LAND TENURES IN AUSTRALIAN LAW.

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I *The reception in Australia of the law as to freehold tenure.*

When Australia was annexed by the Crown, the Crown became the " ultimate " or " radical " owner of all land in Australia. Rights in respect of any land in Australia must therefore be derived either directly or indirectly from the Crown, or not at all.

Annexation deprived the aboriginal natives of Australia of their property rights in respect of the lands they had previously possessed.[1] Batman in 1835 thought that he had acquired title to land in and in the vicinity of what is now Melbourne by means of a " treaty " with the tribe of aborigines who at that time inhabited those areas, but found that no title to unoccupied lands (" waste " lands, as they were called) within the boundaries of the annexed territories could be acquired in any other way than by an express grant from the Crown.

It was, likewise, impossible for anybody to acquire title to any Australian land merely by " squatting " on it. He had to obtain a grant, lease or licence from the Crown in respect of it, or he was a mere trespasser.

The Crown's title to the ownership of all land within the Colony of New South Wales (which at that date comprised approximately the area now within all the States other than Western Australia) dates from the first assumption of jurisdiction and annexation by England. As Isaacs J.[2] has pointed out,

> " We start with the unquestionable position that, when Governor Phillip received his first Commission from King George III on 12th October, 1786, the whole of the lands of Australia were already in law the *property* of the King of England . . . No act of appropriation, or reservation, or setting apart, was necessary to vest the land in the Crown . . . The mere fact that men discovered and settled upon the new territory gave them no title to the soil. It belonged to the Crown until the Crown chose to grant it . . . This doctrine received very practical application when the Crown, by Governor Bourke's proclamation, approved by the Colonial Office, refused to recognise Batman's treaty with the native chiefs in 1835, and notified that persons found in possession of the lands would be treated as trespassers and intruders."

This idea had been expressed in different words in 1847 by Stephen C.J. :

> " The waste lands of this colony are, and ever have been, from the time of its first settlement in 1788, in the Crown ; that they are, and ever have been from that date, (in point of legal intendment), without office found, in the Sovereign's posses-

1. The Crown could have confirmed the title of the aboriginal natives of Australia to the lands they had previously possessed, subject only to the new paramouut title of the Crown ; but, in fact, it did not recognize any aboriginal legal rights to land on the Australian mainland. However, when the Crown became paramount landlord of the lands of Papua and New Guinea more than a century later, it confirmed the aboriginal natives of those Territories in their ownership of legal rights to the lands they had previously possessed, subject however to the new paramount title of the Crown.
2. (1913) 16 C.L.R., at p. 439.

sion, and that, as his or her property, they have been and may now be effectually granted to subjects of the Crown."[3]

In 1828 the Imperial Parliament enacted the Australian Courts Act which, in Section 24, applied to New South Wales all the laws in force within the realm of England on 25th July 1828, " so far as the same can be applied within the said Colony." By virtue of the Common Law and this 1828 Act the English law as to land tenure was introduced into Eastern Australia, as far as it was applicable. A century of subsequent legislation by the various legislatures of Australia has developed a new system of land tenures in the various Australian States and Territories, so that it is now possible to say, with a very high degree of accuracy, that the constitutional supremacy of Australian Parliaments and the Crown over all Australian lands, as much as the feudal doctrines of the Common Law, is the origin of most of the incidents attached to Australian land tenures. This does not mean, however, that the law as to tenures has suffered an eclipse in Australia. The reverse is the case. Legislation has revitalised and developed it, and has given it an importance in modern Australian land law which it has not had in England at any time since the sixteenth century.[4]

No proprietary right in respect of any Australian land is now, or ever was, held, by any private individual except as the result of a Crown grant, lease, or licence and upon such conditions and for such periods as the Crown (either of its own motion or at the discretion of Parliament) is or was prepared to concede. What have been the kinds of tenures applicable to the grants, leases and licences that have been made at various times by the Crown ?

When Australia was annexed by the Crown, and first settled by Englishmen in 1788, socage and copyhold were the only lay tenures recognized by the law of England, and the only spiritual tenure was frankalmoin. Frankalmoin was obsolescent in England even in 1828, and, in any event, was never specified in any Australian deed of grant. No manors on the mediaeval pattern have ever existed in Australia. It cannot therefore be successfully contended that any Australian land has ever been held on copyhold tenure, the tenure of villeinage. There were never *villeins* here ; the convicts were *villains* in another sense. The inference is that no type of tenure other than free and common socage was ever introduced into Australia as a result of the reception in Australia of the Common Law of England.

If this view is adopted, it must be clearly understood that the tenurial incidents attached to freehold grants of Australian land made by the Crown to its Crown tenants here were not[5] necessarily the same as were applicable in 1828 to freeholds held by socage tenure in England. Fealty and *secta curiae* are of no practical importance, and it would seem immaterial whether we take the view that they have become Common Law

3. *A.-G. v. Brown*, (1847) 2 N.S.W. S.C.R. App. 30, at p. 39.
4. Professor Maitland, indeed, once expressed the view that in modern English land law the doctrine of tenure had become an almost useless survival : *Collected Papers*, vol. I., p. 196.
5. It is of interest to note in this connexion that in a Colonial Office Circular of January 1829 (Dr. Battye, *History of Western Australia*, p. 87), dealing with grants of land to be made in Western Australia, it is stated that, " Land thus granted will belong in perpetuity to the grantee, his heirs and assigns, to be held in free and common socage, subject, however, to such reservations and conditions as may be stated in conveyance."

incidents of freehold tenure in Australia, or not. Relief was obsolete in England, and, anyhow, its rate of assessment in Australia was never expressly fixed, and it has never in fact been exacted in Australia. Admittedly, most of the early freehold grants of Australian land exacted an annual "quit-rent," similar in kind to the rentals which at that time were payable in respect of some English freehold lands. The principal difference was that the Australian quit-rent was usually a rack rent, whereas most English rent services had, by the early nineteenth century, become nominal or token rents, as a result of a gargantuan inflation of English money values since the dates—when the respective amounts had originally been fixed. This difference disappeared, however, when in 1846 legislative provision was made for all quit-rents to be compounded in respect of all freeholds in Eastern Australia. There should also be kept in mind as a general source of divergences and differences between English and Australian freeholds, the fact that, whereas most of the instruments by which English lands were first granted to the predecessors in title of the present Crown tenants have been lost, with the result that the incidents of socage tenure in England depend upon general rules of the Common Law and upon evidence of the practice of the Crown and its Crown tenants, in Australia it is nearly always possible to refer to the precise words of the instruments of grant, and to any statute or ordinance modifying or supplementing the effect of those words.

It might prevent ambiguity if Australian freehold tenure were described simply as tenure by a Crown grant of freehold. This would emphasise that it is to the precise terms of each Crown grant, and to the provisions of relevant statutes, and not primarily to generalized rules of the Common Law concerning the incidents of socage tenure, that it is necessary to look in order to ascertain the restrictions in favour of the Crown imposed in the Crown grant upon the Crown tenant's rights to the land.

The reservations and conditions contained in each Crown grant are supplemented by certain statutes which have brought about the eclipse in every Australian State of the Common Law maxim *cujus est solus, ejus est usque ad coelum et ad inferos*. From these statutes will be learnt the precise extent to which that eclipse has resulted in a contraction in Australia of the Common Law rights of enjoyment which belong to freeholders in England.[6]

II *The invention of Australian tenures of new types.*

The year 1846 saw the first step taken along a road which led to the subsequent invention of a multitude of Australian tenures of new types. In that year an Imperial statute authorized the making of Orders in Council. These were issued in 1847 in respect of New South Wales and 1850 in respect of Western Australia.

The 1847 Order in Council had a two-fold significance in the New South Wales of the day. It brought to an end the policy of concentration of settlement,[7] which was to have been achieved by the Crown refusing

6. A discussion of this topic is to be found in the writer's *Freehold and Leasehold Tenancies of Queensland Land*, pp. 83-153.
7. South Australia and Western Australia did succeed in enforcing the policy of concentration of settlement, and, as a consequence, freeholding is the normal method of landholding in those States.

to alienate the fee simple of, or to lease, any land outside " the nineteen counties " around Sydney or outside small areas around Hobart, Melbourne and Brisbane. It also introduced a system of Crown leasehold tenures which led to the whole of Australia being transformed in subsequent decades into a patchwork quilt of freeholdings, Crown leaseholdings, and Crown " reserves."

Before 1847, and especially during the " squatting age " in New South Wales between 1835 and 1847, many thousands of people left the " settled districts " and went into the back country beyond. These " squatters," as they came to be known, took possession of unoccupied land without having any right or title to it. Technically, they were trespassers, but the New South Wales legislature, faced with a *fait accompli*, enacted the 1839 Squatting Act which instituted a system of pastoral licences which, for a fixed annual licence fee, entitled their respective holders to occupy for pastoral purposes land outside the settled districts. The device of pastoral licences was, however, satisfactory neither to the squatters nor to the Crown. The 1846 Imperial statute, as implemented in New South Wales by the 1847 Order in Council, conceded most of the pastoralists' demands. Most pastoralists outside the settled districts thereafter held their lands on leases of 8 or 14 years duration, for low annual rents, a right of resumption being retained by the Crown and a right of pre-emption of the fee simple of the land, or part thereof, being granted to each of these Crown leasehold tenants.

The present States of New South Wales, Queensland, Victoria and Tasmania, have therefore had a common starting point in the evolution of Crown leasehold tenures. South Australia and Western Australia were destined to develop along similar lines, but from different starting points.

The 1847 Order in Council created new pastoral tenures. In 1861, Sir John Robertson secured the enactment in New South Wales (which, by then, had dwindled into its present boundaries) of a statute which introduced a new kind of agricultural tenure. This was called Selection tenure, but is more accurately described as " conditional purchase." It enabled a " cockatoo farmer " of the Colony to obtain a freehold title to his agricultural farm, after the payment (usually in instalments) of a prescribed purchase price, and after fulfilment of conditions such as personal residence on his Selection for a prescribed period and the expenditure of a prescribed sum on making permanent improvements on the Selection. One of the essential features of this kind of tenancy is that, after a prescribed period of years, it changes its nature, as in a kaleidoscope, from a Crown leasehold tenure to a freehold tenure ; and may therefore be said to be a " convertible " tenure. Until the conditions of purchase are fulfilled and the purchase is completed, it has many of the characteristics of a Crown leasehold tenancy with onerous incidents ; afterwards it becomes an ordinary type of freehold.

Later, Selection tenure was introduced also into the other Australian colonies. It is still to be found, in various forms, and under various names, in each Australian State. Although originally an agricultural tenure, it became the prototype of other tenures, such as Miners' Homestead Leasehold tenures in Queensland, which are available for residential purposes in localities which are not necessarily agricultural in nature.

The original type of pastoral leasehold tenures, those which originated in the 1847 Order in Council, imposed few incidents of tenure other than payment of annual rent-services. The agricultural Selection type of tenure had imposed onerous developmental and occupation conditions in addition to the payment of annual rent-services. In the course of time, similar conditions of development or occupation were imposed in respect of some of the pastoral tenancies. Queensland examples of this cross-fertilization are the Grazing Farm Selection tenures (first introduced by the Crown Lands Act 1884) and the Graxing Homestead Selection tenures (first introduced by the Crown Lands Act 1894).

The Crown leasehold principle has been applied not only to lands for pastoral and agricultural purposes, but also to those for mining, fishing, water-utilization, residence and other purposes.

For example, mining lands, like pastoral lands, are mostly held on Crown leasehold or Crown licence tenures. The great Australian gold-rushes of the 1850's and 1860's had led to the introduction of a system of gold-mining licences and gold-mining leases which, in their own way, were counterparts of the pastoral licences and pastoral leases of 1839 and 1847. The glamorized Eureka Stockade of 1854 was the result of opposition by goldminers at Ballarat, Victoria, to the imposition of a system of miners' licences similar to the " miners' rights " of to-day (but much more costly), and similar to the pastoral licences which had been imposed upon " squatters " by the 1839 New South Wales Squatting Act. Their opposition did not secure the abolition of the system of Crown licences, indeed, in the course of time, Crown grants of mineral freeholds ceased to be made. In Queensland no grant of any mineral freehold has been made by the Crown since 1882, and, as a consequence, most Queensland mining lands are held from the Crown on various non-perpetual tenures, each of which imposes (*a*) a licence fee or annual rent, and (*b*) tenurial incidents designed to ensure that the Crown tenant continues to utilize and develop for mining purposes the lands which he holds.

Probably the zenith of the Australian system of Crown leasehold tenures was reached when there was evolved in the closing decade of the nineteenth century the first of the Crown perpetual leasehold tenures. By means of these tenures Crown tenants can obtain a title to a statutory perpetual term of years instead of a Common Law fee simple estate, this perpetual term of years usually being subject to important incidents of tenure to which freehold grants in fee simple are not subject.

Crown perpetual leasehold tenure was first introduced in Queensland in 1907. Since 1917 (with the exception of the three years from 1929 to 1931) it has been the policy of the Queensland Government not to make freehold grants of Queensland land, and during this period Crown perpetual leaseholds have been offered instead of freeholds. It is possible to obtain Crown perpetual leaseholds in New South Wales, but there is no bar to the acquisition of land in New South Wales on freehold tenure.

III *The Queensland system of non-perpetual Crown leasehold tenures.*

Legislation during the century since 1847 has thus brought into existence in each Australian State a complex and diversified system of

Crown leasehold tenures. The development of these laws as to tenures has been most marked in New South Wales and Queensland.

The Crown leasehold principle, introduced during the Imperial period, was developed in scores of New South Wales statutes enacted after the grant of self-government in 1855 and of Queensland statutes enacted after Separation in 1859. The undoubted constitutional right of the Queensland and New South Wales Parliaments to create whatever tenures each think fit has been exercised actively. The result in each State, as Millard has said of New South Wales, is " a bewildering multiplicity of tenures."[8] Gone is the simplicity of the modern English law as to tenures. Gone is the senile impotence of the emasculated tenurial incidents of modern English law. New South Wales and Queensland are in the middle of an historical period in which the complexity and multifarious nature of the laws relating to Crown tenures beggars comparison unless we go back to the mediaeval period of English land law. The relevant laws in the other States of Australia are perhaps less complex and multifarious, in comparison with those of New South Wales and Queensland ; but in no Australian State or dependent Territory are these laws nearly as simple as is the modern English law as to tenures.

Mr. Fyfe, Surveyor-General of Western Australia, who recently investigated the land tenures of all Australian States has said in his Report that Queensland's various Crown leasehold tenures " represent the most comprehensive system in operation in respect of country lands in Australia." Of all Australian States, Queensland is that in which the largest fraction of total area is held by Crown tenants on various kinds of non-perpetual Crown leasehold tenures,[9] and in which there exists a remarkable multiplicity of Crown leasehold tenures.

There are approximately seventy different kinds of Crown leasehold and Crown perpetual leasehold tenures in Queensland.

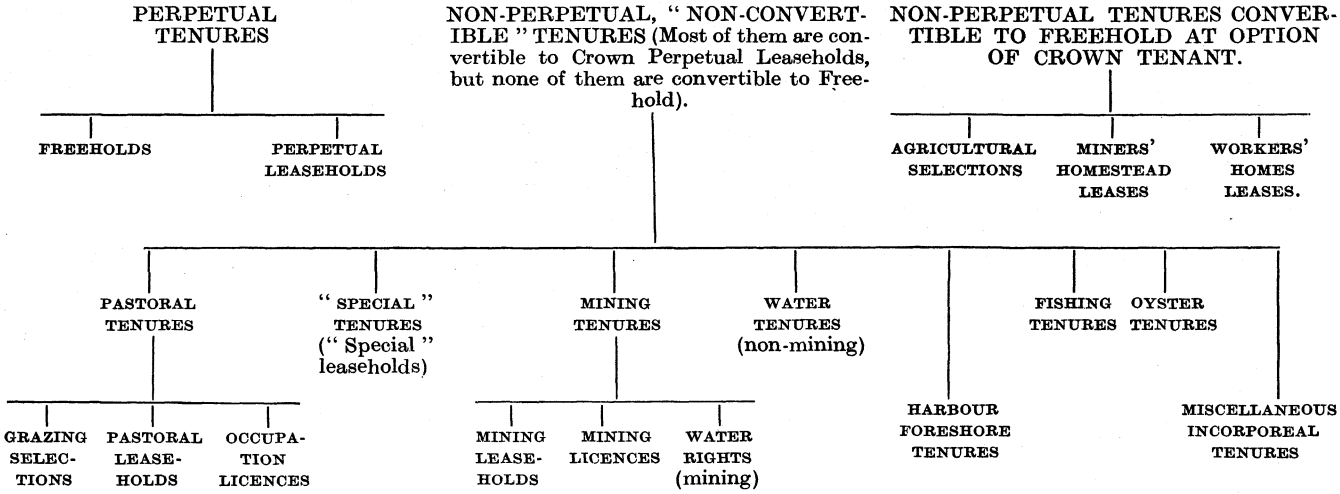
Details as to these are to be found in the writer's *Freehold and Leasehold Tenancies of Queensland Land*, and it is not proposed to enumerate them here or describe their individual characteristics. However, in the Table printed on next page, the major groupings of Queensland tenures are classified (*i*) according as they are perpetual or non-perpetual, and, (*ii*) if non-perpetual, according as they are or are not, at the option of the Crown tenant, " convertible " to freehold tenure.

This Table is supplemented hereunder by a general analysis of the principal characteristics of Queensland's Crown Leasehold tenures. This analysis may also serve to convey some idea of the general characteristics of the tenures in each Australian State.

Crown leasehold tenures (with the anomalous exception of Crown perpetual leaseholds, which are to be discussed later) confer on the Crown tenants only a term of years, such as 1, 2, 10, 20, 28, 30, 40 or 50 years. These Crown tenants do sometimes retain their holdings for longer periods by virtue of a right (sometimes conditional, sometimes uncon-

8. *Millard on Real Property* (*N.S.W.*), (4th edn.), p. 474.
9. In contrast with the 8% of Queensland which has been alienated on freehold tenure or is in process of alienation, is the 34% of New South Wales land and the 54% of Victorian land which is alienated or in process of alienation. Statistics for New South Wales further show that the area held in 1943 in that State under Crown perpetual leasehold tenures was 21,354,935 acres, compared with the 6,390,887 acres of Queensland land held under Crown perpetual leasehold tenures at the end of 1945.

TABLE : QUEENSLAND CROWN TENURES CLASSIFIED ACCORDING TO THEIR RESPECTIVE PERIODS OF DURATION AND ACCORDING TO THEIR " CONVERTIBILITY."



ditional), which is usually given them in their Crown Lease, or renewing or prolonging their original term, in respect of at least some part of the land they hold. However, in the absence of a statutory right to convert a non-perpetual Crown leasehold into a freehold, no Crown lessee can enlarge his term of years into a fee simple.

Another very important characteristic of the Crown leasehold tenures are the many tenurial incidents imposed upon Crown Lessees. These tenurial incidents are designed primarily to (*a*) provide revenue for use by the Queensland and Commonwealth Governments and the Local Authorities, (*b*) develop the productive capacity and economic value, and the civilized amenities, of lands throughout Queensland, and (*c*) prevent the rise of a class of absentee owners possessing undeveloped lands, which would hinder the policy of populating the country districts of Queensland.

Amongst these tenurial incidents are : (*i*) monetary exactions in the form of land taxation and Crown land rentals ; (*ii*) developmental conditions (such as the erection and maintenance of fences or other " improvements," or the eradication of noxious plants) necessitating the expenditure of money, or its equivalent in labour and materials ; (*iii*) certain non-mining conditions, such as the condition of " personal residence " and the less exacting condition of " occupation " ; and (*iv*) mining conditions, such as the condition of labour-employment and that of continuous utilization. There might also be added to the list : (*v*) various rules as to the maximum areas which any one person can hold on each particular kind of Crown leasehold tenure ; and (*vi*) restrictions placed upon the Crown tenants' rights of alienating or encumbrancing their respective holdings.

In respect of monetary exactions, although there exists an apparent point of difference between freehold tenure and the various Crown leasehold tenures, it is to a great extent illusory on closer examination. In respect of each Crown leasehold an annual Crown rental is usually payable. Although no quit-rents are now payable to the Crown in respect of freeholds, any landowner who holds freeholds, the total capital value of which exceeds a specified sum, is obliged to pay annual land taxes which are not payable in respect of Crown leaseholds. A rose by any other name ! Other monetary exactions imposed on land, such as " death duties," stamp duties, gift duties, and Local Authority rates, are usually payable on whatever tenure the land happens to be held.

The principle of periodical re-assessment of the Crown rents due from Crown lessees, led to the establishment in Queensland of an administrative tribunal of specialized knowledge charged with the function of re-assessing these Crown rents. An 1884 Act recreated a Land Board, which became the Land Court in 1897. Important additional functions, including land tax appeals, have been imposed upon it from time to time.

It is in respect of the non-pecuniary incidents of tenure that there exists a very marked contrast between freehold tenure and the Crown leasehold tenures.

Freeholds, like Crown leaseholds, are in Queensland subject to a requirement that noxious plants must be eradicated. There are, however, few if any other non-pecuniary tenurial incidents attached to freeholds.

Certain of the Crown leasehold tenures are subject to developmental conditions which require the Crown tenant to erect fences, clear the land of prickly-pear or other noxious plants, employ labour on continuous mining development, or make various other miscellaneous types of improvements; and to maintain such fences, clearances and improvements when made. It should be mentioned that, in most circumstances, a Crown tenant has a right at the expiration of his Crown tenancy to obtain compensation, or concessions of other kinds, for the improvements he has made on the land.

The conditions of personal residence and the less exacting condition of occupation form another important class of tenurial incidents. The *condition of personal residence* is performed by the continuous and *bona fide* residence of the Crown tenant personally on the holding during a specified period, usually of only a few years' duration. Only very occasionally and only in highly exceptional circumstances will any relaxation of this condition be permitted. The *condition of occupation* is performed by the continuous and *bona fide* residence on the holding of the Crown tenant personally or of a registered bailiff who would himself be qualified to become the Crown tenant of such a holding. Usually the condition of occupation, if applicable to a particular holding, is applicable for the whole period of the Crown lease, except in so far as part of such period may be subject to the condition of personal residence.

Very similar in its nature both to the condition of occupation and to the condition of development, applicable to non-mining tenures, is what we may call for the want of a better name the mining condition of continuous utilization. Land held on the various mining tenures must be utilized " continuously and *bona fide* " for the particular purpose or purposes for which they are respectively granted. Most, but not all, of the mining tenures impose a condition that the land must be continuously worked by the employment of a minimum number of workers specified by law.

Tenurial incidents constitute a very real menace to the continuance of any Crown tenant's right to his tenancy. For example, the conditions of continuous utilization and of labour-employment give an ephemeral character to the great majority of mining tenements, and the non-mining condition of occupation is one upon which a Crown perpetual leaseholder must needs look with apprehension.

In order to prevent the accumulation of unduly large areas of land in the hands of any one Crown tenant, Queensland has adopted a policy of restricting the number and the total area of holdings. Sometimes a maximum is imposed upon the size of any single holding, a maximum number of holdings that any one Crown tenant can hold is prescribed, and a further maximum is imposed upon the total area of land which the one Crown tenant can hold in Queensland in all of the holdings which he is permitted to hold on any particular tenure. These maxima vary, according to the particular tenure, from the $\frac{1}{2}$ acre of Crown Perpetual Town Leaseholds to the 60,000 acres of Grazing Selections, whilst no maximum has been prescribed by Statute in respect of Pastoral Holdings under Part III of the Land Acts. With only a few exceptions, it is the general rule that the imposition of a maximum in respect of a particular

tenure does not debar a Crown tenant from holding additional areas of land on other tenures, if the maximum in respect of each of those other tenures are not exceeded.

Before the second world war a freeholder was, in general, at liberty to deal with his holding in any way he liked and without having to obtain any administrative consents from the Crown, provided only that he conformed to the relevant rules of the general law applicable to such dealings. This old attribute of freeholds is in violent contrast with the system of close administrative controls which fetter the power of Crown leaseholders to deal with their holdings. The consent of a State Minister[10] is a pre-requisite for the validity of any *assignment* of a Crown leasehold ; although there is usually no necessity to obtain such consent to a *sub-lease* or a *mortgage* of the holding if it is subject not to the condition of personal residence but only to the condition of occupation. During the second world war and the transitional post-war period, the necessity to obtain consents from a Commonwealth Minister, as part of a many-sided system of control of the economic affairs of the nation, has also fettered freeholders' freedom to deal with their holdings ; but this development will probably prove to be of a merely temporary nature.

In all Australian States the laws as to tenures are evidence of a cogent and administratively enforced policy of making land serve as an instrument of national and social purposes. It will probably not be until current Australian ideals are abandoned by some future generation of Australians (and, it would seem, most political ideals are abandoned sooner or later) that the present systems of Crown leasehold tenures will collapse, as the feudal system of land tenures did in England progressively from 1330 to 1600.

IV *Comparison of Crown perpetual leasehold tenures and freehold tenure.*

Freehold tenure confers upon the Crown tenant, his successors and assigns, an estate in fee simple, which is usually said to confer " perpetual " title. " Tenant in fee simple," it is said in *Coke on Littleton's Tenures*, " is he which hath lands or tenements to hold for him and his heirs for ever." It is a rule of the Common Law which cannot be disproved by any mathematical or other argument, that a fee simple is a " larger " estate than any leasehold estate, however long the term of years conferred by the latter, even if it be 10,000 or 100,000 years.

Common Law does not recognize perpetual leasehold as a valid kind of mesne tenancy ; although, if a mesne leasehold is validly created for a term of limited duration, it can be made perpetually renewable. However, each Crown perpetual leasehold is the creature of statute and, therefore, it validly confers upon the Crown tenant, his successors and assigns, an estate which is indefinitely prolonged " in perpetuity." Despite this, the relevant Queensland statutes all prescribe that a Crown perpetual leaseholder is not entitled to " a deed of grant in fee simple." This is in contrast with several New South Wales statutes,[11] pursuant

10. This necessity to obtain the Minister's consent is used by the Queensland Lands Department to ensure that no tenurial incidents attached to a particular Crown leasehold will be evaded as a result of any dealing with such leasehold.
11. *Law Book Co. Land Laws Service*, vol. 1, pp. 406-407.

to which Crown perpetual leaseholders, who hold " leases in perpetuity " thereunder, are entitled to a grant " to the lessee his heirs and assigns for ever." This statutory form of words differs from the limitation, which formerly was the technical formula normally required to confer an estate in fee simple, only in the use of the word " lessee." The result has been described as " a troublesome legislative incongruity."[12] Crown perpetual leaseholds are registerable under the Torrens System in New South Wales, but not in Queensland. Even in New South Wales, in the opinion of Mr. Justice Roper in *Nolan v. Willimbong Shire Council*,[13] such a grant " to the lessee his heirs and assigns for ever " creates " a title which is not a fee simple but is a statutory title more analogous to a leasehold than to a freehold title." Similar views have been expressed by others. Justices Isaacs and Gavan Duffy said in *Fisher v. Deputy Federal Commissioner of Land Tax (N.S.W.)*[14] that " a perpetual lease is in its nature inherently distinct from a fee simple." Mr. V. Ryall has pointed out that the two words which are conjoined in the phrase " perpetual leasehold " appear to be " mutually destructive," and he therefore maintains that the phrase is " meaningless."

This criticism should not blind us to the fact that estates held either on freehold tenure or on Crown perpetual leasehold tenure are alike in that they each might theoretically last " for ever," if a purely mathematical meaning is not given to this latter phrase.

It is interesting to speculate as to why Crown perpetual leaseholds should have been called " leaseholds." In many lay minds the most distinctive feature of mesne leaseholds is the number and onerous nature of the tenurial incidents binding upon the tenant, in comparison with the almost total absence of tenurial incidents binding upon freehold tenants. It is this feature, rather than the comparative " length " or " size " of the respective leasehold and freehold interests, which for lay minds constitutes one of the most important practical distinctions between these two types of tenure. This characteristic of mesne leaseholds, with which Australian Parliamentarians were familiar by reason of their everyday experiences as mesne lessors and mesne lessees, led them to use the term " leasehold " in legislating as to Crown tenures, whenever they desired to indicate thereby that the continued retention of his title by the Crown tenant was dependent upon his due performance of many tenurial incidents imposed to prevent the anti-social use of the land. Admittedly, the term was first applied in this sense to Crown tenures which conferred estates of limited duration, but the extension of its use to Crown perpetual leasehold tenures was perhaps natural in view of the onerous incidents of tenure in respect of which Crown perpetual leaseholds resemble non-perpetual Crown leaseholds, rather than freeholds.

As a greater number of onerous tenurial incidents usually attach to Crown perpetual leaseholds than to freeholds, the risk of premature fatality is considerably greater in respect of the former than of the latter.

Annual and other pecuniary exactions may be exacted in respect of nearly all lands, whatever the tenure on which they are held. The

12. V. Ryall, " *Perpetual Leaseholds in New South Wales*," 11 *Australian Law Journal*, p. 223 ; *Millard on Real Property (N.S.W.)*, (4th edn.), p. 472.
13. 14 L.G.R. (N.S.W.) 89.
14. (1915) 20 C.L.R., at p. 248.

weight of the burden doubtless does vary[15] according to various factors, such as the kind of tenure and the aggregate value of the landowner's freeholds ; but there is little difference in the *nature* of the *pecuniary* incidents attached respectively to each tenure.

Most kinds of Crown perpetual leasehold tenures impose upon the Crown tenant a number of non-pecuniary obligations of a continuing kind, such as those of perpetual " occupation," and of perpetual maintenance in good order and condition of the developmental " improvements " which the Crown has required the Crown tenant to make. Failure to comply with these continuing obligations will cause a forfeiture of the holding. It is these non-pecuniary continuing obligations that distinguish Crown perpetual leaseholds in a very marked way from freeholds, to which they are inapplicable.

The necessity to obtain the consent of a State Minister as a prerequisite of the validity of any assignment of a Crown perpetual leasehold, also differentiates that type of tenure from freehold tenure. This point has been elaborated above, in connexion with Crown leaseholds in general.

For as long as the present Queensland policy against making Crown grants of freehold is persisted in, the nature of the differences between freehold tenure and the Crown perpetual leasehold tenures will be a matter of lively political and legal controversy in Queensland ; and might well be of considerable interest outside Queensland.

V *Comparison of Australian tenures and those of mediaeval England.*

It is because large areas of Queensland and New South Wales lands are held subject to multitudinous and multifarious conditions of tenure, that the laws as to tenures devirge in these two States greatly from those of modern England and even, but to a minor extent, from those of other Australian States.

The Crown tenures of mediaeval England were as difficult to classify, and the incidents of such tenures were as multitudinous and multifarious, as are the Crown tenures and tenurial incidents of modern Australian land law, especially in Queensland and New South Wales. Tenurial incidents in mediaeval England were, however, peculiarly appropriate to the feudal period, and those in modern Australia are of a different nature. Despite this, a useful comparison can be drawn between them.

Although such incidents as relief, aids, wardship and marriage may at first seem contrary to modern methods of obtaining revenue for use by the Governments and Local Authorities, some of them are not very dissimilar from modern taxation devices. Thus, a feudal " relief " resembles various kinds of modern " death duties." The exaction of annual land taxes from freeholders and annual Crown rents from Crown leaseholders, differs from feudal " aids," " wardship," " marriage " and " scutage," principally in the regularity of modern exactions in contrast with the intermittent character of their feudal counterparts.

Other incidents of feudal tenure, such as knight service, were designed to aid the accomplishment of public purposes, such as the security of the realm from hostile armed forces and its preservation from civil commotion.

15. See Leaflet H issued by the Queensland Lands Department in 1924, entitled *The Perpetual Lease System of Land Tenure.*

These public purposes are accomplished in modern times by other means ; but different public purposes, such as the peopling of outlying districts, and the development of the nation's resources by the eradication of pests, the erection of fences, buildings and machinery, ringbarking, the creation or improvement of water supplies, and other reproductive works, are achieved in Australia in modern times by means of the various tenurial incidents which have been imposed upon Crown lessees.

In the feudal era in England, as also in Australia to-day, Parliament and the Crown (as advised by the magnates of the realm in past times and by Cabinet Ministers in modern times) imposed upon Crown tenants such tenurial incidents as were best calculated to advance the policies thought at any particular time to be appropriate for the purpose of ensuring the safety and prosperity of the realm.