APPENDIX 3

FEUDAL TERMS IN OUR LAND LAW

N THE very early days, when tribal leaders and tribes controlled the land (communal land that became "the commons"), an allotted part of the common was allocated annually by the "land jury" under guidance of the bailiff as a "usufruct", that gave the individual the "right to use and gainer the fruit, thereof". The individual was also allowed to improve the real estate on an allotment and to sell the improvements (houses and barns, other structures, fences and forges and so on) which, being tied to the land were "Real (royal) property ", as opposed to items of personality, usually referred to by the Normans as "chattel" (CATTLE). These included goats, pigs, chickens. and pheasants as well as oxen, steer bulls, cows and calves, and later furnishings, etc.

Therefor, by simply transferring some "cattle", it was possible to transfer title (the use of) certain improvements freely to a second partly, subject to land tenure agreements and their related corvee (labour duties), head taxes for the use of the land. It was during the United States Revolution (1776 to 1792), when Thomas Jefferson, later to become the US 3rd President, accompanied Benjamin Franklin to Paris to gain French assistance, that he saw the absolute need for a system by which the land could also be transferred, as were the improvements, so that "fee entail", the "cattle of issue")or blood descent) problem plaguing the French society and prohibiting the purchase of land by the landless (free alienation) could be overcome.

It was one of the first pieces of legislation considered by the US Congress and came to British Colonies where land was more readily available, before becoming the law in the English Isles and Ireland. Of special interest to New Zealanders will be the fact that the intervention of the Crown between Maori and the settlers in land transactions was based on the legal premises that all freeholds were granted by the Sovereign and that fee simple purchases from other than the Crown could only apply to improvements and not to the land itself in British lands.

FREEHOLDS

The freehold, on the other hand, has its origins in both Ghent-Liege and the Scottish Lowlands around 950-100 AD. One of the early English kings secularised the large and growing holdings of the (then) Catholic Church after strenuous power struggle between the Commons and the King's Men.

It was the custom in those days for "boons" to be given, rewards made by both kings and surzerasins (lords beholden to serve higher authority), to those under their control in order to provide these retainers with an income which could help keep local peace, provide for the needs of the church, construct and maintain public works, roads, water channels, redoubts and dungeons, provide hospitality for the King and retinue on their rounds and, most importantly of all, raise and service the local militia to serve with their lord in battle with the king against "all enemies foreign and domestic".

These boons, like today's honours, were of 2 types:

- "in fee entail"
- "life estates".

1. could be passed on to the eldest (King approved) son of the donee; while the second reverted to the King or other grantor at the time of death of the donee. Shakespeare's works are fraught with some of this, as in Ben Jonson.

COMMON FREEHOLDS

The Magna Carta, gave a certain class (the yeomandery or Yeo Lang Bow infantry, many of today's "squires and their dames ") the right to some "free to hold" land for non field lots (allotments). Until the times of King Henry VIII and Queen Elizabeth I the house lots of the people were subject to annual rent by their owner (King or surzerain).

The owner could and did have the right to reenter such lots and tear down the improvements, simply by paying the fee or by "fining (ending) the tenant holder of such an allotment and its (royal) real improvements" for any variety of reasons, many of which would seem specious to us today. This, by the way, was the true beginning of the "sovereign's right to eminent domain ".

The "freehold" ("fee to hold") then is a right extracted from the Sovereign, that a parcel of land and its attached improvements could b held in title, possession and use, by enfranchised men, citizens with the rights of "free men ", as opposed to indentured persons, peasants tied to another person (king or lord), and passed on to their own issue (son/sons) without interference of further payment (fee/vieh) to the King, and subject only to annual land taxes and "the Sovereign's overriding right of eminent domain on a temporary or permanent basis". This included "the right to quarter the king's retinue, to demand fresh horses and food from one and all as needed by the Sovereign without payment " and this was one of the causes of the US Revolution which has, in the Bill of Rights attached to the Constitution, clauses to preclude such action by the Sovereign (the US Congress, government or its agents, officers).

Many of the rights all of us take for granted today are not rights at all, but privileges because of restrictions that the Sovereign has permitted to be placed on the Crown. Except that an increasing number of countries, like the USA, now have constitutional and/or statutes that prescribe that "whenever private property is taken for a public purpose the owner shall receive just compensation, reflecting the value of that taken and the value of that remaining so that such citizen shall be no richer and no poorer as the result of the taking of his Property for the commonwealth, than he had before the commencement of the action in eminent domain".

RIGHTS AND PRIVILEGES

There is nothing 'free" in "free-to-hold" titles. All such rights are subject to the payment of rates, eminent domain, planning and use permission, the avoidance of public nuisance and the commercial code sections regarding contracts and the pledging of collateral. "Free-to-hold" titles could be encumbered but could not be foreclosed by the mortgagee, after the horrible experiences of 650-880 AD, when the Church and its monasteries lent as the only source in an age where interest was illegal to Christians, and foreclosed regularly, adding to the ecclesiastical estates at the expense of the society.

It is also because of memories of such abuses by mortgagees that we maintain "mortgagor redemption" rights, not privileges, and force such cases into statutory foreclosure at equity, this coming from the days when only the King on horseback and travelling roundabout, could hear and decide cases concerning land disputes. As for avenues of appeal acquisition, while such avenues do exist in the statutes and at law, it is extremely difficult to a private landholder to challenge the right of taking and/or, the need for the taking, which has been certified by an official of the Sovereign (the government).

The private land-holder can and does have more chance at success in challenging the compensation allowed, with particular reference to damage to any property not being taken. However, even this is not guaranteed in many countries, including some new island nations of the South Pacific, where the nationalisation of land and its improvements without, or with only token compensation, continues to occur today. See for example, "Land Tenure in The Solomon Islands", published by the University of the South Pacific.

NATIONALISATION OF PROPERTY

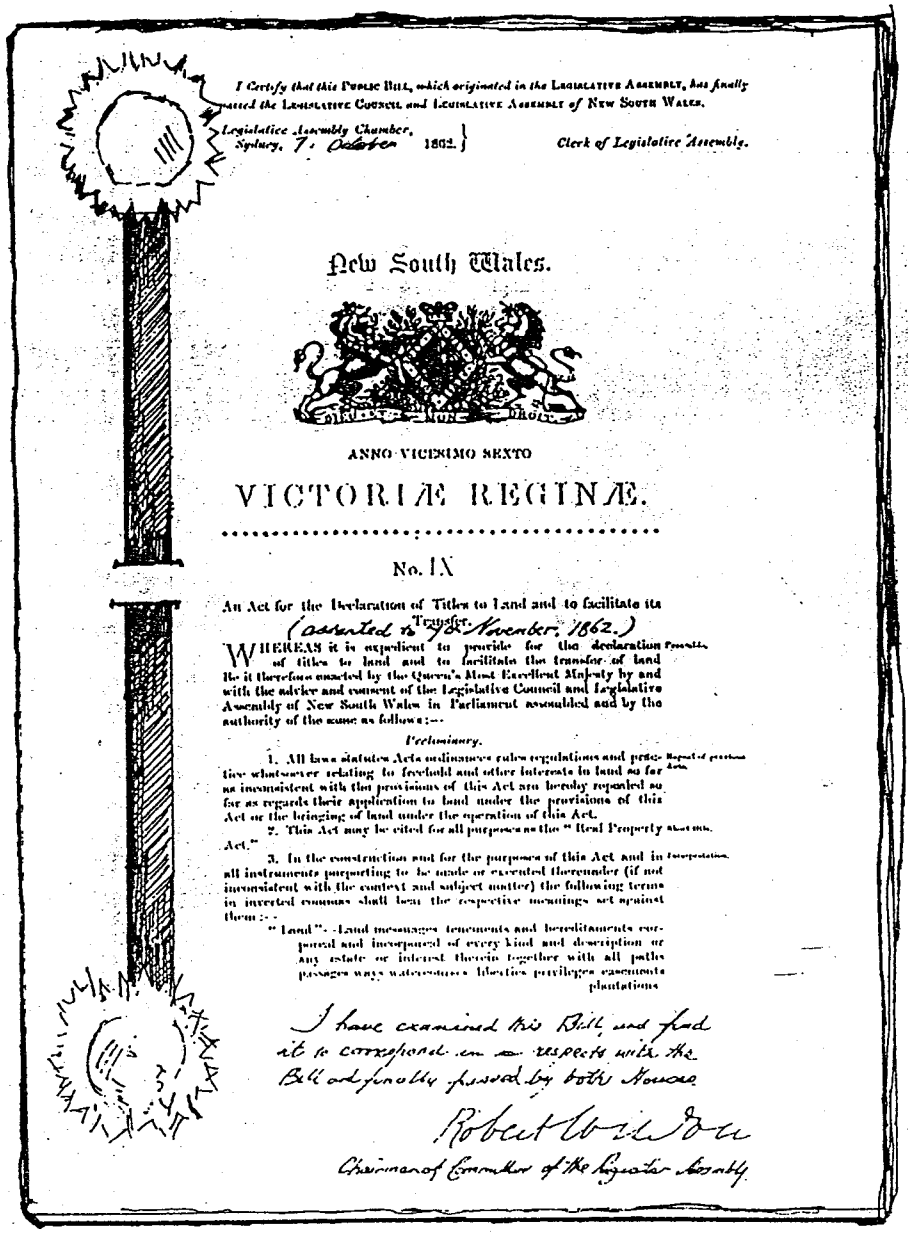
When the public reads and is aghast at newspapers and TV accounts over the nationalisation of private property in some action or other, it is wise to remember that such an uncompensated or token compensated taking is perfectly legal and certainly in accordance with historical legal tradition, for the Sovereign is the ultimate owner of all land. Planning rights and planning permission, and planning restrictions as well as environmental health codes, building safety codes and environmental control - all these take this power, as tested in the courts and often supported by statutes, from the overriding right of the Sovereign to land (three dimensional, from the centre of the earth to the heavens).

What land-owner can say that these restrictions on the unfettered use of his land does not represent a diminution in that property's value, because of the inability to earn more with fewer expenses? These restrictions to the ownership of real estate and real property rights, are usually noncompensated ion the Western world. Yet seldom is there an outcry from the public about such public takings of private property without compensation.

N.S.W. Land Titles Office

TORRENS TITLE IN N.S.W.

125 YEARS OLD



I Certify that this PUBLIC BILL, *which originated in the* LEGISLATIVE ASSEMBLY, *has finally passed the* LEGISLATIVE COUNCIL *and* LEGISLATIVE ASSEMBLY *of* NEW SOUTH WALES.

Legislative Assembly Chamber, Sydney, 7th October 1862. *Clerk of Legislative Assembly.*

New South Wales.

ANNO VICESIMO SEXTO

VICTORIÆ REGINÆ.

No. IX

An Act for the Declaration of Titles to Land and to facilitate its Transfer. (assented to 7th November 1862.)

WHEREAS it is expedient to provide for the declaration of titles to land and to facilitate the transfer of land Be it therefore enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled and by the authority of the same as follows:—

Preliminary.

1. All laws statutes Acts ordinances rules regulations and prescriptive whatsoever relating to freehold and other interests in land so far as inconsistent with the provisions of this Act are hereby repealed so far as regards their application to land under the provisions of this Act or the bringing of land under the operation of this Act. Repeal of certain laws.

2. This Act may be cited for all purposes as the "Real Property Act." Short title.

3. In the construction and for the purposes of this Act and in all instruments purporting to be made or executed thereunder (if not inconsistent with the context and subject matter) the following terms in inverted commas shall bear the respective meanings set against them:— Interpretation.

"Land".—Land messuages tenements and hereditaments corporeal and incorporeal of every kind and description or any estate or interest therein together with all paths passages ways watercourses liberties privileges easements plantations

I have examined this Bill, and find it to correspond in all respects with the Bill as finally passed by both Houses

Robert Lowe

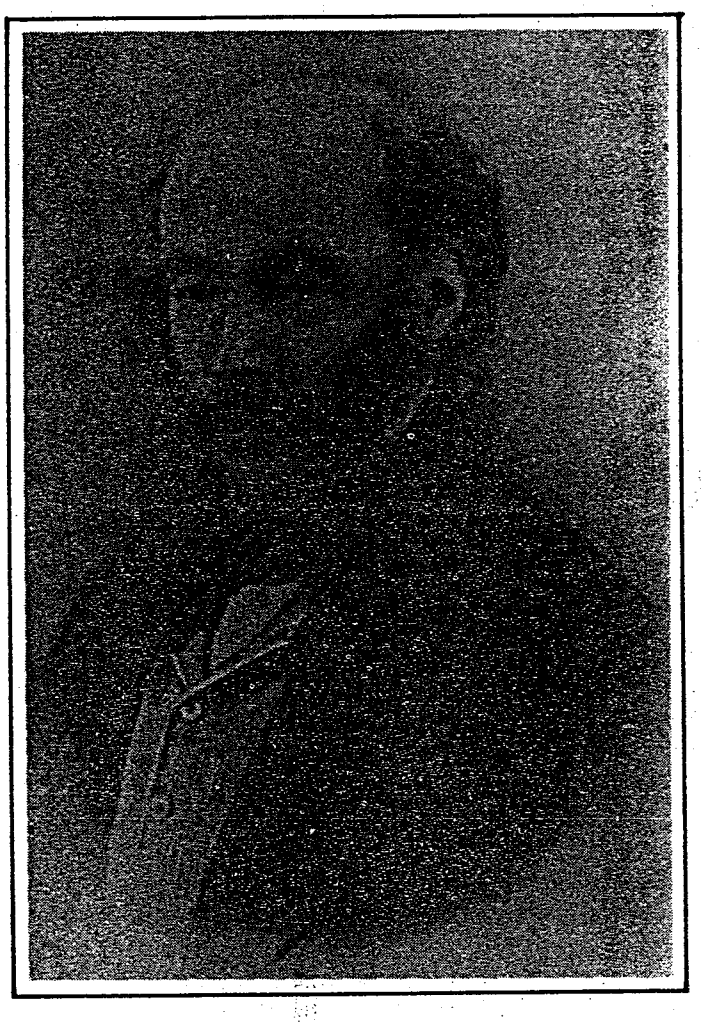
Chairman of Committees of the Legislative Assembly

A Copy of the Original Real Property Act

Torrens Title

On January 1, 1863 - 125 years ago - the Torrens Title was introduced into N.S.W., a system which simplified and speeded up the transfer of land.

Torrens Title is a land titles system, resting on a foundation of legal principles and forming part of the law of the land. But, its day-to-day operation is a matter of management rather than law.



Sir Robert Torrens

The system was devised by Robert Torrens (later Sir Robert Torrens), the son of one of the commissioners appointed to work out a scheme for colonising South Australia.

Robert Torrens came to Adelaide from England in 1840 as Collector of Customs, bringing administrative ability and the determination to right an obvious "wrong".

One of his relatives had fared rath badly with the land titles system th operating in England and young Torre decided that some day he would strike blow at the "iniquitous institution".

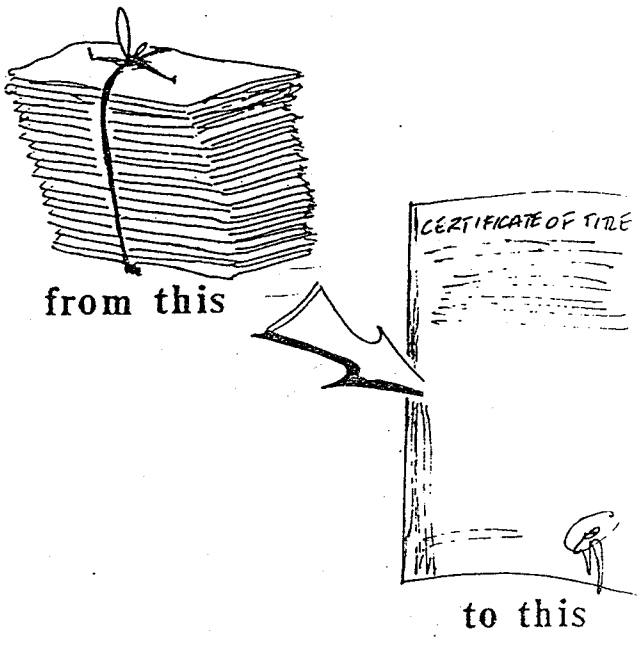
Chain of Deeds

At the time, land ownership was based the English common law system conveyancing, now known as "Old Systen Under this system, which came Australia with the First Fleet, separa deeds were drawn up each time land w sold or mortgaged.

The owner of land and any buildings it generally proved title by produci the series of deeds which formed t chain of title tracing the ownersh back over a long period of time. system was cumbersome, expensive a uncertain.

Torrens was most impressed by the simp and efficient system for transferr ownership of ships.

He became Registrar General and in 18 as a member of the South Australi Parliament, he secured the passage o private bill to apply the marit system to land dealings.



Certificate of Title

The system then introduced has become popularly known as Torrens Title.

Under it, land ownership was to be evidenced by a single State guaranteed document called a 'Certificate of Title'. This was a copy of the folio of the Register held by the Registrar General.

All land transactions were to be recorded in the Register so that ownership of a property was quite clear.

The system was introduced in N.S.W. in the Real Property Act of 1862.

Administration of the Act was entrusted to the Registrar General, Christopher Rolleston, who went to Adelaide to gain first hand knowledge of the system.

Colonial Secretary's Office,
Sydney, 10th December, 1855.

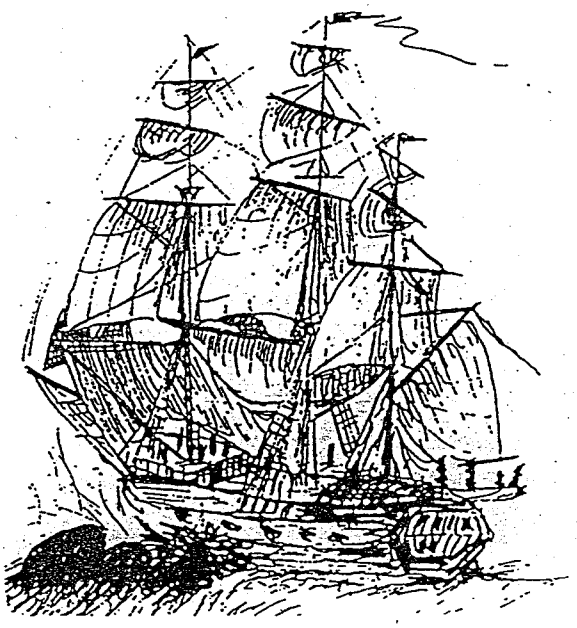
HIS Excellency the GOVERNOR GENERAL directs it to be notified that, in virtue of the power vested in him by the 2nd clause of the Act of Council, 19 Victoria, No. 34, he has been pleased to appoint

CHRISTOPHER ROLLESTON, Esq.,

to be Registrar General of New South Wales.

By His Excellency's Command,
C. D. RIDDELL.

Gazettal of the appointment of Christopher Rolleston as Registrar General



Rolleston was shipwrecked on his retu voyage to Sydney, but survived to stc the system into operation on January 1863, as planned.

All land granted by the Crown sin January 1, 1863, is automatically und Torrens Title. But much land w granted before this date and owne could apply, under the new system, have their titles converted to Torre Title.

Until recently the conversion proce was slow and expensive for the owner b since 1967 the Land Titles Office h been actively and inexpensive converting these "Old System" holdin to Torrens Title. It is planned complete this conversion within 5 year

The Register Today

The Torrens system began slowly b business volumes increased rapidly From a staff of 24 in 1863, the Offi has grown to over 870 people.

The Register now has over 2 3/4 milli current titles. Over 20 million la transactions or dealings have be registered. At present about 2,5 dealings and 40 plans of subdivision a registered each day.

The N.S.W. Land Titles Office is t largest centralised Torrens la registry in the world and perhaps t most efficient. Fees received, among the lowest in Australia, adequate cover the cost of operations.

Progress

While the basic objectives of the Real Property Act of 1862 remain unchanged, the Torrens system has been modernised from time to time to meet changing demands. These changes have been most evident in the last 25 years.

* Over 1 million plans and 20 million dealings have been microfilmed. In 1985 the Land Titles Office received an international award for excellence of microfilm applications for a world-first system for automated computer indexing of microfilm using laser scanning.

* Sophisticated document copying services have been introduced including computer assisted retrieval of microfilm systems. Today the Office is producing an average of 32,000 sheets of copy for title searching and registration purposes each day.

* Computers have been used for some years to produce a variety of indexes and day-to-day business records used by both public and staff.

  A major achievement has been the implementation of the Automated Land Titles System (ALTS) in 1983. This system saw the paper Register replaced by a record on a computer. It shared the honours with the Canadian province of British Columbia for the first (and still the only) systems of the type in the world.

  Over 700,000 titles have been computerised so far and they are currently attracting up to 45% of dealing registrations. It is expected that ALTS will contain over 1 million titles by June, 1988.

* Ever leading in the use of new technologies, the Land Titles Office is currently examining the future use of computerised file tracking systems using machine readable bar codes for improved records management; optical scanning as an alternative to data entry; and optical disk for records storage and retrieval.

* The Land Titles Office has a major role in developing and implementing the State's Land Information System. Already computer terminals are being installed in the premises of clients of the Office for remote searching of title information and plans are being developed for "one stop shops" for more convenient public access to land information.