Promises of Land from the Crown: Some Questions of Equity in Colonial Australia

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Introduction

This essay explores some of the legal problems which arose from the widespread practice in the early years of settlement in New South Wales and Van Diemen's Land (Tasmania) whereby the colonial Governors and their agents allowed or authorised settlers to occupy tracts of the lands of the Crown, with a promise that they would eventually receive a formal grant of the land so occupied, usually a grant of a freehold estate in fee simple. Many of these promises of grant were gratuitous in the sense that they were not supported by any consideration moving from the promisee. Such promises were commonly termed promises of grant without purchase.

What legal rights, if any, did such promises confer? Those to whom promises were made generally assumed that the promises would eventually be fulfilled by issue of a formal deed of grant. Many promisees, indeed, treated the documents which recorded the promise as something as good as a deed of title. They assumed that they had received some proprietary right which could be conveyed to another, or devised by will. The laws of England which had been brought to the infant Australian colonies did not, however, reflect the settlers' assumptions and expectations. A bare promise of a grant of land from the Crown could not have been enforced by legal action. And such a promise conveyed nothing which, under English law, could be characterised as a proprietary interest in land.

Nevertheless those who acted on behalf of the Crown in the management and disposal of the lands of the Crown in Australia always intended that the promises of land grants should be fulfilled. The difficulty which confronted them when the time came for preparation of the formal deeds of grant was that there was no assurance that the original promisee was now the person best entitled to be the beneficiary of the grant. That promisee might be deceased. He or she might have conveyed the interest - whatever it was - to another. This difficulty was clearly one which could not be resolved by the judicial processes of the ordinary courts of law and equity. The laws which those courts were bound to apply were not ones which

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would produce results which would have been considered just and equitable. The judicial arms of government, and their processes, were also not equipped to deal with the large number of cases to be determined. The problem before the administrators of the lands of the Crown was rather one to be dealt with by legislative and administrative measures.

The history related in the following pages is a history of the circumstances and events which led to the adoption, and later refinement, of these special legislative and administrative measures.

The essay begins with a short account of the policies which informed the practice of issuing promises of grant of land without purchase, of the manner in which the colonial Governors implemented those policies, and of the nature and dimensions of the problems created by the Governors' practice. Consideration is then given to the effects of the Governors' promises of grant under the laws of England received into the Australian colonies; to how certain disputes concerning such promises were resolved within the Colonial Office in London; to the special legislative measures adopted in New South Wales and Tasmania to deal with the difficulties which attended efforts to honour the Governors' promises; and to how this legislation affected the law applied in the colonial courts in cases in which they were required to consider claims which stemmed from promises of grant.

Land Settlement: Policies and Practices

From the beginning of European settlement in Australia it was assumed that when Great Britain established colonies in Australia, title to all the lands within those colonies immediately vested in the Crown and that no one else (at least, a European) could acquire a valid title in those lands save by grant of the Crown.[1]

By their commissions the early Governors of New South Wales were authorised to make grants of the colonial lands of the Crown, in accordance with instructions issued to them from time to time by the imperial authorities in London.[2] These instructions dealt

1 *R v Steel* (1834) Legge 65; *Attorney-General v Brown* (1847) Legge 312 at 316-7. The assumption is, of course, no longer part of the common law of Australia: see *Mabo v Queensland (No 2)* (1992) 175 CLR 1. Title by sixty years' adverse possession against the Crown could be acquired under the *Crown Suits (Nullum Tempus) Act* 1769 (9 Geo III c 16). This statute was held to apply in New South Wales in *Attorney-General v Love* [1898] AC 679.

2 On the effect of the instructions see E Campbell, 'Crown Land Grants: Form and Validity' (1966) 40 *ALJ* 35 at 36-8. Comprehensive statutory controls over the alienation of Crown lands in the Australian colonies

with matters such as who should be considered qualified to receive a grant, the acreages to be made available and the terms and conditions on which grants were to be made.

During the early years of British settlement in New South Wales, land was generally made available to aspiring settlers otherwise than by contract to purchase and usually before a formal deed of grant was executed. Over the years 1824 and 1825 the imperial authorities sought to introduce a system under which the primary method of disposal of Crown lands in Australia would be by sale at public auction.[3] The introduction of that scheme was, however, deferred, principally because of the practical difficulties which would attend its implementation: among them the inability of the Surveyor-General's department to undertake the work of survey and valuation which the scheme entailed, and at the same time complete the surveys which (it was assumed) had to be made before formal grants could be made to the many settlers already in occupation of the lands which had been promised to them under the earlier free grants scheme.[4] (Alienation of Crown lands by sale did not become the norm until 1831).

In the light of these difficulties, a modified scheme was introduced in September 1826. This scheme was designed to promote land settlement by Europeans and also to ensure that settlement was appropriately controlled.[5] The scheme involved the establishment (within New South Wales) of the so-called Limits of Location, that is to say the geographical limits beyond which settlers would not be permitted to go in search of the lands on which they wished to be located.[6] It also involved a regime under which persons wishing to select land within those Limits might do so with official sanction. Application for a permit to select land was first to be made to the Colonial Secretary (an officer attached to the Governor's establishment), and if the application was approved, the applicant would be supplied with a letter to the Surveyor-General who would

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were not introduced until the enactment of the imperial *Waste Lands Act* 1842 (5 & 6 Vic c 36).

3 Bathurst to Brisbane, 1 January 1825 (HRA I, xi, 434, 454-6); Instructions to Darling, 17 July 1825 (HRA I, xii, 113-24).

4 Oxley to Darling, 26 January 1826 (HRA I, xii, 379 et seq); Land Board to Darling, 11 March 1826 (HRA I, xii, 406-13); Land Board to Darling, 20 March 1826 (HRA I, xii, 413-9); Darling to Land Board and Surveyor-General, 18 July 1826 (HRA I, xii, 374).

5 Government Order 5 September 1826 (1 *Callaghan's Statutes* 390n, HRA I, xii, 539-41); approved by the Secretary of State, Bathurst to Darling, 2 April 1827 (HRA I, xiii, 219-30).

6 *Sydney Gazette* 6 September 1826. The limits were extended in 1829: *Sydney Gazette* 17 October 1829.

then give the applicant written authority to search for a location. Once a location was selected, the selector was to inform the Surveyor-General of the selection, and, if the Governor approved of the selection, the Colonial Secretary would issue the selector with a written permit to enter into possession 'until His Majesty's pleasure be made known or the Grant be made out'.[7]

The practice of permitting settlers to enter into possession of a tract of land of the Crown, with an assurance that they would later receive a formal grant of it, had begun in the very early years of settlement. In June 1797, soon after his arrival in New South Wales, Governor Hunter complained to the Secretary of State of the difficulties which this practice had created for him. 'It will cost me', he wrote, 'some time and much labour to fix those settlers who have been left so long a time in the manner ... described'.[8] This complaint was echoed in a dispatch of Governor Brisbane's in April 1822. 'On my arrival in this Colony', Brisbane reported, 'I discovered that Major General Macquarie [his predecessor] had been exceedingly liberal in his promises of land: - so much so, that, exclusively of those he had himself been enabled to perfect, there remained a balance of unexecuted grants to the amount of 340 thousand acres'.[9]

Those who were permitted to occupy Crown land under promise of a grant were apt to treat their permits as if they were muniments of title and the land occupied by them following the promise of a grant was often conveyed, mortgaged, devised by will and even seized and sold in execution of judgments. In evidence

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7 For the form of permits see text to note 78 below. A New South Wales statute of 1829 (10 Geo IV No 6) simplified the procedure for recovery of lands the selection of which had been disapproved (see ss 2 and 3). Section 4 also provided that if a person occupying land selected by him transferred any interest in it to another, the permit to occupy should become null and void. On the background to the legislation see Attorney-General Saxe Bannister's memorandum of 8 February 1825 to Governor Brisbane, enclosed in Brisbane to Bathurst, 8 February 1825 (HRA I, xi, 497-8); Bathurst to Darling, 24 August 1825 (HRA I, xii, 56-7). Subsequently the Supreme Court of New South Wales doubted whether the statute 21 Jac 1 c 14 (1623) applied in the colony: *Hatfield v Alford* (1846) Legge 330; *Doe d Wilson v Terry* (1849) Legge 505 at 509. This statute altered the common law rule that if the Crown sued to recover land (on an information of intrusion), the onus was on the defendant to plead and prove that the Crown was not entitled. The statute provided that if the Crown was out of possession for 20 or more years, the defendant should retain possession until the question of title was adjudicated.

8 Hunter to Portland, 10 June 1797 (HRA I, ii, 18). See also Hunter to Portland, 12 November 1796 (HRA I, i, 667).

9 Brisbane to Bathurst, 10 April 1822 (HRA I, x, 630).

before Commissioner JT Bigge in early 1821, Frederick Garling, one of the first solicitors in New South Wales, stated that inhabitants of the colony frequently disposed of their lands before obtaining grants of them, but, he added, 'the purchaser takes it at his own risk, and sometimes a Lease of five years is given with a Bond to convey at the expiration of that period, but it frequently happens that the Grantee makes conveyance of his Grant when obtained from the Surveyor Genl, or Secretary's Office and Defeats the Previous Purchaser'.[10] In March 1820 Deputy-Surveyor GW Evans had informed Commissioner Bigge of similar practices in Van Diemen's Land.[11] In April 1822 Governor Brisbane recorded his astonishment on finding 'the general feeling in the Colony to be that the smallest scrap of paper containing' a promise of grant 'was equivalent, if not superior, to the best title from the Crown: nay an unsupported assertion, under the signature of the Convict clerk in the Surveying Department, that such a promise has been made, has been known to pass current with as much confidence in the public market as a Spanish Dollar'.[12]

Special difficulties arose from the changes which occurred during the early years of settlement regarding the policies and practices to do with the disposal of Crown lands within the principal towns of New South Wales. A measure adopted by Governor Darling in 1829 in order to deal with those difficulties was to create further problems.

In 1792, shortly before his departure from the colony, Governor Phillip had decided that no perpetual or leasehold interests in land within the Sydney area should be granted.[13] But in June 1801, Governor King, Phillip's successor, announced that Crown lands in Sydney might be leased for terms of five years, and at a later date he extended the maximum term of lease to fourteen years.[14] Shortly before the arrival of Governor Macquarie in the colony, the practice was instituted of converting the leaseholds into freeholds,[15] but Macquarie discontinued that practice. He was prepared to grant

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10 28 January 1821 (HRA IV, i, 851-2).

11 HRA III, iii, 318-9.

12 Brisbane to Bathurst, 10 April 1822 (HRA I, x, 630). See also *Spenser v Gray* (1848) Legge 477 at 481-2 (Manning J).

13 HRA I, vi, 714, n 38.

14 HRA I, iii, 285; Bligh to Windham, 31 October 1807 (HRA I, vi, 155). See also id at 714-5.

15 Foveaux to Castlereagh, 20 September 1809 (HRA I, vii, 4); see also id at 793 n 3.

leaseholds and permits to occupy. Of the two modes of disposition he preferred permissive occupancy.[16]

Evidence tendered to Commissioner Bigge in 1820 revealed that no less than four fifths of the lands in Sydney and Parramatta were then held under occupation permits.[17] These permits were commonly bought and sold. Nearly every town allotment, Governor Brisbane reported to the Secretary of State on 3 September 1823, had 'been purchased from some obscure individual, who had exercised the right to sell, under an old verbal permission to occupy, given him by a magistrate or the surveyor'.[18]

In June 1823 Brisbane had suspended the issue of any freehold grants of Sydney lands so that inquiries could be made to ascertain which of those lands were occupied and which not. Directions had been given to the Surveyor-General's department that plans be drawn showing which town lands were occupied. Once these plans had been prepared occupants were to be notified that they must either apply for leases or relinquish their claims. By September of 1823, Brisbane was able to report that applications for leases in Parramatta and Newcastle were being 'answered now with every readiness'. The processing of applications for leases of lands in Sydney and Liverpool had not progressed as well, 'which cannot', the Governor said, 'be deemed surprising, if we couple the extreme irregularity of the boundaries of all their allotments with the various other duties of the Surveying department'.[19]

On 8 June 1829, Governor Darling, after consultation with the colony's Executive Council, issued a Proclamation under which it would be possible for those who, on or before 30 June 1823, held leases of lands in Sydney, or rights of occupancy in the same, to apply for grants in fee simple.[20] This measure was meant to remedy the inconvenience which had 'been occasioned by the want of sufficient Titles for Allotments of Land in the Town of Sydney' and to 'give the necessary security to private Property ...'. The significance of the date of 30 June 1823 was that, since that time, very few leasehold grants had been made of lands in Sydney.

Under the Proclamation it was ordained 'that, on application being made, a Grant in Fee' should be made, on conditions specified

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16 Liverpool to Macquarie, 26 July 1811 (HRA I, vii, 366).

17 'Report of the Commissioner of Inquiry on the State of Agriculture and Trade in the Colony of New South Wales', PP 1823, X, no 136, p 42.

18 Brisbane to Bathurst, 3 September 1823 (HRA I, xi, 121).

19 Ibid.

20 HRA I, xv, 19-20; approved by the Secretary of State, Sir George Murray, 21 August 1830 (id at 716).

in a Government Order dated 29 May 1829,[21] 'to every Person (or his lawful representative), who, on or before ... 30th of June, 1823, was *bona fide* in possession by Lease from the Government, whether such Lease' had expired or not, 'or by mere right of occupancy of any Allotment of Land in ... Sydney, not hitherto alienated by the Crown' and not notified as being required for public purposes. The Proclamation went on to provide that 'in order that all Parties interested may have an opportunity of proving such their respective rights, a description of each Allotment, with notice of the intention to complete a grant thereof, shall be published three months previously for general information'. Grants made would contain a clause 'reserving ... and keeping harmless all Rights of other Private Individuals which may be lawfully established at any time thereafter'.[22]

The Proclamation was poorly drafted and did not pay sufficient regard to the fact that those eligible to apply for grants in fee simple might already have disposed of their 'interests'. As will be seen later, the effect of the Proclamation presented some problems for resolution by the Colony's Supreme Court.

Effect of Promises of Grant

There is no report before the 1860s of any suit having been brought to enforce a promise made on behalf of the Crown to grant land in New South Wales. This is hardly surprising since the Crown could not have been sued in respect of such a promise except on a petition of right.[23] Until the enactment of the *Claims Against Government Act* in February 1857, such petitions appear not to have been employed in the colony.[24] But in any event, it was by no means clear that the promises of grants created any legal rights which were enforceable against the Crown. The legal effect of the Governors' promises did, however, arise for judicial consideration in a number of cases not involving the Crown as a party.

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21 HRA I, xv, 876.

22 On the effect of such a reservation clause see pp 26-27 below.

23 Although petitions of right were available in respect of alleged breach of contract on behalf of the Crown, and to recover corporeal property, there was some doubt about their availability to enforce equitable claims: see W Clode, *The Law and Practice of Petition of Rights* (1887) Ch 11.

24 See 20 Vict No 15 (1857). See also the Victorian statute 21 Vict No 49 (1857), which was reserved for the Queen's personal assent, and assented to by her in June 1858. This Act was repealed and replaced by Part II of the *Crown Remedies and Liability Statute* 1865 (No 241). See also

There was never any doubt that no legal estate in the land promised by the colonial Governors could pass until a formal deed of grant was passed under the public seal of the colony.[25] It also came to be accepted that the transfer of title from the Crown was not perfected until the deed of grant had been enrolled in a court of record or an equivalent office.[26] A mere promise of grant may not have been contractually binding, for the promises which were made were not under seal and in many cases it would have been difficult to establish that the promisee had supplied valuable consideration in support of the promise.[27] It was, however, accepted in *Dumaresq v Robertson*[28] that promisees had given consideration for a promise of grant - by Governor Darling - when they agreed to settle in the colony if a grant of land were made to them.

Those to whom promises of grant were made, as has already been mentioned,[29] were permitted to occupy the land promised to them; indeed, were encouraged to do so. Being in possession, under promise of grant, was assumed by many settlers to confer some kind of title, capable of transfer. It was this circumstance which led the Supreme Court of New South Wales to consider how far, if at all, the principles of equity might accommodate the interests of those claiming some title through an original promise.

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the Tasmanian *Crown Redress Act* 1858 (23 Vict No 1) and *Crown Redress Act* 1891 (55 Vict No 24).

25 See E Campbell, 'Crown Land Grants: Form and Validity' (1966) 40 *ALJ* 35 at 38-40.

26 Ibid.

27 By 1800 it was well settled that purely gratuitous promises were not enforceable at common law or equity unless given under seal. At one time the Lord Chancellor, in the exercise of his equitable jurisdiction, had been prepared to enforce gratuitous parol promises by an order for specific performance, providing the promise was made for good cause, but by the end of the 17th century it was accepted that specific performance would not be ordered to compel fulfilment of promises which were not binding at common law: *Marquis of Normanby v Duke of Devonshire* (1697) 2 Freem 216; *Brownsmith v Gilborne* (1727) 2 Str 738. That gratuitous promises to grant Crown land were not legally binding unless under seal or supported by consideration was recognised in several late 19th century decisions: *Melbourne Corporation v The Queen* (1867) 4 WW & a'B (Eq) 19; *Macpherson v The Queen* (1869) 6 WW & a'B (Eq) 131; *Blackwood v London Chartered Bank of Australia* (1871) 10 SCR (E) 56 at 82.

28 *Dumaresq v Robertson (No. 3)* (1860) Legge 1291; on appeal *Dumaresq v Robertson (No. 4)* (1864) Legge 1391. The proceedings were brought under 20 Vict No 15 (1857), see note 24 above.

29 Above p 1.

The first reported case in which the Supreme Court of New South Wales considered the question of whether any transferable right could be created by a promise of grant of Crown land was *Doe d Walker v O'Brien; sub nom Doe d Maziere v O'Brien*[30] in 1845. The land in dispute in this case had been promised to Michael O'Brien in 1822 by Governor Brisbane, and in 1831 had been seized by the sheriff in execution of a judgment against O'Brien. It was sold by auction to the plaintiff, David Maziere. But some time between the auction and the 'conveyance' to Maziere, a formal deed of grant had been made to O'Brien - in error it seems, for at the time the deed of grant was executed, O'Brien was in Norfolk Island serving a sentence for felony. Maziere, who had no knowledge of the fact that the deed of grant had been executed, went into possession of the land and, over a period of ten years, expended thousands of pounds on improving it. But in 1841 the land was once again seized and sold in execution of a judgment. The purchaser, James Kay, in consideration of his esteem and regard for Mrs Maziere, conveyed the land to trustees to hold for her benefit and the benefit of her children. David Maziere, however, remained in possession of the land until 1843 when O'Brien returned from Norfolk Island, his sentence having expired, and recovered the land in an undefended action for ejectment.

Subsequently the Maziere family brought an ejectment action against O'Brien. (David Maziere was originally the plaintiff, but the trustees were substituted for him). The plaintiffs were non suited simply on the basis that they had not established any legal title against O'Brien. The most that David Maziere had acquired as a result of his purchase of the land at the sheriff's auction in 1831 was O'Brien's 'title ... to *have a grant* made to him'. But this title was not cognisable by the Supreme Court in its common law jurisdiction. It was 'an equitable interest'.[31] Why it should be so regarded was not explained.

Neither Maziere nor the trustees took steps to enforce this 'equitable interest'. Maziere sought rather an ex gratia payment of compensation, from public funds, on the ground that, since the government's professed policy was not to grant lands to convicted felons, the issue of a deed of grant to O'Brien must have been in error.[32] Governor Fitzroy, and his Executive Council, rejected Maziere's application, whereupon Maziere petitioned the Secretary of State, Earl Grey. His petition was supported by Chief Justice Alfred

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30 (1845) Legge 246.

31 Id at 248. Cf *R v M'Intosh (No 2)* (1851) Legge 698 (Crown grant to a person who misrepresented himself to be the promisee held to be voidable).

32 Fitzroy to Grey, 13 July 1847 (HRA I, xxv, 662-7).

Stephen who had presided in the prior ejectment proceedings.[33] Earl Grey referred the petition to the Commissioners of Colonial Lands and Emigration and, on their recommendation, decided not to disturb the decision of the Governor in Council.

One important consideration which disposed the Commissioners against an award of compensation was that neither Maziere nor the trustees had chosen to pursue the equitable remedy which the Supreme Court had suggested was open to them. Maziere, they pointed out, had 'omitted to defend his rights in Court when, with the advantage of possession on his side, it is possible he might have done so effectually, and he has never attempted to enforce (while it was still possible to do so) that equitable title which we apprehend he (or his wife's Trustees) must have possessed'.[34]

In another ejectment action, determined two years after the Maziere action,[35] Chief Justice Stephen again expressed the view that those who had been promised land grants by the colony's Governor thereby acquired 'an equitable interest', albeit one 'of a character not defined and very unintelligible'.[36] But in the particular case the interest of the party claiming through the original promisee of a Crown grant, the defendant, was recognised by resort to common law principles of estoppel.

The promisee, one M'Kelly, had, in 1832, conveyed the land in dispute to one Weston, by the commonly used method of conveyance of freehold estates in possession: bargain and sale of a leasehold, coupled with a deed of release of the freehold in reversion.[37] That conveyance recited that M'Kelly was seised in fee under Crown grant. A formal deed of grant had been made to M'Kelly in 1839 and in 1843 M'Kelly had conveyed the land to one Miller. Miller later leased the land to the plaintiff, Aspinall. The defendant, Osborne, claimed through Weston, and the judgment in his favour was founded on the estoppel created by M'Kelly's recital in his conveyance to Weston that he, M'Kelly, was seised in fee under a Crown grant. The 'interest or

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33 Ibid.

34 Grey to Fitzroy, 20 January 1848 (HRA I, xxvi, 195). At some time after the litigation, Kay and Mrs Maziere's trustees conveyed their interests to O'Brien in consideration of his undertaking to abandon his claim of mesne profits. This was a factor which the Commissioners took into account in rejecting the petition. On the Commissioners see note 75 below.

35 *Doe d Aspinwall v Osborne* (1848) Legge 422.

36 Id at 428 (Stephen CJ for the Court). See also *Bucknell v Mann* (1862) 2 SCR (L) 1 at 7 per Stephen CJ.

37 See evidence of F Garling before Commissioner Bigge, 25 January 1821 (HRA IV, i, 851).

imperfect right of the kind relied on' by Osborne, ie that arising from the promise of grant to M'Kelly, did not defeat the estoppel created by M'Kelly's assertion of full legal title.[38]

In its separate equity jurisdiction also, the Supreme Court had occasion to consider whether a Governor's promise of grant could give rise to a transferable interest in land. The reported cases in which the Court considered that question occurred, however, after the establishment, in 1833, of the Commission of Claims and the issue of deeds of grant on the recommendation of that body. The cases do nevertheless indicate that the Governors' promises of grant were, generally, not regarded by the Court as creating any interests in land, legal or equitable, which were enforceable against the Crown. These promises were rather 'acts of grace'.[39] It is true that in *Spenser v Gray*[40] in 1848 Manning J suggested that, by a promise of grant, a Governor might become 'a naked trustee' for the promisee,[41] and that in *Terry v Wilson*,[42] in 1849, the Court had said that if a person obtained possession of land under promise of grant, he thereby obtained an 'equitable claim to the fee' which was descendible.[43] But in *Cockcroft v Hancy*[44] in 1858, the Court emphatically rejected the proposition that a purely gratuitous promise of grant by the Crown conferred any equitable estate. To hold that an equitable estate was conveyed by such a promise, the Court said, 'would be to determine that the Crown is in such cases a trustee, and compellable as such to convey to the party in any case having that interest'. It knew of 'no authority for such a doctrine ...'.[45] Governor Darling's Proclamation of 1829 had not altered this state of affairs.[46]

The Court nevertheless stated that persons in occupation of Crown lands under promise of grant were not necessarily bereft of

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38 (1848) Legge 422 at 428.

39 *Spenser v Grav* (1848) Legge 477 at 484; see also *Terry v Wilson* (1849) Legge 522 at 531.

40 (1848) Legge 477.

41 Id at 484.

42 (1849) Legge 522.

43 Id at 431; cf *Cockcroft v Hancy* (1858) Legge 1051 at 1077.

44 (1858) Legge 1051.

45 Id at 1062, 1063. See also *Lang v Evans* (1855) Legge 889 at 893: 'It would be a new and startling doctrine, that a mere location order - such as was usually given, in the early days of the Colony, by the favour of the Crown, or perhaps occasionally by the Governor for the time-being - constituted a declaration of trust in the Crown, valid and enforceable by law, and inducing the consequences supposed to flow in such case from the trust'.

46 (1858) Legge 1051 at 1063-4.

rights cognisable by the Court. They might maintain actions of trespass against intruders.[47] 'Without seeking to define the degree of kind of interest conveyed', the Court had already recognised the right of authorised occupants of Crown lands 'to transfer the interest implied by or involved in such occupancy; and actions . . . [had] been successfully brought for breaches of contract connected with such transfers'. It was even possible that a promise of grant might be enforced against the Crown if consideration for it had been given, or if the 'outlay of money had been 'induced by' the promise 'and on the faith of its fulfilment ...'. There could even be circumstances in which 'the transferee or heir of' an authorised occupant of Crown land would 'be entitled to redress against a person obtaining a grant of land, by imposing on him the character of trustee'.[48]

In none of the Supreme Court cases mentioned so far did the Court refer to any English case law which might have assisted parties who had occupied Crown land, with authority and under promise of grant, and who had expended money on the land so occupied. Nor did the Court advert to English case law on the position of the Crown as a trustee. The principles of proprietary estoppel which were to be developed in English cases such as *Dillwyn v Llewellyn*[49] and *Ramsden v Dyson*,[50] however, belonged to the future, albeit one not long distant. The ruling by the Master of the Rolls, Sir John Romilly, in *Unity Joint Stock Mutual Banking Association v King*[51] that if a person to whom land had been promised expended money on the land in reliance on the promise, he acquired, by virtue of his expenditure, an equitable lien for the amount expended was as recent as 1858 and was therefore unlikely to have come to the notice of the judges in *Cockcroft v Hancy*. Lord Chancellor Hardwicke's opinion in *East India Co v Vincent*,[52] in 1740, that equity would not permit the legal owner of land to assert his title, by action in ejectment, when he had by his silence or encouragement allowed another person to build on his land in the other's belief that the land was his own, would probably not have seemed relevant.

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47 Id at 1062.

48 Id at 1063.

49 (1862) 4 DeG F & J 517, 45 ER 1285.

50 (1866) LR 1 HL 129. On the application of proprietary estoppel to the Crown see *Plimmer v Mayor of Wellington* (1884) 9 App Cas 699; *Attorney-General for Trinidad and Tobago v Bourne* [1895] AC 83; *Prince of Wales v Collom* [1916] 2 KB 193 at 204.

51 (1858) Beav 72, 53 ER 563.

52 (1740) 2 Atk 83, 26 ER 451. See also *Dann v Sponser* (1802) 7 Ves J 231 at 235-6, 32 ER 94 at 95-6.

Although the New South Wales judges appear to have had some familiarity with contemporary English law in relation to the award of equitable relief against the Crown, the litigation which came before them in their equitable jurisdiction, and which concerned promises of grants of Crown land, did not involve the Crown as a party. Consequently the judges did not find it necessary to consider the English law in any detail. Had they considered that law, they would have found that the older view that the Crown could not, in any circumstance, hold land in trust[53] had been repudiated and that the only question of importance which was still to be resolved was whether equitable interests and equities could be enforced against the Crown. Since the Restoration, bills seeking equitable relief against the Attorney-General, representing the Crown, had been entertained in the Court of Exchequer in cases in which the legal estate in land which was already subject to an equitable interest or interests had come into the hands of the Crown by descent or escheat.[54] There had also been suggestions that equitable proceedings against the Crown might be brought in Chancery by petition of right.[55] But the general view was still that there was no process by which the Crown could be compelled to convey a legal estate in land to the person equitably entitled to it.[56]

Notwithstanding that it was generally accepted in New South Wales and Tasmania in the 1840s and 1850s that there was no effective way in which the Governors' promises of land grants could be enforced by action in the courts, it was also accepted that these promises should normally be fulfilled, and that the fulfilment of the promises would often entail careful investigation of the dealings which had taken place in relation to the promised land since the original promise was made, in order to ascertain who now had the best claim to receive a formal grant of a legal estate.

As the two cases which are related in the next section indicate, the Colonial Office and its legally trained advisers clearly recognised that the Governors' promises of land grants, at least when followed by occupancy of the land and expenditure of money in the improvement of it, conferred some equitable (albeit unenforceable) claim to a legal estate.

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53 *Wike's Case* (1610) Lane 54, 145 ER 294; *Bacon's Abridgment*, Prerog E 1.

54 *Pawlett v Attorney-General* (1668) Hardres 465, 145 ER 550; *Reeve v Attorney-General* (1741) 2 Atk 223, 26 ER 538; *Burgess v Wheate* (1759) 1 Eden 177 at 255, 28 ER 652 at 681-2. See also WS Holdsworth, *History of English Law* Volume 9 (3rd ed, 1944) pp 30-2.

55 *Penn v Lord Baltimore* (1750) 1 Ves Sen 444 at 453, 27 ER 1132 at 1138.

56 *Hodge v Attorney-General* (1838) 3 Y & C Ex 342, 160 ER 734. See also W Clode, op cit note 23, at pp 142-7; GS Robertson, *Civil Proceedings By and Against the Crown* (1908) pp 482-5.

'Adjudications' Within the Colonial Office

The Case of Henry Dangar

For a period of almost six years, beginning on 21 May 1821, Henry Dangar was an Assistant-Surveyor of lands in New South Wales.[57] In March 1825 Governor Brisbane had authorised him to select land there and on 22 November 1825 had issued a warrant to the Surveyor-General, John Oxley, requiring him 'to mark and measure for the individuals' thereafter listed

> the number of acres specified against each name respectively, and to place them or their legal representatives in possession thereof, the same lands being reserved for their use with the intention that Grants being hereafter passed under the great Seal of the Colony in the usual manner, when they may cease to be in the employment of the Crown, or when they have complied with the terms on which the same are now reserved.[58]

Henry Dangar was one of those listed in the warrant and 1300 acres were 'reserved' for him pursuant to it. He was 'placed in possession' of this land, in the Hunter River district, early in 1826.[59]

Shortly afterwards complaints were made to Governor Darling that Dangar had abused his office. The complaints were referred to the Land Board for investigation and report.[60] The Board found that Dangar had misused his office in that he had purchased location orders issued to several persons before they had even selected land. It recommended that Dangar not be permitted to retain the 1300 acres he had been authorised to select and occupy, under promise of grant.[61]

In the light of this report Governor Darling decided that Dangar should be suspended from office and that the question of whether he be permitted to retain the 1300 acres reserved to him should be referred to the Secretary of State. Dangar, however, resigned his office (31 March 1827) and returned to England to plead his case before the Colonial Office.

His case was that he had entered into possession of the 1300 acres he had been authorised to select and had expended money on

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57 1 ADB 280-2.

58 HRA I, xiv, 684; HRA I, xv, 296.

59 HRA I, xiv, 687.

60 The Land Board had been established in May 1826 to advise the Governor on applications for grants: HRA I, xii, 20.

61 28 February 1827 (HRA I, xiii, 149-56).

their improvement. He sought execution of a formal deed of grant 'in the usual manner'. Doubtless, he wrote to Under-Secretary Hay on 27 February 1829

> you ... will understand me when I say a Grant was made; the Governor's orders for such must necessarily pass long before any grant can be made complete by the delivery to the Grantee of the title deeds. Therefore the Governor's order for a grant is (for the present purposes of the Grantee) in every respect as secure to the Settler as if he had possession of the title deeds. Since by the contrary assumption the good faith of His Majesty's Government is alledged [sic] to be broken.[62]

Hay had already advised Governor Darling that the Secretary of State's present view was that Dangar should not be deprived of the 1300 acres if he had purchased them for consideration, or, if he had not so purchased them, unless he was compensated for the improvements he had effected.[63] Hay had later advised Dangar that, although the Secretary of State had decided that the land would not be granted to him, if he had 'expended any Capital upon that property upon the faith of any promise held out by the Colonial Government, a reasonable compensation should be made to you for any expense which you might thus have incurred'.[64]

According to Governor Darling, Dangar had 'not improved the Land in question'; nor had 'he erected any Building upon it beyond a common Hut or gone to any Expense'.[65] In reply to Under-Secretary Twiss's inquiry concerning the nature of the title which 'reserves' of land usually bestowed,[66] Darling said that the document relied on by Dangar gave no title whatsoever, and that a deed of grant would not be issued unless the conditions attached to the promise of grant had been fulfilled by the promisee.[67]

Eventually it was decided that the promise of grant should be made good, but that a permit which Dangar had been granted prior to his departure from New South Wales to enable him to purchase an additional 2000 acres should be varied in such a way that he would be obliged to pay for the 1300 acres, and allowed to purchase no more than a further 700 acres. Thus, in result, the promise of a free grant was not fulfilled, because there had been no 'breach of faith on the part of the Colonial Government' and because the circumstances of

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62 HRA I, xiv, 684.

63 12 February 1828 (HRA I, xiii. 779).

64 20 February 1829 (HRA I, xiv, 687).

65 19 December 1829 (HRA I, xv, 296).

66 20 March 1829 (HRA I, xiv, 683).

67 19 December 1829 (HRA I, xv, 296-7).

'Dangar's case warranted the denial of every indulgence of which he could with justice be deprived ...'.[68]

The Case of Robert Crawford

Robert Crawford had come to New South Wales in 1821, with Governor Brisbane, and had been appointed to the office of clerk in the Colonial Secretary's office. He had come with an order from the Secretary of State for a free land grant and in 1822 received a grant of 2000 acres pursuant to that order. On 21 November 1825 Brisbane promised him a further 1300 acres, subject to the approval of the Secretary of State, which approval was apparently given. Then on 28 November 1825 Governor Brisbane authorised Crawford and his brother Thomas, in writing, to purchase 3000 acres each. Crawford contended that Governor Brisbane had revised this authority and converted it into a promise of free grants.[69]

Whether Governor Brisbane had in fact promised these two parcels of 3000 acres as lands which would be granted without purchase came into question following the determination by Governor Gipps in 1842 that the authority provided by Governor Brisbane's instrument of 28 November 1825 be cancelled on the ground that the purchase moneys had not been paid.[70] By this time Robert Crawford had been in possession of the 6000 acres promised to him and his brother for many years, had spent money on their improvement, and had, on several occasions, mortgaged them.[71] On 15 September 1843, Crawford presented a memorial to Governor Gipps, for transmission to the Secretary of State, protesting against the Governor's decision. The Governor duly transmitted the memorial to London, but under cover of a dispatch which drew issue with the memorialist's contention that the land in dispute was occupied under promise of a free grant of it. There was, Gipps pointed out, no written record of the promise which Governor Brisbane was alleged to have made. Moreover that promise would have been in breach of the 'regulations' then current which limited the acreage which might be granted without purchase to 2000 acres. There was also on record, in the form of a return made to Governor Darling by the Surveyor-General in 1826, at the former's request, a statement that Robert Crawford held 3000 acres on purchase.[72]

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68 Murray to Darling, 24 July 1830 (HRA I, xv, 601).

69 Gipps to Stanley, 5 October 1843 (HRA I, xxiii, 176-9).

70 Id at 176. A demand for the purchase moneys was made in 1832, but Crawford replied that a free grant had been promised. No further demand seems to have been made until 1842 (id at 178-9).

71 HRA I, xxv, 682.

72 Gipps to Stanley, 5 October 1843 (HRA I, xxiii, 178-9).

Governor Gipps did, however, acknowledge that the Surveyor-General had issued Crawford with a certificate of occupation of the type issued only to those permitted to occupy Crown lands under promise of a free grant. But the Surveyor-General had, he said, been negligent in issuing that certificate, and the colonial government negligent in allowing Crawford 'to remain in undisturbed possession of the land upwards of seventeen years, during which period he ... [had] not only expended capital upon it, but mortgaged it also'.[73]

On consideration of Crawford's memorial, Gipps' comments on it, and comments sought and obtained from ex-Governor Brisbane, the Secretary of State, Lord Stanley, determined, in 1844, that Crawford not be granted title to the land in dispute unless he paid for it at the rate of five shillings an acre - the standard price of purchase at the time Brisbane made the promise relied upon.[74] Lord Stanley's ruling was, however, reversed in 1848 by Earl Grey, in consequence of fresh evidence presented by Crawford and inquiry and report by the Commissioners of Colonial Lands and Emigration.[75]

The additional evidence presented by Robert Crawford was set out in his letter to Earl Grey dated 25 June 1847, transmitted by Governor Fitzroy with a dispatch dated 24 July 1847.[76] It consisted of the following:

(a) An extract from a letter from Sir Thomas Brisbane to Crawford confirming the latter's contention that Brisbane had authorised a grant without purchase.

(b) Evidence that Crawford had been supplied, by the Surveyor-General, with a certificate of occupation and possession of designated acres, by warrant of the Governor, of the type then issued only to 'grantees' without purchase.

(c) Evidence that this certificate had subsequently been produced by Crawford to, and acted upon by, the relevant governmental agency in relation to the assignment to Crawford of convict labour, under current arrangements which enabled free

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73 Id at 179

74 Stanley to Gipps, 17 May 1844 (HRA I, xxiii, 601).

75 Grey to Fitzroy, 15 January 1848 (HRA I, xxvi, 176-7). The Commissioners had been appointed in 1840 to inquire into alienation of Crown lands in the colonies and advise on policies in relation thereto (HRA I, xx, 491).

76 Lord Stanley's ruling on the case had not been put into effect as Crawford's estates had in the meantime been sequestrated: Fitzroy to Earl Grey, 24 July 1847 (HRA I, xxv, 679). Crawford's letter and the supporting documents were attached to that despatch (id at 679-83).

'grantees' to obtain such services and also rations for support of their assigned convicts.

(d) Certifications by the Registrar-General of the Registry of Deeds (W Carter) of registered mortgage transactions in respect of the land in dispute dating back to 1825.

(e) A letter from James Norton, a solicitor in the colony, which described the practices which had been adopted in New South Wales in relation to the processing of applications for land grants.[77]

Norton's letter recounted that:[78]

> For a considerable period after the establishment of the Colony, Grants of land were made on a personal application to the Governor, and were by him notified to the Surveyor-General, and no entry of the order was made, except in the office of the Surveyor General, where the situation and measurement of the land was recorded.
>
> As the Colony increased, an unavoidable delay occurred in the measurement of lands which were selected at a remote distance from the Seat of Government; and as these lands frequently became the subject of testamentary or other disposition before the actual issue of the deed of Grant, so much inconvenience was felt from the irregular course that it became the practice of the Governor to issue a written Order or Warrant for the Grant, which was at once filed and recorded in the Surveyor General's office, and the intended Grantee, on notifying to the Surveyor General the selection he had made, was allowed to occupy the land and received a certificate in the following form:-
>
> > "This is to certify that is in the actual occupation and possession of acres of land situated in the Parish of and County of the same being located to him under Authority of a warrant from His Excellency Sir Thomas Brisbane, K.C.B., date
> >
> > Surveyor Generals office, 18--,"
> >
> > J Oxley,
> >
> > Surveyor General
>
> At a subsequent period, a formal Instrument was delivered to the Grantee, which, in addition to the recognition of his possession of the land, contained a copy of the regulations then in force

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77 On Norton see JM Bennett, *A History of Solicitors in New South Wales* (1984) pp 29-33.

78 9 April 1847 (HRA I, xxv, 682-3).

respecting Grants of land within the Colony. This document was called a primary Grant.

> As these selections were frequently made in remote parts of the Colony, a long period (often of many years duration) elapsed before the actual measurement of the land and issue of the Grant; but as the faith of the Government was understood to be pledged for the issue of a Grant of the fee simple of the land to the party who received the promise and to his heirs and assigns, Mortgages and Sales were universally made of such lands without waiting for the completion of the Grant.

Norton went on to explain that, in time, these transfers had become 'so numerous' and the 'difficulty in determining the rights of the Claimants' to grants so great, that a Commission of Claims had been established. He confirmed that, in Governor Brisbane's time, those who agreed to purchase land from the Crown received, prior to grant, a certificate of receipt of the deposit payable which was quite different from the type of certificate issued to promisees of free grants.

The information furnished by Norton about practice in New South Wales was probably instrumental in securing an ultimate decision in Robert Crawford's favour.

The two Commissioners to whom Earl Grey referred Crawford's second submission were the chairman, Thomas William Clinton Murdoch,[79] and Frederic Rogers, a barrister of some ten years' standing.[80] They found the facts to be these:

> Mr Crawford is in possession of a Certificate, which is taken in the Colony as implying a promise of a free grant, and therefore constituting a complete (equitable) title to the Land he claims: that he has occupied it for 17 years: that on the faith of it he has expended, and others have lent him money: and that the only proof that his certificate is not what it is *prima facie* taken to be, the Evidence of a promised [free] Grant arises from the absence of any record to that effect in the Survey Office, an office in which it is admitted business was at the time negligently done, in which some mistakes respecting Mr Crawford's claims must, on any supposition, have been committed, and which would now appear to contain, though not direct evidence of a promise, yet proof that Mr Crawford was treated as holding one.[81]

The Commissioners recommended that Crawford's claim be recognised, even though this would involve execution of a promise which Governor Brisbane was not authorised to make. Earl Grey

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79 13 DNB 1221.

80 17 DNB 119-21.

81 5 January 1848 (HRA I, xxvi, 177 at 178).

accepted this recommendation and accordingly authorised Governor Fitzroy 'to recognise and act upon Mr Crawford's claim to a Grant of ... [the] land'.[82]

The New South Wales Commission of Claims

On 26 August 1833, the Legislative Council of New South Wales, at the request of Governor Bourke, enacted a statute, 4 Will IV No 9, to authorise the appointment by the Governor of Commissioners to investigate and report on those claims to grants of land which were grounded on promises of grant, whether to particular individuals or by Governor Darling's Proclamation of 1829. The task of the Commissioners was to ascertain who had the best claim to receive a grant from the Crown. In the performance of that task, they were to be guided by 'equity and good conscience'.[83]

The Commission of Claims was the first administrative tribunal of any importance to be established in the colony, and although it was expected that it would be able to complete its work within two years, the number of claims presented to it proved to be so numerous that in 1835 it was found necessary to extend its authority for an indefinite period.[84] In that year also, the Legislative Council in Van Diemen's Land enacted similar legislation.[85]

In forwarding a copy of the New South Wales Act of 1833 to the Secretary of State, Lord Stanley, Governor Bourke explained how the Act had come to be enacted:[86]

> The number of claimants to ... grants, whose Titles rest on evidence requiring minute investigation has been so increasing of late, that it has become absolutely necessary to establish some Tribunal ... to consider and decide upon their validity. Upon communicating with the Judges [Forbes CJ[87] and Dowling and Burton JJ] they recommended the appointment of Commissioners by a Legislative enactment, which they prepared, and which was laid before the Council and passed into a Law.

The Commission, Bourke added, would be funded largely from the fees payable by the claimants and persons presenting opposing claims.

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82 Grey to Fitzroy, 15 January 1848 (HRA I, xxvi, 177).

83 The phrase had been used in English legislation establishing courts of requests.

84 5 Will IV No 21.

85 See below p 32f.

86 26 November 1833 (HRA I, vii, 270-1).

87 Forbes CJ was a member of the Legislative Council.

The fees payable under the Act were in respect of the filing of memorials and oppositions to them, summonses to witnesses, examination of witnesses and the recording of their evidence, documents produced in evidence, advertisements of claims, and hearing of legal representatives or agents of parties.[88] The highest fee payable was for the final report of the Commissioners, and was payable by the party or parties in whose favour it was made.[89] As from 1842 this fee represented the total remuneration payable to the Commissioners and their Secretary in respect of every claim.[90]

There was a lengthy preamble to the 1833 Act reciting the 'mischiefs' sought to be remedied. It read as follows:

> Whereas many persons have heretofore obtained the possession of lands in this Colony by the licence and authority of the several Governors thereof under promise of grants to be to them duly made by the said Governors and upon the faith thereof large sums of money have been expended in improving and building upon the said lands but in many cases such grants have been unavoidably delayed and have not been made as aforesaid and the said lands and premises have come into the possession of other persons claiming to have and hold the same as their just and lawful right obtained by through or under the persons who originally obtained possession thereof as aforesaid And in many cases by reason of the death incapacity or absence of the said last mentioned persons and from other circumstances it hath become impossible to produce such legal titles as would be necessary to enable the Supreme Court of this Colony to take cognizance of and determine thereon and it is expedient and necessary that a remedy should be provided in such cases and that such grants should be made and delivered to and in the name of those persons who have now the just and lawful right thereto obtained as aforesaid.

The Act authorised the Governor to appoint Commissioners who would 'have full power and authority to hear and determine upon all application for grants under the Great Seal' of the colony, 'by or on behalf of persons holding or claiming to hold land and premises by through or under other persons who ... [had] originally obtained the possession thereof by the letter of possession licence or authority of any Governor of ... [the] Colony under promise of grants to be duly made as in the preamble ...' (section 1). Those appointed by Governor Bourke to act as Commissioners were the Surveyor-General, Sir Thomas Mitchell, and two barristers, Sydney Stephen and Roger

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88 4 Will IV No 9, Sch C.

89 The fee was £2 and remained the same under 5 Will IV No 21 (1835).

90 £4/3/- in 1842 (6 Vic No 11); increased to £8/6/- in 1854 (18 Vic No 11).

Therry.[91] Therry was later to sit as a judge in a number of cases which came before the Supreme Court involving consideration of the effects of the legislation.

Under the Act the Commissioners had power to require the attendance of witnesses and the production of documents, and to take evidence on oath (ss 9 and 10). Claimants and opposing parties were entitled to be heard in person, or by counsel, attorney, or agent (s 13). Those wishing to make claims under the Act were required to lodge their claims within six months of the date of a proclamation by the Governor inviting submissions (s 4). A form of application was prescribed (s 5).

If the Commissioners found a claim prima facie well founded, they were to advertise the fact that the claim had been made, by publishing at least three notices in the *Government Gazette*, in the space of two months, and, in such notices, to require persons opposing the claim to lodge their objections within three months (s 12).

If a claim was unopposed, and the Commissioners received 'satisfactory proof of the possession and occupation' of the land claimed, the Commissioners were to adjudge the claim 'to be good and valid' and the land 'held and considered the property' of the claimant (s 12). If a claim was opposed, the Commissioners were 'to decide and report in favour of the party whose claim' was 'found best supported by the evidence adduced' (s 12).

The central provision in the Act was section 7 which provided, inter alia,

> That in hearing and determining upon all claims of grants ... [under the Act] the ... Commissioners shall be guided by the real justice and good conscience of the case without regard to legal forms and solemnities and shall direct themselves by the best evidence they can procure or that is laid before them whether the same be such evidence as the law would require in other cases or not and in any case they or any two of them shall be satisfied that ... [a claimant] is ... entitled in equity and good conscience to hold ... [the land] and to have a grant thereof made and delivered,

the Commissioners should so report to the Governor.

This provision was qualified by a proviso to s 12. This proviso covered two situations. The first was where a claimant could

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91 Sydney Stephen was the eldest son of the New South Wales judge, John Stephen. Therry later became the colony's Attorney-General (1841-3), then the Resident Judge in the Port Phillip District (1845-6) and subsequently a judge of the New South Wales Supreme Court (1846-59): 2 ADB 512-4.

show 'ten years peaceable and uninterrupted possession of any land ... with or under a written title from the person or persons who originally obtained possession of the same by the licence and authority of any Governor of ... [the] Colony under promise of a grant', or from the heirs or assigns of such person or persons. Even though the 'written title' relied on by the claimant had not 'been made and executed in due and legal form', the Commissioners were to adjudge such a claimant entitled to a freehold grant. The other situation covered by the proviso to s 12 was that where the claimant could show 'twenty years peaceable and uninterrupted possession' of Crown land 'without any other title or titles whatsoever ...'. In that situation also the Commissioners were obliged to adjudge the claimant entitled to a grant.[92]

Section 7 of the Act made it clear that the Governor was not obliged to act on the recommendation of the Commissioners, but he invariably accepted and acted on their advice.

Section 14 stipulated that if a grant was made under the Act, the grant was subject to any mortgages and judgments which would have bound the land granted had the grant been made prior to the mortgage or judgment.[93] The mortgages encompassed by this section included those which were purely equitable, for example, those effected by deposit of deeds and a written memorandum of loan.[94]

As mentioned earlier, when the Act of 1833 was enacted, it was believed that the Commissioners would be able to deal with the claims likely to be presented to it within the space of two years.[95] Consequently the Act was expressed to operate for two years only. During that two year period, over 700 claims were considered and more awaited determination.[96] It was decided therefore that the life of the Commission be prolonged, indefinitely, and in June 1835 another Act was enacted to bring this about.[97]

The Act of 1835 differed from its predecessor in several respects. First, the only claims which the Commissioners were

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92 Under s 6 a claimant could present a claim directly to the Governor where he held Crown land 'by virtue of a title of possession or authority from any' Governor, 'which letter of possession or authority' had been given to the claimant, and where no one else claimed a grant of the land. The Governor could, however, require such a claimant to make a claim to the Commissioners.

93 Section 8 of the 1835 Act.

94 *Terry v Osborne* (1858) Legge 806.

95 Bourke to Stanley, 26 November 1833 (HRA I, vii, 271).

96 Bourke to Glenelg, 24 December 1835 (HRA I, xvii, 239).

97 5 Will IV No 21. Section 11 of the Act 'saved' pending proceedings.

authorised to consider were those referred to them by the Governor, and the claims so referable were limited to those of persons claiming in virtue of promises of grant by a Governor (s 3). Secondly, there was no re-enactment of the provisos contained in s 12 of the 1833 Act. Thirdly, the Act omitted the provisions aimed to produce adjudication of contested claims. As the Supreme Court observed in *Cockcroft v Hancy*,[98] it gave 'no power to hear and determine, but only to "examine" a report upon "claims to grants". The clause ... in ... [the 1833] Act which required an adjudication with open doors, and the important provision for extinguishing claims not preferred in due time ... [were] omitted'. Section 4, however, replicated the important s 7 (the 'equity and good conscience clause') of the 1833 Act.

The 1835 Act was later amended, but only in relation to those of its provisions which dealt with fees and remuneration.[99] It was eventually repealed by the *Conveyancing and Law of Property Act* 1898, but its key provisions re-enacted as part of that Act.[100] These re-enacted provisions are still substantially in force.

In enacting legislation for adjudication of claims to grants of land, the New South Wales legislature had recognised that those who had occupied Crown land under promise of grant had thereby acquired some interest in the land, albeit an interest which may have not been cognisable in a court of law or equity. It had recognised also that interests so acquired had, for a long time, been treated as if they were legal interests capable of being transferred. In promoting the legislation, Governor Bourke sought the establishment of administrative machinery which would enable him to perfect these many imperfect titles to land, and to do so as soon as possible. That machinery had been designed for him by the judges of the colony's Supreme Court.[101] They, no doubt, had advised him that the Court was not an appropriate forum for adjudication of the claims which might be made.

It was probably assumed that, once the Commission of Claims was established, the courts of the colony would have nothing to do with adjudication of claims of the kind which came within the Commissioner's jurisdiction. It was probably assumed also that if a deed of grant was executed after inquiry and report by the Commissioners, it was unlikely that the validity of the grant would be questioned or that anyone would assert any title adverse to that of the

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98 (1859) Legge 1051 at 1072-3.

99 6 Vic No 11 (1842); 18 Vic No 11 (1854). See also Gipps to Stanley, 7 November 1842 (HRA I, xxi, 360-1).

100 Sections 16-25.

101 See text to notes 86-87 above.

grantee or persons claiming through the grantee. There was, however, nothing in the legislation on the relationship between the Commission and the courts, or on how the legislation affected the law to be applied by the courts, and over the twenty-five years which followed the establishment of the Commission, the Supreme Court was confronted with a series of cases in which it had to consider the legislation and its effects

The Commission of Claims and the Supreme Court

Most of the litigation before the Supreme Court which involved consideration of the claims to grants legislation was in the equity jurisdiction of the Court. Most of the cases were ones in which the plaintiff claimed that the person or persons to whom the Crown had granted land, upon the recommendation of the Commission of Claims, had taken the land on trust or subject to some equitable interest. One question the Court therefore had to decide was whether the fact that a grant had been executed on the Commission's recommendation precluded recognition of equities other than those created by the grant or subsequent to the grant. If it did not, was the Court bound to decide according to the ordinary principles of equity, or was it obliged to apply the principles according to which the Commission had been directed to apply in assessing the claims presented to it? And was the validity of a grant affected by the fact that, although it had been executed on the recommendation of the Commission, the claim considered by the Commission was not one of a kind which it was authorised to investigate?

In no case did the Supreme Court hold that a Crown grant made after inquiry and report by the Commission was ineffective to pass a legal estate in the land to the grantee,[102] because of fraud on the part of the grantee or because the Commission had no jurisdiction to consider the grantee's claim. The Court did, nonetheless, observe that there had been occasions on which the Commissioners had dealt with claims which, in the Court's opinion, did not fall within their jurisdiction. The Commissioners' jurisdiction, it was pointed out, was limited to investigation of claims in respect of Crown lands which had originally been occupied under promise of a grant of a fee or lesser freehold estate.[103] It did not therefore encompass claims based on the grant of a leasehold with an option to purchase.[104] Nor did it encompass claims based solely on the general promise of grant made by Governor Darling in his Proclamation of 1829, for many of the

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102 On the validity of Crown grants see Campbell, op cit note 2.

103 *Cockcroft v Hancy* (1858) Legge 1051 at 1066, 1072.

104 *Walker v Webb* (1845) Legge 253 at 266.

beneficiaries of that promise had not originally occupied the land in question under promise of grant of a freehold estate.[105]

While the Supreme Court did not deny that a person to whom the Crown had granted a legal estate, following the recommendation of the Commissioners, might nevertheless hold that estate on trust for another or others, it was reluctant to treat such a grant as anything but conclusive of the rights of the grantee vis-a-vis those parties who based their competing claims on dealings with land prior to the issue of grant. In one case only, *Walker v Webb*[106] in 1845, did the Court conclude that the grantee held the land granted to him on trust for the plaintiffs. It so concluded on the basis that, in the proceedings before the Commission of Claims, the grantee, Webb, had misrepresented and concealed relevant facts.[107]

The Court's reluctance to hold that grantees who had been granted unencumbered legal estates, following an examination of their claims by the Commission, nonetheless received their grants subject to antecedent equities reflected a desire to discourage litigation which would involve re-investigation of matters which, it was assumed, had already been investigated by the Commission. The Court never characterised the determinations of the Commission as ones which would attract the operation of the doctrine of estoppel by res judicata, but its deference to those determinations accorded with the policy which informed that doctrine. It is not without significance that members of the Court sometimes referred to the Commission as the Court of Claims.[108]

Having conceded that grantees who received their grants under the claims to grants legislation could have acquired their legal estates subject to prior equities, not expressed in the deed of grant, the Supreme Court had to consider whether, in adjudging the claims of those asserting those prior equities, it should apply the received law of equity or the new statutory law of 'equity and good conscience' which the Commission had been directed to apply. It concluded that it should apply the latter. Its reasons for adopting that course were explained by Manning J in *Spenser v Gray*[109] in 1848.

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105 *Terry v Wilson* (1849) Legge 753.

106 (1845) Legge 253 at 262-3, 264.

107 Walker claimed under a Crown lease.

108 *Walker v Webb* (1845) Legge 253 at 253; *Clarke v Terry* (1853) Legge 753 at 760; *Cockcroft v Hancy* (1858) Legge 1051 at 1066; *Hillas v McGoveran* (1863) 2 SCR (Eq) 32 at 36.

109 (1848) Legge 422.

The Act of 1833, Manning J pointed out, was a law 'by which the ordinary rules as to the devolution or proof of titles could be altered ...'. From that enactment he inferred:

> first, that the commissioners were intended to settle disputes finally as between subjects, but not absolutely as against the Crown; secondly, that the Crown, as represented by the Governor for the time being, was not absolutely and legally denuded of all discretion or power as to the issue of grants or the selection of grantees; and thirdly, that in deciding on all claims the Commissioners were bound, and the Governor intended to be guided, by popular and rational views of justice and good conscience, having reference to the simple practices of a young country and the peculiarities of this colony, as well as to the circumstances of each case - and not by the arbitrary rules which have been thought expedient for regulating the more complicated regulations of an older state.[110]

Having drawn those inferences, Manning J concluded:

> that the only appeal from the Commissioners which the Legislature contemplated was to the Governor; and that if indirectly a question arises before the Supreme Court as to the right to the benefit of a grant under a Governor's promise, the same principle must guide the Court as was imposed upon the Commissioners; for it cannot have been intended that the latter should decide upon the right to hold the lands and have a grant thereof upon one principle, and that this Court, *even if a direct appeal had been given,* should in effect reverse the grant upon principles other than those which are binding upon the Commissioners, and which are pointed out for the guidance of the Minister of the Crown.[111]

The Supreme Court never articulated, with precision, what the guiding principle - equity and good conscience - required. According to Stephen CJ, the principle implied no more than 'that a perfect legal title, from the promisee [of a grant], or his assigns, is not to be deemed necessary'.[112] But when a question arose before the Commissioners involving a question of construction, eg construction of a will, the Commissioners were obliged to decide that question on the same principles which governed courts and judges.[113] Not to hold the Commissioners so bound 'would render uncertain every question referred to' them, 'and subject all titles to the mercy of the loosest, and most vague and varying interpretation'.[114]

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110 Id at 485.

111 Id at 485-6.

112 *Clarke v Terry* (1853) Legge 753 at 761.

113 Ibid.

114 Ibid.

Delivering the judgment of the Court in the later case of *Cockcroft v Hancy*[115] in 1858, Stephen CJ said that it was 'reasonable to suppose that' in considering claims to grants, the Commissioners would recognise, and in general pursue, the analogies to estates and terms of inheritance or limitation at law. Thus, probably, the occupation of a father [under promise of a grant] would be regarded as a title, or quasi title in fee, clothed with the legal estate, and descendible to the heir accordingly. Yet, he supposed also that 'cases would arise in which strict rules, might, perhaps, be thought productive of injustice'. He gave as examples 'a will not in all respects executed according to the statute, or a transfer, having no words whatever of limitation, or a purchase completed without writing'.[116]

'[T]he principles by which' the Commissioners were 'to be guided', Stephen CJ observed 'being such as convey no distinct and fixed idea, are vague and intangible'.[117] But, the Court found it impossible to read the legislation

> and consider its provisions in connection with the object, which evidently the Legislature had in view of enabling the Crown to confer legal titles, on all persons justly entitled to them, without arriving at the conclusion, that, as between rival claimants, and those having adverse interests or pretensions, whether actually claiming or not, the Commissioners' decision was meant to be authoritative, and, if adopted by the Crown, final.[118]

A particular problem which the Court had to resolve arose from the fact that grants recommended by the Commissioners customarily included a clause which had appeared in Governor Darling's Proclamation of 1829[119] and which stated 'that the lawful rights of all parties, other than the grantee hereof, in the land hereby granted, shall endure and be held harmless - anything herein to the contrary notwithstanding'.[120] In *Spenser v Gray*[121] Manning J concluded that this reservation clause, which was 'very vague and of most questionable effect', was not effective to preserve claims which were adverse to those of the grantee.[122] Were the Court to uphold such claims, he reasoned, '[s]ubstantially the effect would be to repeal

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115 (1858) Legge 1051 at 1067.

116 Presumably the reference to purchases without writing was to ss 1 and 3 of the *Statute of Frauds* 1677 (Imp).

117 (1858) Legge 1051 at 1066-7.

118 Ibid. See also *Hillas v McGoveran* (1863) 2 SCR (Eq) 32 at 36.

119 See text to note 21 above.

120 See *Cockcroft v Hancy* (1858) Legge 1051 at 1067.

121 (1848) Legge 477.

122 Id at 484.

the grant, and to give a new one to the other party, without the intervention of the Crown'. The clause, unlike ordinary reservation clauses which reserved 'something to the grantor', purported 'to be in favour of mere strangers to the deed.[123] It would', he continued,

> be singular that such a clause should be sufficient to make a plain grant to A operate (without reference to the party making the reservation) as a grant to B or to any man who can at any time show that he had a better or more strictly legal claim upon the honour of the Crown. If it has that effect, then the Commissioners of Claims, with their advertisements, evidence, and judicial reports, were worse than useless; and the Royal grant, instead of quieting men's possessions, carries upon its face a perpetual warning of its uncertainty. In place of giving security to purchasers, the grant may help to make bad titles pass current, but as between subjects will give no greater certainty to those that are otherwise good.[124]

Manning J suggested that the clause would be of no avail to a person who asserted a title against the grantee, stemming from an original promise of grant, unless the former could show that the promisor had authority to bind the Crown and by the promise 'became a mere naked Trustee for such party as should prove title thereunder according to the strict rules of law'.

Subsequently, in *Cockcroft v Hancy*,[125] the Supreme Court questioned the validity of the reservation clause on the ground that it might be regarded as 'in restraint of the grant ..., and destructive of its alienable quality'.[126] It did not find it necessary to decide the question for it held that the 'lawful rights' preserved by the clause were only those the Commissioners, 'or the Crown ultimately adjudicating, would itself certainly have recognised, or been bound "in equity and good conscience" to recognise'.[127] The plaintiffs in the present case had not established any such right.

The Court's criticisms of the reservation clause were met by the enactment of s 11 of the *Titles to Land Act* 1858.[128] The section provided that:

> In every case where before the commencement of this Act [30 June 1858] any Crown grant of land has been issued containing a proviso purporting to reserve or hold harmless the rights of all parties other

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123 Ibid.

124 Ibid.

125 (1858) Legge 1051.

126 Id at 1068.

127 Id at 1069.

128 22 Vic No 1, incorporated in s 11 of the *Conveyancing and Law of Real Property Act* 1898.

> than the grantee such proviso shall as against every *bona fide* purchaser or mortgagee for valuable consideration (whether before or after the passing of this Act) without actual notice of some adverse claim and against all persons claiming under such purchaser or mortgagee be inoperative and void unless the benefit of such proviso be sought by some suit or proceeding now pending or commenced within three years or (where the grant has issued during the last three years) within five years after the commencement of this Act.

There is no reported case of anyone having instituted prerogative writ proceedings against the Commissioners of Claims, for example, for mandamus to compel the Commissioners to hear a claim, or for prohibition to restrain it from hearing a claim alleged to be outside its jurisdiction, or for certiorari to quash their recommendation. But, because the Commission had no power to decide finally whether a grant should be issued, there would probably have been doubts about its amenability to the last two mentioned writs.[129]

None of the Acts dealing with the Commission had provided claimants or their opponents with any statutory right to appeal to the Supreme Court, even on a question of law.[130] In *Clarke v Terry*[131] in 1853, the Supreme Court 'lamented, that such a remedy was not specifically provided'.[132] Under the legislation, the Court said, 'the applications of parties claiming derivatively, from the original promisees of land' had been 'treated as matters of right'.[133] Yet the Commissioners might be in error as to those rights and likewise the Governor. In some cases the Court might 'very probably, be enabled to apply' remedy, though what that remedy would be was not explained. 'If, however, such important questions of law, as those on which the right' of parties depended in the present case, and which might involve property worth thousands of pounds, could be decided erroneously 'without correction or appeal, the law which ... [had] created such a state of things, one not existing with respect to any other tribunal', clearly seemed 'to demand revision' .[134]

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129 Those remedies were not applied against advisory bodies until well into the 20th century.

130 Compare the Tasmanian legislation, text to note 155 below.

131 (1853) Legge 753.

132 Id at 760.

133 Ibid.

134 Ibid.

Titles to Land Act 1858

This Act, passed by the New South Wales Parliament on 30 June 1858, included among its provisions several which had a bearing on the effect of promises to make grants of Crown land and the rights of Crown grantees, their heirs and assigns.

Section 14 provided that every promise made prior to the Act by any Governor of the colony 'of a grant of land in fee to any person shall (except as against the Crown) be deemed to have conferred upon him an interest in such land devisable by will or alienable by contract in like manner as equitable estates in land are devisable or alienable'. The section went on to provide that every such promise could 'be evidenced by any proclamation or by writing under the hand of the Governor or Colonial Secretary or by a recital or statement in any Crown grant'.

This provision was the legislature's solution to the problem the Supreme Court had encountered in characterising the nature of the interest, if any, conferred by a promise of grant from the Crown.[135] Without saying so expressly, the Parliament seems to have declared that the interest should be deemed an equitable one. That interest did not depend on the promisee having taken possession of the land or having outlaid money on the land in the expectation that the promise of grant would be fulfilled. There were two provisos. The first was that the section did not defeat any ejectment action or any suit which was then pending or which was commenced within six months after the commencement of the Act. The second was that the section should not 'prejudice or affect the title of any person in possession of the land under any Crown grant or claiming adversely to the person first referred to his heirs or assigns'. The phrase 'the person first referred to' was presumably to the person to whom the land had been promised.

Section 1 of the Act was, in part, designed to deal with cases in which persons 'entitled to have a Crown grant ... made to him in fee' had sold, and had contracted to convey or had conveyed, the land without 'any words of inheritance'. The purchaser in such cases was to 'be deemed as against the vendor his heirs and assigns to have taken or to be entitled to (as the case ... [might] be) an estate in fee' unless a contrary intention appeared.[136] Those entitled to Crown

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135 See above pp 25-30.

136 There was a proviso. The section did 'not defeat any ejectment or suit' then 'pending or brought within six months after the commencement of the Act' or 'prejudice the title of any person' then 'in possession of the land and claiming' against the vendor.

grants presumably included those whose claims would be recognised under the claims to grants legislation.

Sections 12 and 13 of the Act imposed limits of time within which persons claiming rights adversely to a grantee of Crown land, by matter before the date of the grant, had to bring proceedings to establish or enforce those rights. If those proceedings were not brought within the applicable time limit, those rights were 'barred and extinguished both at law and equity', 'as against every *bona fide* purchaser or mortgagee without actual notice of the adverse claim and against all persons claiming under such purchaser or mortgagee ...'. Section 12 applied in cases where land had been granted by the Crown prior to the Act, and was in the possession of the grantee, his heirs or assigns. If the grant had been issued during the previous three years, the adversant claimant had five years within which to commence proceedings; but if the grant had issued at an earlier date, only three years. Section 13 applied in cases where the grant was issued after the commencement of the Act. The time it allowed for commencement of proceedings was five years after the grantee, his heirs or assigns had been in occupation of the land under the grant.

The operation of these two sections was not limited to cases in which Crown grant had been issued on the recommendation of the Commission of Claims.

The several sections in the *Titles to Land Act* 1858 referred to above now appear in Part I of the *Conveyancing and Law of Property Act* 1898.

Claims To Grants In Tasmania

Introduction

The circumstances which led to the establishment of a Commission of Claims in Van Diemen's Land were much the same as those which had led to the establishment, in 1833, of the New South Wales Commission of Claims. They were the same in that in both colonies land settlement was directed by the same imperial policies, and the measures adopted locally to implement those policies were similar. In Van Diemen's Land, as well as in New South Wales, persons desiring to settle in the colony could, with official approval, go in search of land and once their selection had been approved, occupy the land under promise of a freehold grant. As in New South Wales, there was a good deal of traffic in the so-called location orders.[137] There were

137 See evidence of Deputy Surveyor-General GW Evans to Commissioner JT Bigge, 22 February 1820 (HRA III, iii, 318-9, 322); Arthur to Bathurst, 17 January 1826 (HRA III, 51-2).

also disputes about whose licensed occupancy of the same tract of land took priority.[138]

The problems encountered in the island colony were exacerbated by serious deficiencies in the work of the government surveyors. Not only were there long delays in the survey of the lands selected,[139] but the surveys which were undertaken were often defective, with the result that many Crown grants contained imperfect descriptions of the land conveyed, and sometimes conflicting descriptions.[140]

In his *History of Tasmania*, published in 1852, William West recorded several cases in which juries empanelled to try ejectment actions had, in apparent defiance of the trial judge's instructions, returned verdicts against the party to whom a formal Crown grant had been made and in favour of the party who had shown prior occupancy of the land in dispute.[141] 'Possession and reputed ownership, were', West observed, 'taken as title'.[142]

Early in 1832 Lieutenant-Governor Arthur announced the establishment of a Land Board whose function would be to examine claims to Crown grants, including claims by persons who titles were defective. The Board, consisting of the Surveyor-General, George Frankland, and the Superintendent of Government Stock at Ross, James Simpson, were not short of business. In 1832 they considered 43 claims; in 1833 another 111.[143]

The Board, which had been established by executive Act was effectively superseded on the establishment, pursuant to the Act passed by the Legislative Council on 16 October 1835 (6 Will IV No 11), of the Commission of Claims. Lieutenant-Governor Arthur had, apparently, been persuaded that what was needed was a body 'with fuller powers than are possessed by the present Commissioners to examine into and report their opinions upon'[144] disputed and other

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138 See, for example, the protracted dispute between G Meredith and Talbot in the early 1820s recorded in HRA III, iv, passim.

139 'Report of the Commissioner of Inquiry on the State of Agriculture and Trade in the Colony of New South Wales', PP 1823, X, No 136, p 36.

140 William West, *The History of Tasmania* Volume 1 (1852) pp 142-3; AGL Shaw, *Sir George Arthur Bart* (1980) pp 101-2.

141 West, op cit note 140, at pp 140-1.

142 Id at p 143.

143 Ibid and A Castles, *An Australian Legal History* (1985) pp 289-90.

144 Preamble of 6 Will IV No 11. It has been suggested (by West, op cit note 140, at p 141, and Castles, op cit note 143, at p 290) that the enactment may have been prompted by the jury verdict in *Terry v Spode* in 1835 (HRA i, xviii, 827, n 112). Terry had brought an ejectment action after

claims to grants from the Crown. The Land Board was not, however, immediately dissolved. Although the Commission was authorised to take over the Board's unfinished business, the Act expressly provided, in s 23, that:

> no act matter or proceeding done commenced or had by or before the present Commissioners for inquiring into claims to Grants or by or before any Commissioners to be hereafter appointed shall become void or abate by the issue of any Commission under this Act ....

The Van Diemen's Land *Claims to Grants Act* of 1835[145] was enacted a little over four months after the corresponding New South Wales Act which had been passed to extend the life of that colony's Commission of Claims.[146] Presumably the Van Diemen's Land Act was drafted with reference to the New South Wales Act, and its predecessor. There were similarities in the legislation of the two colonies, but the Van Diemen's Land legislation (amended in some minor respects in 1839) was not a slavish copy of the New South Wales legislation. From 1858, Tasmania's institutional machinery for dealing with claims to grants of land from the Crown differed from that of the parent colony in a number of important respects.

Claims to Grants Acts of 1835 and 1839

By section 1 of the first *Claims to Grants Act* (6 Will IV No 11), the Lieutenant-Governor of Van Diemen's Land was empowered to appoint three Commissioners with 'power and authority', under s 4, 'to examine and report [to him] their opinion upon all claims and applications for' grants of land from the Crown, 'or to any particular estate or interest in or lien on such land ...'.[147] The claims which the Caveat Board, as the Commissioners came to be known, could consider and report upon were not confined, as had the claims which could be considered by the Commissioners in New South Wales, to those based on promises of grant in the name of the Crown. The jurisdiction of the Caveat Board was defined rather as a jurisdiction to examine and report on claims based on a 'Location Order or other

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Spode had taken possession of land occupied by Terry. Both parties claimed a right to possess the land in dispute under Crown grants. Both grants were adjudged void in that they had been executed in the name of the Lieutenant-Governor, rather than the king, as was required (see Campbell, op cit note 2). The jury returned a verdict for Terry.

145 The short title was conferred by s 16 of 22 Vict No 10 (1858).

146 See note 84 above.

147 The first chairman was Joseph Hone, a former Master of the Supreme Court (Castles, op cit note 143, at p 291). The records of the Commission held by the Tasmanian Archives are noted by Castles, op cit note 143, at p 291 n 16.

authority from any Governor of New South Wales or any Lieutenant-Governor of Van Diemen's Land'.[148]

Unlike the New South Wales Act of 1833,[149] the Van Diemen's Land Act of 1835 did not impose any limit on the time within which claimants had to lodge their claims. Nor did it, like the New South Wales Act of 1835,[150] limit the jurisdiction of the Commissioners to claims referred to it by the vice-regal representative.

On the other hand, it incorporated the key principle in the New South Wales legislation: that declaring the normative standard according to which claims were to be assessed. The Board, s 5 of 1833 Act declared, was to 'be guided by equity and good conscience only and by the best evidence that can and may be procured although not such as would be required or admissible in ordinary cases' - that is, cases in the courts. And they were not 'bound by the strict rules of law or equity in any case or by any technicalities or legal forms whatever ...'.

As in the New South Wales legislation, it was expressly stated in the Van Diemen's Land Act that the vice-regal representative was not obliged to execute any grant recommended by the Board (s 8 of 6 Will IV No 11). In other words, the Caveat Board's reports were no more than advice, which could be accepted or rejected.

But the Van Diemen's Land Act made it clear that the advice expected from the Caveat Board, in cases where the execution of a deed of grant in the name of the Crown was recommended, should be most specific. In such cases, the Board was obliged to advise on the actual terms of the grant recommended: 'the reservations and conditions amount of Quit-rent and other terms (if any) to be contained and mentioned' in the deed of grant (s 4 of 6 Will IV No 11). A draft of the proposed deed of grant had to accompany the report (s 7 of 6 Will IV No 11).

In relation to mortgages and like encumbrances upon the land which were the subject of claims to Crown grants, the Van Diemen's Land Act differed significantly from the New South Wales Act. The New South Wales legislation[151] had employed a formula which produced, by operation of statute, a result such as this: If A received a Crown land grant, following inquiry and report under the legislation, A would hold the estate so conveyed subject to all antecedent mortgages and judgments which would have bound the land

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148 Section 4 of 1835 Act.

149 See p 23 above.

150 See pp 23-24 above.

151 Section 8 of both the 1833 and 1835 Acts; see text to notes 93-93 above.

conveyed to A had those mortgages been made or judgments given, in relation to land already granted, formally, by the Crown. The New South Wales legislation did not preclude a determination by the Commissioners that the land claimed by A was held by him 'in equity and good conscience' as a mortgagee. Nor did it preclude a recommendation by them that, although a grant should be made to A, it should be expressed in such a way as to make it clear that A took as mortgagee only, and subject to the equities of the mortgagor. The Van Diemen's land legislation, in contrast, offered that colony's Commissioners of Claims fairly positive guidance on the course they should adopt when it appeared, on the evidence, that lands which were the subject of a claim before them were encumbered by a mortgage or like transaction.

By s 15 of the Van Diemen's Land Act of 1835 it was provided that:

> where any Land a Grant of which is applied for shall appear to be under mortgage or subject to any other charge or lien legal or equitable it shall be for the Commissioners either to cause the Grant to be made out and delivered to some person or persons to be nominated by the parties interested respectively and which said person or persons shall hold the Land under such Grant as Trustee or Trustees for the said parties according to their respective rights and interests to or in the same land ....

In a case in which the parties could not agree upon who should be nominated as such trustee, the Commissioners were authorised 'to cause the Grant to be made out in the name of and be delivered to such one of the parties (to be holder nevertheless in trust for the several parties actually interested) as ... [should] appear to ... [the] Commissioners to be under the circumstances best entitled to' grant of a legal estate.

The Caveat Board was required to advertise claims made to it.[152] Initially the requirement was that a claim be advertised in at least three successive issues of the *Hobart Town Gazette* (s 14 of 6 Will IV No 11), but under the amending legislation of 1839, one advertisement in the *Gazette* sufficed or else three advertisements in three successive issues of a newspaper published in Hobart and Launceston (3 Vic No 6 s 2). If no caveat against the issue of the grant claimed, or any counterclaim, was lodged within two months of the first such advertisement, the claim could, at the claimant's request be dealt with by one Commissioner,[153] though if the claimant was dissatisfied with the terms of the grant proposed by that

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152 As were the New South Wales Commissioners under s 12 of that colony's Act of 1833 (see p 22 above).

153 Under s 14 of the 1835 Act, the Chairman alone had this authority.

Commissioner, he could demand that his claim be considered by all three members of the Board (3 Vic No 6 s 2).

The Van Diemen's Land Acts did not regulate the proceedings of the Caveat Board in any detail, though they empowered the Lieutenant-Governor, or the Chairman and one other member of the Board, 'to make and establish such Rules and Orders touching the manner of applying to and proceeding before the' Board 'and otherwise for facilitating the objects' of the legislation as to them seemed expedient (s 24 of 6 Will IV No 11). The Acts gave the Board power to take evidence on oath (s 5 of 6 Will IV No 11). And any one member of the Board could summon witnesses (including parties) to attend before it and to produce documents. Penalties were prescribed for disobedience to such summonses.[154] But a person so summoned was entitled to the same conduct money and payment for expenses as would be payable if he or she were summoned as a witness in a trial before the Supreme Court.

There were some powers enjoyed by the Board which were not possessed by its New South Wales counterpart. Any member of the Board could state a case for the opinion of the Supreme Court 'as to the law or equity' on 'any point or points of difficulty' arising in a case before the Board. Any one member could also 'direct the trial of a feigned issue between the parties in the Supreme Court for the better inquiry into and determination of any fact or facts ... ' (s 13 of 6 Will IV No 11).[155] The Board could also award costs as between parties. Under s 24 of the 1835 this power was exercisable only if a claim, caveat or counterclaim had 'been preferred or prosecuted vexatiously or without reasonable and probable cause ... '. This restriction was removed by the 1839 Act (3 Vic No 1 s 6).

Yet another difference between the Tasmanian and New South Wales legislation was that the former provided for rehearings and appeals whereas the latter did not. After receiving a report from the Caveat Board, the Lieutenant-Governor could direct the Board to rehear a case or direct that a particular matter be the subject of further inquiry. If he so directed, he could also 'direct one of the Law Officers to be made a party supporting or opposing' the grant recommended or some provision therein (s 9 of 6 Will IV No 11).[156] If a claim was

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154 Section 6 of 1835 Act; cf s 3 of 1839 Act.

155 The trial of such an issue was before a judge and jury. The trial on feigned issue was a procedure adopted in equitable proceedings in Chancery whereby issues of fact could be tried in a court of common law by institution of a feigned action: see WS Holdsworth, *History of English Law* Volume 9 (3rd ed, 1944) p 357.

156 Under s 4 of the 1839 Act, the Lieutenant-Governor could direct a re-hearing only on the application of an interested party.

contested, and the report of the Board recommending the issue of a grant to one of the parties was supported by only two of the three members of the Board, any party (ie the claimant, a counter-claimant or a person who had lodged a caveat) could, within ten days of the announcement of the majority opinion, appeal to the Supreme Court (s 10 of 6 Will IV No 11). The appeal was ordinarily to be by a case stated by two members of the Board (s 11 of 6 Will IV No 11). On the appeal the Court could direct further inquiry into matters of fact, including inquiry by a jury (s 12 of 6 Will IV No 11). The question to be decided by the Court on appeal was 'whether according to the true intent and meaning of ... [the 1835 Act] the Report of the Commissioners ought to stand or ought to be in any and what respect altered' (s 11 of 6 Will IV No 11). The Court was accordingly bound to apply the 'equity and good conscience' principle by which the Board was to be guided. Like the Board, the Court was empowered to award costs as between party and party.[157]

The 'judgment' of the Supreme Court, on appeal did not in any way tie the hands of the Lieutenant-Governor so if the Court recommended the issue of a grant to a particular person, the Lieutenant-Governor could not be compelled to act on that recommendation.[158]

The Claims to Grants of Land Act 1859

On 22 October 1859 the Tasmanian Parliament enacted the third *Claims to Grants Act* (22 Vic No 10). This disestablished the Caveat Board (s 13), transferred its entire jurisdiction to the Supreme Court (s 1), and invested in the Clerk of the Court the jurisdiction previously exercisable by a single member of the Board to inquire into and report on uncontested claims (s 7). Existing rights to appeal to the Court against reports of the Board were, however, preserved (s 14).

The new jurisdiction given to the Court and its Clerk was expressly declared to be one which was to be exercised according to 'equity and good conscience' (s 8), and although their function was simply to report to the Governor on the claims presented to them, their reports were declared to 'be binding, final, and conclusive between the parties concerned' (subject to any rehearing allowed by the Court under s 4), and if the Court certified by its report that a grant ought to issue, the Governor was to 'cause to be issued a grant ... in accordance with such Report' (s 5).

A report by the Court (or its Clerk) recommending the making of a grant had to be accompanied by a draft of the grant

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157 Section 24 of the 1835 Act as amended by s 6 of the 1839 Act.

158 Section 8 of the 1835 Act.

recommended, which draft was to be prepared in the Office of the Surveyor-General, under the direction of the Court (or the Clerk) (s 9).

In general, the procedures to be followed by the Court in the exercise of its claims to grants jurisdiction were the same as those which the Caveat Board had been obliged to follow, eg in relation to the publication of advertisements of claims (s 6). In the exercise of that jurisdiction the Court was also to have 'the same power and authority as' it had 'in its common law jurisdiction, in compelling the attendance of witnesses and the production of documents, in dealing with contempts, and in all other respects as a Court of Record ...' (s 2).

It is not clear why it was decided to disband the Caveat Board and transfer its jurisdiction to the Supreme Court. Possibly the business coming before the Board was no longer considered sufficient to justify its retention as a separate institution.[159] Another consideration may have been that, if the Court already had jurisdiction to hear appeals against reports of the Board, there was no reason why it should not act as the tribunal at first instance.

It is perhaps not without significance that on 14 September 1859, only a month before the enactment of the *Claims to Grants Act* 1859, the Tasmanian Parliament had enacted *The Crown Redress Act* (23 Vict No 1).[160] Under this Act claims 'founded on and arising out of any contract entered into on behalf of Her Majesty by or by the authority of' the colonial government, including claims relating to land or the use of water, could be brought before the Supreme Court, and adjudged as if they had arisen between subject and subject.[161] There were, however, limitations in regard to the time within which such claims had to be made. Claims arising after the commencement of the Act (1 October 1859) had to be made within six years after the cause of action accrued (s 4). As regards claims which had arisen before the commencement of the Act, no time limit was imposed if the claim related to land or the use of water; but if the claim related to some other matter, the claim had to have arisen since 1 November 1856, have been actually made to the colonial government before 14 September 1859, and suit commenced before 1 October 1860.

The *Crown Redress Act* would clearly have allowed the Supreme Court to entertain both actions at law and suits in equity

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159 Castles, op cit note 143, at p 292, found that in its last year the Board dealt with 60 cases.

160 Repealed and replaced in 1891 (55 Vict No 24).

161 Sections 1, 2, 6, 8. Unlike the corresponding New South Wales legislation of 1857 (see note 24 above), there was no requirement that the Executive Council approve submission of the claim to the Supreme Court.

against the colonial government, represented by its Attorney General,[162] in respect of promises to make grants of Crown land within the colony, so long as the promisee could show that the promise was contractually binding. Specific performance of such a contract might be decreed (s 8), though the Crown's immunity, under the general law, from execution or attachment was preserved (s 9).

The *Claims to Grants of Land Act* of 1859 would, no doubt, have provided many beneficiaries of the promises of grant of Crown lands with better prospects of securing fulfilment of those promises than would proceedings under the *Crown Redress Act*, simply because the promises on which they relied were not contractually binding. But, as the decision of the Judicial Committee of the Privy Council in *Moses v Parker*[163] in 1898 was to reveal, a decision of the Supreme Court in the exercise of its jurisdiction under the *Claims to Grants of Land Act* was unappealable. Such a decision was not, relevantly, a judicial decision subject to appeal to the Judicial Committee in the exercise of its prerogative appeals jurisdiction. It was not a judicial decision for this purpose in that it was made according to 'equity and good conscience' rather than according to law.[164]

'The gentlemen who framed' the 1835 legislation for the Caveat Board, and who, according to William West, 'held the board "in the sacred light of a court"',[165] would probably have been surprised to learn that the Board's successor, the Supreme Court, had not been so regarded by the supreme 'court' of the empire, which itself, technically, was no more than an adviser to the monarch.

Claims to Grants and the Torrens System

In 1862, the Tasmanian Parliament enacted legislation to introduce into the colony the Torrens system of registration of land titles. The *Real Property Act* of that year (25 Vict No 16) was amended in 1863 (26 Vict Sess 2 No 1) to ensure that when Crown lands were alienated in fee, the lands so alienated should be subject to the provisions of the principal Act. The 1863 legislation also contained provisions whereby persons claiming to be entitled to a grant from the Crown could, instead of making a claim to the Supreme Court under the *Claims to Grants of Land Acts*, make application to the administrators of the Torrens system, the Lands Titles Commissioners, and if their application was sustained, obtain a grant which would then be registered under the principal Torrens Act. These provisions had no

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162 See s 6.

163 [1896] AC 245.

164 Id at 248.

165 West, op cit note 140, at pp 143-4.

counterpart in the New South Wales legislation on claims to Crown land grants.

That an application to the Lands Titles Commissioners, based upon a claim to the issue of a Crown grant, was to be an alternative to an application to the Supreme Court was indicated by the provisions in the 1863 Act defining what claims might be considered by the Commissioners, the provisions governing the procedures to be followed by them, and the principles they were directed to apply in dealing with the claims cognisable by them.

The claims cognisable by the Commissioners were, by the 1863 Act, defined as those of any person 'claiming to be entitled to a grant from the Crown of any land under or by virtue of any contract with the Crown, or in equity and good conscience' (s 6). Amending legislation of 1934[166] added to this list claims to entitlement 'by or through any location order or other authority from any Governor of New South Wales or any Governor or Lieutenant-Governor of Tasmania', thereby picking up words in s 4 of the *Claims to Grants of Land Act* of 1835.

Section 8 of the 1863 Act reproduced the 'equity and good conscience' clause by which the Supreme Court, under s 8 of the 1858 Act, was to be guided in the exercise of its parallel jurisdiction. By that standard also were the Commissioners of Lands Titles to 'adjudge' claims to grants of Crown lands.

Section 6 of the 1863 Act replicated, in substance, those provisions in the legislation governing the disposition of applications to the Supreme Court which required advertisement of claims and which dealt with the lodging of caveats to claims. But it also contained a proviso to the effect that if an applicant had already applied, unsuccessfully, to the Supreme Court in its corresponding jurisdiction, the Lands Titles Commissioners had no jurisdiction to entertain the application.

Like the legislation of 1835 to 1839 on the Caveat Board, the legislation of 1863 made it clear that the Lands Titles Commissioners, in the exercise of the jurisdiction thereby conferred on them, did not have power to execute deeds of grant binding the Crown. Their 'adjudications' of claims to such grants were advisory only, and a Governor was under no obligation to implement a recommendation

166 Section 4(IV) of 25 Geo V No 52.

that a grant be executed.[167] Their 'adjudications' were not even declared to be 'final and conclusive' as regards parties other than the Crown, as were 'adjudications' of the Supreme Court under s 5 of the 1858 Act.

In 1934, all of the *Claims to Grants of Land Acts* were repealed, and the *Real Property Act* 1863 amended, so as to extinguish the Supreme Court's original jurisdiction under the 1859 Act.[168] These legislative changes were but part of a series of statutes enacted about that time by way of statute law revision. (That process of statute law revision eventually bore fruit in the publication of an official series of volumes containing all of the statute law in force in the State as of 1936, with annotations, tables and an index of subject-matters.)

The State's *Real Property Act* of 1934 (25 Geo V No 52) repealed entirely all of the three prior Acts, shortly entitled the *Claims to Grants of Land Acts*.[169] That Act of 1934 then incorporated, within the 1863 *Real Property Act*, a new provision, s 6A, which endowed the Supreme Court with a jurisdiction to entertain appeals against any decision by the Commissioners of Lands Titles which was adverse to a claimant who had invoked their statutory jurisdiction to investigate a report on a claim to a grant of Crown lands.

This new section in the governing legislation, s 6A, required the chief executive officer of the Commission, the Recorder of Land Titles, to give written notice to the applicant of any determination by the Commissioners that the applicant was not entitled in equity and good conscience to the grant of the land comprised in the application. The applicant, so notified, was allowed 21 days[170] within which to exercise a statutory right of appeal to a judge of the Supreme Court - by way of a rehearing on the merits. The Attorney-General was accorded an independent discretion 'to appear or be represented' at such a rehearing before the Supreme Court.[171] The decision of the judge of the Supreme Court hearing the appeal was declared to 'be final and conclusive'.[172]

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167 A proviso to s 7 of the 1863 Act stated that nothing in that Act should 'be construed ... to compel the Governor to make or deliver' a grant of an estate in fee from the Crown unless the Governor deemed it 'proper so to do'.

168 By 25 Geo V No 52.

169 Section 2 and Schedule 1.

170 Running from the date the notice of determination was transmitted.

171 Section 6A(5).

172 Section 6A(4).