# ARTICLES

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## PROPERTY LAW AND THE ORIGINS OF AUSTRALIAN EGALITARIANISM

A correspondent to the *Sydney Morning Herald* of 29 March 1856 wrote:

> [T]here is nothing which so generally strikes the imagination and engages the affections of mankind as the right of property, and yet there are very few who give themselves the trouble to consider the origin and foundation of that right.[1]

The letter was signed "An Australian". Unfortunately, however, our correspondent's words were plagiarised from Blackstone.[2] Perhaps "An Australian" reasoned that so few people in New South Wales had read Blackstone, his subterfuge would succeed. And perhaps he was right. Not everyone, however, was as sanguine as "An Australian" about the supposed moral justification for private property. In 1843, for example, Marx had argued that:

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1 *Sydney Morning Herald*, 29 March 1856.

2 Blackstone, *Commentaries on the Laws of England* (Reeves & Turner, London, abridged ed 1890) p115.

> As contrasted with the *barbaric stupidity* of independent private property, the uncertainty of business is pure elegy, the quest for profit has a moving solemnity (or drama), the fluctuations of possessions have a grim inevitability, the dependence upon the government treasury has a high ethical content.[3]

Property has long been the subject of vigorous debate. The reasons are clear. Standing at the interface between law and economy, a knowledge of property and its role, structure and history in a given social context can provide one with an important insight into the nature of that society. As Lewis Morgan argued in *Ancient Society*: "A critical knowledge of the evolution of the idea of property would embody, in some respects, the most remarkable portion of the mental history of mankind."[4] The study of property, moreover, brings one to the study of law. As Bentham noted, in a moment of uncharacteristic clarity, "Property and law are born together and die together. Before laws were made there was no property; take away law, and property ceases."[5] This article examines the relationship between property, law and society in nineteenth century Australia. How are we to characterise the relationship which emerged in colonial New South Wales? I will argue that previous attempts to explicate the development of property law by reference to the idea of capitalism are inadequate in characterising a relationship between property, law and society that captures the nuances of the Australian situation. In its place I will argue that such a characterisation is captured by the idea of egalitarianism. The consequences of this, I will argue, have significant historiographical and methodological implications for our understanding of Australian legal history.

## THE GHOST OF FEUDALISM

> [A]t the birth of the colony the ghost of feudalism hovered over the scene.[6]

On 10 February 1847, Stephen CJ of the Supreme Court of New South Wales ruled, in *Attorney-General v Brown*, that the laws respecting

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3 Marx, "Critique of Hegel's Doctrine of the State" in Marx, *Early Writings* (Penguin, Harmondsworth 1975) p170. The emphasis is original.

4 Morgan, *Ancient Society* (Charles H Kerr, Chicago 1877) p6.

5 Bentham, *Theory of Legislation* (Kegan Paul, London 1911) p113.

6 Hargreaves & Helmore, *An Introduction to the Principles of Land Law (New South Wales)* (Law Book Company, Sydney 1963) p18.

property in the colony were governed by feudal principles, consequent upon the adoption of English law into New South Wales in 1788. As Stephen CJ noted:

> At the moment of its settlement the colonists brought the common law of England with them. So much, at all events they introduced, as was consistent with their conditions. "Such, for instance", says Blackstone, "as the general rules of inheritance" ... and the feudal principle of which we speak, we have no doubt is as much in force in the colonies, as the law which provides for the succession of the eldest son.[7]

In 1788 English law distinguished clearly between real and personal property. The distinction mirrored their relative economic and political importance in late eighteenth century England, as landed wealth carried with it power and influence.[8] However, as the pastoral occupation of Crown land spread in the first half of the nineteenth century in New South Wales, leasehold (a form of personal property) rather than freehold emerged as the most economically significant form of land-holding in the colony by the 1840s.[9] Therefore a freehold of inheritance did not carry the same economic or political importance in the colony as it did in the metropolis. As a result, statute law was debated and ultimately reformed in ways which highlight the perceived irrelevance of the distinction between real and personal property in New South Wales. The introduction of liens on wool in 1843, for example, adapted the laws of mortgage finance to a social context where contemporaries regarded wool, rather than land, as the 'real' property of the colony.[10]

With the introduction of adult male suffrage in 1858 the political importance of freehold property was further diminished. The influence of democratic sentiment thereby engendered gave rise to an era of statutory reform which saw wholesale changes to the law of land transfer in 1862 and the abolition of the law of primogeniture in 1863. These reforms

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7 *Attorney-General v Brown* (1847) 2 Legge 318. See Buck, "*Attorney-General v Brown* and the Development of Property Law in Australia" (1994) 2 *APLJ* 128.

8 See Mingay, *English Landed Society in the Eighteenth Century* (Routledge & Kegan Paul, London 1963).

9 See Roberts, *The Squatting Age in Australia, 1835-1847* (Melbourne University Press, Melbourne 1964).

10 The economic implications of liens on wool are examined in Butlin, *Foundations of the Australian Monetary System, 1788-1851* (Sydney University Press, Sydney 1968) pp340-344.

completed a process of legal change which saw the dissipation of the feudal imprint on property law introduced into New South Wales in 1788.[11] The dominant notion of property as an inheritance had been replaced by the notion of property as a commodity. The distinction between real and personal had been (to all intents and purposes) swept aside. If, then, feudalism is inadequate in effectively characterising the relationship between property, law and society in colonial New South Wales, what alternative are we presented with?

## PROPERTY LAW AND THE TRANSITION FROM FEUDALISM TO CAPITALISM

Andrew Wells, in a recent study of Australian economic history, has analysed the development of property law in nineteenth century Australia by reference to the idea of "capitalism".[12] He rejects the view that "the Australian colonies were initially subject to the tenets of British property law and that with self government the nature of law became increasingly autonomous and adaptive", because it "lends itself to the notion of stages of economic growth, political maturity and the assertion of an Australian 'national' ethos".[13] Rather, Wells applies a Marxist methodology, a methodology which incorporates a model of a transition from feudalism to capitalism.[14] Unfortunately for Wells, he is forced to admit that "[t]he establishment of capitalism in Australia is interesting because it clearly departs from the classic paradigm of transition (from feudalism to capitalism) much debated in the literature".[15] In other words, to apply the simple category "capitalism" may prove as inadequate as the appellation "feudalism" to an understanding of property in colonial New South Wales.

This may be due, in part, to the methodological problems associated with the concept of capitalism itself. As Roberto Unger has argued: "When put

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11 See Buck, "The Ghost of Feudalism: Law, Property and Primogeniture in New South Wales, 1788-1863" (unpublished paper, University of Newcastle 1995).

12 Wells, *Constructing Capitalism: An Economic History of Eastern Australia, 1788-1901* (Allen & Unwin, Sydney 1989) pp87-88; see also Davidson & Wells, "The Land, the Law and the State: Colonial Australia, 1788-1890" (1984) 2 *Law in Context* 89.

13 Wells, *Constructing Capitalism: An Economic History of Eastern Australia, 1788-1901* p88.

14 The literature on this issue is large. For a recent exposition of the Marxist position, with particular reference to property law, see Wood, *The Pristine Culture of Capitalism* (Verso, London 1991).

15 Wells, *Constructing Capitalism: An Economic History of Eastern Australia, 1788-1901* p63.

to use, the concept of capitalism [has] turned out to be too universal and too particular."[16] This is because whenever the concept is defined too loosely, it can apply to a wide range of societies which are, as Unger has pointed out, "utterly different - in their forms of state power, their types of social hierarchy and division, and their ruling beliefs".[17] On the other hand,

> When you make the concept of capitalism more textured you do so with the hope that the more concrete traits will reveal what is most significant about the more general and abstract traits that you began with ... If deviations exist, they can be treated as variations on the central theme.[18]

However,

> It would weaken and even undermine the force of your argument if the more detailed definition turned out to describe situations and events that seemed no more faithful to the more abstract and general elements in the concept of capitalism than all the historical situations your more precise definition excluded.[19]

Yet in spite of these potential problems, there has been a tendency by those authors who have studied the historical development of property law in its social context to weave the transformation of property law into a model of the transition from feudalism to capitalism. Perhaps the chief exponent of this interpretation has been CB Macpherson. Macpherson argues that

> It has long been recognised by social and economic historians that the emergence of capitalism was accompanied by changes in the concept and institution of property.[20]

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16 Unger, *Social Theory: Its Situation and Its Task* (Cambridge University Press, Cambridge 1987) p101.

17 As above.

18 As above p102.

19 As above.

20 Macpherson, "Capitalism and the Changing Concept of Property" in Kamenka & Neale (eds), *Feudalism, Capitalism and Beyond* (Australian National University Press, Canberra 1975) p105.

Macpherson was concerned to show that the legal conception of private property emerged in conjunction with the rise of a capitalist market economy in England in the seventeenth century. He argues that the reason we can most fruitfully explicate the development of the idea and law of property by reference to the emergence of capitalism is because the right of private property

> was exactly the kind of property right needed to let the capitalist market economy operate. If the market was to operate fully and freely, if it was to do the whole job of allocating labour and resources among possible uses, then all labour and resources had to become, or be convertible into this kind of property. The market had to be allowed to allocate labour and resources ... As the capitalist market economy found its feet and grew, it was expected to, and did, take on most of this work of allocation. As it did so it was natural that the very concept of property should be reduced to that of *private* property - an exclusive, alienable, 'absolute' individual or corporate right in things.[21]

Of course, it could be argued that Macpherson's argument at this point is more teleological than historical. Capitalism presumes private property, therefore if capitalism emerges so private property must have emerged. Thus if we can see evidence of capitalistic attitudes to property in seventeenth century England then capitalism and private property must have emerged in the seventeenth century.

The attractiveness of this argument is, of course, its neatness. But history is rarely neat. As EP Thompson has reminded us, "Minds which thirst for a tidy platonism very soon become impatient with actual history".[22] Given, moreover, that Macpherson was attempting to present a Marxist account of these developments, it is perhaps worth recalling that Marx himself attacked those who transformed his

> historical sketch of the genesis of capitalism into an historio-philosophical theory of the general path of

21 As above pp109-110.

22 Thompson, "The Peculiarities of the English" in Milliband & Saville (eds), *The Socialist Register 1965* (Merlin Press, London 1965) p321.

> development prescribed by fate to all nations, whatever the historical circumstance in which they find themselves.[23]

What is needed is a description which reflects the peculiarities of the relationship between property, law and society in nineteenth century Australia. Accordingly, I would propose the term 'egalitarianism'. However, the meaning I attribute to egalitarianism differs in some respects from the way it has been used previously.

## EGALITARIANISM AND AUSTRALIAN HISTORIOGRAPHY

Perhaps the most influential book in the development of Australian historiography published in the twentieth century was WK Hancock's *Australia,* first published in 1930.[24] One quite central passage from that book deserves quotation.

> If ever the ship of Australian democracy enters the calm waters of its millennium it will carry a fraternal but rather drab company of one-class passengers.
>
> > But the curse of class distinctions from our shoulders shall be hurled
> > An' the sense of Human Kinship revolutionize the world;
> > There'll be higher education for the toilin', starvin' clown
> > An' the rich an' educated shall be educated down;
> > Then we will all meet amidships on this stout old earthly craft;
> > We'll be brothers, fore'-n'-aft!
> > Yes, an' sister fore'-n'-aft!
> > When the people work together, and there ain't no fore'-n'-aft.
>
> This, then, is the prevailing ideology of Australian democracy - the sentiment of justice, the claim of right, the conception of equality, and the appeal to Government as the instrument of self-regulation.[25]

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23 Marx, "Letter to the Editorial Board of the *Otechestvenniye Zapiski*" in Marx & Engels, *Selected Correspondence* (Progress Publishers, Moscow 1975) p293.

24 Hancock, *Australia* (Ernest Benn, London 1930).

25 As above pp74-75.

Hancock, of course, was referring to class equality. Yet historians have interpreted this as articulating the ethos of egalitarianism. It is obvious from the rhetorical tone of that passage that it comes from Hancock's 'right of centre' phase,[26] yet the interpretation of an Australian egalitarian ethos is accepted by 'left of centre' historians as well. One could point to earlier articulations of egalitarianism than Hancock's *Australia* but none, perhaps, have played such a central role in the development of Australian historiography. It continues to define the terms of debate and shape the questions asked in two important respects.

First, egalitarianism is usually analysed as a set of beliefs, as a complex of values, as an ideology. As Elaine Thompson has argued in her recent study of egalitarianism in Australia:

> It is a set of beliefs that has been built up over time and spread into the popular culture. These beliefs include: that Australia is a classless society because income and/or wealth are evenly distributed and because everyone can own their own home; that the social styles of rich and poor are much the same ... and that 'Jack is as good as his master'.[27]

Second, as well as being analysed as an ideology, egalitarianism is subsequently assessed in close relation to equality, or equality of opportunity. John Hirst, for example, in an essay on Australian egalitarianism, focuses on "the inequalities that developed when equality of opportunity was the ideal".[28] The notion that equality of opportunity *was* the ideal, and that egalitarianism as a concept employed by historians when looking at Australian history *was* expressed in the pursuit of equality of opportunity, is an idea taken so much for granted it is assumed unnecessary to establish the veracity of the proposition in the first place. Consequently, studies such as Hirst's uncover the apparent paradox of egalitarianism in Australian history; that is, "the inequalities that developed when equality of opportunity was the ideal".[29] Or, as Stuart Macintyre notes: "The paradoxes of this egalitarian national identity

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26 As Hancock himself noted: "From 1926 to about 1933 I was 'right of centre' as *Australia* (1930) makes clear": Rowse, *Australian Liberalism and National Character* (Kibble Books, Melbourne 1978) p124.

27 Thompson, *Fair Enough: Egalitarianism in Australia* (University of New South Wales Press, Sydney 1994) pviii.

28 Hirst, "Egalitarianism" (1986) 5 *Australian Cultural History* 12.

29 As above.

reflect the fact that our inequalities were (and to some extent still are) compatible with a widespread belief in equality."[30] Thus egalitarianism as a belief system in these analyses is rooted in the context of equality. The paradox arises from the co-existence of real and evident material inequalities in the face of an equality-oriented egalitarianism. Now, of course, *if* one assumes a close relationship between equality and egalitarianism then the paradox of egalitarianism is only too readily apparent. But to what extent is this paradox real, or chimerical? How useful is this reading of egalitarianism to a study of property and property law in mid-nineteenth century New South Wales?

## THE PECULIARITIES OF PROPERTY

> In New South Wales ... it has been found necessary to mould the laws of England agreeably to the nature and peculiarities of property there.[31]

"In an economical point of view," noted John Stuart Mill, "the best system of landed property is that in which land is most completely an object of commerce; passing readily from hand to hand, when a buyer can be found to whom it is worthwhile to offer a greater sum for the land, than the value of the income drawn from it by its existing possessor."[32] When the English laws regulating property were introduced into New South Wales a very particular idea (or set of ideas) of property was also introduced. English land law assumed the distinction between land and other property, not only in law but in society. The distinction between real and personal in English law reflected the distinction made between the relative importance of real and personal property in late eighteenth century English society. 'Property' in English society and English law not only implied property in land but was dominated conceptually by the idea of property as a trust and an inheritance, which in turn implied notions of obligation attending the right *to* property. The meaning of property was also shaped by the exclusivity of property ownership. As the landed aristocracy was just that, landed, with property tied up in entails in order to secure dynastic succession, so the law distinguished between real and all other forms of property. Real property was considered to be a superior form of property.

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30 Macintyre, "Equity in Australian History" in Troy (ed), *A Just Society? Essays on Equity in Australia* (George Allen & Unwin, Sydney 1981) p40.

31 Therry, *Reminiscences of Thirty Years' Residence in New South Wales and Victoria* (Sampson Low, Son & Co, London 1863) p237.

32 Mill, *Principles of Political Economy* (Penguin, Harmondsworth 1985) pp255-256.

Indeed, the law and the concept of property which were transplanted into New South Wales were dominated by the notion of inheritance. Both emphasised property as fixed, exclusive, and involving obligations by the owner for the benefit of those for whom the inheritance was held in trust.[33]

In New South Wales, however, the reality of property relations did not accord with the assumptions built into English law. This is revealed with some clarity by the findings of a select committee of the New South Wales Legislative Council set up in 1847 to inquire into the minimum upset price of land.[34] In their report the committee addressed themselves specifically to the question of how the minimum upset price of £1 per acre had affected "tenure on which land is occupied".[35] The committee concluded that

> It was in the power of the Imperial Parliament to enact that land should not be sold for less than £1 per acre, but there, unfortunately, its power stops; it could not make that land worth the sum, nor declare, because it was unsold, that it should be unoccupied, nor prevent those who occupied it from drawing the inferences which their situation naturally suggested. Those inferences were only too obvious and too reasonable. The squatters, forced to occupy and forbidden to buy - forbidden, by the policy of the Government, to acquire lands by purchase, and allowed to occupy till that impossible event should take place, saw that they had obtained, through the impossibility of purchase, all that a purchase could have given them, and that the law which rendered those lands unsaleable virtually gave them away to the present occupants.[36]

It was now in the squatters' interests to maintain the high price, in order that they could occupy cheaply. This implies a peculiar attitude to tenure and to land, an attitude that did not exist in England. The squatters were responding rationally and pragmatically to the situation of the moment. They were not interested in the land as such, they merely wanted security

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33 This is discussed in greater detail in Buck, "Property, Aristocracy and the Reform of the Land Law in early nineteenth century England" (1995) 16 *The Journal of Legal History* 63.

34 NSW, Parl, "Report of the Select Committee on the Minimum Upset Price of Land" in *Votes and Proceedings* LC [1847] Vol 2 at 510.

35 As above.

36 At 515.

over their means of production. They had no interest in freehold as such. If their ends could be met by supporting a system which *discouraged* conversion to freehold, then so be it. This attitude to land lacks social and political ramifications because it perceives land use as a commodity. Squatters were aware that the nature of the law of *real* property did not accord with their attitude to, and use of, land as *personal* property. This was to have far reaching implications for colonial attitudes to the inherited idea of property. The notion of property as a trust, the distinction between real and personal property, even the question of what property was - all these issues were questioned in the colonial social context.

Underneath this whole question of tenure, price and permanency highly divergent views of property were developing. This divergence is cogently illustrated by statements of Governor Gipps and WC Wentworth on the question. As Gipps saw it:

> The lands are the unquestionable property of the Crown, and they are held in trust by the Government for the benefit of the people of the whole British Empire. The Crown has not simply the right of a landlord over them, but it exercises that light under the obligations of a Trustee.[37]

Gipps affirmed the inherited logic of property as an idea and as expressed in law. That logic embodied principles such as the belief that the land was held in trust, that the 'owner' was merely a tenant, and that the ultimate owner was the Crown. In comparison, Wentworth felt that, like chattel property, the land should be 'owned' by its occupier. He was arguing, in effect, that colonial conditions were not in accord with English law.

> It was true, no doubt ... in point of law, that these spacious domains, which formed the squatting stations of the country, did vest in the Crown by virtue of its prerogatives; but the Crown was but the trustee for the public. It was evident that all the value of this country, whether of the city, or of its remotest acres, has been imparted to it by its population, and consequently the country itself is our rightful and first inheritance ... these wilds belong to us and not to the British Government.[38]

37 Quoted in King, *An Outline of Closer Settlement in New South Wales* (Government Printer, Sydney 1957) p59.

38 As above.

It was on precisely this question of competing claims to property that so much contemporary debate focussed.

Property itself, moreover, was beginning to take on meanings in colonial New South Wales different from assumptions about it within the context of English law. In 1843 the New South Wales Legislative Council passed the first *Liens on Wool Act*, which allowed a pastoralist to mortgage a wool-clip while still 'on the sheep's back', as it were.[39] Liens on wool raised the issue of just what 'property' was in a colonial context. This is revealed with some clarity in the evidence of Hastings Elwin before the select committee set up to inquire into the operation of the Act given on 30 August 1845.

> Q: You are aware, as a lawyer, that before the passing of this Act, personal property, such as sheep and cattle, might have been mortgaged?
>
> A: I am; besides it is familiar to me that in the West India islands, for one hundred and fifty years, it was constantly the practice to mortgage what may be called the stock of the estates, namely, negroes; the negroes, indeed, formed the only valuable security on the estates, and it was for the purpose of enabling the party who borrowed the money to make use of it in the employment of the negroes on the estate that these mortgages were made. They have been recognised in the Court of Chancery, in England, over and over again. In some of the islands, Antigua, for instance, they are real estate, and are literally walking freeholds, subject to all the incidents of freehold property; in other islands they are mere chattels.
>
> Q: I suppose in the West Indies negroes were the principal property of the country?
>
> A: Altogether; without the negroes the land was altogether valueless.
>
> Q: Here sheep, cattle and horses are the principal property?
>
> A: Sheep pre-eminently.
>
> Q: Without them the land would be of no value whatever?

39 The background to this legislation is discussed in Butlin, *Foundations of the Australian Monetary System, 1788-1851* p340.

A: None.[40]

The introduction of liens on wool highlighted the irrelevance of the traditional distinction between real and personal property in a colonial social context.

A very particular perception of property was emerging in colonial New South Wales which diverged from the assumptions regarding property in English law. This perception reflected the social and economic distinctiveness of colonial New South Wales. *The Atlas* of 22 March 1845, in an editorial on the advisability of liens on wool, claimed that

> The notion that land is the only *real* security is evidently calculated for the meridian of an agricultural country only. The moment you get into a pastoral estate, the predominance of land over other security vanishes. It is valued merely with reference to the stock it will feed, and its value is not primarily in itself, secondary and dependent upon the value of that stock. This distinction has been impressed by bitter experience upon those who have become large purchasers of land - who have found that *real* property is in New South Wales the most *illusory* of all possessions.[41]

By the 1840s, therefore, property law and the concept of property itself had begun to change in New South Wales to a form approximating the expectations of John Stuart Mill. This transformation was furthered by the reform of the laws of real property in New South Wales in the early 1860s.

## THE PEOPLE'S QUESTION

> In Australia, the great mass of the people are, or confidently look to become, landed proprietors. In Australia, therefore, "thorough law reform" is essentially "the people's question".[42]

40 NSW, Parl, "Report of the Select Committee on the Liens on Wool Act" in *Votes and Proceedings* LC [1845] Vol 1 at 751, evidence of 30 August 1845.

41 "Law for the Colonies" in *The Atlas*, 22 March 1845.

42 Torrens, *The South Australian System of Conveyancing by Registration of Title* (Public Library of South Australia, Adelaide, facsimile ed 1962) p7.

So wrote Robert Richard Torrens in 1859. To many of his contemporaries it may have seemed that the question of access to the crown lands of the colony was settled in 1847 when the Orders-in-Council of 9 March implemented the provisions of the *Waste Lands Occupation Act* 1846 (UK).[43] That legislation provided established squatters the opportunity to take out leases of up to fourteen years at ten pounds per annum without competition. They were also given a pre-emptive right to purchase the property in freehold. To many, it seemed that the land had been "locked up" for the benefit of the large-scale pastoralists.[44] King noted:

> Thus at the commencement of 1850 the pastoralists held undisputed sway ... The runholders used "bribery, corruption and all forms of roguery" in their anxiety to secure their leases and to forestall those only too anxious to take their place. Everywhere the right to purchase one square mile in every twenty five was freely used, the runholder usually choosing the choicest picked spots, valuable for their pastoral and agricultural possibilities, or perhaps strategically controlling the surrounding country.[45]

In 1851, however, gold was discovered in Australia and within the next ten years the population increased almost three-fold.[46] The year before the imperial government had given authority to the New South Wales Legislative Council to draft a constitution for self-government.[47] This was done by a select committee of the Council in 1853,[48] passed by the Council itself in the same year, and enacted with some minor amendments by the imperial government in 1855.[49] The *New South Wales Constitution Act* 1855 (UK) not only conferred full responsible government on the colony and a bicameral legislature but transferred power for that

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43 King, *An Outline of Closer Settlement in New South Wales* p60; see also Roberts, *The Squatting Age in Australia, 1835-1847* p263.

44 See, for example, the opinions given in evidence before the select committee in NSW, Parl, "Report of the Select Committee on the Minimum Upset Price of Land" in *Votes and Proceedings* LC [1847] Vol 2 at 521-574.

45 King, *An Outline of Closer Settlement in New South Wales* p60.

46 Cotter, "The Golden Decade" in Griffin (ed), *Essays in the Economic History of Australia* (Jacaranda Press, Brisbane 1967) p130.

47 *Australian Constitutions Act* 1850 (UK); Melbourne, *Early Constitutional Development in Australia* (Queensland University Press, St Lucia, 2nd ed 1963) pp381-391.

48 On the constitutional debates of 1853, see Martin, *Bunyip Aristocracy: The New South Wales Constitution Debate of 1853 and Hereditary Institutions in the British Colonies* (Croom Helm, Sydney 1986).

49 Melbourne, *Early Constitutional Development in Australia* pp427-432.

administration and settlement of Crown lands to the people of New South Wales.[50]

Concurrent with this was an emerging democratic sentiment among the rapidly increasing population which became institutionalised in 1858 with the establishment of adult male suffrage.[51] Increasingly, calls came from the newly-enfranchised for economic independence on the soil.[52] But as contemporaries were only too aware, the *Waste Lands Occupation Act* 1846 (UK) inhibited small-scale settlement. Consequently, several questions came to dominate New South Wales society and politics in the late 1850s and early 1860s. In particular, questions such as: Who should occupy the land - large-scale pastoralist or small-scale agriculturalist? rich man or poor man? What use should the land be put to - pastoral or agricultural? How should the land be held - leasehold or freehold? These questions collectively became known as 'the land question'. Very quickly, reformers saw the solution to 'the land question' in 'free selection before survey'.

In essence, this involved the opportunity of any person to enter the Crown land squatting runs of a pastoralist and 'select' an area prior to survey that he would then buy in freehold from the Crown.[53] The pastoral interest was outraged.[54] Following an electoral victory in the lower house in the election of 1860 and the threat of 'swamping' the non-elective Council in order to ensure the passage of legislation, the Robertson land Acts were passed in 1861.[55] Robin Gollan has noted of 'the land question':

> In both New South Wales and Victoria the "solution of the land question" was the key which the majority of people believed would open the door to social justice and the realization of the ideal of economic independence. The majority were mistaken, at least in the short-term consequences, but in the political conflict about the land

50 King, *An Outline of Closer Settlement in New South Wales* p70.

51 Gollan, *Radical and Working Class Politics: A Study of Eastern Australia, 1850-1910* (Australian National University Press, Canberra 1960) p32.

52 As above pp33-49.

53 As above p80.

54 Hirst, *The Strange Birth of Colonial Democracy: New South Wales, 1848-1884* (Allen & Unwin, Sydney 1988) pp135-147.

55 *Crown Lands Alienation Act* 1861 (NSW), *Crown Lands Occupation Act* 1861 (NSW). This is described in detail in Huntington, "The History of New South Wales: The Administration of Sir John Young" (1888) 4 *Sydney Quarterly Magazine* 379.

> some democratic advances were made. More important in the long run, it decided that the language of Australian politics would from then on be the language of democracy.[56]

Yet it was not enough to 'unlock' the land for 'the poor man', the capitalist or the speculator, if the cost of conveyancing was so prohibitive as to negate this attempt to widen access to property ownership. As the *Southern Cross* newspaper noted in July 1860:

> It is no doubt of great importance to the country to get a good Land Bill, that is a system of land administration which all the panting capitalists who are said to be besieging the doors of Mr Robertson's particular department, can be enabled to deposit their groaning money bags in the Treasury. But there are a great many people who have bought land, and whose ancestors have bought land, and the right to which land is a matter of litigation in our Courts ... The most prominent matter of law reform is that relating to the transfer of land.[57]

This is not to say that there was not opposition to reforming the laws of land transfer through registration with a view to reducing the cost of buying and selling land. "It is for the most part", argued one member of the Melbourne bar in 1860,

> a mere money question, and land, like every other property, must bear its own burthens, and if it be the most coveted of permanent investments, what matter if the cost of acquiring, dealing, and parting with it be a little high?[58]

But in a society where, as Robert Richard Torrens argued, "the great mass of the people are, or look to become, landed proprietors",[59] concern with the costs of conveyancing were not dismissed so lightly.

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56 Gollan, *Radical and Working Class Politics: A Study of Eastern Australia, 1850-1910* p32.

57 *Southern Cross*, 21 July 1860.

58 Parsons, *The Petition of a Barrister for Aid in Reforming our Laws* (Walker, May & Co, Melbourne 1860) p18.

59 NSW, Parl, "Report of the Select Committee on the Liens on Wool Act" in *Votes and Proceedings* LC [1845] Vol 1 at 751, evidence of 30 August 1845.

Flush from his success at introducing registration of title to land into South Australia in 1858, Torrens was an indefatigable advocate for his scheme in the other colonies. However, in New South Wales, Torrens had to compete with the attention given to the proposals of the English Royal Commission on Land Transfer.[60] In 1861 a select committee of the New South Wales Legislative Council had recommended the adoption of the English bill resulting from the inquiry which later became the *English Land Registry Act* 1862 (UK).[61] The subsequent New South Wales bill was not, however, passed by the Legislative Assembly. Charles Cowper, Premier of the administration which had legislated for free selection, then introduced two bills on 4 June 1862 which were referred to a select committee.[62] Soon afterwards Thomas Dick introduced another bill which was also referred to the select committee. The committee then invited Torrens to appear before it and, following a long interrogation, recommended the adoption of his scheme.[63] The subsequent Government bill was successfully carried in both Houses and the *Real Property Act* 1862 (NSW)[64] came into operation on 1 January 1863. As John Dunmore Lang declared of the impending legislation in parliament on 20 August 1862, it was "one of the greatest reforms ever introduced, and if the present ministry had done nothing else, this bill of itself, would serve to immortalize them in the history of the colony".[65]

Why then, was Torrens's scheme for registration of title introduced into New South Wales when it was? The answer is that it was recognised that the social and political differences between New South Wales and England facilitated the possibility of law reform. As the *Southern Cross* stated in July 1860:

> We are not troubled with class prejudices against law reform. We have no landed aristocracy chary of exposing its titles. On the other hand we have the whole community desirous to have our laws brought practically to every man's

60 Whalan, *The Torrens System in Australia* (Law Book Company, Sydney 1982) p10.

61 NSW, Parl, "Select Committee on the Land Transfer and Registry Bill" in *Votes and Proceedings* LC [1861] Vol 1 at 761.

62 NSW, Parl, "Select Committee on the Land Titles Bill" in *Votes and Proceedings* LA [1862] Vol 4 at 1127.

63 As above, evidence of RR Torrens, 16 July 1862.

64 26 Vic No 9.

65 *Sydney Morning Herald*, 21 August 1862 p2.

> door, and our legal obstructionists (if any such there be) are not sufficiently potent, as a class to avert the good work.[66]

It was precisely on this point that the exigencies of the colony differed from the realities of the metropolis. This was recognised with some clarity by a correspondent to the English *Daily News* in November 1861, who argued that the implications of democracy were entirely different in Australia than they were in England.

> Here it is considered synonymous with Chartism - it is supposed to mean handing over the property and intelligence of the country to the uncertain legislation of the masses. In Australia it has a very different signification. For there the greatest extension of the suffrage must contain a conservative element, which does not, and cannot exist in England. The humblest labouring man in Australia, possessed of the right of voting, knows well that the high rate of wages prevalent in the colony renders it a matter of certainty that with ordinary industry he must one day become the possessor of property - the owner, if he desires it, of some of those countless acres of unoccupied land which seem to invite the labouring classes of this country to go out and take possession of them. Men so situated may with safety be entrusted with the suffrage, where it might be dangerous to confer it on the starving Lancashire cotton spinner, or Dorsetshire agricultural helot, without intelligence to guide them, and without bright hopes to cheer their future. I beg, therefore, your readers to remark that extended suffrage - call it, if you will, democracy - in young and growing colonies, is neither the same thing, nor is it fraught with the same dangers as universal suffrage is supposed to be in England.[67]

In other words, with the possibility of egalitarian property relations, democracy itself became conservative. "It is a democracy", reflected the *Empire* in August 1860,

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66 *Southern Cross*, 21 July 1860.

67 'A Colonist', "The Political Prospects of Our Australian Colonies" in *Daily News*, 5 November 1861, reprinted in the *Sydney Morning Herald*, 24 January 1862 p3

> which has no connection with socialism as a system, nor with republicanism as a force of government. There is nothing proletarian in its character, nor levelling in its object ... All that can be done is to direct its operation in the minds of the people.[68]

The whole debate over 'the land question', after all, had been to turn 'the poor man' into a propertied man.

On 26 April 1859 the Land League of New South Wales issued their manifesto for resolving 'the land question'. The manifesto stated:

> The ingenious mechanic, the stalwart yeoman, and the industrious labourer - those classes of society which form the bulk and basis, the bone and sinew of every Anglo-Saxon nation - have been foiled in every fair effort to find a home of their own ... This, however, is emphatically *the people's question*, and fortunately, in the exercise of their franchise, the people have now the power of settling the matter satisfactorily.[69]

This explains why 'the land question' was described as 'the people's question'. "The land", declared the *Sydney Morning Herald* of 23 June 1859,

> is not all in possession of a limited number of families from generation to generation. It is greatly subdivided; it is held to a great extent by small capitalists; it is the working man's savings bank; and it is constantly being mortgaged and transferred.[70]

That was why the reform of the law of land transfer could also be described as 'the people's question'.

## THE SPECTRE OF EGALITARIANISM

"That all should start on perfectly equal terms", argued John Stuart Mill, "is inconsistent with any law of private property". Rather, for Mill,

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68 *Empire*, 26 August 1860.

69 *Manifesto of the Land League of New South Wales* (Cunninghame, Sydney 1859) p4.

70 *Sydney Morning Herald*, 23 June 1859 p4.

> the more wholesome state of society is not that in which immense fortunes are possessed by a few and coveted by all, but that in which the greatest possible number possess and are contented with a moderate competency.[71]

Consequently, as Mill argued,

> it is not the subversion of the system of individual property which should be aimed at; but the improvement of it, and the participation of every member of the community in its benefits.[72]

It is for this reason that Mill was invoked by law reformers in mid-nineteenth century New South Wales. The reform of the inherited laws of real property in mid-nineteenth century New South Wales was not designed to liberate 'the poor man' from the institution of property, but to incorporate him into the regime of private property.[73]

The developments in the concept of property away from the aristocratic idea of inheritance and towards the modern idea of a commodity had nothing to do with equality but a good deal to do with access in mid-nineteenth century New South Wales. Egalitarianism, as I am using the term, was related to access, not equality. The calls to reform the law of property were not concerned with equalising property. What historians have called egalitarian - the reform of the land laws, the desire to break down the exclusive institutions of an aristocratic concept of property - were concerned with granting access to land to those who had been hitherto denied it. Paradoxically, this unites the claims to property of squatters such as Wentworth in the 1840s and the calls for the introduction of free selection on behalf of 'the poor man' in the 1860s. But widening access had nothing to do with equality or indeed with equality of opportunity (which, it could be argued, is logically impossible in an environment of existing inequalities).[74] The existence of the market system with its attendant inequalities was accepted rather than challenged.

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71 Mill, *Principles of Political Economy* p252.

72 As above p367.

73 For a study of the use of the term 'the poor man' in colonial political rhetoric, see Buck, "'The Poor Man': Rhetoric and Political Culture in mid-nineteenth century New South Wales" in *Australian Journal of Politics and History* (forthcoming).

74 This is argued cogently in Feher & Heller, *Eastern Left, Western Left* (Polity, Oxford 1986) p108; see also Feher & Heller, "Forms of Equality" (1977) 32 *Telos* 6.

The desire was to make the market system *universal*, at a time when the culture and the institutions of society were still exclusive.

Were these actions and these attitudes egalitarian? If so, they were representative of a quite singular idea of egalitarianism. They do not accord with the use of the term by Australian historians such as Hirst and Macintyre, who assess egalitarianism with reference to equality and equality of opportunity. Consequently, I would re-define the term in accordance with the peculiarities of the Australian experience. That which is egalitarian in Australian society is not necessarily conducive to equality. We need to recognise egalitarianism for what it is in the Australian context, possessive, rather than equalitarian.

Yet it is not my purpose in this article merely to redefine egalitarianism as an ideology. Rather, I argued at the beginning that the development of Australian property law could be most usefully explicated by reference to egalitarianism. I contrasted its use, moreover, with the idea of capitalism. Now, capitalism is defined principally as a mode of production.[75] Egalitarianism, as it has been used hitherto, is defined as a set of beliefs, as an ideology. Yet I am using egalitarianism to describe something different to an ideology, or set of beliefs. I am using it as a description of a particular property system, by which I mean the relationship between property, law and society. Egalitarianism as I am using the term describes the logic of property that emerged in nineteenth century Australia. In other words, the meaning I ascribe to egalitarianism is closer to the juridical meaning of feudalism; that is, as a distinctive property system expressed through law.[76]

It could be argued that one of the problems associated with explicating the development of property law by reference to the transition from feudalism to capitalism is that both those terms are analysed as modes of production. This has always presented those historians concerned with the history of property with a problem of periodisation. This is because while the mode of production was undergoing revolutionary changes in the sixteenth and seventeenth centuries, the law of property did not throw off its feudal

75 The literature on this question is vast. For an excellent introduction, see Harvey, *The Limits to Capital* (Basil Blackwell, Oxford 1982) pxiii, who notes: "Everyone who studies Marx, it is said, feels compelled to write a book about the experience."

76 See Bloch, "Feudalism" in Seligman & Johnson (eds), *Encyclopaedia of the Social Sciences* Vol 6 (Macmillan, New York 1931) p203; see also Bean, *The Decline of English Feudalism, 1215-1540* (Manchester University Press, Manchester 1968).

shackles until the nineteenth century. The problem disappears, I would argue, if we do not follow the method used by Macpherson or Wells who attempt to explicate the development of property law by reference to the transition from one mode of production to another. Why? Because the emergence of an economic relation does not necessarily involve the emergence of a legal one.[77] Rather, I would propose that an understanding of property law in modern Australia can be best understood by reference, not to the dominant mode of production, but to the relationship between property, law and society. That relationship was no longer feudal, nor, I would argue, is that relationship adequately captured by the notion of capitalism (precisely because it is usually understood as a mode of production). Rather, I have proposed the idea of egalitarianism, not as an ideology, but as a relationship between property, law and society. I am not disputing the model of the transition of feudalism to capitalism - of one mode of production to another.[78] Rather, I am proposing that the development of property law in Australia can be most fruitfully understood by reference to the transition from one property system to another - from feudalism to egalitarianism, if you will. But not even that. The feudal character of property introduced into New South Wales in 1788 was but a shadow of the medieval relationship between property, law and society. Nor could we claim that a fixed, definitively modern relationship had emerged in its place. Rather, perhaps I could conclude by suggesting that in mid-nineteenth century New South Wales the 'ghost' of feudalism was giving way to the 'spectre' of egalitarianism.

77 This point is explored in Woodiwiss, *Social Theory after Postmodernism* (Pluto Press, London 1990) p132.

78 At least, not on this occasion.