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## LAND OFFICE BUSINESS IN PENNSYLVANIA

JOHN G. STEPHENSON, III†

IN 1927, the General Assembly of Pennsylvania abolished the Land Office Bureau in the Department of Internal Affairs, and the Secretary of Internal Affairs, acting under delegated powers, established in its stead the Bureau of Land Records.<sup>1</sup> This did not bring to an end the institution of the Land Office, which was established by William Penn and was possibly the oldest administrative office of government;<sup>2</sup> for the Department of Internal Affairs remains the Land Office of the Commonwealth.<sup>3</sup> It did signify, however, that two phases of the work

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1. The Land Office Bureau was abolished by § 2, Act of April 13, 1927, P.L. 207. The Department of Internal Affairs was designated as the Land Office of the Commonwealth by § 47, and the authority to establish bureaus was conferred on the Secretary of Internal Affairs by § 13 of the same act. These sections amended §§ 2, 1203, and 212 respectively of the Administrative Code of 1923. Act of June 7, 1923, P.L. 498. See PA. STAT. ANN. tit. 71, §§ 2, 333, 72 (1942). The new Bureau of Land Records is announced in the [1927] PENNSYLVANIA MANUAL 18.

2. The Land Office under the proprietaries was regarded as their private business, and was not regulated by statute. When, under Governor Denny, the assembly wanted to make it an office of record and the governor approved, interest was found in England to procure the royal dissent. See Yeates, J., in *Todd's Lessee v. Ockerman*, 1 Yeates 295, 297 (Pa. 1793). The Act of April 1, 1784, 2 SMITH'S L. 102, which reopened the land office for the sale of lands, adopted the former customs and usages of the land office under the proprietaries. Accordingly, the editor of Smith's Laws found it advisable to append a prodigious note describing in detail the operations of the land office under the proprietaries and the Commonwealth. 2 SMITH'S L. 105-261. This note was of such consequence that the General Assembly, by resolution dated March 27, 1812, directed the Secretary of the Commonwealth, the Secretary of the Land Office, and the Surveyor General to check his citations and to make such additional notes as would show the whole usage of the land office under the proprietaries' government. Their reports, together with a reply by Charles Smith, Esq., are published in 5 SMITH'S L., introduction, pp. x-xxxi (1812). James Tilghman and John Lukens, last Secretary of the Land Office and Surveyor General, respectively, under the proprietaries, returned to office under the Commonwealth. [1927] PENNSYLVANIA MANUAL 366.

3. The Land Office was constituted in 1781 to receive the records and continue the business of the "former land-office or Board of Property" established under the

of the Land Office had been completed: the first, the task of transferring to private and public<sup>4</sup> ownership the vast reserve of wilderness which had been granted to William Penn by Charles II, to which was later added the Erie triangle;<sup>5</sup> and the second, the assignment of collecting the purchase price. There remained the duty of preserving the records of the patents upon which every public and private title is founded, and as an incident thereof, the work of supplying defects in the original titles to much land which had been lawfully appropriated but not finally patented.

After the turn of the century, the volume of applications for vacant and unappropriated land dwindled.<sup>6</sup> Conservationists secured for the

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proprieties. The office was to consist of three persons, whose titles correspond to those under the proprieties: the Secretary, the Receiver General, and the Surveyor General. Act of April 9, 1781, 1 SMITH'S L. 529, § 2. The office of Receiver General was abolished in 1809 and his records, powers and duties were transferred to the Secretary of the Land Office. Act of March 29, 1809, P.L. 122, 5 SMITH'S L. 46. In 1843, the powers and duties of the Secretary of the Land Office were transferred to the Surveyor General. Act of April 17, 1843, P.L. 324, § 5. With the new Constitution becoming effective January 1, 1874, the duties of the Surveyor General devolved upon the Secretary of Internal Affairs. Art. IV, § 19, implemented by Act of May 11, 1874, P.L. 135. The Department of Internal Affairs was designated to act as the Land Office of the Commonwealth by § 47, Act of April 13, 1927. See PA. STAT. ANN. tit. 71, §§ 333, 917, 920, 922, 923 (1942).

4. In speaking of the public lands, that which has been conveyed to the Commonwealth or any administrative agency thereof is regarded as appropriated, and may not be patented as vacant and unappropriated. The statutes provide, for example, for the granting of patents to the Department of Forests and Waters. PA. STAT. ANN. tit. 64, § 324 (1941). No land owned by the state may be sold without legislative sanction. PA. STAT. ANN. tit. 71 § 194 (1942). Land which has once been patented by the state and has been reacquired through escheat, forfeiture, or any other cause is not open for settlement or warrant. *Blaine v. Crawford*, 1 Yeates 287 (Pa. 1793), *Skeen v. Pearce*, 7 S. & R. 303 (Pa. 1821). Escheats were, however, administered by the Land Office until the establishment of the office of Escheator General in 1787. Act of September 29, 1787, 2 SMITH'S L. 425.

5. The royal charter was dated March 4, 1681. It conveyed a tract bounded on the east by the Delaware River, on the north by the beginning of the 43° of North Latitude and on the south by the beginning of the 40° of North Latitude, excepting a circle drawn twelve miles from New-Castle, and extending westward 5° in longitude. 5 SMITH'S L. 406. By calculation, the province contained 35,361,600 acres. SERGEANT, VIEW OF THE LAND LAWS OF PENNSYLVANIA 25 (1838). This was later augmented by the purchase of the Erie Triangle from the United States by deed dated March 3, 1792, the land having been ceded by Massachusetts and New York to the federal government. Note, 2 SMITH'S L. 124. The original boundaries were subsequently adjusted with Maryland, Virginia and New York, and jurisdiction over the Delaware islands with New Jersey by a series of agreements, that with Maryland before, and the others after, the Revolution. Note, 2 SMITH'S L. 129-135. The right to the possession of these lands was purchased from the Indian tribes by a series of treaties, the last of which was concluded at Fort McIntosh in 1785, and by a cession of the Erie triangle lands in 1789. Note, 2 SMITH'S L. 109-124. The title of the heirs of William Penn to all of this land excepting what had been previously appropriated to other persons or held by the proprietaries in their private right or capacity, was vested in the Commonwealth by Act of Nov. 27, 1779, 1 SMITH'S L. 479; PA. STAT. ANN. tit. 64, §§ 1-8 (1941).

6. During the year ending November 30, 1917, for example, there were seventeen applications for vacant land, four of which were for islands. Seven new warrants were issued for vacant lands. [1918] PA. SEC'Y INTERNAL AFFAIRS ANN. REP. 9A, 14A. A few years after the war it was stated that there were then no large bodies of vacant land within the limits of Pennsylvania, but that small tracts were yet

state the preemptive right to secure whatever land was left for forest culture and reservation.<sup>7</sup> It was assumed that all public land had been transferred to private ownership, and this assumption was supported by the public statements of the Land Office.<sup>8</sup> Actually, no one really knew;<sup>9</sup> but if this were indeed the fact, a search for the patent would be an unnecessary step in a title examination, because the passage of time would cure all defects other than claims of the Commonwealth.<sup>10</sup> Accordingly, lawyers ceased to carry their examinations back beyond fifty years,<sup>11</sup> and a new generation grew unfamiliar with the land office practice which had been an important part of the work of earlier lawyers. In recent years, state and federal agencies have insisted on a complete examination of title whenever land is acquired with public funds, and this has reawakened interest in the Land Office. It is the purpose of this Article, which grew out of a study undertaken for the Secretary of Internal Affairs,<sup>12</sup> to explain the use of the land records and the procedures, which are both simple and inexpensive, whereby defects in those records may be corrected.

While no one knows at this moment how much land remains unappropriated or improperly titled, it is not correct to assume that the

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occasionally discovered in various sections of the state which by law remained open for sale. [1924-5] PENNSYLVANIA STATE MANUAL 79.

7. Act of March 28, 1905, P.L. 67; see PA. STAT. ANN. tit. 64, §§ 261, 321-8 (1941). This act also terminated the appropriation of lands in the beds of navigable rivers and streams declared by law to be public highways. Governor Tener, in his message to the General Assembly in 1913 recommended that the state should retain its ownership of vacant islands in the interest of future conservation programs. MESSAGE OF THE GOVERNOR, 1913, at 16. When the legislature failed to act, the governor blocked action on pending applications by refusing to appoint appraisers, and this practice continued. See [1933] PENNSYLVANIA MANUAL 197.

8. See note 6 *supra*.

9. "No records have ever been kept in the Department, or formerly, under the Secretary of the Land Office, or the Surveyor General to show what vacant lands the Commonwealth is possessed of." [1924-5] PENNSYLVANIA STATE MANUAL 78. See [1905] PA. SEC'Y INTERNAL AFFAIRS ANN. REP. 21A.

10. This is an unwarranted assumption, as will be demonstrated later in this Article. The statute begins to run only when a cause of action arises.

11. A contemporary writer states that while a complete abstract would show title back to the Commonwealth, it had become the practice to run a title back fifty years. In the case of city land, it was run beyond fifty years until the land was first laid out in building lots; in the case of country land, until it had first been brought under cultivation. NICHOLSON, A TREATISE ON THE LAW RELATING TO REAL ESTATE IN PENNSYLVANIA 511 (1924).

12. In June, 1957, the Secretary of Internal Affairs authorized a study of the powers, duties and procedures of the Bureau of Land Records and the Board of Property for the purpose of drafting administrative regulations and preparing a codification of the statute law. The study was made under the supervision of the author. In this Article, the author discusses only existing case and statute law and the published regulations of the Department of Internal Affairs. The author is alone responsible for the opinions expressed herein, but is grateful to acknowledge his indebtedness to Dr. William C. Seyler, Deputy Secretary of Internal Affairs, and to A. G. Reese, Director of Land Records, who permitted the author to examine the records and to observe proceedings in the Bureau of Land Records, and spent many hours discussing the problems of administration.

records are not available from which it can be determined by search whether a patent has ever been issued for a particular tract. The difficulty is largely a difficulty of indexing, not a deficiency of records.<sup>13</sup> Warrants and patents were indexed only in the names of the parties until 1907, when the Department of Internal Affairs was authorized<sup>14</sup> to prepare maps showing the location of all appropriated tracts. To the present time, connected warrantee tract maps have been completed for only seventeen of the sixty-seven counties; but while this gives some conception of the difficulty of the task, it shows at the same time that it is not insuperable. When it is discovered that there is no patent for a tract which has long been occupied as private property, the deficiency may be supplied readily.

The statement that the Land Office of the Commonwealth does not know how much vacant public land remains to be sold will, of course, be just as surprising today as it was to Mr. Justice Huston when he undertook a study of the Land Office published in 1847.<sup>15</sup> He assumed that there would be a map for each county and township upon which each entry and patent would be recorded, as in the case of the public lands of the United States.<sup>16</sup> The federal procedure was adopted, however, after the inadequacy of the state procedure had been demonstrated. William Penn had received a vast wilderness described in terms of latitude and longitude and a river, the exact source of which was not precisely known.<sup>17</sup> Instead of surveying the land first and selling lots by the plan, as the federal government did, he adopted the practice of selling warrants for a quantity of land to be located.<sup>18</sup> The warrants were directed to a deputy surveyor who measured out the quantity on

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13. See [1905] PA. SEC'Y INTERNAL AFFAIRS ANN. REP. 21A.

14. Act of June 13, 1907, P.L. 621; PA. STAT. ANN. tit. 71, §§ 914, 5 (1942). The seventeen counties are Allegheny, Beaver, Cameron, Dauphin, Elk, Fayette, Greene, Lancaster, Lawrence, Luzerne, McKean, Mercer, Pike, Potter, Sullivan, Tioga and Washington. Work on Berks and Schuylkill is now under way. It is also known that connected warrantee tract maps are available in several other counties, some of them prepared by the county surveyors, and others obtained from the Land Office Bureau by local interests, who purchased the drafts at the usual rates. The availability of such maps will greatly facilitate the completion of the official drafts.

15. See generally HUSTON, AN ESSAY ON THE HISTORY AND NATURE OF ORIGINAL TITLES TO LAND IN THE PROVINCE AND STATE OF PENNSYLVANIA (1849).

16. 1 STAT. 465 (1796), as amended; 43 U.S.C. §§ 751 *et seq.* (1928). For a description of the federal procedure, see *Southern Pacific R.R. v. Fall*, 257 U.S. 460 (1922).

17. The patent described the eastern boundary as extending northwards along the Delaware River to the 43d parallel of North Latitude "if the said river doth extend so far northwards," otherwise by a meridian line from the head of said river. Appendix, 5 SMITH'S L. 406 (1812).

18. The system was previously employed in the Delaware valley area under Governor Andros. SERGEANT, VIEW OF THE LAND LAWS OF PENNSYLVANIA 22, 34 (1838).

the ground with some tolerances,<sup>19</sup> made a draft thereof, and returned it to the Surveyor General.<sup>20</sup> For want of a map on which to record the survey, it was filed and indexed under the name of the warrantee. The patent, when issued, was enrolled and similarly indexed. To ascertain what land had been claimed, one had to have recourse to the land itself, where only the surveyor's monuments, and this at a time when much of the appropriated land had not yet been cleared, proclaimed a prior appropriation.<sup>21</sup>

There were, of course, some exceptions. The City of Philadelphia was laid out in streets and lots and surveyed before the lots were appropriated.<sup>22</sup> Several towns were laid out, surveyed, and sold by the proprietaries,<sup>23</sup> and the Commonwealth followed their pattern in laying out Allegheny,<sup>24</sup> Erie, Franklin, Warren and Waterford and selling the lots.<sup>25</sup> Following the Revolution, two tracts were set aside north and west of the Allegheny, one to supply bounty lands for the officers and soldiers, the other to redeem the depreciation certificates which

19. A ten per cent allowance, later decreased to six per cent, was originally allowed for roads and barrens. The allowance was the subject of some controversy between William Penn and the colonists in 1701. Note, 2 SMITH'S L. 139 (1810); SERGEANT, VIEW OF THE LAND LAWS OF PENNSYLVANIA 184 (1838). By virtue of this allowance, public roads were later laid out without compensation for the land taken. See *McClenachan v. Curwin*, 3 Yeates 362, 372 (Pa. 1802).

20. For a description of the early practice, see Note, 2 SMITH'S L. 105-261 (1810); SERGEANT, VIEW OF THE LAND LAWS OF PENNSYLVANIA 22, 34 (1838). For the effect upon the records, see [1907] PA. SEC'Y INTERNAL AFFAIRS ANN. REP. A.11, 21A.

21. Courses and distances run on the ground are the true survey—the return of survey is only evidence thereof. This was in contrast with the practice in Maryland where the paper draft was regarded as the true survey. *Lilly v. Kitzmiller*, 1 Yeates 28 (Pa. 1791). For a discussion of surveying practice, see SERGEANT, A VIEW OF THE LAND LAWS OF PENNSYLVANIA 121-9 (1838). A deputy surveyor was appointed by the Surveyor General for each county. § 3, Act of April 9, 1781, 1 SMITH'S L. 529. PA. STAT. ANN. tit. 72, § 918 (1942). So long as the deputy surveyor, whose jurisdiction was confined to the particular county, continued in office, the marks of previous surveys would be recognized.

22. Rights to lots in Philadelphia were sold in England before the foundation of the colony. Later William Penn, who had sold more land than could be encompassed in a city, laid out Philadelphia into city lots which he allocated, making up the difference by rights to obtain warrants for lands in the "liberties." SERGEANT, VIEW OF THE LAND LAWS OF PENNSYLVANIA 224 (1838); Note 2 SMITH'S L. 140 (1810). Penn also planned to lay out the country land by townships, but this was never done. Note 2 SMITH'S L. 140 (1810).

23. The towns of Reading, York, Carlisle, Easton, Bedford, Sunbury and Hannah's Town (Westmoreland County) were laid out by the proprietaries. After the Revolution, custodians were appointed for the unappropriated lots in these towns. Act of April 10, 1781, 2 SMITH'S L. 533. These are to be distinguished from the proprietary tenths or manors. See SERGEANT, VIEW OF THE LAND LAWS OF PENNSYLVANIA 195 (1838). For a discussion of the history of certain lands dedicated as a common in Reading, see *Schwerin v. City of Reading*, 19 Berks 381, 559 (C.P. Pa. 1927); *Commonwealth v. Commissioners of Berks County*, 109 Pa. 214 (1885).

24. Authorizing a town to be laid out along the Allegheny and Ohio opposite Fort Pitt. Act of Sept. 11, 1787, 2 SMITH'S L. 414.

25. Ellicott's plan of Le Boeuf was accepted and the town renamed Waterford. Erie, Franklin and Warren were to be laid out. Act of April 18, 1795, 3 SMITH'S L. 233.

had been issued in the adjustment of their pay.<sup>26</sup> In these two areas, lots consisting of between two and three hundred fifty acres each were laid out on a plan, surveyed according to the plan, and drawn by the beneficiaries.<sup>27</sup> The undrawn donation lands were later opened up for settlement and purchase.<sup>28</sup> The procedure in the allotment of these lands was similar to that followed in the appropriation of the federal public lands.<sup>29</sup> When it is found at the present day that any such land has not been patented, a person who can show title thereto either by record or based on continuous and exclusive possession for the statutory period, may secure a patent for a fee of fifteen dollars, which includes both the price of the land and the office charges.<sup>30</sup>

In those areas where a survey did not precede appropriation, the tracts laid out for purchasers were not necessarily contiguous. Each applicant located his house and first clearing at a convenient place along a road or stream and surrounded it with the acreage to which his warrant entitled him.<sup>31</sup> In the case of the federal public lands, each entry or abandonment was required to coincide with the official subdivisions, which were contiguous;<sup>32</sup> but under the system employed in Pennsylvania, much land was left "concealed" between the surveys. In addition, since land held by right of settlement and improvement was neither available for appropriation nor a matter of record, large tracts of land further divided the surveys. This system, or lack of it, increased the difficulty of preparing the connected warrantee tract maps.<sup>33</sup> The Land Office could proceed only by fitting the individual drafts together like pieces in a jigsaw puzzle. For the indentures, there were the names of the adjoining warrantees, and for the aid which is sometimes given from the picture on a puzzle, there were occasionally noted on the individual drafts the places where township lines, streams and other monuments intersected the survey. When instead of an adjoiner, there was concealed vacant land or an unrecorded settlement, the pieces could

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26. Act of March 12, 1783, 2 SMITH'S L. 63.

27. The practice is described in the preamble to a supplemental act which made the general drafts in the Surveyor General's office the evidence of the location of the lots, and made it the duty of the deputy surveyors to run the lines again and remark the corners. Act of March 24, 1818, 7 SMITH'S L. 122; PA. STAT. ANN. tit. 64, § 193 (1941).

28. Act of March 26, 1813, 6 SMITH'S L. 64; PA. STAT. ANN. tit. 64, §§ 191, 192 (1941).

29. While the filing of an entry was the inception of title to the federal public lands, settlement was the inception of title to the donation lands. PA. STAT. ANN. tit. 64, § 192 (1941).

30. Act of April 29, 1909, P.L. 295, and Act of May 28, 1915, P.L. 571, amending Act of May 5, 1899, P.L. 229; PA. STAT. ANN. tit. 64, § 503 (1941).

31. See [1905] PA. SEC'Y INTERNAL AFFAIRS ANN. REP. A21.

32. *Southern Pacific R.R. v. Fall*, 257 U.S. 460 (1922). See note 16 *supra*.

33. See note 14 *supra*.

not be fitted together, and recourse was necessary to actual surveys to locate various tracts.<sup>34</sup> In those counties for which the maps have been completed, it has generally been observed that whatever vacant and unappropriated land has been disclosed, has consisted of small tracts constituting concealed lands or gores between surveys and lands which are claimed by settlement and improvement.<sup>35</sup>

As the warrantee tract maps have been completed, they have been made available to all interested parties, and have been placed in the Recorder's Office of the particular county.<sup>36</sup> Beyond the compilation of the maps, the Department of Internal Affairs has at present no further duties. It is left to those who find themselves in possession of unpatented lands to make the discovery and to come in and secure a patent. In the course of buying and selling lands in the counties where maps are now available, it may be expected that title examiners will in due course discover whatever defects exist and insist upon their correction. This was not, however, accomplished in the period before the maps became available, largely because in actual practice, title examinations were not carried back that far.<sup>37</sup> The Secretary of Internal Affairs noted toward the end of the Nineteenth Century a marked increase in the number of applications resulting from the forming of syndicates for the purchase of large tracts of land underlaid with coal, the purchasers having been particularly anxious to obtain a continuous chain of title from the Commonwealth.<sup>38</sup>

Land which is not patented but has otherwise passed into private ownership is subject to a lien in favor of the Commonwealth for the purchase price of the land and the fees and expenses.<sup>39</sup> Whatever effort has been made by the Commonwealth to compel the perfection of title has been in the nature of an effort to realize upon these liens.<sup>40</sup> In 1863,

34. As to field work required and the difficulty in locating township lines, see [1907] PA. SEC'Y INTERNAL AFFAIRS ANN. REP. 10A.

35. This appears to warrant the official statement that in general all public land has been appropriated, but small unpatented tracts are occasionally discovered. [1957-8] PENNSYLVANIA MANUAL 317.

36. PA. STAT. ANN. tit. 72, § 914 (1942). The maps were originally lithographed and bound by the state printer. An edition of one thousand copies was authorized at first. Act of June 13, 1907, P.L. 62. This was later reduced to five hundred copies. Act of May 11, 1911, P.L. 277. Later it was directed that the drafts be made on tracing linen, blue print copies to be furnished or sold. Act of March 30, 1921, P.L. 63. Copies are furnished the county recorders and the county commissioners.

37. [1899] PA. SEC'Y INTERNAL AFFAIRS ANN. REP. A15.

38. See note 11 *supra*.

39. *Hoffman v. Bell*, 61 Pa. 444 (1869).

40. The terms of the proprietaries issued in 1769 called for forfeiture if the land was not paid for in twelve months, but this was never enforced. *Biddle v. Cougal*, 5 Binn. 142 (Pa. 1812). Arrears of purchase money due the proprietaries were vested in the Commonwealth by the Divesting Act. Act of Nov. 27, 1779, 1 SMITH'S L. 479; PA. STAT. ANN. tit. 64, §§ 1-8 (1941). The first of the land laws following the Revolution directed payment in four annual installments, and provided for exe-



faced with the heavy expenses of war, Governor Curtin asked for effective measures to collect unpaid purchase money and for a special tax on unpatented lands.<sup>41</sup> Pursuant to this recommendation, the General Assembly directed the Surveyor General to compile and to transmit a list of liens to the prothonotaries of the several counties for entry in a special docket.<sup>42</sup> While the General Assembly rejected the special tax, it increased the rate of interest on unpaid purchase money and authorized the Attorney General to proceed with the enforcement of the liens. The dockets were available in 1869,<sup>43</sup> and in 1871, the Board of Property was given discretionary power to direct the entry of suits by the Attorney General.<sup>44</sup> The Board of Property, however, took little action because of the depression then pending.<sup>45</sup> In 1897, finding the Board of Property ill suited to directing the collection of liens, the General Assembly transferred the duty to the Secretary of Internal Affairs.<sup>46</sup> The incumbent, James W. Latta, began what was probably the first effective drive to collect. Many persons were made aware for the first time of the existence of liens against their land. Having relied upon inadequate examinations of title in the acquisition of their property, they had held it in complete ignorance.<sup>47</sup> They insisted that the Commonwealth should be estopped for not having made its claims known sooner, and organized resistance developed. The following year, after a bill had passed the General Assembly making some ameliorating changes at the suggestion of the Secretary of Internal Affairs, it was recalled from the Governor and replaced by a measure which authorized

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cution to be issued by the county commissioners. Act of April 9, 1781, 1 SMITH'S L. 13. The period was later extended by several acts, for example the Act of April 5, 1782, 2 SMITH'S L. 13. In 1807, the legislature directed interest to be compounded. Act of April 13, 1807, 4 SMITH'S L. 471. It was held, however, that title was not divested under these acts unless the land was sold on execution. *Phillips v. Shaffer*, 5 S. & R. 215 (Pa. 1819). In 1785 and again in 1820, patents were authorized to be issued in exchange for a mortgage. Act of Sept. 16, 1785, 2 SMITH'S L. 339; Act of March 22, 1820, P.L. 99. In 1826, the Secretary of the Land Office was directed to enter suit. Act of April 8, 1826, P.L. 260, PA. STAT. ANN. tit. 64, §§ 441-43. In 1835, it was sought to induce debtors to pay by offering to commute liens according to a system of graduation. Act of April 10, 1835, P.L. 148. This practice was discontinued on December 1, 1859, after a new act had restored the original prices but established a lower rate of interest. Act of March 19, 1858, P.L. 132; PA. STAT. ANN. tit. 64, § 532.

41. [1898] PA. SEC'Y INTERNAL AFFAIRS ANN. REP. A21.

42. Act of May 20, 1864, P.L. 914. It was later found expedient to direct the Surveyor General to provide the dockets. Act of April 4, 1868, P.L. 60.

43. [1898] PA. SEC'Y INTERNAL AFFAIRS ANN. REP. 24A.

44. Act of May 5, 1871, P.L. 261, further implemented by Act of April 11, 1872, P.L. 51, which directed the county surveyors to ascertain the present owners and to notify them of the lien. See PA. STAT. ANN. tit. 64, §§ 468-72 (1941).

45. [1898] PA. SEC'Y INTERNAL AFFAIRS ANN. REP. 24A.

46. Act of May 26, 1897, P.L. 101; PA. STAT. ANN. tit. 64, § 474 (1941).

47. The current owner would have had no notice from the land lien dockets as these carried the names of the original warrantees, which were generally unknown to the current owner, and did not identify the tract by map.

the satisfaction of the lien for the purchase price and the office charges and the issuance of a patent for fifteen dollars.<sup>48</sup> While this sum scarcely paid the cost of further administration, the Department finally succeeded in closing the land lien dockets.<sup>49</sup>

The closing of the land lien dockets did not, however, put an end to all liens for the purchase price of lands. Because of the condition of the records in the Land Office Bureau, liens could be entered only in cases where warrants had been issued or surveys returned, and complete lists of these could not be assured. While the issuance of a patent conclusively bars the Commonwealth, private title can be acquired in two ways without the granting of a patent: the first, by the acquisition of office rights; the second, by settlement and improvement. As the result of the process of development through judicial decisions, each type of title is good against all the world except the Commonwealth, while the Commonwealth retains legal title solely for the purpose of securing payment of the purchase price. Like a mortgagee, it can realize on its lien only through execution.<sup>50</sup> If through mistake a patent is erroneously issued after such a title has been acquired to a person other than the one who has acquired the incipient title, the patentee will be held to be a trustee for, and required to convey to, the holder of the incipient title.<sup>51</sup> As against the Commonwealth, the owner of the inchoate title has a right at any time to secure a patent on payment of the purchase price and office fees, although this is a right which can be lost by abandonment.<sup>52</sup> A private title by office rights is acquired when an applicant has secured a warrant, caused a specific piece of land to be surveyed, and a return to be made. Persons had been permitted to obtain a warrant without payment of the purchase price from 1765 to 1781.<sup>53</sup> When the purchase price is deposited before issuance of the warrant, a lien will exist for the balance due, if any, resulting from the discovery that more land has been included in the survey than was estimated.<sup>54</sup> While a return of survey is the general method of acquir-

48. Act of May 5, 1899, P.L. 229; PA. STAT. ANN. tit. 64, § 503 (1941).

49. They were still open in 1933, the last year in which a detailed reference is found. [1933] PENNSYLVANIA MANUAL 196.

50. *Phillips v. Shaffer*, 5 S. & R. 215 (Pa. 1819).

51. *Hoffman v. Bell*, 61 Pa. 444 (1869); *Consolidation Coal Co. v. Friedline*, 134 Pa. Super. 1, 3 A.2d 200 (1939). Because of the doctrine that the patentee is a trustee, it is not necessary to vacate the patent and to obtain another. In declaring the trust, the court will order title transferred. It does not appear to have been decided whether or not the trustee would be subrogated to the lien of the Commonwealth for the purchase price and patent fees when he has paid them.

52. *Read v. Goodyear*, 17 S. & R. 350 (Pa. 1828).

53. SERGEANT, VIEW OF THE LAND LAWS OF PENNSYLVANIA 55 (1838).

54. Once the purchase price has been paid and all that remains secured by the lien is the office charges, the interest of a warrantee is no longer subject to abandonment. *Hoffman v. Bell*, 61 Pa. 444 (1869).

ing office rights, any other matter of record which adequately describes a specific piece of land will vest title from the moment of issue. A descriptive warrant or location, if it identifies a particular tract, will suffice.<sup>55</sup> In the case of a warrant which is not descriptive, the warrantee's title is complete from the completion of the actual survey upon the ground, even where the survey has not been returned, as the warrantee can thereafter obtain an order to have the property resurveyed and cause a return to be filed.<sup>56</sup> Persons who claim title by settlement and improvement become holders under office rights by securing a survey<sup>57</sup> or by filing a descriptive application.<sup>58</sup> Title by office right to the undrawn donation lands, which were surveyed before they were opened for appropriation, began with an actual settlement thereon.<sup>59</sup>

The second type of inchoate title is based on settlement and improvement. Recognition of rights acquired by settlement and improvement may be traced back to practices under the proprietaries. One was the practice of recognizing the rights of settlers who were actually on the land under grants from the Dutch and Swedes or from Governor Andros of New York, whose presence was aidful to the settlement of the colony. The other stemmed from a great influx of immigrants from the European continent who claimed they had been offered free lands by the agents of William Penn to induce them to settle, and who by-passed the land office in great numbers. While the proprietaries confirmed the title of the former settlers, they never recognized the legality of the latter: but they never took action to evict if the land was improved and the settler were willing to pay or to secure payment of the purchase price.<sup>60</sup> The colonial courts recognized rights of settle-

55. For a discussion of the several types of warrants, see SERGEANT, *VIEW OF THE LAND LAWS OF PENNSYLVANIA* 150 (1838). For various types of descriptive warrants, see *McDowell v. Young*, 12 S. & R. 115 (Pa. 1824), *Maus v. Montgomery*, 15 S. & R. 221 (Pa. 1826), *Lauman v. Thomas*, 4 Binn. 51 (Pa. 1811), *Davis v. Keefer*, 4 Binn. 161 (Pa. 1811).

56. A return is not necessary to establish a survey. *Lambourn v. Hartswick*, 13 S. & R. 112 (Pa. 1824). The Board of Property has jurisdiction to order a resurvey. *Simpson v. Wray*, 7 S. & R. 336 (Pa. 1821). A person not actually residing on the land would be estopped, however, as against a subsequent warrantee whose survey failed to disclose the claim. *Raush v. Miller*, 24 Pa. 277 (1855).

57. A survey without warrant was authorized for lands north and west of the Allegheny by Act of April 3, 1792, 3 SMITH'S L. 70; PA. STAT. ANN. tit. 64, § 140 (1941). A survey was also authorized without prior warrant under § 4, Act of April 11, 1872, P.L. 51; PA. STAT. ANN. tit. 64, § 472 (1941), mentioned in note 44 *supra*. The general practice, however, required the claimant to secure a warrant. Act of April 14, 1874, P.L. 58; PA. STAT. ANN. tit. 64, § 360 (1941).

58. *McDowell v. Young*, 12 S. & R. 115 (Pa. 1824).

59. Act of March 26, 1813, 6 SMITH'S L. 64; PA. STAT. ANN. tit. 64, § 192 (1941).

60. For the early history of settlement rights, see SERGEANT, *VIEW OF THE LAND LAWS OF PENNSYLVANIA* 136 (1838), HUSTON, *HISTORY AND NATURE OF ORIGINAL TITLES TO LAND IN THE PROVINCE AND STATE OF PENNSYLVANIA* 105 (1849). Lands which had not been purchased from the Indians could not be acquired by settlement, except in special circumstances. Note, 2 SMITH'S L. 124-29.

ment and improvement as sufficient to show title in the plaintiff for the purposes of an action of ejectment.<sup>61</sup> After the Revolution, the Supreme Court of Pennsylvania at first refused to recognize this doctrine, but later reversed its position.<sup>62</sup> The first statutory recognition of the rights of settlers came in 1786, when it was provided that no warrant should issue for a tract of land on which a settlement has been made except to the persons who had made the settlement or their legal representatives.<sup>63</sup> Settlement and improvement required more than a mere occupancy of the land — it required residence on the land and the raising of crops.<sup>64</sup> For the purpose of determining priority, title related back to the first occupancy, provided the occupant entered with intent to settle and improve and proceeded continuously with his improvement.<sup>65</sup> An improver acquired title not only to the land which he cleared and occupied, but also to surrounding land equal in amount to what he could have obtained by warrant — three hundred acres under the proprietaries and four hundred under the Commonwealth. A failure to enclose and survey the land within a reasonable period would, however, result in the postponement of the claim to a subsequent survey.<sup>66</sup>

Since the state had no way to account for unwarranted lands, it had no means of filing liens against such land. No doubt many settlers sought warrants in order to protect their claims against interference; but once the land was fenced, there was little danger that a subsequent survey would fail to note the existence of the claim. Land occupied by settlement and improvement was included in the county tax assessments, so that there was no local pressure to compel the settler to obtain a patent.<sup>67</sup> The General Assembly made many attempts to

61. The first reported case is *Campbell v. Kidd*, 2 SMITH'S L. 172 (Pa. 1744), which cites earlier unreported precedents.

62. *Bonnett v. Devebaugh*, 3 Binn. 175 (Pa. 1810).

63. Act of Dec. 30, 1786, 2 SMITH'S L. 395; PA. STAT. ANN. tit. 64, § 65 (1941). This applied only to land in the purchase of 1768. PA. STAT. ANN. tit. 64, § 67. An act of April 3, 1792, made provision for the survey of land for actual settlers without warrant, 3 SMITH'S L. 70, PA. STAT. ANN. tit. 64, § 360 (1941).

64. The first statute defined settlement as "an actual personal resident settlement with the manifest intention of making it a place of abode and the means of supporting a family." Act of Dec. 30, 1786, 2 SMITH'S L. 395; PA. STAT. ANN. tit. 64, § 66 (1941). This act was declaratory of the common law, which distinguished the settler from the speculator. *Bonnett v. Devebaugh*, 3 Binn. 186 (Pa. 1810).

65. The title of the settler relates back to the time of the entry and the first stroke of the axe. *Emery v. Spencer*, 23 Pa. 271, 278 (1854).

66. The period was fixed at seven years in *Farmers' and Mechanics' Bank v. Woods*, 11 Pa. 99 (1849). *Ross v. Pleasants*, 19 Pa. 157 (1851).

67. Tax liability on seated land was regarded as personal. The land could not be sold for non-payment of taxes. See SERGEANT, VIEW OF THE LAND LAWS OF PENNSYLVANIA 208 (1838). For an example of the assessment of a settlement right, see *Farmers' and Mechanics' Bank v. Woods*, 11 Pa. 99 (1849), holding that where an improver failed to return the entire tract claimed he thereby limited his claim.

compel settlers to patent their lands.<sup>68</sup> It was provided in 1899 that they should not be permitted to assert title in interference proceedings on caveat or maintain an action of ejectment without first obtaining a patent.<sup>69</sup> In 1905, it was declared that no right of settlement and improvement could be asserted unless a patent should be obtained within five years.<sup>70</sup> It soon became evident that this would affect the title of many persons who had no actual knowledge of the fact that their title was based upon settlement and improvement and not upon a patent. Before the five year period had expired, the General Assembly repealed this feature; so that it is now provided that preemption rights acquired under existing laws should not be affected.<sup>71</sup> It is now a matter of doubt whether settlement and improvement rights acquired after March 28, 1905, are valid. Even if valid, they would not extinguish the preemptive right of the Commonwealth to acquire the land for forest culture and reservation, and the lien for the purchase price would be for an amount to be ascertained by appraisal.<sup>72</sup>

At the present time, the Department of Internal Affairs is authorized to receive payment of the purchase price and costs, and to issue a patent, when title is held in one of the two ways mentioned. The price in the case of lands held by office rights is fifteen dollars, which includes both the price of the land and the fees.<sup>73</sup> This price was originally established for cases in which liens had been entered in the land lien dockets, but it has been extended to cover cases in which liens have not been entered<sup>74</sup> and cases where the lien is shown on the patent or represented by a separate mortgage.<sup>75</sup> It also covers town lots sold by commissioners.<sup>76</sup> The price in the case of lands which are held by settlement and improvement is the price at which the land was being offered for sale at the time when the settlement took place,<sup>77</sup> with interest at a rate prescribed by law.<sup>78</sup> Because of the great depreciation in the value of the dollar and the great increase in the value of land, the price would seem to be small enough to present no real obstacle to an application

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68. The efforts to collect land liens generally are discussed above. See particularly note 40 *supra*.

69. Act of April 23, 1889, P.L. 46; PA. STAT. ANN. tit. 64, § 363 (1941).

70. § 5, Act of March 28, 1905, P.L. 67.

71. § 5, Act of May 3, 1909, P.L. 413; PA. STAT. ANN. tit. 64, § 327 (1941).

72. If interest is charged from the date of settlement, and the appraisal is made to relate back to that time, subsequent improvements would probably not be included in the price of the land.

73. Act of May 5, 1899, P.L. 229; PA. STAT. ANN. tit. 64, § 503 (1941).

74. Act of May 28, 1915, P.L. 571.

75. Act of April 29, 1911, P.L. 106.

76. Act of April 29, 1909, P.L. 295.

77. When the time of first improvement cannot be shown, the Department of Internal Affairs treats the settlement as having been made when the land was first opened for settlement. [1909] PA. SEC'Y INTERNAL AFFAIRS ANN. REP. 18A.

78. Act of March 19, 1858, P.L. 132; PA. STAT. ANN. tit. 64, §§ 532-34.

for patent. The most expensive land, which was offered at eighty cents an acre, is free of interest. The general price, which prevailed from 1835 to 1905 was twenty-six and two thirds cents an acre with interest at three per cent. On a tract of land which was settled before the Revolution, interest would be calculated from March 1, 1777. As of March 1, 1957, it would cost only \$1.72 an acre to patent this land, with interest accruing at the rate of eight mills a year. This would, of course, be more burdensome to a single person claiming a large tract than to many persons claiming parcels of the original improvement.<sup>79</sup> The prices of lands are available from the Department of Internal Affairs, and are set forth in the margin.<sup>80</sup> All land other than that in which an incipient title has been acquired may be purchased at its current value determined by an appraisal;<sup>81</sup> but this does not include islands and river beds, and is subject to a preemptive right in the Department of Forests and Waters. The procedure for patenting lands will be discussed later.

In making an examination of title, it is necessary to trace title back to the patent because of the rule that the statute of limitations does not run against the Commonwealth.<sup>82</sup> By virtue of the statute of limitations, one may acquire title against a person claiming under office rights or by settlement and improvement, but the title so acquired remains subject to the lien of the Commonwealth.<sup>83</sup> It may be said,

79. The Secretary of Internal Affairs does not require that the application be for the entire tract as originally settled. *Rules of Practice of the Bureau of Land Records*, [1933] PENNSYLVANIA MANUAL 197.

80. Lands lying within the donation and depreciation districts and town lots, in which a survey preceded the allotment, would be claimed by virtue of office rights at fifteen dollars per tract, and are therefore not included in this note. Lands in the purchase of 1768 and prior purchasers are priced at twenty-six and two thirds cents per acre, with interest at 3%. Interest is charged from March 1, 1770, for lands in the purchase of 1768, and from March 1, 1755, for lands in the prior purchases. Seven years interest is remitted for the period of the Revolution. Act of March 28, 1814, 6 SMITH'S L. 207; Act of March 12, 1830, P.L. 77; Act of March 19, 1858, P.L. 132; PA. STAT. ANN. tit. 64, §§ 62, 531-34 (1941). Lands in the purchases of 1784 and 1785, except the donation and depreciation lands and the Allegheny Reserve, were offered at eighty cents per acre on Dec. 21, 1784, 2 SMITH'S L. 272. There is no interest on this price. Act of March 19, 1858, P.L. 132. PA. STAT. ANN. tit. 64, §§ 91, 532 (1941). Land lying north and east of the Ohio, Allegheny and Conewago was reduced to thirteen and one half cents per acre by Act of April 3, 1792, 3 SMITH'S L. 70. It was increased to twenty-six and two thirds cents by Act of March 10, 1817, 6 SMITH'S L. 420. Land lying north and west of the rivers mentioned above was reduced to twenty cents per acre by the Act of April 3, 1792, 3 SMITH'S L. 70. Interest was fixed at 3½% when the price was thirteen and one half cents or twenty cents, and at 3% when the price was twenty-six and two thirds cents. Act of March 19, 1858, P.L. 132. See PA. STAT. ANN. tit. 64, §§ 112, 134, 532.

81. Act of May 3, 1909, P.L. 413; PA. STAT. ANN. tit. 64, §§ 321-28 (1941).

82. *McMurtie v. McCormick*, 3 Pen. & W. 428 (Pa. 1832), *Commonwealth v. Baldwin*, 1 Watts 54 (Pa. 1832), *Schweriner v. Reading*, 19 Berks 559 (C.P., Pa. 1927).

83. *Taylor v. Dougherty*, 1 W. & S. 324 (Pa. 1841), *Galloway v. Ogle*, 2 Binn. 468 (Pa. 1810). The period of limitations is seven years when applied to land held

however, that the calculated risk of an outstanding lien is small. In the first place, judging by the slow progress in completing the connected warrantee tract maps,<sup>84</sup> the Commonwealth will not be ready to embark upon a state-wide program of enforcement within the Twentieth Century. In the second place, the amount to be collected is too small to offset the cost of collection.<sup>85</sup> On the other hand, it must be remembered that there are many interests other than the lien of the Commonwealth which are not barred by the passage of time.<sup>86</sup> The statute of limitations bars only interests which have not matured into rights of immediate possession; it would not bar possibilities of reverter and rights of entry, executory interests, restrictive covenants, minerals sold in place but not yet opened, and many like interests which may remain in abeyance for many years. The only way in which a purchaser can be certain that there are no such interests is to insist upon an examination back to the patent. The examiner who goes back sixty years to a warranty deed relies upon the warranty of a seller who probably did not know, under the practice then prevailing,<sup>87</sup> that he did not have a complete title to the land, and who may have died since the conveyance.<sup>88</sup>

To determine whether or not a patent has been granted, it may not be necessary to have recourse to the Bureau of Land Records in Harrisburg, as many patents have been recorded in the recorders' offices of the various counties. The Department of Internal Affairs is the proper office of record for all patents,<sup>89</sup> while recording in the county recorders' offices was required only in the case of patents issued subject

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under warrant or by settlement and improvement. Act of March 26, 1785, 2 SMITH'S L. 299; PA. STAT. ANN. tit. 12, § 75 (1953). *Mobly v. Oeker*, 3 Yeates 200 (Pa. 1801). After thirty years, it is presumed between all litigants other than the Commonwealth that the Commonwealth has parted with title. Act of April 27, 1855, P.L. 368; PA. STAT. ANN. tit. 12, § 79 (1953).

84. Only seventeen of the sixty-seven counties have been completed since the work was authorized in 1907.

85. It may one day become difficult to show that a settlement and improvement was commenced before March 28, 1905. See notes 70, 71 *supra*. In that case the price would be the full current value determined by appraisal. PA. STAT. ANN. tit. 64, § 327 (1941).

86. For example, a mortgage more than fifty years old which has never been in default. *Girard Trust Co. v. Pennsylvania R. R.*, 364 Pa. 576, 73 A.2d 371 (1950), holding unconstitutional an act quieting title to land after fifty years: Act of May 23, 1949, P.L. 1692; PA. STAT. ANN. tit. 68, §§ 451-57 (Supp. 1949). See Aigler, *Constitutionality of Marketable Title Acts*, 50 MICH. L. REV. 185 (1951).

87. See note 11 *supra*.

88. Unmatured claims, if not made to the personal representative, are discharged by distribution. PA. STAT. ANN. tit. 20, §§ 320.615-16 (1950).

89. All patents issued under the Commonwealth were to be enrolled in the Rolls Office. Act of April 9, 1781, 1 SMITH'S L. 529; PA. STAT. ANN. tit. 64, § 38 (1941). When the Rolls Office was abolished in 1809, the duty of enrolling patents devolved upon the Secretary of the Land Office, who was required to enroll all patents without additional fees. § 5, Act of Mar. 29, 1809, 5 SMITH'S L. 46. The duty is now expressed in general terms in the Administrative Code of 1929, § 1203. PA. STAT. ANN. tit. § 333 (1942). For exception in case of the donation lands, see note 92 *infra*.

to a lien, which was to be stated in the patent.<sup>90</sup> For all other patents, recording in the county is optional with the patentee. The connected warrantee tract maps, when available, are issued to the recorder of deeds of the county. In order to locate a patent in the Bureau of Land Records, when a map is not available, it is necessary to know the name of the original warrantee or patentee, which can be ascertained only by running the title in the county. The records in the Bureau of Land Records do not reflect changes in ownership after the Commonwealth has parted with title. When the chain of title breaks off, it is sometimes possible to pick it up again through tax assessment records. It may be possible to find the name of the original warrantee by running the title to adjoining tracts of land, in the hope that one or more of these may lead to a patent naming the warrantee of the tract in question as an adjoiner. Every effort will be made in the Bureau of Land Records to locate the patent, but it is necessary for the applicant to obtain this information in the recorder's office in the county where the land lies.

Not all patents are enrolled in the Bureau of Land Records. The patents for the donation lands were specifically exempted from recording, but a draft of the tract showing the allotment of the lands serves instead.<sup>91</sup> Some patents for land in the Allegheny and Beaver Reserve are missing from the records, although the drafts on file indicate that they have been issued.<sup>92</sup> In such cases, the records in the Bureau would seem to be sufficient evidence that title has passed from the Commonwealth, and would no doubt support an action to prove a lost deed.<sup>93</sup>

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90. All patents which were issued subject to a lien for the unpaid purchase price were required to be recorded in the recorder's office of the county where the land lay by Act of Jan. 25, 1816, 6 SMITH'S L. 309; PA. STAT. ANN. tit. 64, § 416 (1941). This was chiefly for the purpose of showing the lien and facilitating collection. Patents were allowed to be recorded in the recorder's office of the county by Act of March 14, 1846, P.L. 124; PA. STAT. ANN. tit. 21, § 385 (1955). A requirement that such instruments be acknowledged was later dispensed with, but in a separate section. PA. STAT. ANN. tit. 21, § 390 (1955). See *Reilly v. Mountain Coal Co.*, 204 Pa. 270, 54 Atl. 29 (1903).

91. In lieu of recording, it was provided that a draft of the whole showing the number of each lot should be kept by the Supreme Executive Council until all applications were satisfied, and then deposited with the Master of the Rolls as a public record. Act of March 24, 1785, 2 SMITH'S L. 290. [1886-87] PA. SEC'Y INTERNAL AFFAIRS ANN. REP. 10A.

92. [1909] PA. SEC'Y INTERNAL AFFAIRS ANN. REP. 120A. These lots were reserved by Act of March 12, 1783, 2 SMITH'S L. 62. Power to make conveyances was originally in the Supreme Executive Council, but was transferred to the Governor by Act of Jan. 8, 1781, 3 SMITH'S L. 2, and later to the Secretary of the Land Office by Act of March 29, 1809, 5 SMITH'S L. 46. All records were deposited with the Secretary of the Land Office, and these indicate the issuance of patents by the Governor, which were not enrolled.

93. Act of March 28, 1786, 2 SMITH'S L. 375; PA. STAT. ANN. tit. 21, § 491 (1955). The act does not specifically refer to patents or to the Commonwealth as a party. There is no indication in the reported cases that it has ever been invoked for this purpose.



The failure to find a patent after a careful search of the records does not necessarily show that no patent has ever been issued. It simply means that no patent has ever been issued in the name of a person whose name has been furnished for search. It is just as possible that a patent was issued to someone not in the chain of title as that none was ever issued.<sup>94</sup> If a patent has been issued to someone else, the Commonwealth would be barred, and the present occupant's title, which may rest upon an unrecorded conveyance or on adverse possession, will have been cured by the passage of thirty years.<sup>95</sup> In such a case, it would seem to be a breach of public morality for the Department of Internal Affairs to resell the land to a person who may already be the owner. However, the probability that a patent has been issued, but cannot be found without the name of the patentee, may not be as great as it was formerly thought to be.<sup>96</sup> The completion of the maps for seventeen counties has shown that sufficient data is available to enable the Bureau of Land Records to construct a connected warrantee draft of the whole area in which the land lies, and skills and knowledge have been acquired in the process of preparing the maps which will aid in the search. If it should later be discovered that the land has been paid for twice, a refund is possible, but this would require a special act of legislation.

If a search fails to show a patent and it is determined that one should be obtained, the procedure will vary according to whether the land is claimed by office rights, by settlement and improvement, or as vacant and unappropriated public land. All unpatented land falls into one of these three categories, and may be patented with the exception of islands, land in the bed of navigable rivers, and land which the state elects to retain for forest preservation and culture. The purchase price and the basis of entitlement has already been discussed, and it remains to set forth the procedure.

Land claimed by office rights may be patented for a fee of fifteen dollars upon the filing of an application with satisfactory proof of

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94. "Often warrants and patents were granted for lands in duplication of those before granted. It is claimed by many experienced surveyors that there are large tracts of land which are covered by from two to four or five sets of surveys, the Commonwealth having been paid as many times for the lands . . . Those who are victimized [have] no way of securing the return of the money which they have paid under the second, third or fourth official papers, without an act of the legislature authorizing a refund of the money so illegally paid and received." [1905] PA. SEC'y INTERNAL AFFAIRS ANN. REP. 22-23A.

95. The period is twenty-one years generally; but this does not bar persons under disability. Act of March 26, 1785, 2 SMITH'S L. 299. All persons are barred after thirty years. Act of April 22, 1856, P.L. 532. See PA. STAT. ANN. tit. 12, §§ 72, 73, 82 (1953).

96. See note 94 *supra*.

ownership.<sup>97</sup> The Department of Internal Affairs provides forms upon which the application is made, and has established rules of procedure.<sup>98</sup> It is necessary to show that the land for which application is made is identified in the records of the Bureau of Land Records, either by a descriptive warrant or by a return of survey. When a survey has not been returned, it may be necessary to secure another warrant<sup>99</sup> and to obtain a return by the county surveyor.<sup>100</sup> Unless there is a proper survey on the record, a patent cannot be granted. The Secretary of Internal Affairs will grant a patent for part of the original tract upon a return by the county surveyor of a survey of such part, showing the remainder of the original tract by dotted lines.<sup>101</sup> A patent will issue in the name of the original warrantee without proof of title, if he is the applicant. Other persons must support their claim by an abstract of title prepared by a competent person, or by proof of possession for the statutory period.<sup>102</sup> When ownership has been subdivided, a patent can be issued in the names of the several owners without setting forth the particular interest of each, if they join in an application.<sup>103</sup>

Land claimed by settlement and improvement can be patented upon payment of the purchase price as described earlier in this Article.<sup>104</sup> An application is made on forms supplied by the Department of Internal Affairs. The application must contain a full description of the land together with a draft, showing the names of the original warrantees of

97. Act of May 5, 1899, P.L. 229, as amended; PA. STAT. ANN. tit. 64, § 503 (1941).

98. Rules of procedure were published in the Pennsylvania Manual (formerly Smull's Legislative Handbook) through 1933. Rules of procedure were omitted in the 1935-6 volume, the statement being made instead that so far as is known, all lands in the state are now privately owned. There are currently no published rules of procedure. Reports of actual proceedings are printed in full in the Annual Reports of the Secretary of Internal Affairs.

99. Until a return of survey has been made, the Secretary of Internal Affairs may issue another warrant; but after a return has been made, only the Board of Property can order a resurvey. *Simpson v. Wray*, 7 S. & R. 337, 339 (Pa. 1821); *Mineral R.R. v. Auten*, 188 Pa. 568, 583, 41 Atl. 327, 329 (1898).

100. In many counties, the office of county surveyor has not been filled. In such cases, there is jurisdiction in the Courts of Quarter Sessions to fill a vacancy. PA. STAT. ANN. tit. 16, §§ 1001, 4001 and 7435 (1956).

101. Rule 5, [1925-6] PENNSYLVANIA MANUAL 80.

102. PA. SEC'Y INTERNAL AFFAIRS, Form 96. This form provides for an affidavit of a reputable citizen of the township and county in which the land is situated to the effect that the applicant and those under whom he claims have held the land by peaceful possession and the exercise of ownership for more than twenty-one years last past. Rule 4 of the published regulations, however, provides that when title has passed out of the original warrantee, the applicant will be required to furnish an abstract of title from the warrantee, and makes no mention of proof of adverse possession. [1925-26] PENNSYLVANIA MANUAL 80.

103. Rule 6. Rule 7 provides that any party may discharge the lien of the Commonwealth immediately, and that the patent will be issued afterward upon proof of ownership. [1925-26] PENNSYLVANIA MANUAL 80.

104. Note 80 *supra*.

the adjoining tracts.<sup>105</sup> An affidavit of a disinterested witness must be attached showing that the land is improved and how long since the improvement was made. The applicant must state under oath that he believes that no office rights have been issued for the land. If office rights have issued, he must describe them fully and state why he believes them to have been abandoned.<sup>106</sup> A false affidavit is made subject to the penalties of perjury. It is required by statute that thirty days notice of the filing of the application must be given by publication.<sup>107</sup> On receipt of proof of publication, the Bureau of Land Records calculates the purchase price on the basis of the acreage disclosed in the application, and issues a warrant to survey the land when the purchase price has been paid. The survey is then made by the county surveyor.<sup>108</sup> On return, the Secretary of Internal Affairs must determine whether the survey discloses more land than was shown in the draft, calculates the additional price and the fees, and issues a patent when these have been paid.<sup>109</sup> If there is less land returned than is shown in the application, there is no provision for the return of the excess purchase price.<sup>110</sup>

In showing entitlement to the settlement and improvement, the applicant must furnish an abstract of title from the original claimant, but it is believed that in most cases, proof of peaceable possession and the exercise of ownership for a period of thirty years will be satisfactory.<sup>111</sup> When the date of settlement is not fixed with precision, the Bureau of Land Records is compelled to assume that the settlement took place when the land was first made available for public sale.<sup>112</sup> It is also necessary to show that the settlement took place before March 28, 1905.<sup>113</sup> There are statutory definitions of settlement and improve-

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105. Rules of Practice of the Bureau of Land Records—Application for Vacant Lands. [1933] PENNSYLVANIA MANUAL 196.

106. These requirements are set forth in detail in the controlling act of April 14, 1874, P.L. 58; PA. STAT. ANN. tit. 64, 360-64 (1941).

107. Note 106 *supra*. Publication must be once a week for three successive weeks in a newspaper of the county in which the land is situate, and nearest its location.

108. The county surveyors, elective officers, replaced the deputy surveyors appointed by the Surveyor General by act of April 9, 1850, P.L. 434.

109. The fees are established by statute: for issuing a warrant and return of survey, \$5.00; for a patent of five acres or less, \$5.00; for a patent of more than five acres, \$10.00. Act of April 23, 1933, P.L. 100; PA. STAT. ANN. tit. 71, § 927.

110. [1909] PA. SEC'Y INTERNAL AFFAIRS ANN. REP. 22A.

111. See note 102 *supra*.

112. [1909] PA. SEC'Y INTERNAL AFFAIRS ANN. REP. 20A.

113. § 5, Act of March 28, 1905, P.L. 67, required persons having existing preemption rights to assert them within five years and otherwise provided an exclusive method of acquiring title to vacant lands. The Act of May 3, 1909, protected preemption rights acquired under existing law. See PA. STAT. ANN. tit. 64, § 327 (1941).

ment which must be shown to have been complied with.<sup>114</sup> The rules relating to joinder of parties and applications for less than the whole original tract are applicable to preemptive rights.<sup>115</sup>

When land is vacant and unappropriated — that is, when land is neither patented nor claimed by office rights or by settlement and improvement — it is available at its full current value determined by appraisal. The application is filed on forms provided by the Department of Internal Affairs, and must contain a draft of the tract showing the warrantees of the adjoining tracts. It requires an affidavit by a disinterested witness that the land is unimproved, and an affidavit of the applicant that there are no office rights outstanding, or that they have been abandoned.<sup>116</sup> The Secretary of Internal Affairs then investigates the application, searching the records in his office and making an independent survey if this seems advisable.<sup>117</sup> If the land is found to have been appropriated, the application is refused, but the refusal may be appealed to the Board of Property. If the land is found to be vacant and unappropriated, notice of the application is published at public expense.<sup>118</sup>

The Department of Forests and Waters is then notified that the land has been applied for and has been found to be vacant, and is permitted to assert the preemptive rights of the Commonwealth. If the department does not request conveyance within two months, the Secretary of Internal Affairs may proceed with the application. If the Department of Forests and Waters elects to take the land, it is patented to that department. No provision is made for reimbursing the applicant for his expenses, even where his efforts have been the only means by which the availability of the land was made known to the Commonwealth.<sup>119</sup>

When land is not claimed by the Department of Forests and Waters, the Secretary of Internal Affairs secures the appointment of

114. "Settlement and improvement rights shall only be acquired and recognized as such by an actual entry upon vacant land of the Commonwealth with the manifest intent of making it a place of abode, together with an actual improvement of the land by clearing and tilling the soil, and also defining the limits of such claim by survey and well marked lines." Act of April 23, 1899, P.L. 46; PA. STAT. ANN. tit. 64, § 363 (1941). This would, of course, exclude improvement without settlement or settlement and improvement for other than agricultural purposes or without a survey; but a survey made at the time of application would probably suffice. See *Commonwealth v. Clark*, 157 Pa. 257, 27 Atl. 723 (1893).

115. See note 101 *supra*.

116. The requirements are virtually the same as for an application to patent settled and improved lands, and are based on the Act of April 14, 1874, P.L. 58; PA. STAT. ANN. tit. 64, §§ 360-64 (1941). For regulations, see [1933] PENNSYLVANIA MANUAL 196.

117. The procedure is set out in the Act of May 3, 1909, P.L. 413; PA. STAT. ANN. tit. 64, § 321 (1941). The regulations were first formulated and are reported in [1909] PA. SEC'Y INTERNAL AFFAIRS ANN. REP. 21A.

118. [1909] PA. SEC'Y INTERNAL AFFAIRS ANN. REP. 21A.

119. [1933] PENNSYLVANIA MANUAL 196.

three appraisers.<sup>120</sup> The appraisers are required to visit the land, consider its location, soil, timber, minerals, fisheries and other advantages, and to place a valuation on the tract in terms of its value per acre. On the basis of this valuation and the area disclosed in the application, the Department of Internal Affairs calculates the purchase price. When this has been paid, a warrant is issued to the county surveyor, and on return of survey, it must be determined whether there is any balance due the Commonwealth by reason of excess acreage. When this is paid together with the patent fee, a patent is issued. If the applicant does not pay the purchase price within three months of the filing of the report of the appraisers,<sup>121</sup> the application is regarded as abandoned, and the land may be taken up by the next applicant at the same price.

The title to land lying in the beds of navigable rivers or of streams declared by law to be public highways does not pass to the grantee under a patent.<sup>122</sup> By an important series of decisions, this rule, which in England had been applied only to tidal waters, was extended to the fresh water rivers of the state.<sup>123</sup> Authorization to patent land lying in the beds of navigable rivers has occasionally been given by statute. At one time, the Land Office was permitted to sell the right to take coal and other minerals in river beds, provided there was no interference with navigation and rights incidental thereto.<sup>124</sup> At another time, authorization was given to patent the former beds of abandoned channels between islands and the mainland.<sup>125</sup> The granting of title to river beds has been a source of much conflict. The riparian owners have claimed that if they did not have title to the bed, they should at least have preemptive rights. In 1905, the further patenting of lands lying in the beds of navigable rivers was prohibited;<sup>126</sup> but later the power was given to appropriate channels abandoned in the improvement

120. The appraisers are appointed by the Governor, the Attorney General, the Secretary of the Commonwealth and the Secretary of Internal Affairs. They are sworn to perform their duties, and that they are not interested in the application. If they fail to act in ninety days, three other persons may be appointed. PA. STAT. ANN. tit. 64, §§ 322-23 (1941).

121. Due notice of the filing of the report of the appraisers must be given by mail to the applicant. PA. STAT. ANN. tit. 64, § 325.

122. *Carson v. Blazer*, 2 Binn. 475 (Pa. 1810). Beginning with two acts of March 9, 1771, certain streams have been declared to be public highways and commissioners appointed to undertake their improvements. 1 SMITH'S L. 322, 24.

123. *Shrunk v. Schuylkill Navigation Co.*, 14 S. & R. 71 (Pa. 1826). This meant that a corporation organized to build a dam for purposes of navigation and having the power of eminent domain, was required to pay only for the fast land taken or flowed, and was not liable to pay for the destruction of fisheries or the unhealthy conditions caused by standing water.

124. Act of April 11, 1848, P.L. 533; PA. STAT. ANN. tit. 64, §§ 262-65. The exercise of the right was not to interfere with the rights of riparian owners. See *Brandt v. McKeever*, 18 Pa. 70 (1851).

125. Act of July 15, 1897, P.L. 301. For an account of the administrative difficulties engendered, see [1899] PA. SEC'Y INTERNAL AFFAIRS ANN. REP. 17A.

126. Act of March 28, 1905; see PA. STAT. ANN. tit. 64, § 261.

of the waterways and also channels which have become blocked, giving the former riparian owners preemptive rights.<sup>127</sup> Rights of way may also be granted to municipalities and public institutions for sewage treatment plants and intercepting sewer systems for the purpose of diverting sewage and industrial wastes.<sup>128</sup>

Islands in the navigable rivers were most highly prized by the early settlers because of their level and fertile characteristics and their accessibility to transportation. It was the practice of the proprietaries to survey for themselves the islands which lay within their purchases from the Indians.<sup>129</sup> Following the Revolution, islands were withheld from sale on the usual terms and were offered instead at an appraisal which would take into account the soil, wood, fisheries, distance from the mainland, and other advantages.<sup>130</sup> In 1913, the Governor recommended in his message to the General Assembly that the state retain title to all unpatented islands, as it might want to make use of streams and islands in connection with the conservation of resources.<sup>131</sup> When his recommendation failed to produce legislation, Governor Tener carried his recommendation into effect by refusing to join in the appointment of appraisers to fix the price of islands for which applications were then pending. This practice has continued, but the statutory authority to patent islands has never been withdrawn.<sup>132</sup>

References have been made at several places to the Board of Property, which has supervisory functions over the activities of the Land Office. The Board of Property is composed of the Secretary of Internal Affairs, the Attorney General, and the Secretary of the Commonwealth.<sup>133</sup> Its jurisdiction is derived largely from that of a similar board constituted by the proprietaries, and comprises two general heads: the first, to make special orders in matters of difficulty or irregu-

127. Act of June 27, 1913, P.L. 665; PA. STAT. ANN. tit. 64, §§ 291-95.

128. Act of May 21, 1943, P.L. 304; PA. STAT. ANN. tit. 64, § 261.

129. SERGEANT, *VIEW OF THE LAND LAWS OF PENNSYLVANIA* 191 (1838).

130. Islands in the Susquehanna and its branches were made patentable under the Act of March 6, 1793, 6 SMITH'S L. 93. Those in the Delaware, Ohio, Allegheny and their branches were warrantable under the Act of Jan. 27, 1806, 4 SMITH'S L. 268. A minimum price of \$8.00 per acre was fixed for islands in the Susquehanna. Some further definitions and restrictions are given in an Act of April 2, 1822, 7 SMITH'S L. 594, relating to islands in the Susquehanna. Sand and gravel bars were not to be patented. Islands must be at least four feet above common low water, contain at least forty perches of ground exclusive of rocks, and be capable of producing a crop of grain or esculent root in season. See PA. STAT. ANN. tit. 64, §§ 221-35 (1941).

131. [1913] PA. MESSAGE OF THE GOVERNOR 13.

132. [1933] PENNSYLVANIA MANUAL 197.

133. The board was established by Act of April 5, 1782, 2 SMITH'S L. 13, to replace a similar board established under the proprietaries. The original membership has been changed through the years until the Secretary of Internal Affairs assumed the duties of the Surveyor General in 1874. The present membership is stated in the Administrative Code of 1929, § 406, PA. STAT. ANN. tit. 71, § 116 (1942).

larity when the powers of the Secretary of Internal Affairs are limited; and the second, to try questions of interferences.<sup>134</sup> The first heading includes power to order a resurvey or to direct the correction and return of a survey irregularly made. This jurisdiction is likely to be invoked when land is claimed under office rights which fail adequately to describe the land.<sup>135</sup> Cases of interference are brought before the board either by caveat, a writ obtained by a person wishing to oppose the granting of a patent because of a prior claim, by a return of survey showing an interference, or by the rejection of an application on the ground that the land is not vacant and unappropriated.<sup>136</sup> A person claiming title by settlement and improvement is not entitled to file a caveat unless he deposits the purchase price and makes application for the land. The purchase price is returned if he is unsuccessful.<sup>137</sup> The decisions of the Board of Property are final unless the losing party brings an action of ejectment within three months.<sup>138</sup> Persons may appear before the Board of Property by counsel, and have the right to call witnesses.<sup>139</sup>

The Land Office has one further function which has not been considered in this paper because it does not relate to the origin of private title. It is made the repository of all deeds and muniments of title to land appropriated or acquired by the Commonwealth and its agencies.<sup>140</sup> Related to this function is jurisdiction recently conferred on the Board of Property to determine all cases against the Commonwealth for lands occupied or claimed by the Commonwealth.<sup>141</sup> From decisions in such cases, an appeal lies to the Court of Common Pleas of Dauphin County sitting in Commonwealth cases. The Bureau of Land Records is also the repository of the original titles of the Commonwealth and the proprietaries, including the boundary agreements, to the extent that they have been preserved, and of many other documents of great historical interest.<sup>142</sup>

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134. Administrative Code of 1929, § 1207; PA. STAT. ANN. tit. 71, § 337 (1942).

135. See note 99 *supra*.

136. *Harper v. Farmers' & Mechanics' Bank*, 7 W. & S. 204 (Pa. 1844), *Ege v. Sidle*, 3 Pa. 115, 123 (1846). Appeal provided when the report of the Secretary concludes that land is not vacant or unappropriated, § 1, Act of May 3, 1909, P.L. 413; PA. STAT. ANN. tit. 64, § 321 (1941).

137. Act of April 14, 1874, P.L. 58; PA. STAT. ANN. tit. 64, § 363 (1941).

138. Act of April 3, 1792, 3 SMITH'S L. 74; PA. STAT. ANN. tit. 64, § 421 (1941). In order to give jurisdiction, it was further provided that the successful party would be deemed to be in possession of the property.

139. For regulations, see [1933] PENNSYLVANIA MANUAL 199. This is the last edition in which detailed regulations appear.

140. Administrative Code of 1929, § 1203; PA. STAT. ANN. tit. 71, § 333 (1942).

141. Act of July 29, 1953, P.L. 1023; PA. STAT. ANN. tit. 71, § 337 (Supp. 1958).

142. See [1957-58] PENNSYLVANIA MANUAL 317; Administrative Code of 1929, § 1203; PA. STAT. ANN. tit. 64, § 333 (1942).

One cannot undertake a study such as this without inquiring after methods for the improvement of the law. There appears to be inequality in treatment between the holders of office rights and those who claim title by settlement and improvement. Even if the fees were commuted, however, they would have to be larger in the case of improvement rights because a check of the records for interferences must be made, which is not the case with office rights. Inasmuch as it is believed that all land has been appropriated in one way or another, it would seem advisable to confirm these titles by a statute of limitations specifically barring the Commonwealth. In order to prevent the acquisition of title to lands appropriated by the Commonwealth or acquired by it, such a statute could bar only claims for the purchase price of lands appropriated before March 28, 1905, the day after which public lands could be purchased only for their full current value to be determined by appraisal. In favor of such a measure, it could be argued that the cost of maintaining the Bureau of Land Records is greater than the revenue from the patenting of lands, and that this would make it possible to close down the bureau and to transfer the records to the archives.

In reply to this suggestion, it may be said that the elimination of the patent from the chain of title will not in any way shorten the period of title search, while retention of the patent as a basic document definitely fixes the time beyond which a search need not be made. The patent should be eliminated only if a constitutional quiet title act can eliminate the need for all searches beyond a fixed period. Because such an act could not bar contingent interests which have not ripened into a right of entry, it would be either unconstitutional or ineffective. If it is found necessary to adopt a system like the Torrens system, it will be necessary to preserve the existing records in order to permit the type of title search which must precede a registration proceeding.

The recording system in Pennsylvania is sound and workable. It would be better to strengthen it than to discard it. The present machinery in the Bureau of Land Records would be greatly strengthened if the warrantee tract maps were to be completed, and the task could be accelerated if a greater appropriation were made for this purpose. In all other respects, there are adequate procedures for correcting deficiencies in original titles, and these appear to be administered efficiently.