Circ. 40/1A
Paper No. 6

CROWN LANDS.

(by A.R. JONES, Bills and Regulations).

If you refer to Section 6 of the Crown Lands Consolidation Act, 1913, you will find that "Crown lands" shall not be sold, leased, dedicated, reserved or dealt with except under and subject to the provisions of that Act. At the same time, the Section has to be read subject to the provisions of Sections 2 and 4. The former is a saving clause relating to titles already granted and contracts made under earlier Acts repealed by the 1913 Act, and the latter provides that the 1913 Act shall not be construed so as to affect the operation of any provision contained in quite a number of other Acts, including the Western Lands Act of 1901, the Closer Settlement Act, 1904, the Mining Act, 1906, and - so that nothing is missed - "any Act not hereinbefore mentioned or referred to, whereby special provision is made in respect of any particular kinds of Crown lands or authorising Crown lands to be disposed of or dealt with in any manner inconsistent with the Crown Lands Acts."

Subject, then, to the powers to deal with Crown lands which may be found in the various Acts cited in Section 4, such lands can only be sold or leased or otherwise dealt with under and subject to the provisions of the Crown Lands Consolidation Act, 1913, as amended by subsequent Acts. This Act, therefore, will be your main book of reference, for as an officer of the Department of Lands you will be concerned essentially with "Crown lands". If you look at the long title to the Act you will see that it is "an Act to consolidate the Crown Lands Acts and certain other Acts or parts thereof dealing with the alienation occupation and management of Crown lands".

It would be a perfectly natural question for you to ask: "How did the Crown acquire its title to these lands in the first place or, in other words, what is the basis of the Crown's title?".

It is a matter of history that the eastern coasts of New Holland (now called Australia) were sighted by Captain James Cook in April, 1770, and that some eighteen years later the first fleet under Governor Phillip arrived in Botany Bay from England. The Colony of New South Wales was founded on 26th January, 1788. Of course, New South Wales was for many years after that a much larger territory than it is now, for it was not until 1863 that the Colony was reduced to its present dimensions.

All the lands within the territory originally became vested in the British Crown by its right as universal occupant. There is a very interesting and instructive judgment of the Supreme Court of New South Wales back in January, 1847, (Attorney General v. Brown, 2.S.C.R. appendix page 30) which sets this position out clearly. The headnote to the case is: "The waste lands of this colony are, and ever have been from the time of its first settlement in 1788, in the Crown; and they are, and ever have been from that date, in point of legal intendment without office found, in the Sovereign's possession, and as his or her property they have been and may now be effectually granted to subjects of the Crown. At the time of making a grant of land to a subject, the Crown must be presumed to have had a title to that land; and its title, originally as the foundation and source of all other titles, is matter of judicial cognisance."

The following extract from the judgment of the Court, delivered by Sir Alfred Stephen, Chief Justice, may well be cited:-

> "..... The territory of New South Wales, and eventually the whole of the vast island of which it forms a part, have been taken possession of by British subjects, in the name of their Sovereign. They belong, therefore, to the British Crown. For this we need not refer merely to history. The fact of the settlement of New South

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Wales in that manner, and that it forms a portion of the Queen's dominions, and is subject to and governed by British laws, may be learned from public colonial records, and from Acts of Parliament. New South Wales is termed, in the statute 54 Geo. 111., c.15, and in the 59 Geo. 111., c.122, His Majesty's Colony; not the colony of the people, not even the colony of the empire. It was maintained, that this supposed property in the Crown was a fiction. Doubtless, in one sense it is so. The right of the people of England to their property, does not in fact depend on any royal grant; and the principle, that all lands are holden mediately or immediately of the Crown, flows from the adoption of the feudal system merely. That principle, however, is universal in the law of England; and we can see no reason why it shall be said not to be equally in operation here. The Sovereign, by that law, is (as it is termed) universal occupant. All property is supposed to have been, originally, in him. Though this be generally a fiction, it is one "adopted by the constitution, to answer the ends of government, for the good of the people". But, in a newly discovered country, settled by British subjects, the occupancy of the Crown, with respect to the waste lands of that country, is no fiction. If, in one sense, those lands be the patrimony of the nation, the Sovereign is the representative, and the executive authority of the nation; the 'moral personality' (as Vattel calls him, Law of Nations, book 1, chap. 4) by whom the nation acts, and in whom for such purposes its power resides. Here is a property, depending for its support on no feudal notions or principle. But if the feudal system of tenures be, as we take it to be, part of the universal law of the parent state, on what ground shall it be said not to be law in New South Wales? At the moment of its settlement, the colonists brought the common law of England with them. So much, at all events, they introduced, as was consistent with their then condition; "such, for instance," says Blackstone "as the general rules of inheritance." The same has indeed been said of the statute law; but this is not now in question. Speaking of the exceptions, he observes that the artificial refinements and distinctions, incident to the property of a great and commercial people, are not in force in the colonies, as being neither necessary nor convenient for them. No such observation, however, can apply to a rule so convenient, if not so essential, (even though founded solely on a fiction, or a technicality,) as that which vests the property in waste lands in colonies in the Sovereign. But Blackstone, we apprehend, in the place cited, was considering the applicability of the statute, not the common law; and the feudal principle of which we speak, we have no doubt, is as much in force in colonies, as the law which provides for the succession of the eldest son.

Enough has, perhaps, been said on this point. We will refer, however, to precedents, and to Acts of the Legislature, both at home and in this colony. In the late Act of 5 and 6 Vic., c.36, the waste lands of the Crown, and (in the title) the waste lands belonging to the Crown, in the Australian colonies, are mentioned. It will hardly be disputed, that by these words were meant all the waste and unoccupied lands of the colony; for, at any rate, there is no other proprietor of such lands. In the statute, 10 Geo. 4, c.22, reciting that divers of his Majesty's subjects had settled in certain wild and unoccupied lands in Western Australia, it is said that they have done so by His Majesty's consent and license. In the Australian Agricultural Company's Act, the 5 Geo. 4, c.86, established 'for the cultivation and improvement of waste lands' in this colony, it is enacted that, in case a charter shall be granted to them, the Company may lawfully hold all such lands as shall be granted to them by his Majesty. In Chief Justice Stoke's book on the North American Colonies published in 1783, the usual clauses of a Governor's Commission are published; and among them is one giving him power to grant lands. In Mr. Chalmer's Collection of Opinions, there will be found numerous instances stated, of grants of land in the American Colonies, made by Kings and Queens of England. One by William and Mary, granting lands in New England; reserving all trees above a certain size. Another by the same monarchs reserving one-fifth of all the gold that should be produced. One by Charles

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the Second, reserving an annual rent of forty beaver skins. One by James the First, in the year 1620. One by George the Second, of seven-eighths of all the lands in Georgia. The Crown's right to make such grants seems recognised by the Statute 7 and 8 W.111, c.22, s.16, by which the Crown's patentees are restrained from selling, without license, to any other than natural born subjects of the Crown. The same right is assumed by Lord Hardwicke, in Penn v. Lord Baltimore. That was a contest between two proprietors of American provinces, granted by the Crown to them, to be holden in free and common socage. In short the instances are innumerable. From the time when colonies were first known, there is no example of a grant of lands in them, except by the Crown alone. In this colony, there are probably some thousands of such grants; and very many, with provisos and restrictions similar to those in the present case. The discovery has been made, however, in this late age, and by lawyers of this bar, that these titles are without foundation. If such be the law, it is fit that it should be so declared by a higher Court than this. The appellate tribunal is open to the defendant, and the case may be taken there. I have not yet introduced, however, the colonial enactments. In several of these, (the Acts for restraining the unauthorised occupation of the waste lands of this colony,) the Crown lands are mentioned eo nomine; and their unauthorised occupation is said, expressly, to be derogatory to the rights of the Crown. In the Acts for appointing Commissioners, to report on disputed Claims to Grants of Land, the power of the Governor to make grants, on behalf of the Crown, is assumed. By the 6 W.IV., No.16, that power is recited, and mentioned to have been exercised informally; and then, by the express assent of his Majesty, also recited, all former grants of land by governors are confirmed. In this Act, and in the 3 Vic., No. 1, to confirm certain other grants, supposed to have been informal, the title of the Crown to the waste lands, and the right to grant them, are too plainly recognised to admit of question."

Some two years later (1849) in delivering judgment of the Supreme Court in the case of Doe. Dem. Wilson v. Terry, (2 S.C.R. appendix page 1), the Chief Justice said (i.a.) :-

"The circumstances of newly discovered and unpeopled territories, claimed by and vested in the Crown, on behalf of all its subjects, are so widely different from those of a populated and long settled country, in which the lands never practically belonged to the Crown, and (with the exception of a few tracts and scattered properties, often acquired by the Sovereign, originally by purchase), have for centuries been owned and cultivated by its subjects, that a moment's reflection would present them to the mind even of a stranger. The lands of this colony lie necessarily unoccupied and waste, until granted by the Crown to individuals, willing to reclaim them from a state of nature. The Crown derives no "profits" from them; and could, in the literal sense, no more "possess" them, than it could the animals which roam, unmolested, over the vast area which they embrace. In England, as we observed in the case of the Attorney-General v. Brown, the title of the Sovereign to land is a fiction; or, where the Crown really owns land, the property is enjoyed as that of a subject is, and by a title which admits of proof, by documentary and other evidence. Here, the title of the Crown as universal occupant is a reality; and there is no proof of it required, or admissible. The acquisition of the country, and its settlements by British subjects, are matters of Judicial cognisance".

In the judgment of the Supreme Court in re Attorney General v. Robinson (3 S.C.R. at page 24) the following passage occurs: "Now we require no evidence to enable us to say, because this Court takes judicial notice of the fact, that the Crown was the legal owner of all land in this colony, at the time of its first settlement in 1788".

Thus we see that all the lands in the territory of New South Wales were originally vested in the Crown, and as officers of the Department administering the Crown estate we should be aware of how

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that estate has been dealt with in the past and what are the laws in existence to-day for its management and disposal.

The "Australian Encyclopaedia" (Vol. 1, page 712) says that "the development of land legislation in Australia has been influenced by the character of the early settlement, steadily widening knowledge of the extent and resources of the continent, growth of population, improvements in internal and overseas transit facilities, the development of agricultural science, and the consequent increase in the number of uses to which the soil might be put. Along with these purely economic factors others of a political character have played a part, especially (a) the rise of a Labour Party, hostile to the further alienation of land, and to the existence of the large landowner; (b) the influence of prolonged and intensive propaganda by followers of Henry George; and (c) the general acceptance of the doctrine that the best line of social progress results in the close settlement of rural areas by a nation of industrious and sturdy yeomen .... Most legislation has been of an experimental nature, and later experience has soon made amendments necessary; almost every session of every Colonial or State Parliament has witnessed the passage of new land laws, and the position has consequently become at times very confused, in spite of attempts at simplification and consolidation."

Being assured that all lands in the State were originally vested in the Crown the next step is to see by what agencies lands have passed out of the hands of the Crown. A brief examination of the various authorities conferred on the early Governors and of Acts of Parliament since passed dealing with Crown Lands was made in paper No.1 of this series.

Responsible Government was granted in 1856, and the first Crown Lands Act was passed in 1861. Up to the end of 1861 the Crown had disposed of over seven million acres of land by way of grants and sales, as follows:-

Manner of Disposal	Area
1. By grants, and sales by private tender to the close of 1831	3,906,327 acs.
2. By grants in virtue of promises of early Governors made prior to 1831, from 1832-40 inclusive	171,071 "
3. By sales at auction, at 5s., 7s.6d., and 10s. per acre, from 1832-38 inclusive	1,450,508 "
4. By sales at auction, at 12s. and upwards per acre, at Governor's discretion, from 1839-41 inclusive	371,447 "
5. By sales at auction, at 20s. per acre, from 1842-46 inclusive	20,250 "
6. By sales at auction and in respect of pre-emptive rights, from 1847-61 inclusive	1,219,375 "
7. By grants for public purposes, grants in virtue of promises of Governors made prior to the year 1831, and grants in exchange for lands resumed from 1841-61 inclusive	7,601 "
Total area absolutely alienated as at 31st December, 1861	7,146,579 "

To 30th June, 1949, an area of about 65½ million acres had been alienated or was in process of alienation and about 85 million acres were held as perpetual leasehold, virtually alienated. Crown lands, as such, are to-day, therefore, somewhat limited in extent.

When you come to study the Crown Lands Consolidation Act, 1913, more closely you will find the expression "Crown lands" in very many Sections, and it is to be noted that, unless the context necessarily requires a different meaning, it means (vide Section 5) "lands vested in His Majesty and not permanently dedicated to any public purpose or granted or lawfully contracted to be granted in fee simple under the Crown Lands Acts." It is not necessary at this stage to refer to various decisions of the Court as to whether certain classes of land are or are not Crown lands within the meaning of a particular Section. That is a matter that can best be dealt with when considering the tenure, etc. itself. The object of this paper is to make it clear that all the lands in the State were originally vested in the Crown, that their alienation and occupation has been regulated under authority of the Crown, and that Section 6 of the Crown Lands Consolidation Act, 1913, to-day regulates how Crown lands shall be dealt with.

3rd July, 1940. (Revised 9th August, 1950.)