THE QUIT RENT SYSTEM IN COLONIAL NEW SOUTH WALES

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I THE SYSTEM

When the colony of New South Wales was settled by the British in 1788, little remained of the rich variety of English common law tenures. The *English Statute of Tenures 1660*[1] had abolished tenures in chivalry and converted them into tenures in free and common socage. It had abolished the more burdensome of tenurial incidents. Nevertheless, the tenurial system of landholding had been preserved and was so fundamental a feature of English real property law that its application to newly settled colonies beyond the seas could scarcely be in doubt. Thus, from the beginnings of settlement, title to colonial waste lands was considered to be vested in the Crown and any private person who subsequently acquired an estate in fee simple in land held dependently as a tenant of the Crown.[2]

In granting freehold estates in fee in colonial lands, it had been the practice of the Crown to reserve tenurial services in the form of quit rents. Such rents are a perpetual annual payment of a fixed amount, in money or kind, which have been reserved by Crown grant in lieu of all other tenurial services.[3] It is believed that they originated in the late medieval practice whereby the labour services owed by tenants were commuted into fixed money payments. Before the introduction in 1831 of the rule that no Crown land in New South Wales should be alienated except after sale, the quit rents reserved in the Crown's freehold grants imposed a real burden on grantees and their successors in title. Down to this time little Crown land had been sold. The policy of the British government had been to donate land to settlers and to exact recompense by imposing on tenants a continuing liability to pay a quit rent. After 1831 no-one could obtain a freehold grant from the Crown except by purchase. Though a purchaser might be allowed several years in which to complete the sale, once the deed of grant was issued, he was relieved of any further financial liability. The quit rent reserved in the grant would be something nominal like a peppercorn or one penny payable annually in perpetuity.

Notwithstanding that they might be purely nominal, the quit rents reserved in Crown land grants were essential to the creation of a tenurial nexus between grantor and grantee. Without such a reservation, the Crown's grant would probably have been held imperfect. Since the statute *Quia Emptores 1290*[4] ('*Quia Emptores*') it had not been necessary for a private grant in fee simple to reserve

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1 12 Car II, c 24.

2 *A-G (NSW) v Brown* (1847) 1 Legge 312.

3 *Halsbury's Laws of England* (3rd ed, 1952–64) vol 8, 294; vol 32, 255; *Howitt v Earl of Harrington* [1893] 2 Ch 497, 507.

4 18 Edw I, c 1.

any form of service. That statute provided that where a private person granted another an estate in fee simple, the grantee could not take as tenant of the grantor, but instead would be substituted for him as tenant of grantor's lord. The grantee in the case held of the lord for the same services as formerly were due from the grantor, or if the land had been subdivided, for a proportionate part of the services. The statute *Quia Emptores* did not apply to Crown land grants because the Crown could continue to grant fees simple by way of subinfeudation. However, to create a tenurial bond between the Crown and its grantees, grants necessarily had to reserve services, albeit nominal. On the other hand, *Quia Emptores* precluded the reservation of new tenurial services in private grants in fee simple. If in such a grant the grantor reserved the right to receive from the grantee, his heirs and assigns, an annual rental payable in perpetuity, the reservation gave rise not to a tenurial relationship but to a form of rent charge, a fee farm rent.

The authority of the Crown to reserve quit rents in grants of lands in New South Wales was challenged in *Attorney-General (NSW) v Brown*[5] on the ground that to impose an obligation to pay moneys to the Crown was to impose taxation without parliamentary sanction, which was illegal. The Supreme Court of New South Wales did not find it necessary to rule on this question but it was satisfied that quit rents fell into the category of tenurial services. If, Stephen CJ observed, a quit rent 'be a service, it is at all events a certain service; and there is nothing inconsistent, in any degree, with such a service, and the tenure of free and common socage'.[6]

Strictly speaking, rents in any form are more akin to fees charged for services rendered than taxes and, just as the Crown might lawfully impose tolls, port and market dues without parliamentary sanction, so also must it be assumed to have authority to exact a quid pro quo in respect of its grants of proprietary rights.

II ADMINISTRATION

As a source of revenue the quit rent system in New South Wales proved singularly unproductive. Collection was difficult and expensive and arrears were usually far in excess of receipts. Settlers often complained that the rates had been fixed with insufficient regard to the quality of the land granted to them, and that hardship would result if they were expected to meet the demands upon them in full, particularly when they were called on to pay arrears which had accumulated over any length of time. When Commissioner J T Bigge visited the colony in the early 1820s during Governor Macquarie's term of office, he found that no collections had taken place since 1809.[7] In 1814 a Collector of Quit Rents had been appointed, but the Collector, James Meeham, was also Deputy-Surveyor and his work in the

5 (1847) 1 Legge 312.

6 Ibid 324.

7 John Bigge, *Report of the Commissioner of Inquiry on the State of Agriculture and Trade in the Colony of New South Wales* (1823) 38.

Surveyor-General's Department left him no time for anything else.[8] On Bigge's recommendation, the office of Collector was abolished altogether. In 1825 the responsibility for collecting quit rents and other land revenue was transferred to the Surveyor-General himself.[9] This arrangement was criticised by the Land Board on the ground that it was contrary to the practice followed elsewhere in the Empire, and placed additional responsibilities on an already overworked department.[10] On the Board's advice, the Secretary of State in 1827 directed the establishment of a special collections office,[11] and at the end of the following year he announced that William Macpherson had been appointed Collector of Internal Revenue at a salary of £500 per annum.[12] But even this office was short-lived. In September 1831 the Secretary of State informed the Governor that, following the report of the Commissioners on Revenue and Expenditure in the Colonies, it had been decided to retrench certain posts on the civil establishment and that as soon as arrears of quit rents had been collected, the office of Collector of Internal Revenue would be abolished and the duties of that officer transferred to the Colonial Treasurer.[13] In point of fact, the Colonial Treasury took over collections of quit rents well before all arrears were in hand.

About the same time certain other administrative changes were mooted. The Auditor-General William Lithgow, in a letter to the Colonial Secretary in 1832, pointed out that the accounts kept in the office of the Collector of Internal Revenue, although indicating the sums actually received in payment of quit rents, were inadequate for the purpose of estimating outstanding liabilities. Until proper records were kept, it was impracticable, he said, to exercise proper control over this branch of the territorial revenue. Registers were needed for each county and town setting out the names of persons liable to pay quit rents, the annual amount with which each debtor was chargeable, the date from which his liability commenced, and any payments made by him. Separate registers should be kept for arrears and for rents chargeable for the current and three or four subsequent years.[14] These proposals had the unqualified support of the Lords of the Treasury, and in 1833 directions were given to Governor Bourke to proceed immediately to implement the Auditor-General's plan.[15]

8 Letter from Macquarie to Bathurst, 7 October 1814, in *Historical Records of Australia*, series I, vol 8, 304–5.

9 Instructions of Sir Thomas Brisbane to the Surveyor-General, in *Historical Records of Australia*, series I, vol 11, 332. Cf Brisbane's comments on the progress made in implementation of Bigge's recommendations, 14 May 1825, ibid 584.

10 Land Board Report, 20 March 1826, in *Historical Records of Australia*, series I, vol 12, 423–4.

11 Letter from Bathurst to Darling, 2 April 1827, in *Historical Records Australia*, series I, vol 13, 229–30.

12 Letter from Murray to Darling, 12 December 1828, in *Historical Records of Australia*, series I, vol 14, 516.

13 Letter from Viscount Goderich to Bourke, 29 September 1831, in *Historical Records of Australia*, series I, vol 16, 392.

14 Letter from Lithgow to Macleay, 22 June 1832, ibid 755–6.

15 Letter from Hay to Bourke, 13 June 1833, in *Historical Records of Australia*, series I, vol 17, 136.

III REMISSION OF QUIT RENTS

By 1833, the practice of reserving substantial quit rents in freehold grants in the colony had been abandoned in favour of the system of alienation by sale only. The change had been brought about partly because quit rents had yielded so little revenue. As the Secretary of State, Viscount Goderich, explained:

> The scheme of deriving a Revenue from quit Rents seems to me … to be condemned both by reason and experience. The difficulty and expences of collecting them cannot be expected to diminish, while the great bulk of the land, on which they are due, continues unimproved; and, when it shall be cultivated, the encrease of population and wealth, which such a state of things supposes, will render the Revenue, to be derived from so small a tax as twopence an acre, of trifling importance and easily to be supplied from other sources.[16]

While the Crown was not at this stage prepared to forego its rights under existing grants, incentives were held out to those liable for quit rents to satisfy their outstanding obligations. The Secretary of State proposed that in order to assist the emigration of labourers, to eliminate the expense of collecting quit rents, and to introduce uniformity of tenure, settlers who were willing to bear part of the costs of emigration should be entitled to abatement of their rentals in proportion to the assistance given.[17] Provisions to this end were notified by Governor Darling in August 1831.[18] In 1834 Governor Bourke introduced a scheme whereby, over a period of 12 months, persons liable to pay quit rents were to be given an opportunity of redeeming the same on 10 years' purchase.[19] But few availed themselves of this dispensation[20] and in the following year approval was given to extension of the scheme for a further period.[21]

After Sir George Gipps assumed office as Governor in 1838, renewed efforts were made to enforce outstanding liabilities.[22] Between 1840 and 1843 more than £47 000 had been collected in arrears;[23] at the end of the period £66 000 was still outstanding. Gipps's zealous enforcement policy met with considerable resistance. The government, it was argued, had delayed so long in claiming its

16 Letter from Goderich to Darling, 9 January 1831, in *Historical Records of Australia*, series I, vol 14, 20.

17 Letter from Goderich to Darling, 23 January 1831, in *Historical Records of Australia*, series I, vol 16, 37.

18 Government Notice, 26 August 1831. See also Bourke to Glenelg, 30 April 1836, in *Historical Records of Australia*, series I, vol 18, 410–11.

19 Letter from Bourke to Goderich, 14 March 1833, in *Historical Records of Australia*, series I, vol 17, 39–40.

20 Letter from Bourke to Spring Rice, 8 February 1835, ibid 650–2.

21 Letter from Glenelg to Bourke, 6 August 1835, in *Historical Records of Australia*, series I, vol 18, 64; Government Notice, 1 October 1834; Government Notice, 20 January 1835; Government Notice, 6 February 1836; Government Notice, 7 February 1837.

22 On Sir George Gipps's quit rents policy see K Buckley, 'Gipps and the Graziers of New South Wales, 1841–6' (1955) 6 *Australian Historical Studies* 396, 400–3.

23 Letter from Sir George Gipps to Stanley, 28 April 1844, in *Historical Records of Australia*, series I, vol 23, 555.

dues that settlers had been led to believe that their liabilities had been waived. Moreover, in some cases the amounts due as arrears were so large as to absorb the whole value of the land. Following the recommendations of its Select Committee on Land Grievances, the Legislative Council in 1844 presented an address to the Governor praying waiver of the Crown's right to quit rents due for more than six years, reduction of existing rates, and discharge from liability of all persons who had already paid or should in the future pay as quit rents sums equal to 10 years' purchase at the proposed reduced rates.[24] In the face of such opposition, Gipps thought it advisable to stay his hand pending receipt of advice from the home government. No ruling was, however, made until after Gipps had left the colony. In March 1846 the new Governor, Sir Charles Fitzroy, was authorised to adopt at once a scheme for remission of quit rents.[25]

On 9 October 1846 regulations were notified by the Governor in Council[26] providing that all lands for which 20 years' quit rents had been paid were to be free of all further charge. Debtors who had paid quit rents for more than 20 years were to have the excess refunded to them, while those who paid for less than that period were to be discharged from further liability when they had paid rents for a period of 20 years. In addition 'as an inducement to parties to redeem quit rents due from them', they were to be permitted over the next 12 months to redeem their debts by a lump sum payment representing the amount due for a period of nine years and nine months. The new regulations satisfied nobody. Earl Grey, the Secretary of State, told Governor Fitzroy in no uncertain terms that he had gone too far in his concessions.[27]

In the colony, however, the general feeling was that Fitzroy had not gone far enough. Freeholders, it was pointed out, were obliged to pay at the rate of twopence per acre. Squatters on the other hand had to pay only one-fifth of a penny per acre for their annual depasturing licences.[28] Also, in Van Diemen's Land, the concessions had been more liberal.[29] In May 1848, the Legislative Council presented to the Governor an address to the sovereign praying that quit rents be remitted entirely.[30] Nothing came of it, but in 1849 authority was given for removal of the original limit of 12 months for redemption by equivalent cash payments.[31] Two years later it was announced that, from the beginning of 1852, rents reserved on grants of

24 Enclosed in letter from Sir George Gipps to Stanley, 30 September 1844, ibid 819.

25 Letter from Gladstone to Sir Charles Fitzroy, 7 March 1846, in *Historical Records of Australia*, series I, vol 24, 806–8.

26 Letter from Sir Charles Fitzroy to Earl Grey, 1 January 1847, in *Historical Records of Australia*, series I, vol 25, 296–8; *Laws and Regulations Relating to the Waste Lands in the Colony of New South Wales 1858* (NSW) 32.

27 Letter from Earl Grey to Sir Charles Fitzroy, 30 June 1847, in *Historical Records of Australia*, series I, vol 25, 640–3. Earl Grey did not however order revocation of the regulation; he realised this would cause only confusion and unnecessary embarrassment.

28 Letter from Sir Charles Fitzroy to Earl Grey, 4 January 1848, in *Historical Records of Australia*, series I, vol 26, 143.

29 Letter from Sir Charles Fitzroy to Earl Grey, 9 June 1848, ibid 449–50.

30 Ibid.

31 *Laws and Regulations Relating to the Waste Lands in the Colony of New South Wales 1858* (NSW) 33.

country lands would be reduced to the uniform rate of two shillings per 100 acres, providing that payment at the rate stipulated in the grant had been made for four years at least, and that future liabilities were discharged promptly. Subject to the same conditions, rents reserved on grants of lands in country towns were to be reduced to one quarter of the reserved rate.[32]

Not all tenants took advantage of the provisions for redemption. In 1863 a parliamentary paper was published listing the grants upon which rents had been redeemed, and those on which rents were still outstanding. Subsequently, a register was compiled by the Colonial Treasurer recording the state of indebtedness. Between 1863 and 1950, about £43 000 was received in arrears, leaving an amount of about £7000 still due. Whether the Crown's rights in any case might be extinguished by elapse of time will be considered presently.[33]

IV APPORTIONMENT OF QUIT RENTS

Like any other tenurial service, the liability to pay quit rents devolves upon the tenant in fee for the time being. As mentioned earlier, the statute *Quia Emptores* provided that where an estate in fee was alienated, the alienee should hold for the same services as were due from the outgoing tenant. If only part of the fee was alienated, the services, providing they were services of a kind which could be divided, were to be apportioned according to the value of the land. But the statute did not affect the rights of the Crown, so that if a tenant-in-chief (a tenant holding immediately of the Crown) alienated a portion of the fee, the services due were to be automatically apportioned and the Crown could distrain upon the lands of any of the tenants for the whole services.[34] In 1842 the Crown law officers in New South Wales advised that if a grantee of the Crown had subdivided his land, whoever was found in occupation of any portion of the premises conveyed in the original grant would be held liable for the amount due on the entire grant.[35] The injustice of this state of affairs was recognised and, in the regulations of 1846 for redemption of quit rents, it was announced that:

32 *Laws and Regulations Relating to the Waste Lands in the Colony of New South Wales 1858* (NSW) 34. In 1849, Earl Grey authorised the absolute remission of quit rents due from grantees who had come to the colony from Great Britain on the understanding that convict labour would be assigned to them (*Votes and Proceedings*, 1849, vol 1, 488–9). Regulations issued by the Colonial Office in November 1824 and supplied to intending immigrants had provided that in the redemption of quit rents, a grantee would be credited with one fifth of the sum saved to His Majesty's government by his employing convicts. This concession was withdrawn in April 1828 and transportation of convicts to New South Wales stopped in 1840. In 1848 the Executive Council proposed that any person who had left Great Britain between November 1824 and April 1828, had obtained a land grant and who could satisfy the government that he had emigrated on the faith of the regulation, should be entitled to remission of quit rents owing by him (Letter from Sir Charles Fitzroy to Earl Grey, 29 July 1848, in *Historical Records of Australia*, series I, vol 26, 527).

33 C J King, *An Outline of Closer Settlement in New South Wales: Part 1: The Sequence of the Land Laws 1788–1956* (1957) 17.

34 Charles Sweet, *Challis's Law of Real Property* (3rd ed, 1911) 19–20.

35 Ibid 20.

> In any case in which the land included in a Grant has been subdivided and conveyed in portion to different proprietors, the Government will not object to entertain proposals for the total extinction of the proportionate amount of Quit-rent due on any such portion, on the principle established by this notice; but, as no rule can be laid down which would be generally applicable in cases of this nature, they must form the subject of special investigation and arrangement in each individual case.[36]

Under s 3 of the *Apportionment Act 1905* (NSW),[37] the Colonial Treasurer was empowered to apportion quit rents. On redemption of the portion of the quit rent so apportioned, the Treasurer might release the part of land to which it related from the rent, but notwithstanding such redemption and release, the residue of the quit rent should issue out of the residue of the land.[38] Since 1919, redemption of an apportioned quit rent has had the effect of automatically releasing the land to which it relates from the rental, so that it is no longer necessary to obtain an express release.

V LEGAL ACTION FOR ENFORCEMENT OF QUIT RENTS

At common law the only remedy for enforcement of the obligation to render tenurial services was distraint upon the chattels found on the tenant's land. These chattels might be removed and impounded as security, but until the *Distress for Rent Act 1689*[39] they could not be sold and the proceeds of sale could not be retained.[40] Although defaulters in New South Wales were sometimes threatened with action of this kind,[41] the threats seldom materialised.[42] Legge's reports of litigation in the Supreme Court contain only one case dealing with distress for arrears of quit rents.[43] In this instance, the Colonial Treasurer and a collector of quit rents were sued successfully for trespass upon freehold land held by Charles Windeyer. Having levied a distress, they had remained on the premises, which, the Supreme Court held, they were not entitled to do.

No record has been found of any case in which the Crown attempted to proceed against defaulters by action for recovery of the land itself. Chapter 4 of the *Statute*

36 Enclosure in letter from Sir Charles Fitzroy to Earl Grey, 10 June 1847, in *Historical Records of Australia*, series I, vol 25, 482–3.

37 The provision was incorporated in s 143 of the *Conveyancing Act 1919* (NSW).

38 The same effect was given to redemptions of apportioned quit rents before 24 July 1904, the date of commencement of the *Apportionment Act 1905* (NSW).

39 2 Wm & M 2, sess 1, c 5.

40 On the procedure for distraint, see Frederick Pollock and Frederic Maitland, *History of English Law* (2nd ed, 1923) vol 1, 333 et seq.

41 Buckley, above n 22, 401.

42 On distress by the Crown see Joseph Chitty, *Prerogatives of the Crown* (1820) 208–9. Distress was the main remedy which Governor Gipps invoked to enforce arrears. On 12 August 1845 the Legislative Council submitted an address to Gipps requesting a return of distraints levied in the previous year (*Votes and Proceedings* (1845) 28). The return showed that only nine seizures had been made which yielded £600. In six cases stock had been seized which did not belong to the debtor: Buckley, above n 22, 425.

43 *Windeyer v Riddell* (1846) 1 Legge 295.

of Gloucester 1278,[44] as amended by ch 21 of the *Statute of Westminster II 1285*,[45] provided that where a tenant defaulted in performance of his tenurial obligations for two or more years and left nothing on the land which might be distrained, the lord might recover the land by action at law.[46] This statutory remedy of cessavit presumably was open to the Crown as well as to mesne lords, but whether it could have been used by the Crown in New South Wales against persistent defaulters was less certain.

In 1713, Edward Northey, the British Attorney-General, had advised that the remedy was not available in the colony of New York for the reason that the statutes which gave it had not 'been put in practice on the settling [of] that colony, nor enacted there'.[47] This opinion is rather indecisive and was given at a time when the principles governing reception of the laws of England in the overseas dominions of the British Crown were still not clearly settled. Whatever the colonial view might have been, the British government at that time did not recognise any general principle whereby the laws of England were extended *ipso vigore* to the American plantations. The majority of these colonies, it needs to be added, were regarded as having been acquired by conquest of infidel Indians and, therefore, received only those laws of England which the Crown or the British Parliament was prepared to extend to them.[48] Since New South Wales always had been treated as a settled colony, rather than as one acquired by conquest, the applicability of English statutes such as the *Statute of Gloucester 1278* depended in no way on royal fiat.

The laws in force in England at the date of British settlement of New South Wales became part of the law of the colony, subject, of course, to the qualification that the English law in question was reasonably capable of being applied in the colony. It is difficult to see why cessavit should not have been considered part of the law of New South Wales. At all relevant times the courts of the colony possessed the requisite jurisdiction to entertain such actions,[49] and, if the tenurial system of landholding operated within the colony, why not also the remedial law which had developed in the mother country to protect tenurial rights?

Along with most of the other real actions, cessavit was abolished in England by s 36 of the *Real Property Limitation Act 1833*.[50] Four years later, the Legislative Council of New South Wales adopted the *Act* in toto.[51] But this did not mean that

44 6 Edw I, c 4.

45 13 Edw I, c 21.

46 William Holdsworth, *A History of English Law* (3rd ed, 1966) vol 3, 16; Theodore Plucknett, *Legislation of Edward I* (1949) 90–3.

47 George Chalmers, *Opinions of Eminent Lawyers* (2nd ed, 1858) 149.

48 See Joseph Smith, *Appeals to the Privy Council from the American Plantations* (1950).

49 The Court of Civil Jurisdiction established under the *Letters Patent of 1787* had jurisdiction to try summarily pleas concerning 'Lands, Houses, Tenements and Hereditaments, and all manner of interests therein': *Historical Records of Australia*, series IV, vol 1, 6. Like jurisdiction was invested in the Supreme Court, and the Governor's and Lieutenant-Governor's courts created under the *Letters Patent of 1814*: ibid 77. The jurisdiction of the Supreme Court under 4 Geo IV, c 96 (1823) and 9 Geo IV, c 83 (1828) also comprehended all common law actions for recovery of land.

50 3 & 4 Wm IV, c 27.

51 8 Wm IV, No 3.

the substantive rights which previously might have been vindicated by the real actions were affected in any way. To a very large extent the real actions already had been supplanted by the fictitious action of ejectment; the *Real Property Limitation Act 1833* merely recognised the status quo and enlarged the scope of the action of ejectment so as to make the real actions wholly unnecessary. Although ch 4 of the *Statute of Gloucester 1278* had given rise to a new form of action, clearly it did more than prescribe a particular remedy. In the event of a tenant persistently defaulting in performance of services, the Statute gave the lord of the land a right to seisin in demesne. Although the exercise of this right was dependent upon the lord's title first having been established by action at law, the precise form of action employed must surely have been immaterial.

Those provisions of the *Real Property Limitation Act 1833* limiting the time for commencement of actions for recovery of land were held not to apply to the Crown.[52] However, there can be little doubt that the provisions abolishing the real actions applied equally to subjects and the Crown. Cessavit, it should be emphasised, was not a prerogative remedy and the presumption against interference with the special rights of the Crown could, therefore, have had no relevance. As a general rule, any remedy open to the subject is also open to the Crown, but if the remedy presupposes a disseisin or dispossession, the Crown is confined to its prerogative remedy of an information of intrusion.[53] This exception is founded upon the fiction that the Crown cannot be disseised or dispossessed.[54] But where the Crown seeks recovery of land for persistent default in payment of quit rents, there is no reason at all why it should not sue upon information or alternatively in ejectment, for in such a case the Crown relies neither on a disseisin nor on a dispossession.

Enforcement of quit rents had also presented problems in the American colonies.[55] To protect the financial interests of the Crown, the British government had always advocated the establishment of colonial Courts of Exchequer.[56] Thereby the Crown presumably intended to obtain for itself the undoubted advantage of proceeding against its debtors by the prerogative writ of extent.[57] The writ, which is thought to have been created by s 55 of the *Act* 35 Hen VIII, c 39 (1544), is a writ of execution, and directs the sheriff to take the defendant into custody, and to inquire on the oaths of good and lawful men what property[58] the defendant has and its value (extent), and then to seize the same on behalf of the Crown. Being a writ of execution, a writ of extent could not issue until the defendant's indebtedness had been established by matter of record. In the case of simple contract debts, the debt became one of record only after the issue from the Exchequer of a commission of inquiry directing commissioners to inquire of jurors whether the defendant was

52 *Hatfield v Alford* (1846) 1 Legge 330, 338–9.

53 Chitty, above n 42, 332–5.

54 Ibid 245.

55 See generally Beverly Bond, *Quit Rent System in the American Colonies* (1919).

56 Ibid 291, 299, 310, 312, 449–50.

57 Chitty, above n 42, 261 et seq.

58 Both real and personal.

indebted to the Crown, and, if so, for what amount, and then after the return of the results of the inquiry to the Court.

Where rent was reserved under a Crown grant, either of leasehold or freehold, no such inquisition apparently was necessary. The validity of the Crown grant itself depended on enrolment in a court of record, and since the Exchequer records showed whether rents had been paid or not, the Crown's entitlement also would appear by matter of record.[59] Before any writ of extent could issue, the Crown first had to give the defendant an opportunity of pleading any defence he might have. This was done by issue of a writ of *scire facias*, under the seal of the Court of Exchequer, commanding the sheriff to warn the debtor to appear before Barons of the Exchequer on a certain day to show cause why execution should not be levied.

Although the Crown could proceed for recovery of debts in any royal court, the advantage of suing in the Court of Exchequer was that by means of the writ of extent the Crown could levy execution not only against the debtor's chattels but also against his freeholds. At common law, execution could not be levied against a judgment for debtor's lands. This rule was modified by ch 18 of the *Statute of Westminster II 1285* which allowed execution to be levied against one half of the debtor's lands. The judgment creditor was, however, permitted to retain the land only until such time as the debt had been satisfied from the issues.[60] In New South Wales this limitation proved particularly inconvenient, and in 1813 Imperial legislation was passed to enable the real property as well as the personalty of a judgment debtor to be seized upon a writ of *fieri facias*.[61]

Exchequer jurisdiction in revenue matters was not specifically invested in any New South Wales court until 1823. The *Letters Patent of 1797* and *1814* invested the civil courts of the colony with general jurisdiction to entertain debt actions but made no distinction between actions brought by private persons and actions by the Crown.[62] The absence of revenue jurisdiction in the Supreme Court erected under the second *Charter of Justice of New South Wales 1814* (UK) was brought to the attention of Commissioner Bigge by the then judge of the Court, Barron Field. One defect, Field J observed:

> in our present charter is that of a revenue jurisdiction and power to sue for the King's debts as given by the Ceylon Charter and to Bengal by stat. 53 Geo 3, c 155, S.111. Our charter recites the necessity of making only 'sufficient provision for the recovery of debts, and determining of private causes between party and party in New South Wales', altho', to be sure, the stat. 54 Geo. 3, c. 15, s. 2 contemplates the King's power to use in

59 *Doe d Hayne v Redfern* (1810) 12 East 96.

60 On this remedy (elegit) see Theodore Plucknett, *Concise History of the Common Law* (5th ed, 1956) 390–1.

61 54 Geo III, c 15.

62 *Historical Records of Australia*, series IV, vol 1, 6, 77.

> our Courts. But the revenues and increase of the colony will now require larger powers to be expressly given.[63]

Notwithstanding that the Supreme Courts established in New South Wales and Van Diemen's Land under the *Imperial Act 1823* 4 Geo IV, c 96 were specifically invested with the jurisdiction of the English Court of Exchequer, the Chief Justice of Van Diemen's Land, John Pedder, thought that because of the limitations which had been imposed by the *Act* on the use of juries, the Supreme Court of that colony had no authority either to seal commissions of inquiry or to issue writs of extent. The correctness of this interpretation of the *Act* was questioned both by the colonial Attorney-General, Joseph T Gellibrand,[64] and by counsel to the Colonial Office, James Stephen Jr.[65] Gellibrand's opinion was 'that the King is not deprived of any of his rights by implication, and that all the rights of the Crown are in full force in this Colony so far as the circumstances will admit'.[66] James Stephen agreed entirely, but added 'as the subject is important, and the Chief Justice entertains an opposite opinion, it will probably be thought right to set the question at rest whenever the Act of Parliament is renewed'.[67] Later in 1826 James Stephen's cousin, Alfred, the Solicitor-General of Van Diemen's Land, also urged that the matter be clarified. In a memorandum on 4 Geo IV, c 96, prepared at the request of Lieutenant-Governor Arthur, Alfred Stephen commented:

> It is, as I understand, decided in this Island that the Court has no power to issue a writ of *Extent*, altho' a Court of Exchequer, by reason that there is no Jury, which could be impannelled, to try any traverse taken in respect of seizures under it. This point, in a Colony where there are necessarily so many Crown debtors, yearly encreasing in number, is one which it would be very desirable to set at rest by Legislative Enactment. It would indeed be advantageous to the interests of the Crown to give additional and unusual facilities for the recovery of its debts, at all events for enforcing payment of the Sums reserved on Grants and Leases of Land, the source from which its largest revenue will one day be derived.[68]

As events turned out, nothing was done either to clarify the position regarding writs of extent or to facilitate recovery of quit rents.[69]

In some circumstances neglect by the Crown to enforce its rights to receive quit rents from its tenants may have the effect of barring its remedy altogether. Under the *Crown Suits Act 1769*[70] suits by the Crown to recover rents were barred unless

63 Letter from Field to Bigge, in *Historical Records of Australia*, series IV, vol 1, 860–1.

64 Letter from Gellibrand to Arthur, 26 September 1824, in *Historical Records of Australia*, series III, vol 5, 242–3.

65 Letter from Stephen to Hay, 1 April 1826, ibid 268–9.

66 Letter from Gellibrand to Arthur, 26 September 1824, ibid 243.

67 Letter from Hay to Arthur, 1 April 1826, ibid 269.

68 Letter from Arthur to Hay, 15 November 1826, ibid 422. See also ibid 429 where Stephen drew attention to the doubts which had been raised in the colony about the applicability of 35 Hen VIII, c 39.

69 The *Act* 9 Geo IV, c 83 (1828) re-enacted the provision in 4 Geo IV, c 96 (1823) investing Exchequer jurisdiction in the Supreme Courts.

70 9 Geo III, c 16; held applicable in New South Wales in *A-G (NSW) v Love* [1898] AC 679.

brought within 60 years after the right to the same has accrued. However, the statute did not bar recovery where at any time during those 60 years the rents were duly in charge to the Crown or stood insuper of record. Section 2 provided that rents were to be held duly in charge where they were in charge by, to, or with any auditor, auditors or other proper officer or officers of revenue. What was needed to put rents in charge was considered at some length by the Irish Land Commission in *Re Maxwell's Estate*.[71] The Commissioner, Bewley J, explained that formerly rents payable to the Crown were put in charge either 'by the Court of Exchequer upon a *scire facias* on behalf of the Crown' or 'by the Auditor-General ex officio from the King's grant'.[72] In the case of land grants by the Crown, the procedure was as follows:

> the fiat of the Attorney or Solicitor-General for the patent or grant lodged in the Rolls Office; and when the grant was sealed and enrolled it was not given directly to the party concerned, but was brought by one of the Clerks in the Rolls Office to the Auditor-General to be entered by him. The Auditor-General having ascertained the rent inserted it in the Roll of the King's rents, and the grant was then delivered to the party.[73]

The principal roll here referred to was the Pipe Roll of the Exchequer. Bewley J, following earlier English and Irish judicial authority,[74] concluded:

> Rents were therefore held to be in charge when, in the rolls delivered to the receiver, or auditors of the Crown or other collectors of the Royal revenue, they were charged against them; and although these rents were not received or even demanded from the persons liable to pay them for a period of more than sixty years, they were nevertheless deemed to be duly in charge, and the claim of the Crown was protected, although the receivers, auditors and collectors should return nil.[75]

While the arrangements adopted in New South Wales for the compilation of rent rolls were not identical with those in England and Ireland, there can be little doubt that, for the purposes of the *Crown Suits Act 1769*, the quit rents reserved on Crown grants were at some time put in charge. As a result, lapse of time did not bar the Crown's rights in those cases where arrears were still outstanding.

VI CONCLUDING OBSERVATIONS

During the early years of British settlement in the colony of New South Wales, the purpose of reserving to the Crown a right to payment of quit rents from those to whom grants in freehold were made was not simply to make it plain that grantees

71 [1891] LR Ir QB & Ex 356.

72 Ibid 362.

73 Ibid.

74 *A-G v Maxwell* (1814) 8 Price 77; *A-G v Lord Eardley* (1820) 8 Price 39; *Hatton v Waddy* (1837) 2 Jones 841.

75 *Re Maxwell's Estate* [1891] LR Ir Q B & Ex 356, 363.

(and their successors in title) held as tenants of the Crown. The purpose was also to ensure that grantees would incur an obligation to contribute to the revenues of the colonial government from the incomes that they might derive from the lands granted to them. But the administrative arrangements for the collection of quit rents proved unsatisfactory, and many of those under an obligation to pay these rents found it difficult or impossible to discharge their obligations. The lands allotted to them were not as productive as might have been expected having regard to their geographical extent.

The quit rents system also generated some nice legal problems concerning the ways and means available to the colonial government to enforce outstanding liabilities to pay the quit rents. These problems stemmed in part from uncertainties about the extent to which the laws of England applied in the colony.

The expectation that quit rents would be a significant source of revenue for the colonial government was disappointed. It is not, therefore, surprising that, from 1831 onwards, the original scheme for the disposition of freehold estates in the waste lands of the Crown was abandoned and replaced by a regime under which those desiring to acquire such an estate could do so only by purchase for consideration, albeit subject to a liability to pay a nominal quit rent.