HOW FREE IS YOUR FREEHOLD?

(A short study of the prevailing system of Land Titles in Australia)

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Published by the author, 1988

P.O. Box 336, Norfolk Island. 2899
National Library of Australia, Canberra. ACT 2600
ISBN 9592 475 4 8

Printed by Photopress International, Norfolk Island

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Do You Have Land Rights?

In this year of the Bi-centenary of Australia, at a time when the question of land rights for aborigines is compelling public attention, and when land price is reaching astronomical levels, it is appropriate to examine the history of landholding in Australia, and to present a remedy for the injustices, not only to the aboriginal community but to all Australians; not in the system of landholding itself but in its application and operation whereby people are impoverised by the price of land, each generation holding the next generation to ransom.

A claim by aborigines to land rights is valid, but so also is a claim by all Australians to a just system of landholding free from exploitation by the robbery of land price.

The following pages are intended to bring some enlightenment to the subject.

It is generally understood that the Australian system of land titles is historically derived from that of the United Kingdom; the colony of New South Wales at its foundation in 1788 being that part of the continent in which the system was first established. Its origins go back many centuries, to the time when the Feudal System was in operation in Great Britain, dating from the Norman Conquest in 1066 and recorded in the Domesday Book of William I.

Nowadays, the general feeling among landholders is that the land they occupy is their property in the same sense that the 'improvements' - farms, factories, buildings used in commerce - are their property (however much they may be subject to mortgage); but there is a clear distinction between the two. Whereas the ownership of property in the form of 'improvements' is indisputably that of the registered owners, the land itself, covered by the 'freehold' title is held subject to certain implicit obligations which limit the rights of owners, this limitation being enshrined in the term 'fee simple' which is embedded in the words of the title itself. This obligation binds the landholder to the Crown, that is in modern terms the permanent government, it being the representative of all the people, reflecting the fact that the land of a country inalienably belongs to the whole nation. It is supported by the right of a government to 'resume' land for public purposes.

The Feudal System laid upon the holders of estates a number of obligations or services to the Crown, ranging from military service, 'knight's service' and, in the case of ecclesiastic establishments, the provision of education and the succour of the poor in sickness or misfortune. 'Fee', a feudal benefice, meant land granted to a man and his heirs in return for services. Most of these obligations were removed by a statute of 1660, following the restoration of Charles II when all titles were converted into 'free and common socage' (the word 'free' referred to free men as distinct from villeins and 'common' meant the latter, who had no right other than the protection of their lord). 'Socage', a term of anglo-french origin, according to the Oxford Concise English Dictionary is a noun meaning "feudal tenure of land involving payment of rent or other services to (a) superior". The obligations of the ecclesiastic estates were automatically terminated by the confiscation by Henry VIII of the monasteries and Church wealth and lands (circa 1530), following which came enactment, under Elizabeth I, of the Poor Laws which transferred the obligation of education and support of the indigent to local government.

There have been attempts to impose the theory that, as the Feudal System was abolished in Great Britain, its basic obligation to return the rent to the Crown could not properly be sustained in New South Wales, despite its recognition in the original land grants of the requirement to pay 'quit rent' on demand. But in a judgement of the Supreme Court in 1847 this was denied and it was 'clearly held that upon the founding of the colony by British subjects in 1788 the land of the colony became vested in the Sovereign as the representative and executive authority of the nation and that as the Sovereign's estate they may now be effectively granted by him'.1

Estates in Fee Simple

Millard, in 'Real Property in New South Wales', says of Freehold: 'in earlier times a man who held land by feudal tenure was said to have a free holding or 'freehold' (liberum tenementum) because of the services he rendered for it, of which the most usual was military or knight's service, were thought worthy of a free man; whereas the villein, who held in 'villenage' paid for his land by labour in his lord's fields and in other ways which were considered degrading, and he who held a lease for a term of years had only a chattel ... It must be remembered that a freeholder could not be the absolute owner of the land, but must hold it of the king or of some other lord. He was said to have an estate in the land and to be *seized*, that is possessed of it for an estate of freehold.'

On the Fee Simple, he says further: 'The greatest estate that a man can have in land is what is called an estate in Fee Simple, or 'in Fee', that is an estate distinguished by being inheritable by his blood relations, not only lineal (i.e. his own descendants) but collateral (i.e. his brothers, sisters etc., and their descendants). The tenant in fee simple is now, in common language and for all practical purposes, the owner of the land itself. But by the theory of law he holds as a mere tenant of the Crown, and when he gives or sells his estate he does but put another tenant in his place: and this theoretical relation of lord and tenant must be borne in mind in order to understand the present state of the law.

'Under the feudal system, those persons who held lands directly from the king by royal grant were called his tenants *'in capite'* and his holdings were called *'fiefs'*. It was established as early as the reign of Henry I that these were estates of inheritance; that is, that an estate in fee passed to the heir of the holder without a fresh grant from the king. The tenant *in capite* in his turn granted parts of his land to other freeholders. This was called *subinfeudation*, and the effect of it was to create a new tenure between the grantor and the grantee so that the grantee and his heirs became tenants of the grantor, who was called the *mesne* or intermediate lord. *Subinfeudation* was abolished by a statute of Edward I, known as the statute of *quia emptores*, which enacted that every tenant in fee simple might sell his holding or part thereof at will, but so that the purchaser should hold the tenements of the same lord and by the same services as the vendor had held them before. In other words, the tenant in fee may dispose of his lands and, as we have said, put another tenant in his place, but he cannot create a tenure of fee simple between himself and that other. The effect of this in New South Wales is that every tenant in fee simple must hold his land of the King as Lord Paramount.

'The fact that the King is Lord Paramount is here manifested in a far more marked way than in England, for while there the fundamental rule that all lands within the realm were originally derived from the Crown is more or less a legal fiction, here, on the other hand, the Crown's universal occupancy was no mere fiction. "The waste lands of this colony are, and ever have been from the time of its first

settlement in 1788, in the Crown; and they are and ever have been from that date, in point of legal intendment, without office found, in the Sovereign's possession, and as his or her property they have been, and may now be effectually granted to subjects of the Crown (Judgement in Att.Gen.v Brown, previously quoted). The titles to all lands in the State must therefore be traced to the Crown and must originate in a Crown Grant."[2]

In Halsbury's "Laws of England" (vol. 32/p. 207) the law relating to land tenure and 'ownership' is thus clearly stated:

> "Technically land is not the subject of an absolute ownership, but of tenure. According to the doctrines of the common law there is no land in England in the hands of a subject which is not held of some lord by some service and for some estate; and this tenure is either under the King directly, or some *mesne* Lord, or a succession of *mesne* lords, who, or the last of whom, holds of the King. Thus the King is lord paramount, either mediate or immediate, of all land within the realm. The tenure of land is based on the assumption that it was originally granted as a 'Feud' by the King to his immediate tenant on condition of certain services, and, where there has been subinfeudation, that the immediate tenant in turn regranted it; and although for some purposes this system, known as the 'feudal system' has lost its practical importance, it still determines the form of property in land.
>
> "Tenure carried with it reciprocal obligations and rights on the part of lord and tenant. The lord was bound to defend his tenant's title; the tenant was bound to render to his lord certain services. The nature of these services varied according as the tenancy was in *chivalry* or *in socage*. Tenure in *chivalry* furnished the basis of the military organisation of the Teutonic races after the fall of the Roman Empire. Tenure in *socage*, supplemented by tenure in *villenage*, provided for the practical requirements of agriculture. In addition, lands might be granted to the church, and, if no services were reserved, this was tenure in *Frankelmoign*."

As to tenure in chivalry and socage, Halsbury says (p.576):

> "The usual form of tenure in *chivalry* was tenure by knight's service. The personal relation of lord and tenant was constituted by homage and fealty, and the essential service was the providing of one or more knights according to the size of the fee. This service came to be generally commuted for a money payment known as 'escuage' or rent ... Homage was not required in *socage* tenure, but the tenant did fealty, and usually rendered services such as plough service or the payment of fixed *escuage* or money rent."

The changes and developments from the feudal to the modern system have been manifold and important, but of all aspects of the change none is so vital to the study of sociology as the process by which the English people, once secure and well provided for according to their standards, became landless. And no other change has had such dire and deep-seated results. Other changes have been more picturesque and more popular with shallow writers. But the discovery that the English people have been the victims of a gigantic conspiracy for the past 500 years by which they have been, to a large extent, disinherited, dispossessed and dispatriated, has dawned on many more than William Cobbett, Henry George, J.K. Chesterton and Francis Neilson. In spite of the magnificent work of J.R. Green and others, the complete history of the English people has never been written in popular form. But its essential features are deeply written both in the literature and the landscape, institutions and buildings of England, and among the plainest for anyone to see is the fact that man is a land animal and interference with his rights as such is a basic injustice and basic historical fact.

The most obvious feature of the feudal system was, as already quoted from Halsbury, the mutual obligations of King and tenant. Nobody wants to return to feudalism but any informed person can see the necessity for restoring the rights of the people which the feudal system largely preserved. Could anyone think of anything more enlightened than the service or 'rent' basis of feudalism and the freedom from taxes? By resorting to land-rent for public revenue, and correspondingly abolishing taxes as far as the rent will permit, the essential merits of the feudal system tenures can be resuscitated in modern form.[3]

Fee Simple (Freehold) or Perpetual Leasehold?

The practical question to be decided is: in order to restore the basic rights of the people in the land -

(a) should the necessary legislation preserve the fee simple with due provision for the rent to be secured to the community as its revenue by the modern method, and for security of tenure as at present, or

(b) should the community introduce a new system of perpetual leasehold with provision for the economic rent to be secured to the community, or

(c) should some compromise or third method be found for 're-inheriting, the people into their equal human rights in the land and their right not to be pillaged by taxes?

The most satisfactory answer to these questions was given by Henry George in his PROGRESS AND POVERTY part of which is here quoted as follows:

> "We have weighed every objection, and seen that neither on the grounds of equity or expediency is there anything to deter us from making land common property by confiscating rent. But a question of method remains. How shall we do it?
>
> We should satisfy the law of justice, we should meet all economic requirements, by at one stroke abolishing all private titles, declaring all land public property, and letting it out to the highest bidders in lots to suit, under such conditions as would sacredly guard the private right to improvements. Thus we should secure, in a more complex state of society, the same equality of rights that in a ruder state were secured by equal partitions of the soil, and by giving the use of the land to whoever could procure the most from it, we should secure the greatest production.
>
> But such a plan, though perfectly feasible does not seem to me to be the best. Or rather I propose to accomplish the same thing in a simpler, easier and quieter way, than that of formally confiscating all the land and letting it out to the highest bidders. I do not propose either to purchase or to confiscate private property in land. The first would be unjust; the second needless. Let the individuals who now hold it still retain, if they want to, the possession of what they are pleased to call their land. Let them buy and sell, and bequeath and devise it. We may safely leave to them the shell, if we take the kernel. *It is not necessary to confiscate land; it is only necessary to confiscate rent.*"
>
> "Nor to take rent for public uses is it necessary that the State should bother with the letting of lands and assume the chances of the favouritism, collusion and corruption this might involve. It is not necessary that any new machinery should be created. The machinery already exists. Instead of extending it, all we have to do is to simplify and reduce it. By leaving to landholders a percentage of rent which would probably be much less than the cost and loss involved in attempting to rent lands through State agency, and by making use of this existing machinery, we may, without jar or shock, assert the common right to land by taking rent for public uses.
>
> "In this way the State may become the universal landlord without calling herself so, and without assuming a single new function. In form, the ownership of land would remain just as now. No owner of land need be dispossessed, and no restriction need be placed upon the amount of land anyone could hold. For, rent being taken by the State, land, no matter in whose name it stood, or in what parcels it was held, would be really common property and every member of the community would participate in the advantages of ownership."[4]

Advantages of Common Ownership through Site Rent

Nobody today would wish to return to the Feudal System; that would be virtually putting the clock back hundreds of years and would be a futile exercise, doomed to failure.

On the other hand, nobody in his right mind could view with equanimity the prospect of progressively more enslavement by the taxation system, of which there appears every likelihood looking at

the present condition of the so-called democratic states of the West, and of which the communist states are all too plainly living examples.

The alternative of the public resumption of the land rent for public purposes, therefore, offers the prospect of all the advantages of the principle behind the Feudal System without those features which would be unacceptable in a true democracy, e.g. the inequality of the personal landlord-tenant relationship, insecurity arising from the instability of the throne or from the forming of a cabal of landlords such as that of the barons who, through Magna Carta, led to the general destruction of the system and the installation of a tax system in its stead.

Nobody objectively viewing the situation in Australia today could deny the dangers confronting the country from the vast concentration of unproductive speculative investment in so-called 'real estate', with its consequent inflation of rents and the virtual destruction of the market for rented property and the ever mounting costs of housing, i.e. cost of land, building costs, necessity for mortgage finance at high interest, etc. with, on the other hand, the consequent burden of taxation to offset its evil effects. Not to mention the ever-widening gap between the rich, with their artificially inflated incomes, and the landless poor.

Ironically, the existence of present-day feudalism in many states in Central and South America and Africa, with their extremes of wealth and poverty, power-wielding landlords in government, and slavery throughout the rest of the community, offers the world a glaring case of the basic cause of the revolutionary forces at present battling for supremacy, backed by the well-meaning wealth-engorged leaders of Western nations fearful of the dangers to their own communities.

Common sense alone must induce the thoughtful citizen to seriously consider this argument, the satisfactory resolution of which could guarantee the future stability of Australia.

The machinery for the collection of land rent (the Surplus Product, as Henry George called it after the French economists of the 17th century, who first proclaimed its nature and virtues) exists in the system of rating revenue for local government, which already takes a fraction of the Site Rent and which could easily be organised to take it all, over a period of time, so as to cause a minimum of disturbance,

based on, say, a ten-year scale beginning with ten percent of the 'site rent' of unimproved land, rising in annual increments until the whole of the Site Rent (excluding all improvement) is collected in the tenth year and annually thereafter. Taxation to be similarly treated on a reverse scale, beginning with the Income Tax.

The savings alone in the redundancy of the Income Tax Department and similar offices would provide a great contribution to the restoration of Australia's financial stability.

Finally, consider the great moral benefit of the cessation of dependence on taxation for public revenue: the elimination of the continuing scandal of 'tax evasion', the freeing of the taxpayer from the eternal preoccupation with 'exemptions' and 'allowances', the end of inducements to corruption and crime; with, on the other hand, the knowledge that the earnings of one's labour remained at one's own disposal, instead of being in an ever-growing proportion at the mercy of some public authority with no interest in human welfare except in the abstract, garnished with political rhetoric.

The system here proposed would preserve the Fee Simple and secure property rights to everyone forever. If enshrined in the Australian Constitution it could bestow on this nation the glory of a truly humane system of government and uphold the true freedom of the individual, safeguarded by justice and the prospect of lasting peace throughout the Commonwealth.

Notes:

1. See 'Legacy to Labourers' by William Cobbett
2. Millard on 'Real Property in N.S.W.'; also Williams 'Real Property' (in England)
3. W.A. Dowe (article) in THE STANDARD (N.S.W.) January 1956 (revised) See also, e.g., 'The Conspiracy against the English Peasantry' chapter in 'Modern Man and the Liberal Arts' Neilson (Schalkenbach New York 1947)
4. 'Progress and Poverty' by Henry George (Schalkenbach, N.Y. 1958 ed)

Acknowledgements:
The author gratefully acknowledges the valuable assistance in the preparation of this Study by Mr. W.A. Dowe, Solicitor (retired) of Sydney. Founder/Director of the Australian School of Social Science, also Mr. Lionel Boorman, Solicitor (also of Sydney), for advice and suggestions.
Assistance (financial) with the printing and distribution costs of this booklet are also gratefully acknowledged to the trustees of the Ivy Akeroyd Bequest.