CONDITIONAL LAND GRANTS BY THE CROWN

One of the first and most important tasks of government in a newly settled colony is the allocation of land. Land constitutes one of the basic economic assets and the rules fixing the terms on which individuals may obtain access to it will determine to a large extent the degree of control men are able to exercise over the lives of others. As the Earl of Durham pointed out in 1839 in his celebrated report on the North American colonies, upon the manner in which colonial waste lands are distributed, "almost . . . everything else depends".[1]

Planning a programme which is going to affect so fundamental a relationship as that between individuals and lands presents many problems. The government must decide, for example, whether public lands are to be donated to those who wish to settle, or whether intending settlers should purchase their holdings from the Crown. Other matters to be considered are whether settlers should be permitted to locate land wheresoever they please, whether any restrictions should be imposed on the size of allotments to be granted, and also whether the government should retain any power of controlling the use of the land it has made available for private settlement. This last question is bound up with the species of proprietary rights to be granted.

Within the framework of the common law it is possible for grantors to control the destiny of the land they alienate by the annexation of conditions subsequent to their grants. A grant subject to conditions subsequent confers on the grantee a defeasible title, and in the event of breach of a condition, the grantor or his successor has a right of entry, or, if the grantor happens to be the Crown, a right to enter upon proof of the breach of condition by matter of record. The law does not allow a grantor to annex to his grant any conditions he pleases. Some conditions may be adjudged void on the ground that they are repugnant to public policy. However, there are reasons for believing that the restrictions imposed on conditional grants by private persons do not apply in their entirety to grants on condition by the Crown.

This essay examines the role of conditional Crown land grants in the furtherance of public lands policies during the early years of settlement in eastern Australia, the reasons why the conditional land grants system foundered, and the special legal position of such grants.

Public Lands Policies

The objectives of public lands policy for the colony of New South Wales originally were very limited. The colony had been established primarily as a place for reception of convicts sentenced to transportation and, to begin with, the home government regarded the disposal of Crown lands only as a means of producing foodstuffs for the penal establishment and of rehabilitating prisoners who by good conduct had earned remissions of sentence. Governor

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The following abbreviations have been used:
G.N.: *Government Notice.*
H.E.L.: Sir William Holdsworth, *History of English Law.*
H.R.A.: *Historical Records of Australia* (citing series, volume and page numbers).

[1] *The Report of the Earl of Durham* (2 ed. 1905) 144.

Phillip was authorized to grant small allotments to emancipated convicts, the size depending on the grantee's marital status, in return for a small annual quit rent payable in perpetuity to the Crown.[2] Shortly afterwards, instructions were received empowering the Governor to grant land to ex-servicemen wishing to remain in the colony and to settlers who had emigrated of their own accord.[3] In all cases, the government was prepared to issue freehold grants in free and common socage, free of all charges save the usual quit rents.

At first little attempt was made by the government to control the manner in which grantees made use of their land. Grantees received estates in fee simple which meant that they enjoyed considerable freedom in determining how the land should be exploited. Since applicants for grants were not expected to buy the land, in the accepted sense of the term, or even show a *bona fide* intention to settle, there was always a danger some individuals would solicit Crown land grants solely for the purpose of obtaining property for resale. "Dummying" was particularly prevalent during the period when the amount of land the colonial Governor might grant to any one person was limited. To check such malpractices, it was decided as early as 1793 to annex conditions to freehold grants requiring the grantee to reside on and cultivate the land for five years and stipulating that during that time he should not alienate without the Governor's consent.[4] On breach of any of these conditions, the grantee's estate was declared to be forfeit to the Crown. By this means it was hoped that settlers would be encouraged to bring their land into a state of production as quickly as possible and that the acquisition of land for speculative purposes would be discouraged. The British government's intention first seems to have been that conditions should be annexed only to the grants to ex-convicts, however, during Governor Macquarie's term of office, residence, cultivation and alienation conditions were included in all grants.[5] Town allotments granted by Macquarie were subject not only to conditions forbidding alienation for five years, but also to conditions requiring grantees to build dwelling houses according to prescribed standards.[6] On the recommendation of Commissioner J. T. Bigge, many of the Crown grants of country lands issued in the 1820's contained conditions requiring grantees to use their best endeavours to procure the assignment to them of a specified number of convicts, the number varying according to the size of the lot. By annexing such conditions, the government's intention was to reduce the costs of the penal establishment and at the same time, to make more farm labour available to settlers.[7]

The conditional grants system was not an unqualified success and eventually was abandoned in favour of a system whereby Crown lands were alienated only after contract of sale. Improvement and alienation conditions either proved impossible of performance or else were flagrantly disregarded. "The

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[2] Instructions of 25 April, 1787, *H.R.A.*, I, i, 14-15.

[3] Enclosure in Grenville to Phillip, 22 Aug., 1789, *H.R.A.*, I, i, 124-6.

[4] Dundas to Grose, 31 June, 1793, *H.R.A.*, I, i, 441. Major Francis Grose, the Acting Governor, and Captain William Paterson, his successor, apparently ignored the Instructions requiring that freehold grants be conditional since conditions did not appear in deeds of grant until after the appointment of Governor Hunter in 1795 (*H.R.A.*, I, i, 769, n).

[5] Macquarie to Liverpool, 14 Nov., 1814, *H.R.A.*, I, vii, 551-2; see also *H.R.A.*, I, vii, 626-7.

[6] *H.R.A.*, I, vii, 626-7.

[7] See J. T. Bigge, *Report of the Commissioner of Inquiry into the State of the Colony of New South Wales* (1822) 161. Initially grantees were required to take one convict for every 100 acres granted (Brisbane to Bathurst, 10 April, 1822, *H.R.A.*, I, x, 630), but by a Government Order of December, 1824, it was announced that the number would be fixed at five for every 100 acres granted except in cases where the grantee held 2,000 acres in which event the number was to be thirty for the whole. It was realized, however, that since the value of land in the colony varied so much it was undesirable to make this a universal condition. See Forbes to Wilmot, 6 March, 1823, *H.R.A.*, IV, i, 431; Bathurst to Brisbane, 30 May, 1823, *H.R.A.*, I, xi, 83 *et seq.*

frequent violation that has taken place of the rule prescribed by His Majesty's instructions, of not selling, transferring, or alienating the land, until after the term of five years, and the facility with which this violation has been practised," Commissioner J. T. Bigge reported, "has certainly had some effect in producing indifference on the part of the grantees to the duty of perfecting their own titles."[8] Of the causes for violation of the cultivation conditions, Bigge had a great deal more to say. He had been informed by the Surveyor-General that "so long as the quantity of produce is regulated solely by the wants of the government", such conditions could never be observed to the letter. His own view was that in these circumstances, strict enforcement of cultivation conditions was neither expedient nor just. Furthermore, so great was "the variety of soil in New South Wales, and the impossibility or obvious futility of bringing some parts of it into cultivation, on account of their natural sterility, on the quantity of heavy timber with which they are encumbered, that the literal and sometimes partial enforcement of the condition, must operate as an expulsion of the proprietor".[9] Quite apart from the practical difficulties encountered by settlers in complying with the conditions in their grants, there were certain deficiencies in the legal machinery which the Crown had to invoke to enforce its rights. These will be considered presently.

Recognizing the inefficacy of conditions as a means of promoting productive land use, Governor Macquarie introduced in November, 1821, a new scheme whereby applications for grants would be considered on the basis of the proved ability of applicants to undertake land development. Grants would issue only to those who passed a capital means test.[10] This scheme was only temporary, and early in 1825, fresh instructions were sent from London laying down a new system for the alienation of Crown lands.[11] Under this system, applications for free grants were not to be considered unless the land had been put up for sale and remained unsold six months after the Proclamation announcing the sale. Recipients of free land grants were still to take subject to conditions respecting improvements, residence and alienation. Because of the tremendous backlog of work in the Surveyor-General's Department, it was found necessary in 1827 to suspend the sales regulations.[12] Nevertheless, early in 1831, it was announced by the Secretary of State that in future, no Crown land in the colony would be alienated except after purchase at public auction at a fixed minimum price.[13] The new policy was later given statutory expression in the Waste Lands Act, 1842.

Once the free grants system was abandoned, the government gave up any pretence of seeking to control land use by the annexation of conditions to freehold grants. In retrospect, the whole venture in land use control seems to have been misconceived. In the first place, insufficient was known about the physical environment for anyone to predict with certainty whether land subject to cultivation conditions could be cultivated economically. In the second place, land was granted to settlers irrespective of their means to undertake land development. Quite apart from these considerations, no system of land use control could be effective without proper provision for its policing and enforcement. In the absence of compulsory registration of land dealings, there was no chance at all of enforcing conditions restricting alienation.

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[8] J. T. Bigge, *Report of the Commissioner of Inquiry into the State of Agriculture and Trade in the Colony of New South Wales* (1823) 37.

[9] *Ibid.*

[10] Macquarie to Bathurst, 28 Nov., 1821, *H.R.A.*, I, x, 568.

[11] Bathurst to Brisbane, 1 Jan., 1825, *H.R.A.*, I, xi, 434 *et seq.*, 454-6 *et seq.* See also Instructions to Governor Darling, 17 July, 1825, *H.R.A.*, I, xii, 107-25.

[12] Darling to Bathurst, 17 April, 1827, *H.R.A.*, I, xiii, 254-5; Huskisson to Darling, 9 Nov., 1827, *id.* 614.

[13] Goderich to Darling, 9 Jan., 1831, *H.R.A.*, I, xvi, 19-21. See also *G.N.* 1 July, 1831, *H.R.A.*, I, xvii, 850-1, n. 25, *G.N.* 1 Aug., 1831, *H.R.A.*, I, xvi, 864-7, n. 116.

Without regular inspection of properties there was little possibility of detecting breaches of cultivation and residence conditions and conditions respecting building standards.

The fact that so many of the early Crown land grants in fee were subject to conditions has complicated the investigation of land titles. Titles, originally thought to be indefeasible, on closer examination may be found to be defeasible titles only. The question then arises whether the conditions annexed to the Crown grant are valid, and if so whether any breach of those conditions in the past has affected the title of the grantee and his successors in title. These problems are dealt with below.

Validity of Conditions in Crown Grants

There have been few judicial decisions regarding Crown grants upon condition, but so far as one may judge, the Crown is allowed slightly more latitude in the annexation of conditions to its grants than are private grantors. In a private grant in fee simple, a condition which prohibits alienation absolutely or for a limited period of time is void. The same applies where the land is granted on the condition that the grantee and his successors in title use the land for a particular purpose.[14] In the Irish case of *Fowler* v. *Fowler*,[15] the Crown grant under consideration imposed fairly general restrictions on alienation. An annuity had been granted to a trustee on trust to pay the same to a named beneficiary, her executors and administrators, subject to the condition that she did not alienate her interest by sale, mortgage or anticipation. The question to be decided was whether this condition had been infringed by the registration of a judgment mortgage. The Master of the Rolls held that it had not, because the conveyance was involuntary and the condition in the Crown's grant related only to voluntary dispositions. The validity of the condition restricting alienation seems not to have been an issue, but obviously, if the condition was void, the question of its breach would not have been relevant.

A condition subsequent in a private land grant is considered void *ab initio* if it offends against the Rule against Perpetuities. Whether conditions in Crown grants may be held void on this ground is open to doubt. The Judicial Committee of the Privy Council in *Cooper* v. *Stuart*[16] held that although the Rule against Perpetuities was received as part of the general law of New South Wales, it had no application at all to land grants in which the Crown had reserved a right to resume the land at some remote date in the future if and when it should be required for public purposes. In alienating the waste lands of the colony, the Board pointed out, the Crown's object was not so much to make money as to encourage people to settle in the country. The reason why the Rule against Perpetuities was thought not to apply to resumption clauses in Crown grants was explained thus:

> It is simply impossible to foresee what land will be required for public purposes before the immigrants arrive who are to constitute the public. Their prospective wants can only be provided for in two ways, either by reserving from settlement portions of land, which may prove to be useless for the purpose for which they are reserved, or by making grants of land in settlement, retaining the right to resume such parts as may be found necessary for the uses of an increased population. To adopt the first of these methods might tend to defeat the very objects which it is the duty of a colonial governor to promote; and a rule which rests

[14] *Theobald on the Law of Wills* (12 ed. 1963) Chap. 44; G. C. Cheshire, *The Modern Law of Real Property* (8 ed. 1958) Chap. VII.
[15] (1865) 16 Ir. Ch. R. 507.
[16] (1889) 14 App. Cas. 286.

on considerations of public policy cannot be said to be reasonably applied when its application may probably lead to that result.[17]

Many of the other common law rules regarding grants on condition are also founded on public policy, though the courts have sometimes disguised this fact by holding conditions void on the ground that they are repugnant to the estate granted. But to characterize a condition as repugnant to the estate granted may be begging the question. The common law recognizes a variety of freehold estates in land, including fees simple absolute and fees simple on condition. If a person makes a grant in the terms appropriate for the creation of an estate in fee simple, but then annexes conditions which have the effect of denying to the grantee all the rights and powers associated with such an estate, the real question is not so much whether the conditions are inconsistent with the limitation of an estate in fee simple, but whether or not grantors should be permitted to create qualified estates of the type envisaged in the particular case. By what name such estates are to be known is of no great importance. In point of fact the courts have sanctioned the creation of estates partaking of some of the characteristics of fees simple, though not of all of them. What qualifications a grantor may impose upon the rights and powers ordinarily exercisable by a tenant in fee simple ultimately must depend not on *a priori* notions about estates in fee, but on what the judges consider to be in the public interest. To allow private landholders the power to dictate how their successors in title may use and dispose of the land may be thought undesirable. But a private grantor occupies a position vastly different from that of the Crown in a newly discovered territory.

In relation to colonial waste lands, the Crown really acts in two capacities. It is the original proprietor of the soil, but in the management and disposal of Crown lands, it performs a function governmental in character. In the absence of controlling legislation, the Crown is free to alienate the public domain as it sees fit, subject, of course, to such restrictions as are imposed by the common law. Legislative controls over the alienation of Crown lands in the Australian colonies were not introduced until the enactment of the Waste Lands Act in 1842. However, in the intervening period, the granting of Crown lands was not left to administrative whim. Public lands policies were formulated by the British government and rules giving expression to those policies laid down for the guidance of colonial Governors. The rules set out in royal instructions and despatches from the Secretaries of State were designed as rules of general application and, though not rules of law in the strict sense, they had much the same practical effect. It is relevant to note that in many cases, the instructions received by the Governors were translated into "land regulations" and subsequently published under that name in official gazettes. Clearly, if a rule having legislative force prescribed the annexation of certain conditions to Crown land grants, no court of law could hold the conditions invalid merely on the ground that it considered them repugnant to public policy. If one accepts the view that royal instructions laying down rules of general application performed the same regulatory purpose as legislation on Crown lands, then it is equally clear that the conditions inserted in Crown grants pursuant to royal instructions cannot be judged by the same standards of public policy as apply to conditions in private grants. When considered in conjunction with the broad policies that lay behind them, the conditions in the Australian land grants take on an aspect quite different from that of similar conditions in private grants. Collectively, their object was to promote land improvement and economic development. For the courts

[17] *Id.* 293-4.

to have held them contrary to public policy would have been tantamount to condemning the government's objectives, and with them the whole principle of governmental control of land use.

Avoidance of Crown Grants for Breach of Condition

In some respects, the draftsmanship of the early Crown grants left much to be desired. Frequently the grants of conditional fees contained a clause declaring that on breach of condition the grant should be "null and void" and the premises forfeit and escheat to the Crown. However, breach of condition does not *ipso facto* determine either a private or a Crown grant on condition subsequent, but merely renders it voidable.[18] In the case of a private grant, the grantee's interest is determined upon the re-entry of the grantor or his heirs, but in the case of a Crown grant, the common law rule is that "where a common person cannot have a possession, neither in deed nor in law, without an entry, the King cannot have it without an office, or other record".[19]

In England, the Crown's right to resume usually was tested by the ancient process of inquisition of office, or as it is sometimes called, "office found". This involved "an inquiry made (through the medium of an indefinite number of jurors summoned by the sheriff); by the King's officer, his sheriff, coroner, or escheator *virtute officii*, or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the King to the possession of lands or tenements, goods or chattels".[20] Most inquisitions were set in motion by writs or *ad hoc* commissions issued out of Chancery.[21] By the statute 33 Hen. VIII, c. 22 (1541), inquisitions without writ or other process under the Great Seal were possible only if the land in question was of an annual value not in excess of £5. After the enactment of this legislation, inquisitions before escheators (officers of the Exchequer), sheriffs and coroners *virtute officii* were of no great significance.

The conduct of inquisitions of office was governed by statute also. Inquisitions were required to be taken openly in towns of men of good fame.[22] As a safeguard against forgery, the jury's findings had to be engrossed in duplicate and indented; one part was to be given to the foreman of the jury, the counterpart to the escheator or the commissioner of escheat.[23] Within a month after the jury had delivered its findings, the inquisition had to be returned into the Chancery or the Exchequer. If an office had been found for the Crown, third party claimants could intervene by traverse of office, *monstrans de droit* or by petition of right.[24] For the better protection of

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[18] *Littleton on Tenures* 351; *Fisher* v. *Gaffney* (1884) 5 N.S.W.R. 276.

[19] Joseph Chitty, *Prerogatives of the Crown* (1820) 249. See also *id.* at 248. As to when the Crown's entitlement is shown by matter of record see *Doe d. Hayne* v. *Redfern* (1810) 12 East 96 and *A.-G.* v. *Ryan (No. 2)* (1852) Legge 719. In the latter case the Full Court (Stephen, C.J., Dickinson and Therry, JJ.) held that where a Crown grant had been made to A and B, their heirs and assigns in trust for C, on C's death the Crown was entitled and since on the Information of Intrusion, the death of C was not disputed, on the face of the pleadings title appeared in the Crown.

[20] Chitty, *op. cit.* 246. On inquests of office see Constable, *Prerogativa Regis* (ed. S. E. Thorne) (1949) 46-7; *The Warden and Commonalty of Sadlers' Case* 4 Co. Rep. 54b; *Paris Stoughter's Case* (1610) 8 Co. Rep. 168a; 2 *Co. Inst.* 689; Chitty, *op. cit.* 246-61.

[21] See H. E. Bell, *An Introduction to the History and Records of the Court of Wards and Liveries* (1953) 72.

[22] 36 Ed. III, st. 1, c. 13 (1362); 8 Hen. VI, c. 16 (1429); 1 Hen. VIII, c. 8 (1510).

[23] 36 Ed. III, st. 1, c. 13 (1362); Hen. VIII, c. 8 (1510); Bell, *op. cit.* 74.

[24] 8 Hen. VI, c. 16 (1429). On a traverse of office, the claimant could not dispute the facts found on the inquest (except where they showed that to obtain possession the Crown would have to take further proceedings by *scire facias*) but could only assert that the facts showed title in himself. Legislation of Edward III's reign (34 Ed. III, st. 1, c. 14 (1361) and 36 Ed. III, st. 1, c. 13 (1362)) enlarged the range of issues that might be raised by traverse of office. A claimant was also permitted to intervene and otherwise

third party claims, it was enacted in Henry VI's reign that no lands seized by the Crown upon office found could be regranted before the inquisition had been returned into Chancery or the Exchequer, and had remained there for one month.[25]

How far, if at all, did these requirements apply in the Australian colonies? At first, the necessity of establishing the Crown's entitlement to re-enter upon breach of condition, appears to have been overlooked. A General Order promulgated by Governor King on April 18, 1803, for example, announced the cancellation of a grant issued to a settler at the Hawkesbury by reason of the fact that he had sold his allotment contrary to the condition forbidding alienation for five years. Curiously, in this instance, the breach of condition had been committed before the deed of grant actually issued. The settler merely had been promised a grant and had been permitted to enter into possession pending grant. "To prevent such fraudulent Practices in future," King's Order concluded, "every person about purchasing a Farm will do well to inform himself, if there are any legal Title Deeds; otherwise any loss and disappointment must fall on the Seller and Buyer."[26]

In 1821 Barron Field, the judge of the Supreme Court, took the opportunity of reminding the Crown that:

> In the case of a conditional Grant, tho' the Condition be unperformed, the King cannot regrant without Office found by the Stat. 18 Henry 6, c. 6, that is without the Inquest of a Jury to ascertain whether the condition be performed or not. . . . Should the Crown ever please to take advantage of the unperformed Conditions in the Grants of the Colony, it must first appoint a Commission of Escheat or Inquest of Office.[27]

The judge did not indicate whether the Governor or the courts of the colony possessed the power to issue the necessary processes, though having regard to the limitations on their jurisdiction, it is doubtful whether at this time either the Governor or any of the courts could have authorized writs or commissions of escheat. The Governor, it is true, had been invested by his Commission with power "to constitute and appoint justices of the peace, coroners, constables and other necessary officers and ministers . . . for the better administration of justice and putting the law in execution"[28] and presumably would have had power to appoint escheators. But escheators, as we have seen, could not take inquisitions of office without writ or commission, except in cases where the value of the lands in question did not exceed in their annual value the sum of £5. Whether the civil courts erected in the colony could have issued writs or commissions of inquiry seems doubtful. Both the Court of Civil Jurisdiction, established under the First Charter of Justice, 1787,[29] and the Supreme Court, constituted under the Second Charter of Justice, 1814,[30] had been invested with some common law jurisdiction but not, it should be noted, jurisdiction as ample as that possessed by the Lord Chancellor in England.

It is interesting to note that this was not the first time colonial judicial machinery had been found inadequate to handle inquests of office. In 1773 the Board of Trade referred to the Privy Council a complaint received from a resident of New Hampshire complaining that the Governor of the colony

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show his right (*autrement monstrer son droit*) by confessing the title of the Crown and avoiding it upon proof of his own title. The latter procedure was referred to as *monstrans de droit*. See 9 *H.E.L.* 24-6, 32-9.

[25] 8 Hen. VI, c. 16 (1429); 18 Hen. VI, c. 6 (1439); Chitty, *op. cit.* 249.

[26] *H.R.A.*, I, iv, 339.

[27] *Sydney Gazette*, 7 April, 1821; cited by Frederick Garling, *H.R.A.*, IV, i, 412.

[28] See Phillip's Second Commission, *H.R.A.*, I, i, 4.

[29] *H.R.A.*, IV, i, 6-12.

[30] *H.R.A.*, IV, i, 77-94.

had resumed land for breach of condition without office found. It was pointed out by the complainant that there was no Court of Chancery or other court in New Hampshire which possessed authority to issue a commission of inquiry.[31] In those colonies lacking Courts of Chancery, it was common practice for the jurisdiction of Lord Chancellor, both equitable and common law, to be exercised by the colonial Governor, by virtue of the clause in his Commission giving him custody of the public seal of the colony.[32] Where the jurisdiction of the Lord Chancellor had not been reposed in other hands, it was the Governor who in practice issued writs or commissions of inquiry. In some of the instructions issued to the American colonial Governors, clauses will be found explicitly directing the Governor not to dispose of forfeited or escheated lands until the sheriff, provost marshal or other appropriate officer had made inquiry of sworn jurors as to the value of the lands. But, in addition, the Governor was instructed to return an account of the lands to the Treasury and the Board of Trade and to await His Majesty's directions on disposal of the lands.[33] In his book *Colonial Law*, Charles Clark described the procedure for resumption of escheated property in colonies in which there were no escheat tribunals as follows:

> When property has escheated to the Crown . . . a petition from the parties (applying for a re-grant) to His Majesty is forwarded to our (the colonial) agent residing in London; he presents it to the Secretary of State for the Colonies, who submits it to His Majesty. The Secretary of State directs the Governor to issue a writ of inquiry. The Governor sends a writ, directed to certain persons, requiring them to issue a precept to the marshal for impanelling a jury to try the question of escheat or not; they hear the evidence and decide accordingly. The judges report the case to the Governor, who acquaints the minister with the result. . . .[34]

Possibly it was this form of proceeding which James Stephen, Jr., counsel to the Colonial Office, had in mind when, in reply to the New South Wales Attorney-General's query whether English practice in regard to escheated property should be adopted in the colony,[35] he wrote: "the Governor cannot lawfully grant escheated property, except upon a reference to the Secretary of State, to whom he ought to communicate the circumstances of each case. . . ."[36] There is no evidence that any of the Australian Governors were instructed to issue commissions of escheat. Shortly after Barron Field had drawn attention to the necessity of Office found before land was resumed for breach of condition, the Governor, Sir Thomas Brisbane, requested Earl Bathurst, the Secretary of State, that a commission should be issued.[37] Whether any action was taken pursuant to this representation, the despatches do not indicate, but with the passing of the Imperial Act, 4 Geo. IV, c. 96 (1823), it is possible that the Colonial Office felt that no specific action was called for. If proceedings for resumption had to be taken, they could be instituted in the newly established Supreme Courts in New South Wales and Van Diemen's Land. When he replied in 1826 to Governor Arthur's query about enforcement of conditions in Crown grants, Earl Bathurst obviously took it for granted that the colony of Van Diemen's Land possessed the requisite machinery.

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[31] 5 Acts of the Privy Council (Colonial Series) 370-5.
[32] Charles Clark, *Colonial Law* (1834) 31-2.
[33] L. W. Labaree, I *Royal Instructions to British Colonial Governors, 1670-1776* (1935) 331.
[34] Clark, *op. cit.* 173. On escheat courts see *id.* 193, 233, 312, 354, 377, 457.
[35] Enclosure in Brisbane to Bathurst, 8 Feb., 1825, *H.R.A.*, I, xi, 497.
[36] Stephen to Hay, 15 Aug., 1825, *H.R.A.*, IV, i, 616; Bathurst to Darling, 24 Aug., 1825, *H.R.A.*, I, xii, 56-7.
[37] Brisbane to Bathurst, 29 Nov., 1823, *H.R.A.*, I, xi, 184.

Grantees who had failed to cultivate their holdings, he said, should be told that their lands thereby had "become liable to resumption, whenever the Government may think proper to enforce the conditions of the original Grant".[38]

But whether the Act 4 Geo. IV, c. 96 (1823) gave the Supreme Courts in New South Wales and Van Diemen's Land the requisite power to issue writs or commissions of escheat was a matter on which legal opinions differed. In a memorandum on the Act dated October, 1826, Alfred Stephen, then Solicitor-General of Van Dieman's Land, wrote:

> The resumption of lands by the Crown, for breach of conditions on which granted, being a most important topic, and a measure about to be resorted to in very many instances of gross violation, I would respectfully suggest that additional facilities for enabling the Crown to effect such resumption would be very desirable. It has indeed been questioned whether the Crown possesses at present, under all circumstances, any means whatever in the Colony of compelling restitution of lands by law, if possession be obstinately retained. In New South Wales, however, an Information of Intrusion was filed and pleaded to, and the case was tried without any objection taken. But, in fact, the adoption of any summary simple mode of proceeding and trial, calculated, without technicality of pleading, for raising and deciding the single point of "condition, broken or not", would be materially in ease of the defendants.[39]

Exactly why it was that doubts had been raised about the existence of facilities in the colony to compel restitution of lands upon conditions broken, the Solicitor-General did not say. Elsewhere in his memorandum he drew attention to the failure of 4 Geo. IV, c. 96 to give the Supreme Court "the many important powers, appertaining to the Common Law Side of" the Court of Chancery in England, and to the difficulties the Crown had encountered in enforcing the liabilities of its debtors.[40]

The problems which had arisen in the enforcement of debts owed to the Crown were somewhat akin to those associated with resumption of lands for breach of conditions. To avail itself of the prerogative writ of extent against debtors, the Crown first had to establish by matter of record that the defendant was indebted, which usually involved an inquisition of good and lawful men. Having established indebtedness, the Crown was free to issue a writ of extent directing the sheriff to make inquiry, again of a jury, as to the debtor's property, and then to seize the property in satisfaction of the debt.[41] In 1824, the Chief Justice of Van Diemen's Land had refused an application by the Attorney-General for "a commission of Information as to the goods and chattels of a Felon and for an Extent against the persons, who [had] possessed themselves of the same" on the ground that these processes involved the empanelling of a jury and that under s. 6 of 4 Geo. IV, c. 96, issues of fact in actions at law could not be tried by jury unless both parties agreed and the Supreme Court sanctioned this mode of trial.[42] Whether commissions of information and inquisitions of office could properly be characterized as actions at law is doubtful, but the fact remains that a superior court judge had placed an obstacle in the way of enforcement of the Crown's rights by the common law processes which entailed any form of inquisition.

In view of the uncertainties which had arisen in both New South Wales and Van Diemen's Land about Crown proceedings in general, one would have expected the Colonial Office to have offered some comment and advice on the

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[38] Bathurst to Arthur, 5 March, 1826, *H.R.A.*, III, v, 119.
[39] *H.R.A.*, III, v, 427-8.
[40] *Id.* 422.
[41] Chitty, *op. cit.* Ch. XII.
[42] Comments of J. T. Gellibrand on 4 Geo. IV, c. 96, 24 Sept., 1824, *H.R.A.*, III, v, 242-3. See also Gellibrand to Arthur, 17 Nov., 1824, *H.R.A.*, III, v, 244-5.

problem. But apart from James Stephen's perfunctory observations, no advice seems to have been received from London as to what should be done to enforce the Crown's rights. The Imperial Act 9 Geo. IV, c. 83 (1828) which took effect on the expiration of 4 Geo. IV, c. 96, said nothing about Crown proceedings, although the jurisdiction of the Supreme Courts in New South Wales and Van Diemen's Land was extended by the inclusion of a provision giving them power and authority to do "all such acts, matters, and things as can or may be done by the . . . lord high chancellor within the realm of England, in the exercise of the common law jurisdiction to him belonging". In addition, s. 8 made it possible for the Supreme Courts to award trial by jury in actions at law at the request of one of the parties only. This presumably would have overcome some of the objections of Chief Justice Pedder to the issue of commissions of inquiry. There is *dictum* in at least two subsequent cases supporting the view that the Supreme Court as constituted by the Act of 1828 has the requisite power to institute inquisitions of office.[43] Significantly both of these cases arose after 1844, when jury trial became universal in actions at law and civil issues of fact before the Supreme Court.[44]

For re-entry to be made on behalf of the Crown upon breach of condition, it has never been suggested that office found is an indispensable preliminary. It is enough that the Crown's title be established by matter of record, a requirement which would be satisfied by entry of judgment for the Crown in a court of record. Mention already has been made of one form of proceeding which the Crown might invoke instead of inquisition of office. In his memorandum of 1826 Alfred Stephen spoke of actions having been brought in New South Wales upon information of intrusion, a prerogative remedy in the nature of the action for trespass *quare clausum fregit*.[45] The propriety of this remedy in cases where the Crown desired to resume colonial lands for breach of condition had been confirmed by the Crown Law Officers in England as far back as 1737.[46] Chief Justice Forbes of the New South Wales Supreme Court shared their opinion. Assuming, he said in *R.* v. *Steel*,[47] that the case is one in which to entitle him to possession the subject would be driven to an entry, the Crown in like case could establish its entitlement by information of intrusion, for the information was a matter of record.[48] It should be noticed, however, that where the Crown seeks to show title by proof of a grant upon condition and breach of condition, the mere filing of the information could not justify a re-entry by the Crown. In cases where the Crown alleges merely an intrusion upon Crown lands, the defendant must specially plead and prove his title, and unless he specially pleads, he may be evicted immediately, since title for the Crown appears on the record.[49] It is otherwise, however, if the Crown informs the Court that the land in dispute has been granted by the Crown. As the Supreme Court of New South Wales pointed out in *Reg.* v. *Cooper*,[50] in such cases the defendant cannot be put to proof of his title. Rather it is for the Crown to prove the facts upon which its entitlement

[43] *R.* v. *Steel* (1834) Legge 65; *A.-G.* v. *Ryan* (No. 2) (1852) Legge 719.
[44] 8 Vic. No. 4.
[45] Chitty, *op. cit.* 332-5.
[46] G. Chalmers, 1 *Opinions of Eminent Lawyers* (1858) 175; W. Forsyth, *Cases and Opinions on Constitutional Law* (1869) 151. (The opinion is dated 11 Feb., 1737.)
[47] (1834) Legge 65.
[48] *Id.* 67.
[49] Chitty, *op. cit.* 332-5. The Statute 21 Jac. I, c. 14 (1623) which provides that where the Crown is out of possession for more than twenty years and during that time has not taken the profits, the defendant shall remain in possession until title is tried, proved and adjudged to be in the Crown, has been held not to apply in New South Wales (*Hatfield* v. *Alford* (1846) Legge 330; *Doe d. Wilson* v. *Terry* (1849) Legge 505; *cf. Emmerson* v. *Maddison* (1906) A.C. 569).
[50] (1886) 7 N.S.W.R. (L.) 15.

to possession depends. Until title be tried, proved and adjudged to be in the Crown, the defendant cannot be ousted from his possession.

Conditional Grants and the Crown Suits Act

The Crown law authorities in Australia did not in practice adopt a rigorous policy of enforcing Crown grants on condition. Obviously, if the Crown was to assert its rights to the full, it was imperative that resumption proceedings be initiated as soon as breaches of condition were discovered, otherwise, the evidence showing the Crown's entitlement might be destroyed. Evidence of breach of cultivation conditions was easily obliterated, and in any event, it would have been difficult for the Crown to find jurors who were prepared to return verdicts adverse to their fellows. Proof of breach of conditions against alienation would not have been as difficult, especially after 1817, when a system of voluntary deeds registration was introduced into New South Wales. But even when the evidence to prove the Crown's entitlement could be found, was the grantee's title perpetually to be liable to defeasance?

Although the Crown Suits Act, 1769,[51] does not deal specifically with proceedings for resumption of lands by the Crown for breach of conditions subsequent, it does, nevertheless, limit the time within which legal action may be taken for recovery of land. Section 4 of the Act provides that where the Crown is entitled to recover lands previously granted for a "limited estate in fee simple", no proceedings for recovery shall be "filed, issued or commenced" except within sixty years after the Crown becomes entitled to possession. Although the application of this section to proceedings for avoidance of Crown grants on condition has not been the subject of judicial decision, it is hard to imagine what kinds of situations it might refer to, if not to avoidance of conditional fees.

In New South Wales, legislation has been enacted under which the Crown may be precluded from recovery even before the expiration of the limitation period. In 1849, a Bill was introduced into the Legislative Council to provide that no title should be held invalid for non-performance of conditions in a Crown grant. At the instigation of Sir Alfred Stephen, the Chief Justice, this proposal was modified so as to prevent resumptions only in those cases where the Crown had signified its intention not to proceed. Accordingly it was enacted in s. 10 of the Titles to Land Act, 1858, that no title should be held bad at common law or equity for breach or non-performance of any condition in the Crown grant where it should appear by Proclamation or writing under the hand of the Governor, counter-signed by the Secretary for Public Lands and Works (now the Minister for Lands), that no proceedings would be at any time taken on behalf of the Crown for avoiding the grant by reason of the breach or non-performance. The apparent intention here was that, once by Proclamation or other written instrument the Crown had declared its intention not to take proceedings for resumption of lands for conditions broken, the Crown grant thereafter should be construed as if it had conveyed a fee simple absolute.

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[51] 9 Geo. III, c. 16; *A.-G.* v. *Love* (1898) A.C. 679.

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