

# THE RISE AND FALL OF BLACK REAL PROPERTY OWNERSHIP:

## A REVIEW OF BLACK LAND OWNERSHIP FROM THE ROUGH BEGINNINGS TO THE GREAT GAINS; DISPOSSESSION VIA THE USE OF "LEGAL" TACTICS AND THE PUSH FOR BLACK LAND RETENTION

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Dispossession from the land has affected all small farms; however, land loss is most severe among black landowners. As black-owned land values continue to escalate, it becomes even more prone to purchase by land speculators and developers. The critical situation of black land loss is surpassed only by the profound impact land ownership has upon the black community.

This paper represents an interdisciplinary study examining the historical relationship of past and present laws and their impact upon black landownership. A key section of this paper focuses upon Georgia statutory law. In addition, ideas about potential remedies and retention of black-owned lands are also explored.

### HISTORICAL BACKGROUND

In 1865 an Act to Establish a Bureau for the Relief of Freedmen, Refugees and Abandoned Land was passed.<sup>1</sup> The Act later became known as the "Freedmen's Bureau." The Bureau had "extraordinary jurisdiction, even though it never exercised its power fully. It made laws, executed them and interpreted them; it laid and collected taxes, defined and punished crimes and maintained and used military force for the accomplishment of its various ends."<sup>2</sup> It was on the basis of the Freedmen's Bureau Act that black folk formed their dreams of "40 acres and a mule."<sup>3</sup> "But the vision of 'forty

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1. In relevant part the Act states: There is hereby established in the War Department . . . a bureau of refugees, freedmen, and abandoned lands to which, shall be committed, as hereinafter provided, the supervision and management of all abandoned lands. . . . The said bureau shall be under the management and control of a commissioner to be appointed by the President. . . . That the commissioner, under the direction of the President, shall have authority to set apart, for use of loyal refugees and freedmen, such tracts of land within the insurrectionary states as have been abandoned, or to which the United States shall have acquired title by confiscation, or sale, or otherwise, and every male citizen, whether refugee, or freedman, as aforesaid, there shall be assigned not more than forty acres of such land. Washington & Favors, *Forty Acres, No Mule: A Survey of Land Laws and How They Affect Blacks in Two Southeastern States*, 5 N.C. CENT. L. REV. 36 (1973) [hereinafter cited as Washington & Favors] (quoting AN ACT TO ESTABLISH A BUREAU FOR THE RELIEF OF FREEDMEN, REFUGEES AND ABANDONED LAND, 13 STAT. 307, Mar. 3, 1865).

2. Washington & Favors, *supra* note 1 at 36.

3. *Id.*

acres and a mule<sup>7</sup>—the righteous and reasonable ambition to become a landowner, which the nation had all but categorically promised the freedmen—was destined in most cases to bitter disappointment.”<sup>4</sup>

The establishment of the Freedmen's Bureau was short lived; only months after it was formed, President Andrew Johnson, in response to the black acquisition of “free” land confiscated from Confederates, “declared a general amnesty from confiscation”<sup>5</sup> of federally seized land. It was largely due to the failure of an effective land reform movement during reconstruction that blacks were left without a land base.<sup>6</sup> Even with the lack of success of the Freedmen's Bureau<sup>7</sup> and executive action militating against them,<sup>8</sup> blacks continued to actively engage in their pursuit to acquire land; although this had to be done primarily through the acquisition of small plots. “But no one—and this is the great tragedy of Reconstruction—no one satisfied the hunger for land.”<sup>9</sup> For the most part, the efforts of blacks attempting to acquire land were thwarted by whites interested in ensuring that newly freed slaves “kept their place.” “The sale of land to blacks was discouraged, and whites who agreed to sell land (usually at inflated prices) or to provide necessary financing ‘were not uncommonly threatened with physical violence.’”<sup>10</sup>

Even when local whites did approve of the sale of land to a black, he had to meet several prerequisites:

In addition to a history of hard work and credit-worthiness, a prospective black buyer had to be considered “safe”, and to “know his place.” Those blacks who became landowners often were chosen by whites who, in a paternalistic relationship, “sponsored” or assisted a favored black farmer in acquiring his own parcel of land. Otherwise, blacks were most successful if they had all cash, or large sums of money accompanied by an offer to pay off the remaining debt in an inordinately short amount of time. But these conditions were not necessarily sufficient. On occasion, blacks were known to offer double the asking price for a piece of land, and still be refused; the prospective black buyer was not permitted to purchase sought-after land.<sup>11</sup>

Furthermore, blacks were restricted to purchasing only the least desirable land, i.e., land located farthest from major roads and that which was least fertile. Nevertheless, despite these barriers black land acquisition began to rise in 1875.

#### THE RISE AND FALL OF BLACK LAND OWNERSHIP 1875-1969

In a work entitled *The Negro in the South*, W.E.B. DuBois and Booker

4. W.E.B. DuBois, *THE SOULS OF BLACK FOLK* 35 (1953).

5. U.S. COMM'N ON CIVIL RIGHTS, *THE DECLINE OF BLACK FARMING IN AMERICA* 15 (1982) [hereinafter cited as *THE DECLINE OF BLACK FARMING*].

6. Nelson, *Black Political Power and the Decline of Black Land Ownership*, 8 *THE REV. BLACK POL. ECON.*, 253, 255 (Spring 1978) [hereinafter cited as Nelson, *Black Political Power*].

7. W.E.B. DuBois, *THE SOULS OF BLACK FOLK* 35 (1953).

8. *THE DECLINE OF BLACK FARMING*, *supra* note 5 at 15.

9. L. BENNETT, JR., *BEFORE THE MAYFLOWER: A HISTORY OF THE NEGRO IN AMERICA* 1619 - 1964 188 (Revised ed. 1970).

10. *THE DECLINE OF BLACK FARMING*, *supra* note 5 at 16.

11. *Id.* at 22.

T. Washington estimated that blacks owned approximately three million acres of land in 1875, eight million in 1890, and twelve million in 1900.<sup>12</sup> By 1910 blacks had amassed nearly fifteen million acres.<sup>13</sup> The majority of black land acquisitions may be attributed to the purchase of small plots of property over an extended period of time.<sup>14</sup> The consensus among writers in the area of black land loss and retention is that black land ownership in the South reached its pinnacle in 1910.<sup>15</sup>

After 1910, black held land began its course of sharp decline. The only period where there was any increase was the period from 1940-1950; such increases were largely due to the prosperous conditions of World War II.<sup>16</sup> Among the many reasons cited for the precipitous decline of black land ownership are: black migration from the South to northern and western cities,<sup>17</sup> general illiteracy among rural blacks,<sup>18</sup> and chicanery perpetrated by unscrupulous lawyers, land speculators and county officials.<sup>19</sup> Other isolated causes of the demise of black land tenure are "the emergence of white racism and Jim Crow legislation, the fall of the cotton prices, the coming of the boll weevil, the lack of adequate credit at reasonable rates, the general erosion and depletion of the soil."<sup>20</sup> A combination of the above factors have operated to decrease black land holdings to fewer than six million acres.<sup>21</sup>

#### THE IMPACT OF BLACK LAND OWNERSHIP ON POLITICAL PARTICIPATION

A discussion of the relationship of black land ownership to black political participation is necessary to illustrate the correlation between political powerlessness and the lack of control over land. Further, it is important to address this topic because property is generally looked upon only as an equity base and not as a political tool.

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12. THE NEGRO IN THE SOUTH: HIS ECONOMIC PROGRESS IN RELATION TO HIS MORAL AND RELIGIOUS DEVELOPMENT 105 (G. Jacobs ed. 1907).

13. *Id.*

14. *Id.* See also, R. BROWNE, ONLY SIX MILLION ACRES: BLACK OWNED LAND IN THE RURAL SOUTH (1973) [hereinafter cited as BROWNE, ONLY SIX MILLIONS ACRES]; THE BLACK RURAL LANDOWNER—ENDANGERED SPECIES: SOCIAL, POLITICAL, AND ECONOMIC IMPLICATIONS (L. McGee & R. Boone eds. 1979) [hereinafter cited as THE BLACK RURAL LANDOWNER]; Nelson, *Black Political Power*, *supra* note 6 at 253.

15. THE BLACK RURAL LANDOWNER, *supra* note 14 at xviii.

16. By 1966, the black population had increased to 21.5 million and two significant geographic shifts had taken place. The proportion of blacks living in the South had dropped 55 percent and about 69 percent of all blacks lived in metropolitan areas compared to 64 percent of whites. The total black population more than doubled from 1910 to 1966, the number living in cities rose five-fold (from 2.6 million to 14.8 million) and the number outside the South rose eleven-fold (from 880,000 to 9.7 million), REPORT OF THE NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS 239 (1969).

17. THE BLACK RURAL LANDOWNER, *supra* note 14 at 19.

18. "Racial discrimination in public education played a significant role in the subordination of black farmers. High rates of illiteracy among blacks facilitated their exploitation as sharecroppers and tenant farmers and restricted their ability to rise to the level of farm owners. For example, in North Carolina in 1922, 58 percent of the black adult sharecroppers and 64 percent of the black adult tenant farmers were illiterate. In contrast, 90 percent of black farm owners could read and write, suggesting a high correlation between literacy and landownership." THE DECLINE OF BLACK FARMING, *supra* note 5 at 32.

19. Washington & Favors, *supra* note 1 at 37-38.

20. *Id.*

21. BROWNE, ONLY SIX MILLION ACRES, *supra* note 14 at 3.

During the era of the "Black Manifesto"<sup>22</sup> many of the socio-economic and political problems eating away at the base of black people's struggle were addressed. Land ownership was rarely, if at all, looked upon as a possible foundation for "Black Power." "The relationship between black land ownership and political power is one that has received far too little in the analysis of the social, economic and political position of Blacks in American society."<sup>23</sup>

The general relationship between land ownership and political power is highlighted by the fact that some states went so far as to make property ownership a prerequisite to voting in certain elections. For example, the state of Louisiana restricted the right to vote on whether a municipality could issue certain bonds to property owners.<sup>24</sup> The United States Supreme Court in *Cipriano v. City of Houma*<sup>25</sup> held that such a restraint, by the state of Louisiana, on the fundamental right to vote contravened the fourteenth amendment. Because of the importance of the right to vote, the Court employed the compelling governmental interest test and rejected the state's contention that the "special pecuniary interest" of property owners justified the exclusion of non-property owners.<sup>26</sup>

In *Turner v. Fouche*,<sup>27</sup> black residents of Taliafero County, Georgia<sup>28</sup> brought an action challenging the constitutionality of a statutory scheme used in Taliafero and many other Georgia counties to select juries and members of the local school boards. The scheme provided for a county school board of five freeholders selected by the grand jury. The state argued that anyone, who seriously desired to serve on the school board, would be able to obtain at least a square inch of land in order to become eligible to serve on the school board.<sup>29</sup> The Supreme Court disagreed stating that "it seems impossible to discern any interest the qualification can serve."<sup>30</sup> The *Turner* court went on to hold "that the . . . freeholder requirement for membership on the county board of education amounts to [nothing] more than invidious discrimination."<sup>31</sup>

"The denial of black people of an equity base in land ownership has consistently been at the heart of black economic impoverishment and political powerlessness in the United States."<sup>32</sup> It is reported that in the South,

22. "The manifesto called for reparation of half a billion dollars as compensation for 'centuries we have been forced to live as colonized people in the United States.' The reparations were to be used for building black ability to make further demands on the white society and to fund institutions which could themselves improve the standard of living of black Americans." 3 EBONY PICTORIALS HISTORY OF BLACK AMERICA 113 (1971).

23. Nelson, *Black Political Power*, *supra* note 6 at 253.

24. LA. REV. STAT. ANN. § 39:501 (West 1950). *See also* LA. REV. STAT. ANN. §§ 33:4258, 39:508 (West 1950).

25. 395 U.S. 701 (1969) (per curiam).

26. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-45 (1978).

27. 396 U.S. 346 (1969).

28. In 1960 blacks owned approximately 12.5 percent of all the land in Taliafero County, Georgia. Fisher, *Rural Ownership of Land by Blacks in Georgia: 1920 and 1960*, 9 THE REV. BLACK POL. ECON., 98 (Spring 1978).

29. 296 U.S. 346, 363 (1969).

30. *Id.*

31. *Id.* at 364.

32. Nelson, *Black Political Power*, *supra* note 6 at 253.

land possibly constitutes the largest equity base under black control.<sup>33</sup> A lack of control over a significant portion of real estate has made black people the primary target of discrimination and oppression.<sup>34</sup>

The lack of black land ownership mirrors the political powerlessness of blacks in the southeastern United States.<sup>35</sup> One study found that land owning blacks tend to be "more self-reliant, better off nutritionally and more secure psychologically" than blacks who do not own land.<sup>36</sup> Further, land owning blacks are apt to be far more politically active than non-owners: "black land owners [tend] . . . to be more civic minded, more active in social and political affairs, have greater sense of self-worth, and enjoy the pride and prestige of land ownership."<sup>37</sup> The following survey by the Farm Security Administration (hereinafter referred to as FSA) reflects a great disparity in civil rights participation between landowning and non-landowning blacks:

EXTENT OF INVOLVEMENT OF FSA PROJECT LANDOWNERS AND BLACK  
TENANTS IN VARIOUS CIVIL RIGHTS ACTIVITIES RANKED BY  
DEGREE OF "DANGEROUSNESS"<sup>38</sup>

ACTIVITY	FSA PROJECT LANDOWNERS N=177	TENANTS N=91
Attended civil rights organization meetings	73.4%	39.6%
Joined a civil rights organization	49.2	19.8
Worked on voter registration	24.9	6.6
Signed a petition protesting actions by local whites	25.4	2.2
Ran for political office	19.2	7.7
Had an outside civil rights worker living in home	12.4	1.1

As the chart indicates, "the FSA landowners outdistanced the tenants on virtually every indicator of civil rights movement involvement, and the disparity between the two groups was greater the more dangerous the activity."<sup>39</sup>

33. Turner, *Blacks in the Cities: Land and Self-Determination*, 1 THE BLACK SCHOLAR 13 (April 1970).

34. Nelson, *Black Political Power*, *supra* note 6 at 253.

35. BROWNE, ONLY SIX MILLION ACRES, *supra* note 14 at 24-25.

36. THE DECLINE OF BLACK FARMING, *supra* note 5 at 5 (quoting U.S. DEP'T OF COMMERCE, LAND AND MINORITY ENTERPRISE: THE CRISIS AND THE OPPORTUNITY 34 (1976) [hereinafter cited as LAND AND MINORITY ENTERPRISE]).

37. THE DECLINE OF BLACK FARMING, *supra* note 5 at 6 (citing LAND AND MINORITY ENTERPRISE, *supra* note 36 at 47).

38. THE BLACK RURAL LANDOWNER, *supra* note 14 at 180.

39. *Id.*

## THE PRIMARY LEGAL DEVICES TO DEPRIVE BLACKS OF LAND

### A. *Partition Sales*

Partition sales take place when one or more heirs desires to sell his or her portion of the land, but the heirs are unable to come to terms as to how the land can be divided equitably so that a share can be sold.<sup>40</sup> Partition sales, as they relate to heir property, should be of particular concern to blacks because the Emergency Land Fund (hereinafter referred to as ELF), a private non-profit organization which assists black farmers, through a survey discovered that twenty-seven percent of all black-owned land plots in the southeastern United States was heir property.<sup>41</sup>

In Georgia, the statutes governing heir property, like those of many states, grant joint tenants and tenants in common who have an interest in the land the right to bring a partition action.<sup>42</sup> The Georgia statute governing statutory partition in relevant part provides:

When two or more persons are common owners of lands and tenements, whether by descent, purchase, or otherwise, and no provision is made, by will or otherwise, as to how such lands and tenements shall be divided, any one of such common owners may apply by petition to the superior court of the county in which such land and tenements are located for a writ of partition which shall set forth plainly and distinctly the facts and circumstances of the case, shall describe the premises to be partitioned, and shall define the share and interest of each of the parties therein.<sup>43</sup>

Once the application for partition has been submitted and proof of notice<sup>44</sup> has been given, the court has the duty of examining the petitioner's title and share of the premises to be partitioned and must direct the clerk of the superior court to issue a writ of partition.<sup>45</sup> The court has the discretion to order a sale of the land involved whenever it is convinced that an equitable division of the land is not possible due to improvements thereon or because the land has escalated in value due to mining, the discovery of precious metals, or because the land value will depreciate if partitioned.<sup>46</sup>

A large amount of black-owned land is heir property because many black land owners die intestate.<sup>47</sup> Since the intestate's estate is never distributed, title to the property remains in the name of the deceased and all the heirs who have an interest in the property. The various undetermined interests clouds title and the property cannot be alienated without the approval of all the heirs.<sup>48</sup> Further, the person occupying the land may not know the identities of the heirs who possess an interest in the property. Several generations may pass, yet the title to the land will remain in the name of the long deceased ancestor.

40. THE DECLINE OF BLACK FARMING, *supra* note 5 at 66.

41. *Id.* (citing EMERGENCY LAND FUND, THE IMPACT OF HEIR PROPERTY ON BLACK RURAL LAND TENURE IN THE SOUTHEASTERN REGION OF THE UNITED STATES 62 (Jan. 1981) [hereinafter cited as IMPACT OF HEIR PROPERTY]).

42. GA. CODE ANN. § 44-6-160 (1982).

43. *Id.*

44. *Id.* at § 44-6-163.

45. *Id.*

46. *Id.* at § 44-6-167.

47. BROWNE, ONLY SIX MILLION ACRES, *supra* note 14 at 54.

48. *Id.*

"This clouds the title, and no mortgage can be gotten, no part sold or otherwise disposed of without the consent of all the owners."<sup>49</sup> This can be expensive, extremely time consuming and often results in the entire property being lost in the following way:

A suit for partition is brought to divide the land among the heirs and give each title to his own piece. The number of heirs and the size of the property is generally such that it is impractical or impossible to actually divide the land. Therefore, the land is sold and the proceeds are divided among the heirs in in [sic] the proportion of their interest in the land. At such partition sale, the only person with enough assets to buy the land is a white man and because there is usually no other bidder, he gets the land for a fraction of its market value. A variation of this procedure, where the white man instigates the partition after having gained a small interest, has been used, especially in the past, to gain black-owned land. This is sometimes known as legal theft.<sup>50</sup>

Because a large amount of black-owned land is heir property, not only are there problems with unmarketable titles, but, more significantly, the value of such property is grossly depressed.

Partitions are commonly used by persons who have bought out one of the co-tenants with the intent to force a sale of the land in order to acquire the entire plot.<sup>51</sup> When one of the heirs has property that has been in a family for generations it is invariably lost to those "who make it their business to keep abreast of what properties are going to auction and who attend the auctions prepared to buy."<sup>52</sup> "[T]he purchaser[s] at these . . . sales are almost always white persons, frequently local lawyers or relatives of the local officials. . . ."<sup>53</sup>

Surprisingly, on July 17, 1978, Alabama broke new ground in the area of heirship property. That state's legislature enacted a statute which allows heir owners to purchase the departing heir's share at a price set by a court appointed appraiser. Under the Alabama law a partition sale will be held only if "none of the heirs wish to purchase the departing heir's interest, or if the heirs fail to meet the deadline for payment."<sup>54</sup> The statute provides that:

Upon filing of any petition for a sale for division of any property, real or personal, held by joint owners or tenants in common, the court shall provide for the purchase of the interests of the joint owners or tenants in common filing for the petition or any others named therein who agree to the sale by the other joint tenant in common or any one of them. Provided that the joint owners or tenants in common interested in purchasing such interests shall notify the court of same not later than 10 days prior to the date set for trial of the case and shall be allowed to purchase whether default has been entered against them or not.<sup>55</sup>

Alabama courts have held the statute has two purposes: to preserve family estates by preventing title from coming into the hands of a stranger<sup>56</sup>

49. *Id.*

50. *Id.*

51. Washington & Favors, *supra* note 1 at 41.

52. BROWNE, ONLY SIX MILLION ACRES, *supra* note 14 at 53.

53. *See id.* Although this statement was made in reference to tax sales it is equally applicable to partition sales.

54. THE DECLINE OF BLACK FARMING, *supra* note 5 at n.74.

55. ALA. CODE § 35-6-100 (Supp. 1980).

56. Scott Paper Co. v. Griffin, 409 So. 2d 1375 (Ala. 1982).

and to protect persons from being dispossessed of their property via a forced sale.<sup>57</sup> Georgia and other states should, in order to preserve family estates and to protect uninformed heirs from unscrupulous land speculators, follow the Alabama lead and adopt similar legislation.

### B. *Tax Sales*

Georgia law allows the state and its municipalities to issue an execution on property within the state when the owner fails to pay the assessed taxes.<sup>58</sup> The United States government also has the power to place a lien against property for the failure to pay federal taxes.<sup>59</sup> Whenever any property is levied upon by the sheriff for delinquent taxes, it is the sheriff's duty to advertise the property for sale and to give twenty days written notice to the owner.<sup>60</sup>

The tax collector is responsible for issuing executions for nonpayment of taxes.<sup>61</sup> A taxpayer, in order to protest any undue taxes levied against his property, may submit an affidavit of illegality which allows for a judicial determination of the issue.<sup>62</sup> Georgia has a seven year statute of limitations on tax executions.<sup>63</sup> An owner of any property sold at a tax sale has a right of redemption.<sup>64</sup> This right is conditioned upon the payment of the redemption price within twelve months from the date of the sale.<sup>65</sup> A deed obtained by a purchase at a tax sale is as valid as one made pursuant to an execution issued by the superior court.<sup>66</sup>

An appreciable amount of black-owned land is lost through tax sales because the owner is unaware that he even owes the tax, not to mention that his property has been levied on by the sheriff and will be auctioned off at a tax sale. This unawareness may be "because the owner is elderly and forgetful, because he never received a tax bill or notice of the delinquency sale, because he thought he had paid the taxes when in fact he was paying some other type of payment, or because the owner has moved away."<sup>67</sup>

There are documented instances where blacks have had their land sold at tax sales solely due to fraudulent practices of their white lessees. "Cases were also reported of blacks having leased their land to whites with the understanding that the tenant would pay the taxes, whereas the tenant [would] deliberately fail to pay the taxes, conceal the tax notices, and ultimately purchased the property cheaply when it went up for auction."<sup>68</sup>

The mass exodus of blacks from the south to the north and west, in many instances led to absentee ownership, or placed the burden on elderly

57. *Prince v. Hunter*, 388 So. 2d 546 (Ala. 1980); *Madison v. Lambert*, 399 So. 2d 840 (Ala. 1981).

58. GA. CODE ANN. § 48-3-1 (1982).

59. I.R.C. § 6321 (1982). This statute accords the U.S. a lien upon all property, and rights to property, whether real or personal, belonging to the taxpayer who refuses to pay his taxes.

60. GA. CODE ANN. § 48-3-9 (1982).

61. *Id.* at § 48-3-3.

62. *Id.* at § 48-3-1.

63. *Id.* at § 48-3-21.

64. *Id.* at § 48-4-21.

65. *Id.* at § 48-4-40.

66. *Id.* at § 48-4-6.

67. BROWNE, ONLY SIX MILLION ACRES, *supra* note 14 at 52-53.

68. *Id.* at 53.

persons to farm the land and pay the taxes. Those factors along with the deceptive practices of white tenants have made tax sales a major reason why blacks have lost significant amounts of real property.

### C. *Mortgage Foreclosure*

"A mortgage is in form of conveyance of an estate on condition; the estate purports to be a defeasible fee which terminates upon payment of a specific debt."<sup>69</sup> A legally binding mortgage note constitutes a personal obligation, by the borrower, to repay the loan. Foreclosure is a device exercisable by a lender, in the event of default by the borrower, which allows the lender to sell the mortgaged property to satisfy the indebtedness.<sup>70</sup>

In 1903, W.E.B. DuBois recognized the manner in which mortgages were drafted to deprive unwary blacks of their real property. He wrote that:

The crop-lien system which is depopulating the fields of the South is . . . the result of cunningly devised laws as to mortgages, liens, and misdemeanors, which can be made by conscienceless men to entrap and snare the unwary until escape is impossible, further toil a farce, and protest a crime. I have seen, in the Black Belt of Georgia, an ignorant, honest Negro buy and pay for a farm in installments three separate times, and then in the face of the law and decency the enterprising American who sold it to him pocketed the money and deed and left the black man landless, to labor on his own land at thirty cents a day. I have seen a black farmer fall in debt to a white storekeeper, and that storekeeper go to his farm and strip it of every single marketable article,—mules, ploughs, stored crops, tools, furniture, bedding, clocks, looking-glass,—and all this without a sheriff or officer, in the face of the law for homestead exemptions, and without rendering to a single responsible person any accounting or reckoning.<sup>71</sup>

Although in modern times most foreclosures are the result of economic hardships rather than blatant chicanery "they are a major cause of blacks losing their land."<sup>72</sup>

Georgia is a lien-theory state;<sup>73</sup> therefore, "[a] mortgage . . . is only security for a debt and passes no title."<sup>74</sup> No particular form is necessary to create a mortgage, but "a mortgage must clearly indicate the creation of a lien and must specify the debt for which it is given and the property upon which it is to take effect."<sup>75</sup>

Mortgages on real property may be foreclosed by any person who is legally entitled to foreclose the mortgage.<sup>76</sup> The person must petition the superior court of the county in which the mortgaged property is located, and indicate in the petition the amount of his demand, and include a description of the mortgaged property.<sup>77</sup> After the petition is filed, the court grants a rule which directs that the principal, interest, and cost be paid into the court.<sup>78</sup> Publication of the rule must be made twice a month for two months

69. GEORGIA REAL ESTATE LAW § 20-2 (1972).

70. AIKEN & WARD, GEORGIA FORECLOSURES & CONFIRMATION § 2-6 (1979).

71. W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 127-28 (1953).

72. THE BLACK RURAL LANDOWNER, *supra* note 14 at 121.

73. GEORGIA REAL ESTATE LAW § 20-1 (1972).

74. GA. CODE ANN. § 44-14-30 (1982).

75. *Id.* at § 44-14-31.

76. *Id.* at § 44-14-180.

77. *Id.*

78. *Id.*

or served on the mortgagor or his attorney at least thirty days before the money is to be paid to the court.<sup>79</sup>

While many mortgage foreclosures are legally justified because of the action or inaction of the property owner, there are instances where the mortgagor does not know why his property is being foreclosed. For example:

A recent case involved an illiterate black man who, during an emergency, mortgaged his property to pay for some groceries worth only a small fraction of the value of his land. But the mortgage was duly foreclosed and he lost his property without fully understanding what was taking place.<sup>80</sup>

Such unconscionable practices, in all likelihood, were due to the fear of objecting to using large sums of property as collateral for small loans and the widespread illiteracy among blacks in the South.<sup>81</sup>

### DOES SECTION 1983 PROVIDE A REMEDY?

Section 1983 provides that:

Every person who, under color of any statute . . . of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.<sup>82</sup>

Section 1983 originally was Section 1 of the Civil Rights Act of 1871 which was patterned after Section 2 of the Civil Rights Act of 1866.<sup>83</sup> Section 1983 was enacted as an enforcement mechanism for the fourteenth amendment.<sup>84</sup> "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the Constitution and laws of the Nation."<sup>85</sup>

The purpose of Section 1983 is reflected in the legislative history of the Act. Senator Osborne stated that it is the duty of the United States government to step in when the states refuse to protect the rights of their citizens.<sup>86</sup> In reference to the inaction of state officials in protecting minority rights Representative Perry stated: "Sheriff's, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices."<sup>87</sup>

Local government officials, even today, have buried their heads in the sand and allowed black landowners to be taken advantage of. The ELF reported that in one state a "probate judge who 'entered public office owning an insignificant amount of land' . . . now owns an 'estimated 15,000 acres in a county that is eighty percent black.'"<sup>88</sup>

Under Section 1983, willfulness is not a prerequisite to imposing liabil-

79. *Id.*

80. BROWNE, ONLY SIX MILLION ACRES, *supra* note 14 at 56.

81. *See generally*, THE DECLINE OF BLACK FARMING, *supra* note 5 at 14-43.

82. 42 U.S.C. § 1983 (1982).

83. *Mitchum v. Foster*, 407 U.S. 225, 238 (1972).

84. *Id.*

85. *Id.* at 239.

86. CONG. GLOBE, 42d Cong., 1st Sess. 653 (1871).

87. *Id.* at 1st Sess. App 78.

88. THE DECLINE OF BLACK FARMING, *supra* note 5 at 68 n.78 (quoting IMPACT OF HEIR PROPERTY, *supra* note 41 at 291).

ity on a defendant who deprives a plaintiff of his rights: "Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."<sup>89</sup> Section 1983 also imposes liability for damages upon those officials who, in carrying out their official duties, violate the constitutional rights of an individual.<sup>90</sup>

In *Earnest v. Lowentritt*<sup>91</sup> a black family asserted a Section 1983 civil rights claim arising from the foreclosure of their mortgage in 1940. They contended that "their pleadings should be construed to allege a conspiracy between the judge and the defendant sufficient enough to satisfy the state action requirement of § 1983. . . ."<sup>92</sup> The court stated that "[p]rivate acts or conduct may incur liability under § 1983 if the individual is a 'willful participant in joint action with the State or its agents.'"<sup>93</sup> The court added that state action does not exist merely because a state provides access to its tribunals to private litigants.<sup>94</sup> However, "a private party acts under color of state law only when there is corruption of the judicial power by the private litigant."<sup>95</sup> By way of example the court cited *Dennis v. Sparks*,<sup>96</sup> in which the Supreme Court held that private litigants in a state court action who bribed a judge and obtained an injunction which deprived their opponents of their property acted under "color of law."

The *Earnest* case appears to offer a glimmer of hope for those deprived of property by local officials or by private individuals in collusion with local officials who are acting under "color of law." *Earnest* seems to say that if the plaintiff can prove collusion or corruption by a public official (this is of particular importance in cases involving partition, tax and foreclosure rules) with a private litigant a Section 1983 action may provide them with a remedy.

#### MEANS OF RETAINING BLACK-OWNED LAND: PROPOSED SOLUTIONS

The precipitous decline of black people's greatest equity base has had a devastating socio-economic and political impact upon the black community. "[T]he rate of decline of black-operated farms over the last decade was alarming—57 percent—a rate loss 2½ times that for white-operated farms."<sup>97</sup> This decline is due primarily to the racism embedded in our nation.<sup>98</sup>

The Farmer's Home Administration's (hereinafter referred to as FmHA) mission is to support and halt the declining number of farmers in America. It has "a budget for farm loans that exceeded \$6 billion in the Fiscal Year 1981."<sup>99</sup> However "[i]n 1981 blacks received only 2.5 percent of

89. *Monroe v. Pape*, 365 U.S. 167, 187 (1960).

90. *Monell v. Dep't of Social Services of New York*, 436 U.S. 658 (1978).

91. 690 F.2d 1198 (5th Cir. 1982).

92. *Id.* at 1199.

93. *Id.* at 1200 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)).

94. *Id.*

95. *Id.*

96. 449 U.S. 24 (1980).

97. THE DECLINE OF BLACK FARMING, *supra* note 5 at 176.

98. *Id.*

99. *Id.* at 178.

the total dollar amount loaned through FmHA's farm credit programs."<sup>100</sup> Consequently, Congress should review FmHA and United States Department of Agriculture (hereinafter referred to as USDA) loan programs as to their disproportionate impact on black-operated farms. The FmHA and USDA's Office of Equal Opportunity should be required to oversee the lending programs of those agencies with the same degree of scrutiny with which the Equal Employment Opportunity Commission (hereinafter referred to as EEOC) reviews the hiring practices of covered employers.<sup>101</sup>

Moreover, the FmHA should ensure that its funds are loaned to those who exhibit the greatest need. The United States Commission on Civil Rights suggests that the FmHA should:

- (1) require stricter "credit elsewhere" tests to determine if credit is available to applicants from other sources;
- (2) provide, for the purposes of eligibility, a more specific definition of a "limited borrower;"
- (3) require documented outreach to minority and small farmers informing them of special loan programs, particularly the limited resource loan program.<sup>102</sup>

#### A. *Incorporation of Heir Property*

This means of gaining control of heir property will allow any heir to petition a court of competent jurisdiction in the county in which the land is located to form a corporation and vest title of the property in the corporation. The corporation will then issue shares of stock to each heir in proportion to their interest. As with any corporation, a board of directors will be elected.<sup>103</sup>

The incorporation of heir property is a viable alternative because it would allow heirs to take advantage of traditional reasons for incorporating. For example, it would provide heirs with the professional expertise and guidance generally attributed to boards of directors.<sup>104</sup> Further, "there would be no requirement for agreement [among the heirs]. Unknown heirs and unlocatable heirs may be provided for in the distribution of stock."<sup>105</sup> The primary advantage of incorporating heir property is that incorporation would clean up titles to large parcels of land, as opposed to one tract at a time.

#### B. *Partition and the Setting Aside of Homesites*

This solution will permit "any owner of an undivided interest in heir property consisting of two or more acres, [to] petition the probate court in the county in which the property is located, to have not more than one heir

100. *Id.*

101. To oversee enforcement of Title VII, Congress established the EEOC, a presidentially appointed independent commission. The EEOC is empowered to undertake effective and coordinated enforcement of Title VII by issuing cease and desist orders and filing suit. DUNFEE, *BUSINESS AND ITS LEGAL ENVIRONMENT* 428 (1983).

102. *THE DECLINE OF BLACK FARMING*, *supra* note 5 at 183-84.

103. *Impact of Heir Property*, *supra* note 41 at 432-36.

104. *Id.* at 434.

105. *Id.*

set aside in fee simple, for a homesite."<sup>106</sup>

After the petitioner has received his homesite, his interest in the remaining portion of the heir property will be proportionately reduced to reflect the value of the homesite.<sup>107</sup> In the event the value of petitioner's homesite exceeds the value of his undivided interest in the heir property, petitioner will be required to pay the difference to the remaining heirs.<sup>108</sup>

This procedure is viable because only enough land is partitioned for a homesite, the land remaining stays intact. Therefore, it would still be possible to maintain tracts of land large enough for profitable agricultural ventures. On the other hand, setting aside homesites may be used by as many heirs as would be practicable by partitioning.<sup>109</sup>

### C. *Heirship Proceeding*

An heirship proceeding will give a tenant in common of heir property the opportunity to petition a local probate court in order to obtain the names of all of his co-owners. After obtaining the names of all the heirs, the property may be divided accordingly. The states' statutes governing notice and the appointment of guardians ad litem would be applicable.

This alternative would be relatively fast and inexpensive. "While it does not change the nature of heir property, it does remove the problem of the unknown heir."<sup>110</sup> Further, heirship proceedings would increase the alienability of the property and pave the way for further action by the heirs where agreement is required.<sup>111</sup>

## CONCLUSION

Many fled the dusty fields, meager wages and long work days in the sweltering southern sun for the glitter and the promise of a better life in northern cities. Some left behind their farms without tenants, others left land in the care of the elderly who were physically unable to make the land profitable. The cost of this mass exodus from the South was the loss of black-owned real property through foreclosures, tax sales and fraudulent practices of local whites. Today the loss of black-owned real property has reached a catastrophic level. A concerted effort must be made to halt the loss of black-owned real property and a similar effort must be put forth to acquire property for willing and able purchasers.

One such effort should be made by our black educational institutions. Black colleges and universities must continue to produce technicians who not only understand land and agricultural development, but lawyers and businessmen who are cognizant of the legal safeguards available to retain property and who can effectively manage such holdings. Black land-grant colleges have given more support to poorer black farmers than other educational institutions.<sup>112</sup> "Though the traditionally black land-grant institu-

106. *Id.* at 422.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 430.

111. *Id.*

112. THE DECLINE OF BLACK FARMING, *supra* note 5 at 53.

tions have been in existence since 1890, Congress appropriated no Federal funds for them to conduct agricultural research until 1972."<sup>113</sup> Congress must not only continue to support agricultural research at traditionally black institutions, it must also increase its funding of such research.

Nevertheless, black people must build their own support base. Federal funds are not only limited, but are almost always tied to political support and the party composition of Congress. Therefore, the black community should support such organizations as the Emergency Land Fund and Project Black Land in order to strengthen its land base.

The bare reality is that development and retention of land requires money. As funds from the government become scarce and more dependent upon political persuasion, a greater burden will be placed upon the black community to raise funds. Without concerted effort to prevent the loss of black-owned real property black people will soon be faced with the total and irrevocable erosion of one of society's most potent equity bases.

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113. *Id.*