The transferor, who but for the statute would otherwise have been a mesne lord, had no further role in the relationship between the freeholder of the land and the superior lord.

These changes had a profound impact on the development of manors. First, where freehold land within a manor was transferred by the lord, the transfer operated as a severance of that land from the manor. Where a free tenant of the manor made a freehold transfer, that transfer could also operate as a severance. Whenever severance occurred, the transferee owed no services to the lord and the land was no longer subject to tenurial incidents (see box below). Second, the prohibition against subinfeudation meant that the chain of tenure could not be lengthened, but only shortened. As time passed, the transfer of land from one owner to another made it difficult to trace or prove the existence of earlier mesne lords, including those who had been lords of the manor. As a result, lordships progressively became vested in the Crown while those in possession of what had been manorial land held it directly from the Crown. Third, although the statute did not bind the Crown (which from 1289 made little apparent use of its power to create manors), the lord of all Crown manors was the Crown itself, and any grantee would be unable to subinfeudate. Crown manors could therefore never have the capability for transfer of the lordship by the tenant, nor could they give rise to the multiplication of tenures that had been characteristic of manors generally before 1290. It was almost certainly non-Crown manors that Megarry V-C had in mind when, in *Baxendale v Instow Parish Council* [1982], he referred to the fact 'that of necessity a manor had its origin prior to the Statute of *Quia Emptores* 1289 and could not be created subsequently'.

Reputed manor and conveyancing issues

Five hundred years on from the Norman Conquest, land ownership in England and Wales was largely settled with royal justice in place to protect property rights. It was impossible to create a manor and there was progressive diminution not just in the extent, but also in the status of existing manors. The Tenures Abolition Act of 1660:

> ...converted all tenures into free and common socage with the exception of *frankalmoign* (which became obsolete in any event) and copyhold. Nearly all burdensome incidents were abolished for all land of free tenure.
> (*Megarry & Wade: The Law of Real Property* (7th ed 2008)).

Land that the lord acquired outside the manor could not, according to Coke, be annexed to the manor even if the tenants were willing to do their services. Coke also drew the distinction between a true manor (a manor *re et nomine*) and a reputed manor (a manor *in nomine tantum*). A reputed manor was what a true manor became when land sales had reduced the number of free tenants to one, so that a court baron could not be held. In the recent decision of *Crown Estate Commissioners*, Lewison J observed that 'most manors today' are reputed manors.

The observation is unsurprising, but its significance can hardly be overstated. The lordship rights attached to a reputed manor are similar to those attached to a true manor. There is no right to hold a court baron, and no right to services from tenants, but the lord may enjoy a broad range of customary or prescriptive rights in the categories described at the outset of this article. However, there is an important difference between true manors and reputed manors in relation to conveyancing practice, and this difference may critically affect the extent of lordship rights and land ownership.

Before 1 January 1882, the conveyance of a reputed manor did not pass the freehold interest of the grantor in the waste, or in any specific tenement possessed by the grantor unless there were express words to that effect (*Doe d Clayton v Williams* (1843)). The same apparently applied to transmission by will (*Scriven on Copyholds* (1896) p5). If, therefore, a lordship title devolved where the manor had ceased to be a true manor and had become a reputed manor, the waste and specific tenements within the manor would not pass unless expressly conveyed.

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Definitions

Subinfeudation
The process whereby X, holding lands as feudal tenant of the king or other superior lord, transfers some of those lands to Y who holds them as them as feudal tenant of X. The practice was forbidden in 1290 by the statute *Quia Emptores*.

Tenurial incidents
Rights and obligations appertaining to free orunfree tenure.

Fealty
Fidelity. The feudal oath of fealty was taken at the outset of every teancy by the tenant to be true to the lord of whom he held his land.

Before 1882, when the law changed (as a result of s6 of the Conveyancing Act 1881), there must have been many instances where manors transferred by conveyance or will did not expressly refer to or identify the waste with the result that it was severed from the lordship and the subsequent owner of the manor had no legal title to it. Similarly, the conveyance of a true manor before 1882 also required express words if it was to pass title to the lordship (*Rooke v Lord Kensington* (1856) per Page Wood V-C). The modern law dealing with the conveyancing of manors, reputed manors and lordships dates from the Conveyancing Act 1881. Now, under the Law of Property Act 1925, 'land' includes a manor, and '"manor" includes a lordship, and reputed manor or lordship' (s205(1)(ix)). The requirements for effective conveyance of manorial land and title were more rigorous before 1882 than they subsequently became.

Lordship in gross

Today the title 'lordship of the manor' has no necessary connection with ancient houses surrounded by rolling acres.

> Manors which have originally been well created may in course of time have ceased to have any demesne lands annexed to them; and where that has happened, the manor becomes a manor or seignory in gross. (*Scriven on Copyhold*)

A seignory (or lordship) in gross is a bundle of lordship rights, which must be conveyed expressly. The rights are no longer appendant to land (although, confusingly, a lordship is contained within the definition of 'land' in the LPA 1925 (s205(1)(ix)). For this kind of lordship to have any meaningful existence or application it is necessary to identify the manorial lands to which those rights were originally attached. The process of identification is not easy in the absence of plans attached to documents of title. Although estate plans were not produced in any number until the late 16th century, where title documents survive it is less common to find accompanying estate plans until the 19th century. Assuming, however, that manorial lands at a particular date can be identified in type, and in extent, it is necessary to enquire what became of them subsequently. Since the transfer of manorial land by way of freehold grant operates as severance of that land from the manor, such freehold land will not be subject to lordship rights unless the original conveyance creating severance so provides. The position is different in relation to what was copyhold land before 1926. As noted earlier, the Law of Property Act 1922 indefinitely preserved the lord's sporting rights, his right to hold fairs and markets, the lord's or tenant's rights to mines or minerals, any tenant's rights of common, and the lord's or tenant's liability for the construction, maintenance and repair of dykes, ditches, canals and other works. The consequence appears to be that lordship rights over freehold land today cannot validly be asserted unless that land was either copyhold land before 1926 or, if not, was expressly subject to lordship rights from the date the freehold was severed from the manor.

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Conclusion

The law abhors a vacuum, and courts will go to almost any length to support a right that is openly asserted, long continued and never before contested if it can find a legal origin for that right (*Simpson v Attorney General* [1904]). Manorial title, however, inevitably involves going back to 1289, and *Quia Emptores* made the creation of non-Crown manors in England unlawful after 1289. A presumption prevails only so long as it is not contrary to statute and so long as proof to the contrary is lacking. No court should therefore presume the grant of a manor in England after 1289. Wherever lordship rights are asserted over land, they should not be regarded as lawful merely because they have been exercised for many years. They must be tested against such evidence as there is about a manor after 1289. The manor may have been broken up and extinguished altogether by land sales. Alternatively, if the evidence suggests a date when the manor ceased to be a true manor and became a reputed manor instead, then the devolution of title since that date, by conveyance or will; the identification of manorial lands and sales of manorial lands should all be investigated to see whether title is valid. If there is reasonable evidence to suggest that it may not be, then a party with sufficient locus can challenge a registered lordship title by application to the Land Registry, or to the court, and can challenge an unregistered title by application to the court.

Even where title is valid, and particularly with a lordship in gross, there remains the issue of whether lordship rights can be exercised over particular land. In either case, the respondent would be unwise to merely rely on reputation and the fact that hitherto the exercise of lordship rights had gone unchallenged. ■

Baxendale v Instow Parish Council [1982] Ch 14
Crown Estate Commissioners v Roberts [2008] EWHC 1302
Delacherois v Delacherois (1864) 11 HLC 62
Doe d Clayton v Williams (1843) 11 M&W 803
Re Holliday [1922] 2 Ch 698
Merttens v Hill [1901] 1 Ch 842
Morris v Smith and Paget (1585) Cro. Eliz. 38
Rooke v Lord Kensington (1856) 2 K & J 753
Simpson v Attorney General [1904] AC 476