LEASEHOLD OR FREEHOLD ?

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THE HONOURABLE
MR. JUSTICE ELSE-MITCHELL

"Unto John Doe His Heirs and Assigns Forever" A Study of Property Rights and Compensation

The late Sidney Land Luker, the author of the County of Cumberland Planning Scheme, was well aware from his study of English planning experiences that the implementation of the County Plan would entail the payment of substantial compensation to owners of land which was required for public purposes or which would be injuriously affected by the zoning provisions of the Scheme. He knew that the Barlow Committee in England had reported in 1940 that "the difficulties that are encountered by planning authorities under the existing system of compensation and betterment are so great as seriously to hamper the progress of planning throughout the country".[1] He also knew what massive problems were faced by the Scott Committee in 1918 and the Uthwatt Committee during the Second World War in attempting to ease the financial burden of planning for reconstruction upon the public purse. Sidney Luker died a little more than twelve months after the County of Cumberland Planning Scheme became law in June 1951 and had he lived a little longer it is certain that he would have been both dismayed by the astronomical claims totalling £375,000,000 which were made for injurious affection resulting from that Scheme, and astounded at the ingenuity which lawyers and others had devoted to the formulation of those claims.[2]

In the light of these facts, it seems certain that the late Sidney Luker, conscious of the political considerations involved, would have regarded as sheer idealism the statement of a leading English planner, Lewis Keeble, that "the interest of the Planner is to be able to operate in conditions which enable land to be put to its most suitable use in the public interest without having constantly to consider whether any particular proposals are likely to involve a burden of compensation so crippling that they are unlikely to be implemented for that reason."[3]

The inquiring mind of a realist such as Luker must often have asked the question whether there was not some solution to the perennial threat of compensation claims frustrating planning schemes devised for the public good. He may have regarded this sense of frustration as inevitable in a society based on private property but, had he been a lawyer, he may have perceived that it is not the existence of private property rights but the peculiar incidents of inheritable estates in land—freehold interests you may call them —as they have evolved in our society which present such obstacles to the implementation on the score of cost of so many planning proposals.

Hence it is that I have taken as the title or text of my address ". . . unto John Doe his heirs and assigns forever" which are the technical words of limitation so well known to lawyers by which freehold estates in land in this country have been created by grants from the Crown. At risk of embarking upon some of the intricacies of the law of real property, but consistently, I hope, with the terms of the Sidney Luker Memorial Lecture, I shall attempt an exposition of the process by which freehold estates have assumed such importance and raise for investigation and research a means by which the Gordian Knot of compensation claims may be severed so as to serve the public interest and the ends of town and country planning.

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For many centuries, from the Middle Ages until the

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The rules for the Luker Lecture require that it shall be such as will promote interest in and understanding of planning problems and shall provide a creative stimulus to the planning profession.

twentieth century, the collocation of words forming the title to this address provided the legal basis for the creation, either by grant from the Crown or conveyance between subjects, of the greatest estate in land known to English law, that estate being an estate of freehold designated by the lawyers "a fee simple".[4] It is of such an estate in land that everyone save a lawyer speaks when he refers to the ownership of land although in strictness the owner of land in this country is simply a tenant in fee simple of that land from the Crown.[5]

This concept of tenancy is but a result of the fundamental principle of English land law, applying in this State, that no one except the Crown can have absolute ownership of land; the Crown's ownership is an attribute of sovereignty which may stem from conquest or, as in Australia, from discovery and occupation. All those who acquire rights to any lands over which the Crown has sovereignty are deemed to be its tenants whether they derive their right by grant from the Crown directly, or by transfer, conveyance or some other disposition made by a person who directly or indirectly derived his title from the Crown by a similar grant. In the time of the English feudal system and perhaps until the *Enclosure Acts*, there was some resemblance between "a tenant in fee simple" and a tenant as we understand that word today, for the tenant in fee simple was originally obliged to render services to the king or to the lord of the manor of or through whom he had derived title to the land; the services which he was required to render included military service which in later times was commuted for a money payment called escuage or scutage; he was also obliged to do homage and to swear fealty.[6] By the time New South Wales was colonised, these medieval services and duties had been replaced by an obligation to make a money payment in the form of a quit rent and when grants of land were made by the early Governors of this Colony, it was the practice to reserve such a quit rent,[7] that is, to make the grant of a freehold estate in fee simple dependent upon the annual payment of a sum of money, but it is most unlikely that there exist in New South Wales today any lands in private ownership on which any money quit rent reserved by the Crown grant has not been redeemed so that virtually all land in the State of New South Wales which has been granted by the Crown is held by the owner for an estate in fee simple free from any obligation to make any payment or contribution to the Crown or the Crown revenues except such as may have been imposed by legislation levying taxes and rates to meet the costs of governmental or municipal services.[8]

The most significant feature of the development of the land laws in this country has been an extension or enlargement of the rights of tenants in fee simple and a correlative attenuation of the rights of the Crown. And, although the title to all land in New South Wales derives from the Crown because upon its discovery and settlement all those lands came under the sovereignty of the Crown, the history of the colonial era and of land settlement in the nineteenth century shows how the rights of the land-owner were reinforced to a point where the public origin of the owner's title was forgotten and the public interest disregarded.

In the early years of the Colony, grants of land were made to officials of Government, military officers stationed in the Colony, free settlers and ex-convicts.[9] These grants were often in the nature of inducements for the grantee to remain in or to migrate to the Colony but many grants were procured by friendship or were the result of patronage; not the least important of these were the considerable grants made to John Macarthur of large areas of land in the Cowpastures near Camden. It should be added that this patronage was not unknown as between Governors and there were in fact reciprocal grants made by Governor King to Bligh, that being one of King's last formal acts, and shortly after by Governor Bligh to Mrs. King, the title to the latter grant being appropriately designated "Thanks".[10]

These grants for the most part were of the fee simple of land and until the 1820's they were issued, as the Instructions to the early Governors required,[11] subject to the reservation of a money quit rent varying according to the situation of the land and the status of the grantee. This rent was as high as 9d per rod per annum in the case of some town lands and as low as 2/- per annum for 100 acres of rural land,[12] but in general, in order to encourage improvement it was not payable during an initial period of five, ten or fifteen years and was coupled with a condition against transfer or alienation during that period.[13] From the time of the earliest grants by Governor Phillip, a condition requiring the grantee to improve or cultivate the land was included[14] and at a later date it became customary to exclude or reserve natural timber which was fit for naval purposes or bridge building and, in some instances, deposits of stone and gravel suitable for road making.[15] Except in the case of some grants which excluded such parts of the land granted as might be required for public highways, they were not subject to any condition which would enable the land to be resumed, that is, taken back by the Crown without compensation, if any part of it was needed for public purposes. In the course of time after 1825, however, it became the practice to include a provision for resuming the land granted upon the Crown paying for any buildings which might have been erected on the land and for the fee simple of the land according to a valuation made by two independent persons as arbitrators.[16] At about the same time the quit rent provisions previously included in Crown grants were modified by a proviso that the obligation to pay such rent might be redeemed by 20 years' purchase.[17] Subsequently, in the year 1846, regulations of general application provided for the automatic redemption of quit rents which had been paid for twenty years.[18]

Up to the year 1810, when Governor Macquarie arrived in New South Wales, 177,500 acres of land in the County of Cumberland had been granted by the early Governors. During Macquarie's term of office an additional 400,000 acres was granted, again mostly within the Cumberland Plain.[19] These are the lands in which the most intensive development in the State of New South Wales has taken place in the intervening years and in which the most serious problems of modern planning exist.

The 1820's witnessed a tremendous expansion of settlement to the north, south and west of the County of Cumberland and in less than a decade, between 1820 and 1829, over 2,000,000 acres of land were alienated by grant outside the County of Cumberland;[20] this was the commencement of the era of vast pastoral expansion during which there were strong pressures for a change in land policy. In the early years the land resources of the Colony had been regarded as something of an asset to be traded

or bartered for services or favours or to encourage agriculture, but in the years of pastoral expansion after the 1820's the land became a source of revenue:[21] the squatting interests objected to annual licence fees as the price of permits to occupy broad acres and whilst they were prepared to pay to acquire land they also objected to sales by tender or auction as those means of disposal would inflate the price.[22] Above all else, however, they sought security of tenure. During Gipps' term as Governor, proposals for the disposal of pastoral lands by long lease received serious consideration, but in the long run the combined influence of wealthy land-owners, political reformers and the landless working class succeeded, by the 1860's, in procuring the adoption of a policy for the disposal of Crown land by sale with the security of tenure provided by the grant of estates in fee simple.[23]

This outline is sufficient to show that the disposal of Crown lands by grants of freehold estates in fee simple had by the end of the nineteenth century become a recognised feature of our social and economic order: the estate in fee simple had come to represent the normal title of an owner of land, whether in towns and other centres of population, or in rural areas of the Colony. This, along with other factors which I now propose to mention, has had a substantial impact on the cost of implementing schemes which entail the acquisition of land for public purposes.

In all civilised communities a sovereign government has a right to take land in private ownership or occupation for public purposes;[24] this power of compulsory acquisition, as it is known in England, is called a right of eminent domain in the United States of America but in New South Wales is described as a power of resumption, that is, the taking back by the Crown of that which it granted. But however designated, it originated as a right to do such things as were for the benefit of all subjects. In 1606 all the Judges of England declared that: "When enemies come against the realm to the sea coast, it is lawful to come upon my land adjoining to the same coast, to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it. And therefore by the common law, every man may come upon my land, for the defence of the realm . . . . And in such case on such extremity they may dig for gravel, for the making of bulwarks; for this is for the public, and everyone hath benefit by it; but after the danger is over, the trenches and bulwarks ought to be removed, so that the owner shall not have prejudice in his inheritance; and for the commonwealth, a man shall suffer damage; as, for saving of a city or town, a house shall be plucked down if the next be on fire; and the suburbs of a city in time of war for the common safety shall be plucked down; and a thing for the commonwealth every man may do without being liable to an action."[25]

But by degrees the law was moulded to protect the rights of the land-owner and before the end of the eighteenth century one of England's leading Commentators, Sir William Blackstone, declared that: "So great moreover is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. . . . In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does, is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform."[26]

The concession in this statement of principle that the legislature can divest a man of his property rights on the basis of a compulsory sale has given rise to the notion which still persists in English law that the acquisition of land possesses the elements of a compulsory contract of sale under which the land-owner is entitled to payment of a price representing the value of the land to him. This is the origin of the concept in compensation law of a "value to the owner" which exerted a considerable influence on the basis adopted for the assessment of compensation for the compulsory acquisition of land in England and New South Wales in the ensuing two centuries.[27]

Save for the rare occasions on which land was requisitioned for purposes of national defence, there was little need for resort to the process of compulsory acquisition in England until the Industrial Revolution when the building of the English railway systems commenced. And whilst the acquisition of large areas of land for railway buildings, yards and tracks was often authorised by legislation, the acquiring authority was not some Government instrumentality obliged to act for the public good but a group of private entrepreneurs who had procured the passing of a special Act of Parliament for that purpose.[28] In each case the Act required the payment of compensation but "public opinion in regard to compensation was undoubtedly much influenced by the fact that railway enterprise undertaken for profit rather than the direct interest of the State was the moving force. The sense of grievance which an owner at that time felt when his property was acquired by railway promoters, then regarded as speculative adventurers, led to sympathetic treatment by the tribunal which assessed the compensation payable to the owner, and this point of view became general and continued for many years to influence all awards of compensation for land expropriation for public purposes."[29] In making this observation in 1918, the Scott Committee said: "It ought to be recognised, and we believe is today recognised, that the exclusive right to the enjoyment of land which is involved in private ownership necessarily carries with it the duty of surrendering such land to the community when the needs of the community require it. In our opinion, no land-owner can, having regard to the fact that he holds his property subject to the right of the State to expropriate his interest for public purposes, be entitled to a higher price when in the public interest such expropriation takes place, than the fair market value apart from compensation for injurious affection, etc."[30]

This may have been the community sentiment in England in 1918 when the country was still at war and reconstruction and replanning after the war seemed a social necessity, but it certainly has not represented the prevailing attitude of land-owners in New South Wales at any time in the last hundred years. The reasons for the widely accepted attitude in this State are not hard to find. First of all there was an emotional element in land ownership which had made land-holding a symbol of family security. This in time stimulated the campaign to "unlock the lands" which converted many of the previously landless working class into petit-bourgeois land-owners;[31] secondly, the legislation in New South Wales which authorised the resumption of land was modelled on the *English Lands and Railway Clauses Consolidation Acts* of 1845[32] and carried with it the same opprobrium as had attached to those Acts in England; thirdly, the Courts of New South Wales adopted without question the interpretations of English legislation given by the Courts of that country and even went further in a desire to relieve any sense of grievance of an expropriated owner.[33]

In the course of time, the Australian Courts extended the rights which an owner of land might assert against a governmental authority in respect of the compulsory acquisition of land to limits far beyond those which had been laid down in England. Not only did this mean that the acquisition of land for public purposes became more difficult but the measure of compensation moneys which an owner could exact when his land was resumed became inflated; this was ensured by the fact that compensation was customarily assessed, not by arbitrators as was usual in England, but, until quite recent times, by juries who readily responded to the emotional appeals of eloquent counsel to be generous to an owner whose land had been taken.[34]

Some results of these influences and tendencies should be briefly mentioned. First, the concept of "value to the owner" which was an extension if not a distortion of market value gained general acceptance: juries were directed that they might add to the market value of the land acquired such amount as they thought reasonable to compensate the owner for the loss of any special advantage which the land had to him.[35] This was further extended in more recent times to include a "retention value" over and above the market value in any case where the market price might be controlled or regulated; in other words, it should be a liberal estimate and could even include a black-market price.[36] Secondly, any plan of the acquiring authority to redevelop or resell the land acquired or any part of it was often held to vitiate the public purpose of the resumption and in any case precluded the authority from recouping any part of its loss by such means as the sale of frontages to a newly made street or to one which had been widened or realigned by the exercise of statutory powers.[37] Thirdly, the prospect of the acquiring authority making a profit by redevelopment and resale, if that did not invalidate the resumption, was used to inflate the compensation moneys upon the basis that any such profit was one of the potentialities of the land which the owner himself might have exploited.[38] Fourthly, the right to compensation was extended to claimants who had insubstantial interests in land such as squatters without any documentary legal title,[39] mere occupiers and even weekly tenants of premises which happened to be controlled under Landlord and Tenant legislation.[40]

Sufficient has been said to indicate the means whereby the wholesale grant of freehold estates in fee simple has, because of the burden of compensation claims, become an obstacle to the acquisition or resumption of lands for public purposes. With the tremendous increase in land values for a century or so, this has more often been the case with city or urban lands but questions of cost have also impeded if not frustrated schemes for the acquisition of rural lands for closer settlement and similar purposes.[41]

There is perhaps some poetic justice in the fact that the political decisions of the last century to make such grants of land in a prodigal fashion for the purpose of appeasing a clamouring public, if not a demanding electorate, are today seen as preventing the implementation of planning proposals and development schemes which, but for their cost, would be politically popular. Schemes for slum clearance, expressway construction, the provision of parking areas and open spaces for a variety of public purposes, if not discarded because of their initial cost, are often deferred from month to month, budget to budget, and election to election, because of an unavailability of funds to undertake the necessary resumptions and, with each deferment, the cost of the land increases in a spiral progression until at length it is often so crippling as to require the abandonment of the project.

It is easy to be wise after the event and whilst it may not contribute much to the discussion to damn past decisions taken at political level or for purely political ends, it is worth pointing out that from time to time during the eighteenth century perceptive minds were conscious of the folly of the land policies then being pursued and the voices of leading figures in public life were raised in protest against those policies.

All the early Governors and some of the Colonial officials in Whitehall saw the evils of speculation in land and of the granting of land to persons who might sell it at a profit without having done anything towards its improvement or cultivation; they attempted to control this by conditions of residence, conditions requiring improvements to be made and by restrictions on alienation for limited periods, but these were far from effective and by the year 1828 less than ten per cent of a total of nearly 3,000,000 acres granted were cleared and the cultivated lands were less than two and a half per cent of the total.[42] In 1828 Sir Francis Forbes, the dynamic and farsighted Chief Justice of New South Wales, criticised the abandonment of quit rents in Crown grants and the failure to collect such rents, for he regarded them as a means of controlling land use as well as a continuing source of revenue.[43] Sir George Murray, the Secretary for the Colonies, in a despatch to Governor Darling in 1831, condemned the practice of "individuals accumulating large tracts of country in their possession" and said that such a practice had led to very serious evils and was one which weighed heavily upon the Colony because so many proprietors had "allowed large portions of their grants to remain in the same uncultivated state as when they received them."[44]

Governor Gipps, whose term of office witnessed the first major crisis in land policy in the Colony, was opposed to the grant of unlimited rights of permanent ownership; he acknowledged the difficulty of confining the spread of settlement by prohibitions such as had existed in Macquarie's day but favoured the occupation of land under lease or licence coupled

with a limited option for the lessee or licensee to acquire the freehold.[45]

By the time free selection of rural lands was introduced in 1861, there were elements of a land fever in the community which continued for many years thereafter: all sorts of frauds and devices, dummying and peacocking,[46] were adopted to procure additional lands until at length by the 1890's the aggregation of large areas in few hands, the inadequacy of the development and improvement of lands and the influence of Henry George's single tax theories, combined to reveal the folly of earlier policies of land disposal and to demonstrate the need for conserving the remaining unalienated Crown lands and introducing some measure of control over its disposal and use in the public interest.[47] Amongst the steps that were taken after 1890 were the creation of new forms of tenure, particularly grants of limited freehold interests such as the homestead grant which was in reality similar to the grants made by the early Governors, namely, the grant of a fee simple subject to the payment of a perpetual rent to be reassessed every ten years as a proportion of the value of the land, and to certain other conditions including personal residence of the holder.[48] Land tax was imposed in 1894 to make the aggregation of large estates unprofitable[49] and in the early years of this century plans were devised for the repurchase or resumption of privately owned lands for closer settlement on terms which would give the new settlers estates less than freehold, including leases in perpetuity or for long terms.[50] There was even in some quarters a strong movement for the nationalisation of the land and, indeed, the adoption of leasehold tenures as the main or sole method of disposal of Crown lands for settlement might be characterised as a form of nationalisation and was in fact introduced in Queensland in the early years of the century.[51]

Despite the oft-repeated claim of grazing and farming interests that only the security of tenure provided by freehold estates will ensure adequate development of rural lands, the experience of the disposal of leasehold interests in such land has, in some rural areas at least, proved the contrary. Fiscal laws have perhaps done much to put the ownership of land in true perspective: the burden of land tax and municipal and shire rates on land ownership has come to be regarded as inevitable and as one of the costs of production, whilst the future incidence of death and estate duties is a serious and continuing anxiety to large land-owners. Whilst some of these obligations exist to a similar extent on leasehold estates, the income tax laws are far more generous in the deductions allowed for tax purposes to the holders of such interests;[52] indeed, from this viewpoint and if the land is regarded as an asset for its immediate productive capacity as distinct from being a durable asset which may result in some capital gain, the ownership of a leasehold interest in land may be more advantageous than ownership of freehold estate.

Whether this is correct as a general principle or only in some special situations, there is little doubt that in the field of rural land policy we have almost come full circle with the return to a system of disposing of Crown lands on terms and conditions which are little more than a complex reformulation of those applied by the early Governors from Phillip to Brisbane. Political theories and pressures in one or more of the Australian States at various times in the present century have resulted in departures from such a policy of land disposal on restricted conditions but, even so, it is difficult to refute the basic wisdom of any system which is designed to protect the public interest against the consequences of inflationary trends in the cost of land settlement and primary production. Rural planning, closer settlement, and the development and population of new regions like irrigation areas, present rather different problems from those which are encountered in the replanning of cities and towns, more particularly because of the astronomical increases in the values of land in and about cities and metropolitan areas which on any basis are quite unmatched by the increases in the values of rural lands except those where metropolitan development is in prospect. To illustrate this, it is only necessary to mention that the unimproved value of land in the City of Sydney, the most densely built-up area in the State, increased from £70,556,374 in 1951 to £283,143,893 in 1966 whilst in the Municipality of Blacktown, a developing area in which there were large tracts of vacant land ripe for development, the increase was from £1,735,966 in 1951 to £46,177,123 in 1966,[53] these increases far outstrip the diminution in the value of money as measured by changes in the standard price indices.

Many have been the solutions suggested for the problems of planning cost to which I have adverted and which are emphasised by such spiralling values as these. Supporters of Henry George's theories see the imposition of a land tax as a panacea for this and other economic problems of modern society but it is clear that if any substantial impact on land values is to be made by land taxation the rate of any such tax would have to be so high that most people would regard it as excessive and confiscatory.[54] Various schemes for the expropriation of any increase in the value of land which is ripe for development or of the unearned increment which land gains as a result of community activities and expenditures have been investigated and devised in the days since the First World War. In particular, the principles of betterment, as it has come to be called, have received considerable support from planners and even been given legislative recognition in the town and country planning provisions of the *Local Government Act* of this State,[55] but the inadequacy of these provisions has provoked other suggestions for the acquisition of some part of the unearned increment in land values by a development charge varying with the increase in value of lands on which development is proposed.[56] The Uthwatt Committee in England recommended the acquisition of the development rights in all lands outside built-up areas on payment of compensation, together with complementary restrictions upon development and a power of compulsory acquisition for public purposes.[57] These recommendations were incorporated in the English *Town and Country Planning Act* of 1947 which also required payment of a levy for private development, but subsequent legislation in the years 1953, 1954 and 1959 abolished the scheme. As recently as May of this year a bill to establish a Land Commission with power to acquire land by compulsory process and to impose betterment levies was introduced into the British House of Commons to give effect to the recommendations made in a White Paper published in September, 1965.[58] This bill proposes that land acquired by the Land Commission may be disposed of by a new form of title called "crownhold"[59] subject to covenants which will preserve the development rights in the Commission, restrict alien-

ation by the holder and give the Commission a right of pre-emption or resumption at a price or on terms which would exclude any actual or potential increase in value.[60] This legislation is similar in some respects to schemes for the closer settlement of rural and irrigation lands which have been in force in this State for many years and, in particular, like those schemes, it adopts the principle of the disposal on a limited title of land acquired by compulsory process.

One feature which is seen to emerge as a common element of many of the legislative and other plans designed to acquire or preserve development rights is the retention in the Crown or some public authority of the ultimate reversion of any land which may be the subject of development or redevelopment. Why then, one may ask, is it not more appropriate to acquire by compulsory process of universal application without compensation the ultimate reversion in all lands held in fee simple so that the titles of the holders in fee simple of all lands would be reduced to those of lessees from the Crown for a long term of years? This would at one stroke convert the present system of land titles from one of freehold inheritable estates to estates of limited duration.

Whether this be characterised as a reform of the law, an inroad on property rights or a measure of expropriation without compensation, it is a change which would be regarded as highly conducive to the orderly redevelopment of urban areas by some planners and large-scale developers who have become acquainted with the system of leasehold tenure which applies in Canberra and who consider that such a system would provide, at minimum cost to the community, a simple, flexible and effective basis for planning development and controlling land use.[61] The legal efficacy of such a system of titles needs no emphasis for there is no easier way to control land use than by the covenants of a lease and, moreover, as the term of a lease expires the development rights would necessarily revert to the Crown and the value of the owner's interest in the land would diminish year by year instead of increasing as it does when an owner has an estate in fee simple. Even if full compensation rights for improvements on the land at the end of the lease were reserved to the lessee, the cost to the community of redevelopment schemes and public projects such as road widening would be infinitely smaller because there would be far less room for speculation in land dealing and no prospect of a person acquiring and retaining the ownership of land simply for the purpose of securing a capital gain.

In one sense it might be said that such a system would restore the landholder to a position vis-à-vis the Crown or the community similar to that which he occupied in feudal society vis-à-vis his overlord, and in terms of rendering a service to the Crown or to the community this is a proper obligation to be expected of a landholder, for the land is a community asset which no single person has created and which no person can own except in the sense that he may use it during his time on earth. In this respect it is paradoxical that the common law confers rights in perpetuity upon owners of land whilst only limited rights are conferred by statute upon inventors, authors and composers: despite the human ingenuity and effort which is basic to an invention and the inspiration and labour which result in the creation of literary and musical masterpieces, the rights of ownership granted to inventors, authors and composers under legislation relating to patents and copyrights are limited to specific terms of years.[61A] Is it not anomalous that society continues to extend rights in perpetuity to the ownership of land which is a community asset whilst refusing to extend similar rights to the product of a creative mind?

It is to be expected that measures directed to the ends that I have suggested would meet with a wealth of opposition. Like a suggestion on cognate lines made to the Uthwatt Committee in 1942,[62] it would be objected to as involving land nationalisation. This is hardly an apt characterisation of the proposal because it would preserve the rights of user of the current owner for his life or for some long term which would probably be of the order of fifty years and, in any case, as I have endeavoured to show, our law of real property has its origin in the dominion of the Crown over all lands and, in this country at any rate, the title of every owner to the land he occupies is at root that of a tenant only.[63] That such a scheme would entail the expropriation of the reversion without compensation is undoubted, but one may ask whether there is any real difference between the imposition of death and estate duties at very high rates on the value of land passing by inheritance on the one hand, and the termination of the interest of an owner on his death or the limitation of such interest to a long period of years on the other; and for that matter, one may also be tempted to ask whether it differs in principle from the imposition of land taxes, municipal and shire rates on the values of land or the levying of a capital gains tax on any increase in the value of land held? This does not mean, however, that as an acquisition without compensation the suggested scheme is necessarily unjust. For one thing, the concept of "just compensation" or "just terms" for the acquisition of property which is part of the Australian constitutional system is recognised as "involving a consideration of the interests of the community as well as of the persons whose property is acquired."[64] A second element is that the whole notion of justice is bound up with the question of equal treatment and a fair application of the same rule to every citizen and land-owner and to every possessor of land is no more unjust than any law which restricts in equal manner the freedom of action of all citizens or land-owners in the interests of the general welfare of the community. The issue of justice is, in reality, a social one of preserving fair and adequate rights of land-owners and this in turn poses the question whether a title limited to the life of the owner or to a term of, say, fifty years, or some reasonable unexpired residue of such a term, would afford sufficient security for the exploitation or development of the land. Upon this matter there can be little doubt, for it is becoming a not infrequent practice for new trading enterprises of some large companies to be developed on land held under lease for terms of fifty years or less and, of course, there are substantial income tax advantages accruing to a developer or trader who undertakes the construction of buildings on land held under leasehold title which are not similarly available where the land is held in fee simple.[65] And even in the domestic or family sphere it is rare than an ordinary home-owner would expect security for more than fifty years and certainly not for a period extending beyond the life of himself and his spouse; the new measure of security attaching to mere weekly tenancies of homes which are protected by the *Landlord and Tenant (Amendment) Act* in this State shows at once the extent to which family

social needs can be met by the creation of leasehold interests and the manner in which rights or property can be affected by legislation without the expenditure of public funds being necessary to compensate for the affection.

Apart from the objections already mentioned, any scheme to convert existing titles in fee simple into leasehold interests or to acquire the development rights by the means discussed would be criticised as impracticable. It may be that it has some qualities of idealism, but so in large measure have many of the major planning proposals which have been formulated in recent years; indeed, there is probably in these days more invective directed against planners for being visionaries or idealists than almost any other professional class in the community. Like so many sound planning proposals which in spite of their idealistic qualities have been frustrated by lack of money, its practicability is a matter of foresight and courage. Given a determination to revitalise our cities and urban areas, to ensure proper standards and improve the amenities of future cities and towns, as well as an acknowledgment of the need to control development in rural areas, the only question remaining to be answered is whether we can devise a means by which all necessary steps to these ends can be taken without the financial burden assuming crippling proportions. No one doubts that the cost of planning and replanning must be met by the community, that is, by its present and future citizens who will share the benefits which are certain to ensue from the implementation of sound planning proposals. Is it not more equitable, therefore, to cast the financial burden upon the land-owner whose efforts did not create and seldom have added much to the value of the asset in his hands rather than to expect the productive processes of the community and the income and wage earners to bear another impost which will have to be passed on and added to all other community costs? By such a wholesale change in land titles, the land-owner will lose the prospect of any capital appreciation in the value of the land but this is something he has not earned, and "his heirs and assigns" will lose the prospect of inheriting an asset having a value which they did nothing to create.

And so at length I pose for consideration, enquiry and research the question whether in these more enlightened years the time has not arrived to reform our property laws so as to restore the land to its original and proper place in the social and economic order. Is there a sound basis for saying that a fundamental reform of our land laws would facilitate, at far less cost to the community, the rebuilding of decayed and obsolete localities in our cities and towns to give them new vitality, the creation of new urban areas with facilities and amenities to provide a full life to town dwellers, and the control of rural land use to ensure the best development of our productive resources and, by the integration of all these objectives, the improvement of community life in our modern complex society? Are we satisfied that it is impossible to achieve these objectives at a cost the community can bear otherwise than by some basic change in our land laws, and, if so, is it not apposite that we should be prepared to introduce a system of leasehold titles and, by reducing estates in fee simple in land to terms of years, to diminish some of those property rights which for centuries have ensued from a grant of land "to John Doe his heirs and assigns forever"?

REFERENCES

(1) *Report on the Distribution of the Industrial Population*, 1940, Cmd. 6153, paragraph 248.

(2) *Annual Report of Cumberland County Council*, 1954, p. 2.

(3) *Principles and Practice of Town and Country Planning*, 3rd edn., 1964, p. 12.

(4) Millard's *Law of Real Property in New South Wales*, 6th edn., 1948, p. 15.

(5) *Attorney General* v. *Brown* 1847 2 Supreme Court Reports (NSW) Appendix, p. 30.

(6) Megarry, *Law of Real Property*, 1957, pp. 14 et seq.; Holdsworth, *History of English Law*, Vol. III, pp. 37-40.

(7) Forms of Grants of Land made by the early Governors are to be found in *Historical Records of Australia*, Series I, Vol. I, p. 310; Vol. XII, pp. 390, 391, 400.

(8) *Land Tax Management Act*, 1956 (NSW); *Local Government Act*, 1919 (NSW); *Metropolitan Water Sewerage and Drainage Act*, 1924 (NSW).

(9) Perry, *Australia's First Frontier*, 1963, pp. 24-25, 47-51; *Historical Records of Australia*, Vol. XII, pp. 379-380.

(10) *Royal Australian Historical Society's Journal*, Vol. 48, p. 245.

(11) *Historical Records of Australia*, Vol. I, pp. 14, 124-128, 365-366, 523-527; Vol. III, pp. 394-398; Vol. VII, pp. 193-197; Vol. X, pp. 598-603; Vol. XII, pp. 379-389; Perry, op. cit., pp. 47-49.

(12) *Historical Records of Australia*, Vol. XII, pp. 380, 399.

(13) *Historical Records of Australia*, Vol. I, pp. 310-311, 441, 769; Vol. XII, p. 390.

(14) Ibid.

(15) Ibid.; Vol. XII, pp. 379, 418.

(16) Ibid.; Vol. XII, pp. 400-401.

(17) *Historical Records of Australia*, Vol. XII, pp. 379, 400, 418.

(18) *Government Gazette*, October 9, 1846; July 31, 1849.

(19) *Historical Records of Australia*, Vol. XII, pp. 379-380.

(20) Perry, op. cit., pp. 131, 134.

(21) Epps, *Land Systems of Australia*, 1894, pp. 12-13; Roberts, *History of Australian Land Settlement*, 1924, pp. 122-126.

(22) Epps, op. cit., pp. 18-19; Roberts, op. cit., pp. 175 et seq.; *Historical Studies, Australia and New Zealand*, Vol. 7, p. 178.

(23) *Historical Studies, Australia and New Zealand*, Vol. 7, p. 178; Vol. 8, p. 166; Vol. 9, p. 173; *Crown Lands Alienation Act* of 1861 (NSW).

(24) *Law Quarterly Review*, Vol. 3, p. 314; Vol. 75, p. 188.

(25) *The King's Prerogative in Saltpetre*, 12 Coke's Reports, p. 12; *Re De Keysers Royal Hotel Ltd.*, Law Reports 1919, 2 Chancery, p. 197; affirmed 1920 Appeal Cases, p. 508.

(26) *Commentaries*, 1857 edn., Vol. I, pp. 125-126.

(27) *Law Quarterly Review*, Vol. 75, p. 196.

(28) Halsbury's *Laws of England*, 1st edn., Vol. I, p. 622; and see long titles of *Lands Clauses Consolidation Act*, 1845 (Imp.) and *Railway Clauses Consolidation Act*, 1845 (Imp.); Browne and Allan, *Law of Compensation*, 2nd edn., pp. 1, 278.

(29) *Second Report of Scott Committee on Law and Practice relating to the Acquisition and Valuation of Land for Public Purposes*, 1918, Cmd. 9229, p. 8.

(30) Ibid.

(31) *Historical Studies, Australia and New Zealand*, Vol. 8, p. 166.

(32) *Government Railways Act*, 1858 (NSW), section 45; *Lands for Public Purposes Acquisition Act*, 1880 (NSW), section 18; *Public Works Act*, 1912 (NSW), section 124.

(33) *Pastoral Finance Association* v. *The Minister*, 13 State Reports (NSW), p. 179.

(34) *The Land and Valuation Court Act*, 1921 (NSW) provided for the assessment of compensation by a Judge of that Court instead of a jury (section 9).

(35) *Pastoral Finance Association* v. *The Minister*, supra.

(36) *Commissioner of Succession Duties* v. *Executor Trustee and Agency Co. of South Australia*, 74 Commonwealth Law Reports, pp. 358, 373-374; *Commonwealth* v. *Arklay*, 87 Commonwealth Law Reports, p. 159; *Minister for Public Works* v. *Thistlethwayte*, 19 Local Government Reports (NSW), p. 352; cf. *The Valuer*, Vol. 17, p. 555.

(37) *Campbell* v. *Municipal Council of Sydney*, 24 State Reports (NSW), p. 179; affirmed Law Reports 1925 Appeal Cases, p. 338; *Thompson* v. *Randwick Municipal Council*, 81 Commonwealth Law Reports, p. 87; *Minister for Public Works* v. *Duggan*, 83 Commonwealth Law Reports, p. 424.

(38) *Turner* v. *Minister for Public Instruction*, 95 Commonwealth Law Reports, p. 245.

(39) *Perry* v. *Clissold*, Law Reports 1907 Appeal Cases, p. 73.

(40) *Reeve* v. *The Commonwealth*, 78 Commonwealth Law Reports, p. 410.

(41) King, *An Outline of Closer Settlement in New South Wales*, 1957, pp. 189-190.

(42) Perry, op. cit., p. 131; cf. Roberts, op. cit., pp. 74-75; *Historical Studies, Australia and New Zealand*, Vol. 11, p. 458.

(43) *Historical Records of Australia*, Series IV, Vol. I, pp. 693-694.

(44) *Historical Records of Australia*, Series I, Vol. XV, p. 803.

(45) Roberts, op. cit., p. 180; *Historical Studies, Australia and New Zealand*, Vol. 6, p. 396; Vol. 7, p. 178.

(46) Roberts, op. cit., pp. 226-230.

(47) Roberts, op. cit., pp. 335-336, 380-385; Epps, op. cit., pp. 171-178; King, op. cit., p. 187.

(48) *Crown Lands Act* of 1895 (NSW), section 17.

(49) *Land and Income Tax Assessment Act* of 1895 (NSW), section 10.

(50) Roberts, op. cit., Chapter 28; King, op. cit., p. 196; *Closer Settlement Acts*, 1901, 1904 (NSW).

(51) Roberts, op. cit., pp. 384-385.

(52) *Income Tax Assessment Act* 1936-1965 (C'wealth), sections 83-89.

(53) Figures supplied by Department of Local Government (NSW).

(54) *Progress and Property*, 75th Anniversary Edition, pp. xxii-xxv, 442.

(55) Section 342AC(4); *Bingham* v. *Cumberland County Council*, 20 Local Government Reports (NSW), pp. 1, 27-32.

(56) H. O. Thomas, *Financial Considerations for Statutory Planning in New South Wales*, APIJ, Vol. 4, October 1966.

(57) Cmd. 6386, pp. 16, 19, 104; other Committees in England had previously investigated this question—see the *Second Report of the Scott Committee*, 1918, Cmd. 9229, pp. 16-19 and Appendix 3.

(58) Cmd. 2771.

(59) Clause 17.

(60) Clauses 18-21; the scheme of the legislation is discussed in *The Law Guardian*, July, September and October 1966, Nos. 17-19.

(61) See for example *Urban Redevelopment in Inner City Areas*, Planning Research Centre, 1965, pp. 29-31; H. O. Thomas, op. cit.; *Sunday Telegraph*, September 25, 1966, pp. 17-18.

(61A) The rights granted by a patent endure for sixteen years but may be renewed in some circumstances for a further five or ten years (*Patents Act* (C'wealth) 1952-1962, sections 68, 94); the term of a copyright is fifty years from the death of the author or fifty years after publication (*Copyright Act* (Imp.) 1911, sections 3, 17(1), *Copyright Act* (C'wealth) 1912-1963).

(62) Cmd. 6386, pp. 154-156.

(63) Sir Arthur Underhill, a member of the Scott Committee which made the *Fourth Report on the Transfer of Land in England and Wales* in 1919 (Cmd. 424), considered that the titles to all land in England held on any tenure of freehold or copyhold should be converted to leases in perpetuity; see Appendix I to that Report, pp. 25-34; his recommendation was accepted in principle by the Committee but was not implemented by legislation.

(64) *Grace Bros. Pty. Ltd.* v. *The Commonwealth*, 72 Commonwealth Law Reports, pp. 269, 280.

(65) *Report of Commonwealth Committee on Taxation*, 1961, para. 259, et seq.