

SECTION 4

LAND TENURE

Compiled by J.P.Barry J.D.Lines

1994 UPDATE

Compiled by J.P.Barry

SECTION 4 - LAND TENURE

4.1 Basic Principles and the Origins of Terminology

The purpose of this Section is to explain the historical background and development of the modern system of registration of title, the benefits of which are enjoyed by nearly all owners of land in Victoria today. Although this State's title registration system is approximately 130 years old, it is necessary to go back much further in time if we are to understand why and how it came into being.

The Victorian title registration system is a creation of the law and depends upon it for its functioning-law, that is, the whole body of law at present administered in Victoria comprised of common law, equity and statutes. Statutes must also be understood to include things like regulations (Statutory Rules), by-laws and the local laws of municipalities.

At the heart of Victorian land law and all other law in this State lies the English common law. Although modified by English, Australian and Victorian statutes, the common law remains the core of our legal concepts but it is not a fixed or permanent core. The common law is the product of practical legal experience and reaction to changing circumstances over a thousand years of history, and land law, with its basic concepts of title, is best explained by a review of that history.

In this way unique concepts, that are still part of our law, take on a meaning and cohesion based upon the common law's four ingredients of feudal land tenure, custom, legislation and case law.

4.2 Feudal Origins of Land Law

Under the Roman Peace (*Pax Romana*), the inhabitants of Western Europe had enjoyed reasonable law and order for centuries. But when the Roman legions were overrun by the barbarians in the fifth and sixth centuries of the Christian era, not only was the Empire destroyed but the European peoples also lost the protection they had enjoyed. Europe was reduced to a state of anarchy in which lawless men could dispossess others of their land and thus, of their means of livelihood.

To gain protection for themselves, their families and their land, those who could not defend themselves sought the protection of more powerful neighbours. A person "commended" himself to serve and respect his stronger neighbour, (his lord) who, in return, agreed to maintain and protect the man and his dependants.

The lord could discharge his obligation of maintenance by granting this vassal some land. If the vassal already owned land in his own right, that is, if he were an "allodial" owner, he would probably surrender his land to the lord who might then grant it back to the vassal who thus became a tenant of the lord.

Much of the land in Western Europe which had been owned by village communities before the barbarians overran the Roman Empire thus came to be owned by local magnates who granted parts of the land to vassals or tenants in return for services. This social organisation is known as "feudalism" which may be defined as - "A state of society in which the main social bond is the relation between lord and man - implying on the lord's part protection and defence; on the man's part protection, service and reverence, the service including service in arms. This personal relation is inseparably involved in a proprietary relation, the tenure of the land - the man holds land of the lord, the man's service is a burden on the land, the lord has important rights in the land, and (we may say) the full ownership of the land is split up between man and lord."

4.2.1 Feudal Land Tenure

After the Norman Conquest in 1066 all remaining allodial (absolute estate paying no dues and not held from a superior) titles were obliterated in England.

From that time onwards, all land was held by tenants of varying standing, either directly from the sovereign, or from mesne lords holding an intermediate estate below that of the sovereign but superior to that of the tenant in possession of the land.

The tenants in chief or "tenants in capite" granted their land to other tenants, also for services, and these tenants could also grant their land to lesser tenants and so on down to the "tenant in demesne" who actually possessed the land, worked the ground and occupied the lowest rung on the feudal ladder. Those who were both tenants and lords were "mesne" or middle lords. The interest of these middle lords in the land was called their "seignories" and the interest of each tenant was his "feud" or "fee".

The word "fee" is a derivation from similar words in Old English and other old northern European languages which related to cattle and property. Hence "fee simple" came to be applied to freehold land which passed from one to another on an hereditary basis.

There was in fact no limit to the number of rungs in the feudal ladder and in the number of mesne lords who might enjoy the advantages of feuds from their seignories.

For example " - In Edward I's day Roger of St. German holds land at Paxton in Huntingdonshire of Robert Bedford, who holds of Richard of Ilchester, who holds of Alan of Chartres, who holds of William le Botiler, who holds of Gilbert Neville, who holds of Devorguil Balliol, who holds of the King of Scotland, who holds of the King of England -". This shows one such seignory.

With time the various forms of service tended to become standardised and tenures were classified according to the type of services required.

The villein tenant who ploughed the ground, sowing and reaping crops was said to be an unfree tenant because of the uncertain nature of the service required of him. Although the length of service might be definite, the precise nature of that service was not and the tenant held his land in accordance with the customs of the particular manorial court which would enforce those customs. Such a tenant had no recourse to the King's courts if ejected by his lord.

"Feudalism was an aristocratic concept and you can be sure that no overlord would be found ploughing in the field. He restricted himself to such gentlemanly pursuits as warfare, hawking, hunting and the ravishing of lovely ladies".

Grants of land could be made either to free men or to the class known at various times as villeins, serfs, or peasants, who not being free, were bound or bonded to the land. To free men tenures were granted by a deed between the parties, which set out the rights of each party, each of whom had a duplicate deed. Such tenures were known as "freehold tenures", and they gave rise in their turn to freehold estates.

Grants to serfs were usually related to the manor to which they were attached, but over the years social conditions changed. Labour services were replaced by money payments and unfree serf tenure gradually lost its taint of servility. The practice evolved where the villein tenant was given a copy of the entry on the Manor Court Roll as evidence of his title and he was said to hold tenure by copy of the court roll instead of, as formerly, tenure in villeinage. Ultimately, the tenure became known as copyhold. With, eventually, practically the same protection as a freeholder. This copyhold tenure never existed in Victoria although it was preserved in Britain until abolished by the *Law of Property Act 1922*.

Free tenures, initially also required services but they were those in which the exact nature of the service to be performed was stated and a tenant who owed his lord "four dozen eggs at Christmas and four days ploughing at Michaelmas" was said to be a free tenant.

Some free tenures were held by religious institutions such as monasteries but the more significant were the military and non-military lay tenures. The personal or military tenures were "grand serjeanty" where the tenant personally served the King or "Knight serjeanty" under which most of the land was held, where the main obligation was to supply armed knights or horsemen for service in the King's army for 40 days each year if required.

Some of the examples of the incidents of grand serjeanty reveal a very different age. For example, Solomon Atfield held certain land called Coperland and Atterton in the County of Kent, "of our Lord the King in Capite, by the Serjeanty and Service of holding the Head of our said Lord the King, between Dover and Whitsond, as often as he should happen to pass over Sea between those Ports towards Whitsond". Another grand serjeanty called for a measure of vulgar agility. "Rowland le Sarcere held one hundred and ten Acres of Land in Hemingston in the County of Suffolk, by Serjeanty; for which, on Christmas Day, every Year, before our Sovereign Lord the King of England, he should perform, altogether, and once, a Leap, a Puff, and a Part".

It soon became apparent that money would be more use than military service or the services offered by grand serjeanty, so a money payment called scutage was paid to commute the recurrent obligations of these services, but, with inflation, it became not worth collecting this money so tenants who held land by grand serjeanty or Knight service had neither to serve nor pay.

The military tenures carried other onerous burdens as well as military and personal services. The five most important of such obligations, known as incidents of tenure, were:

(a) Aid

These were payments which the lord could demand from his tenants on certain occasions that involved the lord in expense. These occasions were

- the ransom of the lord himself,
- the knighting of the lord's eldest son, and
- the marriage of his eldest daughter.

(b) Wardship

This was the right of the lord to manage, for his own profit, the land of a tenant who left a male under twenty-one or an unmarried female under sixteen as his heir. The right could be sold or bequeathed.

(c) Marriage

This was the lord's right to select a spouse for any tenant whom he had in wardship and to fine the ward for declining to marry a suitable spouse so chosen. If the ward chose to marry under age without the lord's licence, the fine was doubled. Like wardship, this right of the lord could be sold or bequeathed.

(d) Escheat

This occurred whenever, for whatever reason, the tenancy came to an end. It mainly occurred when the tenant died without heirs or when a tenant was convicted of a felony. In the latter case the use of the land passed to the king for a year and a day and then reverted to the lord. If the felony were treason however, the land was escheated or forfeited to the king permanently.

In the case of a failure of heirs, the land passed by escheat to the lord without the use of the "year and a day" rule.

Today escheat by way of failure of heirs has been replaced by the doctrine of *bona vacantia* (goods without an owner) whereby, if the owner of the land dies intestate and without successors, the land reverts to the Crown. Escheat because of felony, or its variant forfeiture, was completely abolished in Victoria by the *Crimes Act* 1890.

(e) Relief- Seisin

This resembled modern death duties and was payable to the superior lord before the tenants succession to the land and, in the case of a tenant-in-chief, payable to the King.

These incidents could be extremely burdensome. So to avoid the burdens of wardship and marriage, in particular, the tenants set about finding ways around the problems. Thus, the concepts of trusts and future interests which are now well-established legal principles evolved. These are discussed later.

Non-military tenures of which petty serjeanty and socage were the most common gradually came to mean virtually the same, and any free tenure which was neither military or spiritual came to be called free socage. The petty serjeanty services required varied greatly and were in some cases either ridiculous or vulgar. For example, at Bockhampton in Berkshire, "William Hoppeshort holds Half a Yard-Land in that Town of our Lord the King, by the Service of keeping for the King six Damsels, to wit. Whores at the Cost of the King, - This was called Pimp-Tenure." In Hampshire, John de Wintershul holds the Manor of Schyresend ... by the Serjeanty of finding a Serjeant to keep the Whores in the Army of our Lord the King." It is pleasant to recollect that in the 1925 legislation the English Parliament

was assiduous to preserve the honourable incidents of both grand and petty serjeanty. The obligations, however, were gradually commuted to money payments known as quit rents which may originally have borne some relationship to the economic worth of land but eventually were not worth collecting. This lack of economic worth and the freedom from the incidents of tenure (see above) led many large landowners to freely admit that their land was held under peasants' tenure.

In feudal times the system of subinfeudation (of adding a new tenant to the bottom of the feudal ladder) worked adequately initially but, in time, with the change of social structure, the drop in the value of money, and lack of wars demanding military service, the incidents to the tenure, aid, wardship, marriage, relief, and escheat, became more valuable than services rendered.

Problems arose for the mesne lords when their tenants alienated part of their land for low annual scutage. In the event of wardship or an escheat, the mesne lord did not regain the land but some trifling rent. In other cases if the mesne lord disappeared, his lord would not know when he became entitled to an estate.

Substitutions which were effectively a means of selling out, although not extending the feudal ladder as did subinfeudation, also had disadvantages for the lord:

"If a new is substituted for an old tenant a poor may take the place of a rich, a dishonest that of an honest man, a foe that of a friend - the lord may suffer in another way - so that instead of being able to look to one man and six hides for his scutage or rent he can be compelled to look to one man and four hides for two-thirds of it and to another man and two hides for the residue".

A hide of land was a certain quantity of land, such as might be ploughed with one plough in a year. According to some it was 60 acres; others say 80, and others 100. The quantity was probably determined by local usage. The process of subinfeudation corresponds, although very roughly, to our present day ideas of sale with or without subdivision. Originally there was no power to "alienate" or sell, but only to grant lesser estates, on possibly varying tenures, to people who thus became subtenants of the original, "immediate", tenant. The words "service" and "tenure" are directly connected, as the tenure of land was determined by the kind of service required of the grantee.

For the purposes of alienation, subinfeudations were however still more common than substitutions and by the 13th century the tenant could alienate without the lord's consent. This latter provision weakened the whole feudal structure of obligations and service. So in 1290 the statute *Quia Emptores* passed and had the following effects:

- (a) Abolished subinfeudation.
- (b) Allowed free tenants to alienate to a substitute without consent of the lord, provided the alienee held by the same services as his alienor.
- (c) Required that services were apportioned if only part of the tenement was alienated.

This statute only applied to the fee simple, not to leasehold estates or life estates. It was repealed in Victoria by the *Imperial Acts Application Act* 1980. As no tenure in Victoria carries services attached to it, the prohibition of subinfeudation is meaningless in this State.

Moreover, section 19 of the *Property Law Act* 1958 permits the free alienation of all rights and interests in land so the power of alienation given in *Quia Emptores* is no longer needed.

The immediate effect of *Quia Emptores* in 1290 was that no new rungs were added to the feudal ladder and gradually, the number of middle lords reduced with the only person able to create a new tenure in fee simple being the King. With every escheat the feudal ladder lost a rung, so more and more land came to be held directly from the Crown. If no mesne lord claimed land it was assumed that it was held by the King and, since services had been commuted for money, of little worth, records for the middle lords were not worth keeping.

With more and more land held by the King the feudal incidents, aid, wardship, marriage, relief and prime seisins (those payable directly to the King) became an important source of Royal revenue outside the control of parliament. In this way the monarchs could govern for considerable time without summoning parliament.

To relieve these burdensome feudal dues, one of the first acts of the "Long Parliament" was to resolve to abolish feudal dues and, on the Restoration of Charles II, this action was confirmed by the *Tenures Abolition Act* of 1660 which:

- (a) Converted all tenures with the exception of copyhold and religious tenures into free and common socage.
- (b) Abolished the incidents of tenure.
- (c) Preserved the honorary services of grand serjeanty but not the tenure itself.

This meant that after 1645 only free and common socage (freehold) and copyhold existed as tenures and the only valuable incident left was escheat.

Copyhold was never brought to Australia. Nonetheless, the concept that all land is held in feud from the Sovereign remains accurate. There is and remains no absolute ownership of land by a subject. The summary of the concept as discussed in Halsbury's *The Laws of England* (Volume 32 page 201) applies in Australia:

"Technically land is not the subject of 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 Sovereign directly or under some mesne lord or a succession of mesne lords who, or the first of whom, holds of the Sovereign. Thus the Sovereign is lord paramount, either mediate or immediate, of all land within the realm. The tenure of land is based upon the assumption that it is originally granted as a "feud" by the Sovereign 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 most purposes this system, known as the "feudal system" has lost its practical importance, it still determines the form of property in land".

In Australia, (and elsewhere as discussed in the text of Halsbury), the ownership of land which, for any reason, still remains unalienated, is said to vest or to be vested "in the Crown". It is usually referred to as Crown land, and in Victoria, is controlled and administered by the Department of Conservation, Forests and Lands, in some cases in conjunction with another State Department.

Nowadays, of course, most land is held by subjects, and the only area where the Sovereign retains absolute ownership, apart from lands not yet alienated, is in such parts of the realm as the foreshore and other tidal waters.

There was, however, no inherent right of the Sovereign to the ownership of soil covered by non-tidal water. The owners of land divided by a stream previously owned the banks and bed of such *ad medium filum aquae*, that is, up to the middle of the stream. This common law presumption was reversed by section 5 of the *Water Act* 1905 and the reversal applies to all cases whether the land was alienated before or after the Act. Section 5 of the *Water Act* 1905 is now to be found as section 5 of the *Water Act* 1958.

4.2.2 Custom

Feudalism, brought to its peak under the Norman Kings, did exist before the Battle of Hastings, as did another component of English law. For the most part, English law dates from 1066, the year of the Norman conquests and of the accession to the throne of William the Bastard as William I. Although William defeated King Harold at the Battle of Hastings and became King by right of conquest, he was also offered the throne by the Witanagemote or Witan. In accepting this offer for the added security it gave him, the Conqueror also agreed to accept the conditions upon which it was offered. One of these was that he would respect and preserve the compilation of laws of the Saxons, Ethelbert, Ina and Albert made during the reign of King Edward the Confessor, which was the customary or common law of his new kingdom.

This second component of English law has left, in the main, only shadowy traces of its presence. It may be found in obscure areas of law such as Gavelkind and borough-english, forms of land tenure that are now only of interest to legal historians. In one area, however, this adoption of custom led to a development that became so important as to demand to be called the third component of English law. This is legislation.

4.2.3. Legislation

One of the customs adopted by William was that he would consult, at frequent intervals, the body of nobles, warriors and churchmen who made up the Witan.

From the very first the Norman Kings went through at least the form of consulting the Witan before pronouncing a decision or publishing any decree or proclamation, and from this body, the King and his chief subjects developed Parliament as we know it today. The history of English law is partly the story of how the right to advise the King became a right of Parliament itself to present proposals, known as Bills, for the King to assent to and publish, at which time the Bills became Acts. After 1688, as part of the price of the Glorious Revolution, the right to initiate Bills became the sole prerogative of Parliament, and nowadays the monarch's assent to and publication of a Bill is very nearly a formality. It would be only in a very grave situation indeed that the ruler today would refuse the advice of his Prime Minister, or would refuse his assent to an Act of Parliament.

William set up a number of Courts with the necessary judges to administer the King's justice, and they were given wide powers to interpret the customary or common law. But they were also sworn to administer the law as decreed by the King himself, in consultation with the Witan, and of course a law so proclaimed would take precedence over the customary or common law if there were any conflict. As time went by these decrees, or statutes, or acts, by whatever term they were known, themselves became part of the common law, and became this, the third of the four great branches of the common law - legislation.

4.2.3.1 Subordinate Legislation

For centuries, Parliament was able to transact all the business placed before it, and was able to provide in the greatest detail for every aspect of a matter on which it seemed desirable to legislate. However, due to the development of society, the increases in population, and the vast spread of the network of commerce, it became increasingly impossible for Parliament itself to deal with all the minutiae involved in every Act of Parliament and, in particular, with the mass of administrative detail which the growing and changing population required. It thus became the practice to legislate in broad outline, to make provision for some body designated in the Act to make additional rules, in terms of and not inconsistent with the Act, and to provide further that this legislation, whether it is called by-law, regulation, ordinance or some other name, should have the force of law upon publication. One restraint, however, is placed on the relatively unfettered freedom of the subordinate authority - it is usual to place in an Act embodying these provisions the further provision that such regulations must be placed before and approved by Parliament within fourteen days of publication, or within fourteen days of the commencement of a session, if Parliament is not sitting at the time.

An outstanding example of this subordinate legislation is the power given to and exercised by all local authorities in Victoria to make, in certain clearly defined spheres, by-laws or "local laws" for the good order and government of the inhabitants of their municipal areas.

4.2.4 Case Law

The fourth branch of the common law came into existence within a century of the Conquest, exactly how is not known today, but it can almost certainly be ascribed to the human desire for uniformity and to abide by the decisions previously made by the judges and their predecessors in similar cases. Very early, manuscript books were circulating giving reports of cases heard at the various courts, including argument and the comments and decisions of the judges. It is thought that these manuscripts may originally have been notes taken and used by students, and borrowed by astute practitioners for their own use. It became the practice for lawyers to quote these Year Books, as they came to be known, as support for their argument, and for the judges to cite them to lend weight to the decisions they handed down.

At first merely a practice, it gradually assumed a binding character, until today it may be said that a single decision by a single judge can state a rule or principle which, unless or until it is disapproved by a higher court, will be likely to be followed in subsequent cases where the facts are the same. A court these days is not bound by its own previous decisions, but is bound by those of a court higher than itself.

These decisions are nowadays reported in series of volumes known as the Law Reports, officially compiled and issued, usually on an annual basis, by the appropriate reporting authority. However some reports are still published by private sources.

One common law concept, to choose only one of many, which has gradually been distilled from case law is that of possession. The judges gradually extended an action for assault to include an assault (or trespass) where no physical injury was done but a person was dispossessed of his land. Thus, over time, the recovery of land where a person was dispossessed became linked with the right of possession and not of title. Eventually possession itself became the root of title. Accordingly, the common law now states that when someone is dispossessed, a new title commences which, unless the dispossessed owner takes some action to recover his title, may establish a title superior to that of all others including the dispossessed owner. In this circumstance the plaintiff in any action for repossession is not required to prove that he has absolute title against all comers. He is required to show merely that he has better claim to the land than the defendant.

From this concept comes the old saying possession is nine tenths of the law. Possession is *prima facie* evidence of ownership and is good against all claimants except the rightful owner who must prove his claim with rebutting evidence.

At common law and under the deeds system of holding land it was possible to obtain a prescriptive right to land by enjoying the right from time immemorial but this was later reduced to proof of uninterrupted use for a period of 20 years unless the dispossessed owner was subject to a disability such as infancy or lunacy. In the case of disability the period was extended to thirty years. In Victoria, by the *Limitations of Action Act 1958*, the period remains at thirty years when the dispossessed owner suffers a disability, otherwise it has been reduced to fifteen years.

4.3 Equity

The King's Court administered the common law as modified by legislation but, owing to the rigidity of that law and its unfitness to meet changing circumstances, cases frequently arose where people suffering an injustice were unable to get redress from the regularly constituted courts. However, there was a possibility of a remedy by petitioning the fount of justice - the King himself. The King formed the habit of referring these petitions to his Lord Chancellor, who in turn found that the number of cases referred to him entailed the setting up of a special staff (of monks) to deal with them. The Chancellor in those days was always a high ranking churchman, and in his courts known as Courts of Chancery, he enforced a gradually growing body of rules which were directed to the conscience of the litigants rather than to their civil status.

The Lord Chancellor, and later the subordinate clergy whom he appointed to deal with the pleas addressed to him, did not ask: What is the legal position between these two people? But: What should this man's conscience as a good Christian impel him to do? And if, the flesh being notoriously weak the dictates of conscience were ignored, the Chancellor and his subordinates were at all times ready to act as an external conscience and to compel the unchristian to act in a manner more befitting their moral obligations. To aid them they could call on the secular or civil arm, and obdurate litigants could, if necessary, be confined to prison until they saw fit to comply. This forms the basis of the present day injunction.

The insistence, by the Courts of Chancery, upon enforcing the dictates of conscience led to the growth of the trust and the equitable estates so important in modern Victorian land law.

To avoid restrictions placed upon the alienation of land and to avoid the costs associated with feudal incidents such as wardship, tenants began to alienate their land to third parties for the use of the tenants' heirs or for the use of those to whom the tenants wished to alienate the land. The common law, however, did not recognise the interest held by the third party as one which was actually held for the benefit of another. It thus permitted a third party to abuse his obligations by treating the land as his own.

The Chancellor and the Courts of Chancery which gradually arose to share his jurisdiction did enforce such obligations and in time they recognised a complete set of estates and obligations that could be held by a person pursuant to a Use. These, called equitable estates and interests, mirrored those estates and interests which might be held by the third party and which were recognised by the common law.

The equitable estates and interests were enforceable in the Courts of Chancery against the third party and anyone who dealt with him. The only exception was a stranger who had no knowledge of the third party's obligation and paid value, to the third party, for his interest. The Courts of Chancery would not penalise an unwitting stranger who, in good faith and for value, dealt with the third party.

This same distinction between legal and equitable interests remains today as does this limitation upon the enforceability of an equitable interest.

Uses avoided the common law but they also avoided the King's right to incidents of service and so reduced the amount of revenue available to him. For the latter reason they were extremely unpopular with the English monarchs. Several statutes were passed forbidding Uses but the ingenuity of lawyers and the determination of the Chancery judges repeatedly found ways to avoid their effect. In a legal struggle that lasted more than two hundred years and only ceased with the decay of feudalism, the use took its modern form as the Trust whereby a trustee holds land (or goods) for the benefit of a beneficiary. By virtue of this, the beneficiary possesses an equitable estate or interest in the land whereas the trustee retains the legal estate or interest.

The same process of circulating reports and of making references to reports that had occurred in the common law courts also arose in the Chancellor's jurisdiction, and it was not long before academic lawyers could detect and state a body of rules which would usually, although by no means always, be applied by the Courts of Chancery. To this body of rules was given the name Equity and it is the basis of the developments discussed above.

Today in Victoria equity and common law are administered by the same court, in the same action if necessary, and may be initiated by the one writ.

4.4 Estates and Tenures

The theory discussed earlier, that the Crown owns all land, whether or not it is granted to a subject upon condition or otherwise, was introduced into Australia along with the rest of English law, and remains good practical law. One of its effects is that each State has a department responsible for Crown land administration which has an extensive land tenure section which deals with all kinds of Crown grants of land or interests in land which are not freehold. This latter term needs a little explanation.

If we first look at freehold estates we find that originally, in the feudal system of land holding which is the root of our land law, land was granted not only for the comparatively limited period of a man's life but also, in many respects, during the King's pleasure.

And of course it could be granted, even in those days, for a short period only, for example for five, ten or twenty years. Such short-term tenures were at first regarded as "mere personal contracts." They are now recognised and treated as "estates less than freehold" but remain rather anomalous interests in land which no longer fit comfortably within the structure of land law as it developed over the centuries.

Over a period of time, influential landowners, and in particular those close to the throne, established the principle that land should be granted for the benefit of a man and his family and that, provided the grantee did not commit any actual breaches of the feudal bond, and provided that he had any family to follow him, it would be allowed to pass from one to the other. Many people, particularly in the early days, wished to retain land strictly within the family, and it became possible to do this by special provision, by will as well as by grant. At this time this was a real innovation for it was not possible to sell or buy land, as we do now, and this right to sell or buy was not established until some centuries afterwards.

After the capacity to alienate land developed, land which was granted on any tenure to a man "and his heirs" created and bestowed what is now known as an estate in fee simple. This remains the largest freehold estate known to the law, and in practice continues without limit of time, since in normal circumstances a man's property, if not previously sold, passes either by his will or by the operation of law to some relative, however distant.

The second type of freehold estate, to be kept strictly within the family, is known as an estate tail, but these are uncommon these days because they are so easily defeated - again by the operation of

revolutionary processes in the law, helped by the ingenuity of lawyers. As far as is known, only two estates tail still exist in Torrens land in this State although they may no longer be created since 1980. In that year the *Imperial Act, De Donis Conditionalibus* of 1285 which previously enabled the creation of these estates was repealed by the *Imperial Acts Application Act* (Vic).

Although unusual, it is also possible, although for quite different reasons, for either the Crown or a subject to create what are known as conditional fees simple or fees simple determinable, in addition to the rather more common estates for life or for a term of years. The latter interests for a term of years are known by the general term of leases, or estates of leasehold, and are probably the most common example of interests in land in our system. They are certainly the most common commercial relationship between individuals. The whole concept of leases and estates less than freehold is becomingly increasingly important in the light of fast advancing technology in planning and increasing public awareness of the fact that perhaps land should not be regarded as a commodity, but as a resource which must not be squandered. The land we live on is all that mankind has and, additionally, we occupy it in common with all other living species.

In Victoria, the practice of granting land, mainly for rural purposes, on specified conditions, and only for terms of years of varying lengths, that is/for estates less than freehold, has always been very popular since the earliest settlement with governments of all political colours. In all States this led to large areas of land being brought under the control of a State Land Department. This in turn has led to the creation of registries of interests of all kinds in what has come to be known as "Crown land."

Most present day writers distinguish between "freehold" land and "Crown leaseholds", which although not valid in a strict legal sense, is a practice which is extremely useful, and which in any case, has come to stay.

It is therefore true in this State to say at the present time that land which has been granted by the Crown in fee simple, the registry of which is managed by the Registrar of Titles or the Registrar-General, is freehold land, as opposed to Crown leaseholds, which remain within the jurisdiction of the Department of Conservation and Natural Resources and its Minister, for no matter how long the leasehold, its reversion always belongs to the Crown. In freehold land the Crown owns only the notional ownership; there is no reversion.

4.5 The Introduction of English Law

So far we have examined the many threads that were woven together over centuries to form English common law and we have looked at the rise of equity in the English Courts of Chancery. We have also looked at the way in which some of the principles derived from English common law and Equity now apply in this State. But how is it that the state of our Victorian law today can be traced back to these diverse sources?

To understand this, it is necessary to go back a little to the first white settlement in Australia. The Colony of New South Wales, as first constituted, was purely a penal institution, with wide, even despotic, powers vested in the Governor. The law in force was military or martial law, and the early courts all took the form of Courts Martial. But it was the martial law of England which was applied and enforced, only slightly modified by the terms of the Governor's directives from the Crown. In the earliest years, the Governor's word was very nearly the law, but it was never entirely so. Very soon the growing Colony found that the military law, which was mostly slanted towards offences and offenders, was quite inadequate for its needs, even when helped out by decrees and proclamations issued from time to time by various Governors. As early as 1814 a Supreme Court was established, with a single judge, who was to sit with two magistrates to hear non-criminal cases.

In 1823, the Imperial Parliament passed an Act called *4 Geo. IV c. 96* giving the Colony a Legislative Council, which the Governor was required to consult before making any law.

At that time few Acts had short titles such as are used today. Rather, this Act would be described as being the ninety-sixth chapter (or Act) passed by the Parliament, being the English Parliament of course, in the fourth year of the reign of George IV.

By this Act a new Supreme Court was constituted, with a other judges, and provision was made for the hearing of civil and criminal cases, with a jury drawn from civilians for civil cases. Some political

power was given to the Chief Justice, since in future every proposed law had to be certified by him as not being contrary to the existing laws of England.

In 1828 a temporary Act called 9 *Geo.IV* c.83 (Imperial) or "An Act to provide for the more effectual administration of Justice in New South Wales and its dependencies" was passed. This provided that the whole law of England as it existed on the date of passing of the Act should apply to the Colony of New South Wales, so far as that law was applicable. As the successive eastern Colonies were established, this enactment or its successor automatically applied to each one.

This Act was later made permanent by section 53 of *Act 5 & 6 Vie. c.76*. Confirmation of this Act's application to the new Colony of Victoria is contained in section II of the *Laws (Continuation) Act 1851* (N.S.W.). This stated that, up until the Victorian legislature made laws in respect of the same matters, the statutes of New South Wales (including those Imperial statutes in force in New South Wales) would continue to apply.

This position was confirmed by the *Act Interpretation Act 1890* (Victoria). Thus, in Victoria today, unless a local Act has been passed affecting a specific subject matter, the following external statutes will apply to that subject matter:

- (a) The laws of England existing in 1828 as these were applicable to the Colony of New South Wales;
- (b) All laws made in the Colony of New South Wales from 1828 until 1851 when Victoria separated from New South Wales; and
- (c) All Imperial laws stated to affect the Colony of New South Wales from 1828 to 1851 and the Colony of Victoria from 1851 onwards.

Naturally, time has meant that the Victorian Parliament has enacted legislation which now excludes the operation of Imperial and New South Wales legislation in almost all areas. The direct application of Imperial laws prior to 1828 has been ousted in almost all areas of law by the enactment of various *Imperial Acts Application Acts* and *Imperial Acts Re-enactment Acts*. The latter re-enact Imperial Acts and so repeal them in favour of Victorian ones.

The last consolidation, in 1980, of the *Imperial Acts Applications Act* left very little jurisdiction in Victoria for the operation of Imperial Acts. It saved from repeal any Imperial statute that expressly applied to the dominions and possessions of the Crown where the statute was necessarily applicable to Victoria. It also saved any Imperial Act that dealt with matters now exclusively in the hands of the Commonwealth pursuant to the Australian Constitution. Such an Imperial Act would be repealed if the Commonwealth has or were to legislate concerning these matters.

Both these categories of exemption from repeal are necessary to allow for legislation such as recently occurred when appeals to the Privy Council were abolished. The State, Federal and Imperial Parliaments were required to legislate to accomplish that result but, without these categories of exemption from repeal, the process of common legislation would have been made far more difficult. It was also necessary to save these categories from repeal because, from 1828 onwards, Imperial legislation could affect the Colony of New South Wales and after 1851, the Colony of Victoria, if explicitly stated to do so.

The final category of exemption from repeal found in this Act concerning Imperial Acts pertains to those Acts that ensure the security or safety of the Sovereign.

All other Imperial statutes are repealed by this Act except the parts of those few which are actually transcribed in the *Imperial Acts Application Act 1980*.

Nonetheless, although Victoria now is affected by the direct operation of very few Imperial and even fewer New South Wales Acts, the Colony in 1851 inherited a wide variety of these which did apply to the Colony at that time.

Since the establishment of the various State legislatures, and later the Commonwealth, almost the whole field of domestic law is covered by local statutes.

4.6 Commonwealth Law

There is still another source of our law, and in some fields an all important one In 1901, after years of struggle and bitterness and endless negotiation, the Colonies of Australia entered into a federal union of States A Constitution was adopted which provided that the States would cede to the Commonwealth their sovereignty over a number of clearly specified powers - Defence, Customs, Posts and Telegraph, for example - and should retain their sovereignty over all the others The effect of this is that in the spheres thus allocated to the Commonwealth we have to look to Commonwealth statutes or case law

In addition, the Commonwealth was given power to legislate in certain named holds where, until the power was exercised, the States retained their sovereignty In some cases this 'concurrent' power has been exercised, notably in bankruptcy, marriage and divorce In these as well as the other areas mentioned, the position is that, where a Commonwealth law and a State law are in conflict, the Commonwealth law will prevail

4.7 Land Law

It should now be clear why some knowledge of certain special areas of English law may be very necessary, and why access and reference to English text books and law reports are of great importance to the legal practitioner in this country However, amidst all this discussion of law and of land law in particular, the most obvious question of all has not yet been asked - what is land?

To the man in the street, this is a question with a self evident answer Land is the earth or soil within a given set of boundaries In the context of land law and legal theory, however, the concept of land is very different indeed

For example, the first Torrens statute in Victoria, the *Real Property Act 1862*, gives a definition of land which sets out the legal concepts involved

"Land" shall extend to and include messuages, tenements and hereditaments corporeal and incorporeal of every kind and description, whatever may be the estate or interest therein, together with all paths passages ways watercourses liberties privileges easements plantations, gardens mines minerals and quarries and all trees and timber thereon or thereunder lying or being unless the same are specially excepted

It will be seen that this definition is very wide indeed Land is much more than the allotment on which you build your house or your church, your shop or your factory It includes the house, and the furniture, and fittings in it - if they are fixtures! It includes trees and shrubs growing on the surface, and it includes mines and minerals under the surface It even includes rights of ownership to the space over and below the surface, subject to limitations which will be noticed later It extends to watercourses, which in effect means the land covered by the water

First, however, some of the terms in this definition need explanation A **messuage** is a house or a dwelling house A **tenement** is a holding of real property, which in turn is a legal term meaning freehold land

Hereditaments mean some attribute of the land which is inheritable and passes automatically to a man's heirs on his death For convenience these hereditaments are divided into corporeal, those things which having an effect on the senses, and have a physical being and can be seen or handled and incorporeal having no substance but nevertheless creating some interest in the land which can be enjoyed. Hence the land itself is a corporeal hereditament whereas a right-of-way over the land is an incorporeal hereditament

These terms do not need special study However, the definition as a whole is tremendously important, and its wide implications need to be constantly borne in mind It will be advantageous if it can become habitual to think of any parcel of land, not as a single entity, but as a **composite** - a bundle of rights, which may be gathered together into one, but which may also be handled and examined separately -the right of the owner to possession, of the mortgagee to payment of principal and interest, of the Crown to minerals under the surface, and so on

It must be also borne in mind that land", in its legal as well as its physical sense, is much more than two-dimensional The dominion over an area of the earth's surface comprised in the "piece or parcel"

of land owned by a man extends more than merely laterally to the four corners as pegged originally by some surveyor. It also extends to some extent in a downward direction - otherwise no man could garden, let alone mine for gold and precious stones. A little thought will show that it also must extend to some little distance upwards - otherwise no man could build a house, let alone the Eiffel Tower. How far, then, does this ownership of land extend in a vertical direction?

To the mediaeval lawyer the answer was simple and uncomplicated - land "extended to and included" everything *usque ad coelum et ad inferos* meaning "everything from heaven to hell", to quote Sir Edward Coke, an Elizabethan lawyer. From hell to heaven is quite a distance, and the present day lawyer would be more conservative. Knowledge of the spherical shape of the earth and the consequent converging of lines prolonged downwards from the surface, would place theoretical limits on the subsurface dominion of the surface owner, although for most practical purposes the proposition would work, in that direction. And the invention of the aircraft and the great increase in flying has put practical difficulties in the way of the man essaying to build a modern Tower of Babel.

This doctrine, which has always been understood by lawyers, for at least the last century, to have a practical limitation, has been explored in two modern decisions which, between them, place the real status of the maxim beyond doubt.

In *Bernstein of Leigh (Baron) v. Skyviews & General Ltd* [1978] Q.B 479 the Court of Queen's Bench was concerned with an action of trespass involving the air space above the country house in Kent which belonged to the plaintiff. The defendant had taken aerial photographs of the buildings without the permission of the owner. Lord Bernstein.

The Court dismissed the action, saying that the rights of an owner of land to the air space above his land extended only to such height as was necessary for the ordinary use and enjoyment of the land and any structures on it. In coming to this conclusion, and to the further point that above such a height the owner had no greater rights than any other member of the public, Mr. Justice Griffiths reviewed all the previous authorities, so that the whole argument as to the rights to air space is concentrated in this judgement.

Limitations on the ownership of airspace have also been imposed by Commonwealth statutes such as the *Air Navigation Act* 1920-1986. These allow aeroplane overflights despite any common law rights that might have existed in the owners of land. The other case, which came before the Judicial Committee of the Privy Council on appeal from the Full Court of New South Wales, related to both air space and the subsurface rights of an owner. *Commissioner of Railways and ors. v Valuer-General* [1974] A.C. 328 was concerned with the valuation of land at Wynyard Station, Sydney. The Valuer-General had had considerable difficulty in working out for valuation purposes the fragmented title to the land, even so far as surface rights were concerned. The advice of the Privy Council was delivered by Lord Wilberforce, who traced the history of the doctrine back to the 13th century Roman lawyers of the School of Bologna in Italy. He regarded Coke's acceptance of this doctrine as "uncritical", although Blackstone, the great 18th century lawyer whom he quotes, spoke of an "indefinite extent of the right above the surface". "Indefinite" of course, is not equivalent to infinite.

Summing up the cases in the 19th century, which followed a growing realisation of mineral values in the community, his Lordship said that in none of these is there "an authoritative pronouncement that land means the whole of the space from the centre of the earth to the heavens; so sweeping, unscientific, and impractical a doctrine is "Unlikely to appeal to the common law mind" he thought. He added that, by the lawyers of that day, the maxim was used as "a statement imprecise enough, of the extent of the rights, *prima facie*, of owners of land."

The decision of the Privy Council may be stated to mean that, although the maxim can be used as a guide, below as above the surface, an owner's rights extend only so far as is necessary for the ordinary use and enjoyment of his land. In this particular case, as Wynyard had been the subject of extensive excavation for subway, railway and other purposes, the principle extended to structures below the natural surface as well as to those above it.

The idea of "*usque ad coelum et ad inferos*" today can be expressed by saying that the ownership of the surface extends just so far in each direction upwards or downwards vertically as the owner is able to bring and retain under his effective control. However, the important thing for the land surveyor is that he must look up as well as around. The eaves of a building may extend over what appears to be a boundary, and so may the footings of a wall - so it may be necessary also to excavate a little. For the lawyer and the surveyor, it is wise to keep these principles in mind when dealing with a plan of survey.

There are, however, two important reservations to even the modern limited doctrine of *usque ad coelum et ad inferos*. The first of these is contained in section 339 of the *Land Act* 1958. This states that any land first alienated from the Crown after 29 December 1891 shall only be alienated to a prescribed depth which is usually fifty feet. Beyond that depth, the land remains the property of the Crown. The only exception is where a lease or licence is granted for mining purposes. There, a depth limitation of fifty feet would make any mining, other than alluvial, rather pointless and so does not apply, unless specifically stated.

It is in relation to mining and minerals that the other reservation on a private owner's use of the land arises - by means of a statutory restatement of the common law. The common law, as we have previously seen, states that, however extensive the rights of the private owner, or to be more accurate, of the tenant in fee simple, they cannot displace the absolute ownership of all land which always remains in the Crown. One of the incidents of the Crown's absolute ownership of land which has retained substantial economic importance is the Crown's continued ownership of royal metals, despite any alienation of the land where they are situated. Initially, under the common law, the royal metals were gold and silver but Victorian statute law later extended this list. Section 291(2) of the *Mines Act* 1958 stated that gold, silver/ uranium, thorium and oil shale were and remained the property of the Crown despite any alienation of the land. Section 291(1) of the same Act cast the net still wider by stating that all other minerals, as defined by section 3(1) of that Act, on all land shall belong to the Crown, unless the land was first alienated on or before 1 March 1892. The *Mines Act* 1958 has been substantially repealed and is now superseded by the *Mineral Resources Development Act* 1990, which still reserves ownership of all minerals to the Crown, (s.9).

Ownership of minerals by the Crown is of course valueless unless it also possesses the right to empower another to search for and extract them on alienated or private land. Section 204 of the *Land Act* 1958 gives that right. The right to enter land and work it for mining purposes is a valuable one and there is a need to protect that right and the miner's investment against others who may encroach, including the private land holder. Consequently, these rights are registered.

Until the introduction of the *Mineral Resources Development Act* 1990, if the right was encapsulated in a mining lease of more than three years, there was an interest in land sufficient at law for the lease to be registered by the Registrar of Titles pursuant to the *Transfer of Land Act*. With the introduction of the new Act, mining leases are no longer issued and are being replaced by mining licences. These will be recorded in a register maintained by the mining registrar.

4.8 Proof of Title and the Problems involved.

It has been seen already that property in land is not absolute, and is finite in a number of ways, both as to extent on the surface and the extent above and below it. It is also finite in respect of time, at least potentially, and it is also limited in relation to such things as the requirement to use it in conformity with any planning scheme in effect or to gain permits before undertaking building on the land. But how is property in land proved?

The person who is actually in occupation of land is, in many cases, likely to be the owner, although not of course in every case. Obviously, he could be there by virtue of a lease of any duration from one to 80 or 100 years or more. On the other hand he could be a trespasser. When it is desired to purchase the land, the purchaser needs to be sure that he is in fact dealing with an owner, and not with some fraudster or with some person who may be acting without the owner's consent or agreement.

Yet another problem facing a purchaser is the existence of equitable interests. They may mean that, if he buys the land, he may find his interest subject to the interests of beneficiaries because he has bought from a trustee and in some way is deemed to have had notice of the trust.

For centuries the purchaser was forced to rely on the production by the vendor of a number of transfers from previous owners, showing a chain of ownership leading up to the date of his own acquisition. Alternatively, it was sufficient for the vendor to establish, by any means he could, that he had been in undisputed possession for a period, originally as much as sixty years, which has gradually been reduced over a long period of time to fifteen years, (or thirty, if the dispossessed owner was under a disability).

In order to meet the difficulties which were frequently encountered, a system of registration of title to land has been introduced at some stage or other in the history of all countries in the western world.

Others - for example Japan - have adopted European methods, or have had such ideas engrafted on local law - for example, Singapore and Sri Lanka. Victoria too has its own system of title registration based upon the pioneering work of South Australia, which, under the guidance of Robert Torrens, introduced a method of land registration known as the "Torrens system". All Australian States now have the system and for most land in this country it means that property in land can normally be proved by the production of a "Certificate of Title" issued by a State Government, and backed by the authority, financial and otherwise, of the State.

In the introduction of this system, the registered surveyor had no part - indeed at that time he did not exist - but he has played a great part indeed in the development of the system and in helping to make it a success. All of the original Torrens Statutes provided for the licensing of surveyors - a provision of which Registrars have made full use.

4.9 The Origins of the Torrens System of Registration

Land law in Victoria, as with all Victorian law, was initially English, complicated and overlaid with additional provisions introduced by the Governor of New South Wales and later the Governor acting on and with the advice of New South Wales Legislature. Once the District of Port Phillip separated in 1851 from the Colony of New South Wales and became the Colony of Victoria, it immediately began to replace the previously existing Imperial and New South Wales statutes with its own. But in the area of Crown land it could not.

The *Act 5 & 6 Vict. c.76* gave the Colony of New South Wales in 1843 the power to legislate for its own peace, welfare and good government subject to certain restrictions. The effect of one of these restrictions was to retain control by the Imperial Parliament over all Crown lands in New South Wales. In 1851, when the Colony of Victoria came into existence, it was subject to that same restriction because the *Act 5 & 6 Vict. C.76* was part of the law with which it began its life. It was not until 1855, when the Imperial Parliament enacted *Act 18 & 19 Vict.C.55* removing these restrictions, that the Colonial administration could make grants of land in its own right.

This inability of the Colony to deal with its own Crown or waste lands until 1855 meant that the stability of land ownership was affected. All Crown grants came from England and this meant delays and complications for those who sought land in the Colony. In turn, the old and creaking conveyancing system of England, as translated to the Colony, came under increasing pressure as it was pushed harder to cope with colonial land hunger.

The discovery of gold added still further pressure. The deeds conveyancing system relies heavily for its efficacy upon a community's collective memory and for that memory to develop there must be a settled and stable population. In 1855 Victoria had neither. The Colony was in the grip of a gold rush and new areas in where there was no local memory at all were being opened for settlement. In the older settled areas, a high transient population, the lure of gold and the lack of conveyancing skills made the risks and costs of conveyancing very apparent.

Throughout all the Australian Colonies, concern was rising to ensure that the ownership was made more secure. Added to these other problems, the conveyancing system was extremely complex. It had to be left in the hands of lawyers, the only persons able to comprehend it, and yet stories abounded of the duplicity, uncertainty and cumbersomeness inherent in the system. Also, many owners of land in the Colonies were resident in England, a situation which further added to the complications as well as being a circumstance that opened the way for fraud.

4.9.1 The Torrens System in South Australia

Eventually, it was South Australia who led the way in reform. In 1856 after that Colony had endured twenty years of experience with the English conveyancing system, and some of it was bitter, certain articles appeared in the 'South Australian Register' in which the burdens of the English law of property were pointed out. A plea was made for simplification, for something which would be more in keeping with a young Colony, and which would sweep away expense, time and doubt. These articles were written by Anthony Forster, and they attracted, among other correspondents. Dr. Ulrich Hubbe.

This man was a Doctor of Civil and Canon Laws of the Kiel University, who had worked with the Prussian Judicial Service, qualifications necessary for anyone who was to argue the merits of any system which cut across the old established law and custom.

The man who became more active in this matter of land title reform was one Robert Richard Torrens. He was the son of Colonel Torrens who was Chairman of the board of Commissioners responsible for establishing the Province, later the Colony of South Australia. Robert Torrens obtained the degree of Master of Arts at the Dublin University, which assisted him in many of the tasks that confronted him as an executive officer of the young Colony. As a clerk in the Customs House London, Torrens was trained for a business career, and with his educational background, it appeared a wise move when he was appointed Collector of Customs for South Australia, where he arrived in 1840, at the age of 26. Torrens was a very able speaker, fluent and forceful. His attitudes to the many situations he faced, stamped him as one who held his own view very strongly. When opposed, he showed great tenacity and his natural ability as an orator was often used to subdue rather than to reason.

From time to time these qualities brought him in to conflict with his superiors, including Governor Grey; also his relations with the press were in the nature of continual mutual criticism, which on one occasion led to him being convicted for common assault for thrashing the editor of a newspaper with a walking stick in one of Adelaide's main streets. Nevertheless, he accepted many opportunities to further the interests of South Australia.

For instance, he was a trustee of the Port Adelaide Mechanics Institute and Library formed in 1851, and in the enlarged Legislative Council of the same year he was one of the four nominees of the Governor. Torrens was a vice president of the Savings Bank, the Chairman of Trustees, and a Lieutenant Colonel in the Volunteer Artillery, and in which capacity he reported in 1862 on a system of defence at Port Adelaide.

His publications included "*The South Australian System of Conveyancing by Registration of Title*", "*Speeches by R.R. Torrens*", "*A Handy Book on the Real Property Act of SA*", "*Transportation considered as a Punishment and as a Mode of founding Colonies*", "*An Essay on the Transfer of Land by Registration*" and "*The Effects of the Gold Discoveries on the Currency*".

Torrens left the Customs and was appointed Registrar-General and Colonial Treasurer on 3 January 1852. This, of course, included the registering of deeds under the *Registration of Deeds Act 1841*, and even in this field he tried to break new ground.

When responsible government was granted, Torrens was elected as one of the members for the City of Adelaide and sat in Cabinet as Treasurer. Indeed, he formed a Ministry himself in 1857, but was only Premier for about one month.

In July 1856 Torrens had written to the Governor stating his intention to introduce a land reform measure to the Legislative Assembly. The English Merchant *Shipping Act 1854* was stated to be a model for certain aspects of registration, and the Bill was largely drafted, in the fashion of a layman, by Torrens himself. The press was voluble on the subject and Torrens gathered a circle of confidants and advisers to effect considerable improvements to his original draft.

Among these was Dr. Hubbe, previously mentioned. His influence is to be seen in Torrens' subsequent arguments in support of his first Bill where Torrens argued that in the Hanse Towns of northern Germany a system of transfer by registration had been in force for over 600 years. The Bill, now called "the Original Bill", was introduced to the House on 4 June 1857, and was stated to be cast on the following principles:

"The first and leading principle of the measure which I introduce is therefore designed to cut off the very source of all costliness, insecurity, and litigation, by abolishing altogether the system of retrospective titles, and ordaining that as often as the fee simple is transferred the existing title must be surrendered to the Crown, and a fresh grant from the Crown issued to the new proprietor.

The principle next in importance prescribes that registration *per se* and alone shall give validity to transactions affecting land. Deposit of duplicate of the instrument, together with record of the transaction by memorandum, entered in the book of registration and endorsed on the grant by the Registrar-General is to constitute registration. This method is designed to give confidence and security to purchasers and mortgagees through the certainty that nothing affecting the title can have existence beyond the transactions of which they have notice in the memoranda endorsed on the grant."

After some delay in making refinements and additions, a substituted Bill, called "the Second Bill" was introduced, and drew a substantial number of amendments. The Bill was passed as the *Real Property Act* (South Australia) in January 1858, largely because of the pressures of public opinion. Although there had been some activity in England over the previous two decades in relation to real property dealings, it was not until 1857 that the English Royal Commissioners reported in favour of registration of titles. This report may have influenced the final adoption of the South Australian Bill in some respects, but it is certain that the South Australian initiatives predated the arrival of the English Commissioner's Report.

Much has been written about the contributions of Torrens, Dr. Hubbe and others in bringing about the South Australian *Real Property Act* in 1858. Perhaps the most concise statement made as to the authorship of this new *Real Property Act* came from the pen of the well known Anthony Forster, and is dated St. Leonards on the Sea, 15 May 1892:

".....I may however say at the close of a long life that the *Real Property Act* originated in a series of leading articles that I wrote in the South Australian Register calling attention to the great and unnecessary expense of land transactions. Mr. Torrens was attracted by these articles, and he conceived the happy idea of getting rid of deeds altogether and substituting them for a certificate. As all lawyers were against it, it could never have been brought to a final consummation, but for the efficient help of Dr. Hubbe, who has unfortunately had too little recognition. The provisions of the Bill were settled by Mr. Torrens and a few friends and put into proper form by Dr. Hubbe and passed the Houses. Torrens took charge of it in the Assembly, and I in the Legislative Council. We had the whole Colony at our back. This is in a few words the history of the *Real Property Act*".

With the passing of the new Act, Torrens was offered, and accepted, the position of Registrar-General which necessitated his resignation from Parliament. His task now was daunting in many respects, and particularly in the fact of strong opposition from the legal profession. For example, people were counselled against bringing land under the Act. This opposition had the effect of a move which culminated in the introduction of land brokers in 1860 when the *Real Property Act* was amended to permit brokers to conduct dealings in land. Land brokers continue in South Australia to this day.

In its early operation, some provisions of the Act were struck out in the Supreme Court, and the Act was extensively amended in 1859, and again in 1860, and after the work of a Real Property Commission in 1860, the Act was further amended in 1861.

At this stage of the development of the "Torrens System" in South Australia, *Real Property Acts* based on the South Australian model started to spread throughout Australia commencing in Queensland in 1862, and eventually spreading to New Zealand.

4.9.2 The Torrens System in Victoria

In Victoria, a private members Bill which was based on the Report of the English Royal Commissioners of 1857 was introduced into the Legislative Council in 1857.

This Bill was referred to a Select Committee, and although this Committee reported favourably, no action was taken. Another private member's Bill was introduced to the Legislative Council late in 1859, this time based on the Torrens principles. This was dropped in the face of strong criticism from the lawyers in the Assembly. A Bill introduced by the Attorney-General in 1861 was also dropped, and success was not to be achieved until February 1862 when James Service, the member for Ripon and Hampden, introduced into the Assembly a Bill based directly on the South Australian Act of 1861. This Bill did not meet with the approval of the Premier, Attorney-General or the Minister for Justice, but, nevertheless, it passed the Assembly without amendment, and only a few small amendments in the Legislative Council. This Act, the *Real Property Statute* took effect from 1 October 1862.

In his second reading speech to the Assembly, Service stated his intention was to simplify and cheapen the transfer of land, which under the then existing deeds system could incur very expensive legal fees. The proposals would also create an Assurance Fund to guarantee title and support the principle of indefeasibility, which he regarded as perhaps the most important feature of the Bill. Land brought under the operation of the Act would issue with an original and a duplicate Certificate of Title, and be entered in the Register Book. This would do away with the necessity for deeds. The possible existence of equitable interests would no longer cast doubt in the mind of a purchaser as to his ownership of the land, because notice of a trust was not to be entered in the Register Book and only interests entered in the Register Book were to be indefeasible, apart from certain stated exceptions.

It is evident that at this early stage in the development of Victoria, the recurring discrepancies between title measurements and the actual measurements of Crown grants, were a source of concern to many.

What showed on paper did not necessarily fit with what was on the ground, and Service quoted "Hoddle's Straight Line" as an example.

This referred to Punt Road in Richmond which was shown as a straight line on Government maps, but on crossing the Yarra River the actual continuity was offset by "some six or seven chains". He was adamant that applications to bring alienated land under the operation of this Act must be made to correspond with the original Crown grant. This insistence on preservation of original Crown boundaries has permeated survey requirements in Victoria ever since that time.

The Act required two amending Acts in 1863 and 1864, and by 1865 a new *Transfer of Land Statute* was passed by Parliament. This Statute incorporated part of the existing *Real Property Statute*, and retained this title until 1890 when it was extensively amended and renamed the *Transfer of Land Act*. This latter Act went through major changes in 1915, 1928 and 1954. The present *Transfer of Land Act* 1958 No. 6399 (VIII) is under periodical review.

4.10 Boundaries of Land

For the landholder, title registration gives security of tenure by means of a State guaranteed title but the Victorian "Torrens" system does not guarantee boundaries. The fixing of these is the province of surveyors. In fixing boundaries, the surveyor must not only bring his knowledge of land tenure to bear, he must also be aware of the way the law interlocks with good surveying practices.

Enough has already been said regarding the extent of the ownership of land, both above and below the surface, to indicate that it will very often be necessary to have regard to the eaves or other extensions of buildings above the ground, and such things as footings underneath. On the ground itself, the types of boundaries, and the extent to which they can be or may be used, are many and various.

The most common and most obvious are the imaginary lines, whether straight or curved, which extend between marks placed by the surveyor or between those marks that already exist on the ground.

By far the greater number of boundary marks in a developed area are actual physical objects, such as fences, roads, railways, the banks of waterways, and the line of or, in some cases, a line through, a building. This kind of line, like those along the edges of cliffs where these are boundaries, is not always possible of exact direct measurement, and must be determined indirectly.

On the seashore, or in rivers and streams, the bounding land may have been eroded or added to by accretion or erosion. These features have a special branch of the law all to themselves.

As was pointed out in the United States by Mr. Justice Cooley as long ago as the 1880s, the role of the professional man carrying out any cadastral survey is at least partly a judicial one. This may not be apparent at first sight, but reflection will show that what a surveyor has to do, in such an operation, is very similar to the task of a judge. He has to gather and assemble pieces of evidence, not all of which are mutually consistent with each other, and has to come to a final decision as to what the facts are. And the surveyor, unlike the judge in many cases, does not usually have the benefit of a jury in arriving at that decision.

In considering a fence as a boundary, the actual construction of the fence is very important. Any person with experience of survey plans will have noticed that it is usual for surveyors to measure to the centre face of a square fence post, unless it is at a corner, in which case it is usual to measure to and from the actual corner of the post. As is the case with most well established practices, there is a reason for this, which lies in the actual methods of construction used by fencers over a period of many years in this country. Nonetheless, any surveyor, or even any student with actual experience, will know the extent to which fence posts, even corner fence posts, may lean out of the perpendicular, and there are many rules, of thumb and otherwise, applied by surveyors in deciding where the centre of such a post originally was.

The aspiring surveyor should spend some time in considering the nature of fences, the method of construction of typical fences, including the more recently introduced materials used for fencing. This is desirable to ensure that the normal rules relating to the part of a fence post to which measurements

are taken, or from which they are made, are not followed blindly, but are interpreted in the light of the construction, or method of construction, of the fence.

Old fences are of considerable importance but the older a fence is, the more the possibility that it may have got out of repair, and may not now be exactly representative of the original line as it stands. Nevertheless an ancient line of fence at or near the probable line of boundary should never be ignored.

In 1893 the Judicial Committee of the Privy Council heard an appeal in the case where it was contended that a fence erected at least 40-50 years before did not mark the boundary between the land of the plaintiff and the defendant. On this point their Lordships commented, among other things, that:

"the fence had been in its then situation for upwards of 40 years" (it was in fact about 50) "and that no legal origin could be shown for it except the boundary referred to in the deed"; and that "the possession and enjoyment of the two adjoining lands had been for that period determined and regulated by it".

They thought that in such circumstances there arises a very cogent presumption in favour of the existing fence being on the line intended and expressed by the deed of conveyance by the predecessors in title of the defendant to the predecessors in title of the plaintiffs - "a presumption not to be displaced, if at all, unless by the most conclusive evidence of error of the actual position of the fence". They were not convinced that there was any such error.

In this connection, one well known trap for the unwary is a fence which was never intended to mark any boundary at all,

The establishment of boundaries in the first instance and, what is usually more difficult, their re-establishment later, depend on rules of law as much as on the ability to recognise the physical object, but both are important. The latter ability comes with experience and with practice, and is often not as easy as it looks. Nothing betrays inexperience or ignorance in cadastral work as thoroughly as an inability to distinguish between authentic original marks and spurious or misleading ones.

Discussion will be directed later to rules of law governing the reinstatement of boundaries, with some reference to various kinds of boundaries which may be found. This will also include rules relating to the weight which must be given to varying and often conflicting evidence which may be found by the surveyor when he is carrying out a cadastral survey.

The Act of particular interest regarding boundaries of land is the *Property Law Act 1958*. Part VII of this Act concerns itself exclusively with survey boundaries and is part of the essential knowledge of any surveyor.

The existing Act has its origins in 1928 with the first passage of an Act by this name. The original Act, No .3754, consolidated provisions from various Acts including the *Conveyancing Act 1915*, *Landlord and Tenant Act 1915*, *Married Women's Property Act 1915*, and parts of the *Real Property Act 1915* which was repealed. This new *Property Law Act* also took account of some changes in English law in 1925.

Boundaries are further discussed in greater detail in Sections 5 and 7.

4.11 Summary of Forms of Land Tenure

In concluding this Section, it may be helpful to list the main forms of land tenure as they apply in Victoria today.

4.11.1 Estates of Freehold:

- (a) Fee simple;
- (b) Life estate (and the resulting estate by remainder upon death of a tenant for life);
- (c) Estate tail;

(d) Conditional and determinable estates in fee.

Estates in fee simple in this State emanate from Crown grants and are confined to land held under the provisions of the *Property Law Act 1958* (General Law or Old Law titles) or the *Transfer of Land Act 1958* (formerly Certificates of Title and now folios of the Register).

Life estates, as the name indicates, last for life only and then pass to another by remainder.

The entailed estate is now virtually extinct and no further such estates may be created because of section 249 of the *Property Law Act*. By this section any attempt to do so creates an estate in fee simple.

Conditional and determinable estates are rare, and provide much difficulty when they do occur because determining who is to take the reversion, should they be defeated, is subject to a labyrinth of complex and archaic rules.

4.11.2 Crown Land

There are three broad categories of Crown land:

- (a) National Parks and Reserves, e.g. State Forests which are now controlled by the Victorian Plantations Corporation.
- (b) Land held under lease or licence for various purposes. In the *Land Act 1958*, these are set out as follows:

Crown leases:

- selection purchase leases
- perpetual leases
- conditional purchase leases
- swamp land allotment leases
- grazing leases
- cultivation leases
- leases other than grazing or agricultural leases for the following purposes:
 - for obtaining and removing therefrom guano or other manure; for sites of inns, stores, smithies, bakeries or similar buildings in thinly- populated districts;
 - for sites of bathing houses, bathing places, bridges, tollhouses or ferries and punt houses;
 - for sites of tanneries or factories or saw or paper mills, stores, warehouses or dwellings;
 - for sites of quays and landing places or for sites for the depositing of materials;
 - for the working of mineral springs;
 - for sites for ship and boat building or repairing and marine and general engineering works;
 - for the manufacture of salt;
 - for purposes of amusement and recreation;
 - for any other purpose authorised by the Governor in Council.
 - industrial leases
- industrial development leases
- conditional purchase leases of land not within the metropolitan area
- plantation area leases
- improvement purchase leases
- special land leases

- purchase leases
- Mallee lands selection purchase leases
- Mallee lands perpetual leases
- North West Mallee Settlement Areas perpetual leases
- Agricultural College Lands leases
- development leases
- Wonthaggi township leases
- auriferous selection purchase leases
- electric line leases

Crown licences:

- auriferous licences
- worked-out auriferous lands licences
- grazing licences
- agistment permits
- licences for any purpose
- licences for the removal of materials from watercourses
- licenses for the manufacture and removal of salt
- licences for the seeking and removal of gemstones and other objects
- licences for the purposes of a jetty, landing stage, boat ramp, slipway, net rack or mooring bee farm licences
- bee range area licences
- apiary occupation rights
- eucalyptus oil licences
- residence area rights
- licences under section 49 of the *Land Act* 1869
- forest land holders' licences
- licences other than agricultural for the following purposes:
- to cut, dig and take away any gravel, stone, limestone, salt, guano, shell, seaweed, sand, loam, brick, or other earth;
 - to occupy the site of fishermen's residences and drying grounds;
 - to occupy the sites of fellmongering establishments, slaughterhouses, brick or lime kilns;
 - to erect pumps;
 - to collect ballast;
 - to occupy an area for the purpose of gardening thereon;
 - to occupy as a site for business or for residence and business and area not exceeding in extent such area as is prescribed;
 - for any of the purposes for which leases as above may be granted.

- A M P development test licences
- electric line licences
- unused road and water frontage licences

Most of the lease and licence types are obsolescent The Minister or Department of Conservation and Natural Resources, as the case may be, will no longer grant leases or licences in many of the categories listed Instead, they are being permitted to disappear by attrition

4.11.3 The Commonwealth *Racial Discrimination Act 1975* and "Mabo".

The decision in *Mabo -v- Queensland* No 2 (1992) 66 ALJR 408 may also alter the extent of interests which private citizens may hold in Crown land It will certainly mean that some parcels of Crown land will be subject to native title

The decision of the High Court stated that native title can exist over any land where Aboriginal and Torres Strait Islander people have maintained their connection with the land throughout the years of European settlement, including the maintenance of traditional laws and customs This native title, however, will be extinguished by valid legislation or executive acts of Imperial, Colonial, State, Territory or Commonwealth Governments if these acts are inconsistent with the continued existence of native title

It is likely, from the general view of the High Court, that the grant of an estate in fee simple or a grant of a leasehold interest would extinguish any native title that may have existed over the land. This is because the exclusive possession that is part of the inherent rights in an estate in fee simple or in a leasehold are totally inconsistent with the continued existence of any native title over the land. Simply put, if I have exclusive possession of land, no-one else is capable of using the land unless I permit the use Native title and exclusive possession of land cannot stand together Accordingly, for most privately owned land, any native title that may have existed over the land will be extinguished by its grant by the Crown

It seems that a grant of an interest in land that gives exclusive possession extinguishes any native title over the land, the native title does not revive, should the interest cease

Although native title is extinguished by legislative or executive acts of Governments which are inconsistent with the continued existence of native title, the acts must be valid Here we see the operation of the *Racial Discrimination Act 1975 (Commonwealth)* This Act came into force on 31 October 1975, and makes it unlawful to distinguish between the rights enjoyed by people on the basis of their race If, since 1975, a Government has acted to extinguish native title in a way by which it would not extinguish ordinary title, the extinguishment is invalid

This means that where a Crown grant of land has been made post 1975 over land which is subject to native title, the act of grant will be invalid unless the Government treats the native title holder in the same way as it would have treated the owner the owner of land whose rights it extinguished Although it is not yet settled, it would appear that a native title holder whose title has been extinguished by a Crown grant made post 1975 must receive compensation for his or her loss if the Crown grant is to remain valid

For a very small number of parcels of privately owned land in Victoria, native title holders must be compensated if the grants extinguishing their interests are to remain valid

Extinguishment of any existing native title does not occur unless there has been a grant of an interest in the land which carries rights of exclusive possession Consequently, native title may be asserted over land that is subject to licences granted by the Crown A licence, by its nature, does not confer exclusive possession on its holder The rights given by native title could co-exist with the rights given by a licence, provided, of course, that the native holder could prove that he or she has maintained connection with the land throughout the years of European settlement, including the maintenance of traditional laws and customs Given the close settlement of Victoria, proof of this threshold condition is no easy task It would therefore seem that, for all the fire and smoke generated by the decision in *Mabo*, the effect in Victoria will be minimal

The decision, however is extremely complex. Not least of its difficulties is the refusal of the Court to define native title. It seems that it is a usufruct, that is, a right to use the fruits of land. Usufructs and usufructuary rights are found in Roman law and the Civil law based on it. However, they do not exist in either Australian or English law. How these usufructs which are normally confined to Civil Code countries, such as Austria, France, Italy and Germany, are to operate in Australia's common law system is yet to be determined.

Another difficulty is the uncertainty that this decision gives to the Crown's reservations of minerals and mineral rights. The *Land Titles Validation Act* 1993 recognised and enacted as law the principles set out above. Although assented to on 17 August 1993, the main provisions of the Act have not yet come into effect.

4.11.4 Unoccupied Crown Land

This is more or less a residual category. Alienation of this Crown land can be made in fee simple, or leasehold tenure or under licence.

Subject to the *Forests Act* 1959, the whole of the unalienated lands belonging to the Crown are subject to the following system of classification:

Class 1: Good agricultural and grazing lands.

Class 2: Agricultural and grazing lands.

Class 3: Grazing lands.

Class 4: Inferior grazing lands.

Class 5: Swamp or reclaimed lands.

Class 6: Lands which may be sold by auction (not including swamp or reclaimed lands).

Class 7: Auriferous lands.

Class 8: Water reserves.

These classifications are important in considering applications to make Crown land available for various purposes, and also in the allocation of areas of land.

4.11.5 Mining Interests

These are an anomalous group in that, while they are or have been granted to individuals in the same manner as the Crown leases and licences previously described, they are grants of interests in the Crown's residual rights as absolute owner of all land.

There are many types of mining interests or tenements, including those that may be granted pursuant to the *Petroleum Act* 1958 and the *Extractive Industries Act* 1966, but the main types are or have been:

- right to prospect under a miner's right
- right to use a claim for mining purposes under a miner's right
- exploration licence
- residence area right
- mining lease
- development lease
- mining licence
- specific purpose licence
- prescribed machinery or equipment licence
- mining purposes licence
- tailings removal licence
- tailings licence

- tailings treatment licence
- prospecting area licence
- licence to construct drives
- searching permit

It should be noted that the nature and types of available mining tenements are currently under government review (1989) and it is probable that, in the future, there will be a simplification, perhaps along the lines proposed by the Lands Bill for interests in Crown land

4.13 Leaseholds

As discussed earlier, these are not truly real property but rather an anomalous type of personal property

4.14 Bibliography

In an effort to keep the text uncluttered, footnotes have been omitted, however the following sources were used

(a) Texts

Adamson, T (Editor) *Acts and Ordinances in Force in Victoria Volume II* Melbourne, Government Printer 1856

Brown, A G *Law Relating to Land Boundaries and Surveying* Queensland, Association of Consulting Surveyors, 1980, pp 14-29

Halsbury, Earl of *The Laws, of England* 3rd Ed *Viscount Simonds* London, Butterworth & Co 1960 particularly Volume 32 p 201

Jackson J *Legal History in a Nutshell 2nd Ed* London, Sweet & Maxwell, 1955

Jessup GA *Torrens of the Torrens System* Unpublished 1950 Copy available from Archives of Public Library of South Australia

Maitland FW *The Forms of Action at Common Law* Ed Chaytor AHG Whittaker WJ Cambridge University Press 1954

Megarry R E *Miscellany-at-Law* London, Steven & Sons Ltd 1958

Megarry R E Grimwade H W R *The Law of Real Property 4th & 5th Ed* London, Stevens & Sons Ltd 1975, 1984

Robinson S *Transfer of Land in Victoria* Law Book Company of Australia 1979

Voumard L *The Sale of Land 2nd Ed 4th Ed Wikrama- Nayake P N* Law Book Company of Australia 1965, 1986

Wallace J *Review of the Victorian Property Law Act 1958* Unpublished monograph 1984

Whalan DJ *The Torrens System in Australia* Law Book Company of Australia 1982, pp 3-12

Webb T P. *A Compendium of the Imperial Law and Statutes 2nd Ed* Melbourne, C F Maxwell 1892

(b) Statutes

Victoria

Acts Interpretation Act 1890
Crimes Act 1890
Imperial Acts Application Act 1922
Imperial Acts Application Act 1980
Imperial Acts Re-enactment Act 1980
Land Act 1958
Land Titles Validation Act 1993
Limitation of Actions Act 1958
Property Law Act 1958
Real Property Act 1862
Statute Law Revision Act 1984
Transfer of Land Act 1958
Transfer of Land Statute 1866

Commonwealth

Air Navigation Act 1920-1986
*Australian Constitution Racial
 Discrimination Act 1975*

New South Wales

Laws (Continuation) Act 1851

Imperial

*Constitution Act 1855 Law of
 Property Act 1922 4 Geo IV
 c.96 9 Geo IV c.83 5 & 6
 Vict. c.76 18 & 19 Vict. c.55*

Acknowledgements

Section 4 was originally arranged, refined and enlarged as necessary by John P. Barry, LLB,LLM, using a draft compiled by the editor, John Lines. The primary sources for this draft were *The Surveyor and the Law*, published by the New Zealand Institute of Surveyors; *Law Relating to Land Boundaries and Surveying* by A.G. Brown, published by the Association of Consulting Surveyors, Queensland; and a paper *Torrens of the Torrens System* by G.A. Jessup, unpublished, copy held by Archives of Public Library of South Australia. The use of this material is gratefully acknowledged.