

THE BACKGROUND OF THE FREEHOLD

In my last lecture I tried to present to you a diagnosis of the sickness in our economy and more particularly in our great farming industry. I concluded by claiming that the disorganisation and weakness in this industry basically derived from freehold land tenure.

I think you should understand the background of freehold land tenure if you are to fully understand this social institution and if you are to follow my thought as to what should replace it.

I propose in this lecture to survey briefly the evolution of freehold land tenure and why it has been so universally adopted in the English speaking world.

Our ideas of the ownership of landed property derive from three principal sources. These are (a) Roman Law, (b) the Bible, and (c) our barbarian ancestors.

Your first thought no doubt is that I am off course and that the product of ancient policies can have little bearing on current concepts. Well, we shall see.

I propose to say something about each of these sources in turn and to assess the influence of each in our modern world. You will be surprised to find that in our tradition freehold land tenure is a comparatively modern thing. I do not speak of other traditions where land ownership is simply an expression of the relationship between the conqueror and the conquered but will confine myself to freehold land tenure as we in New Zealand know it today.

Roman Law

The Roman concept of property was that of absolute ownership. There was little distinction between the ownership of land and things produced by human labour. Historically the military conquest of the world generated this concept of property and the institution of slavery. The Romans were governed by law and they governed the world by law and the law embodied the concepts of absolutism in government and absolute ownership of land.

Huge estates worked by slaves became a general pattern not only in the conquered lands but in Italy itself. In Pliny's famous sentence the fall of the empire stemmed from this cause.

"Great estates ruined Italy," he said, "and the crop of men failed."

The barbarians who overran the western empire changed all that, except in the southern parts of Italy and in Spain and Portugal where Roman concepts of property survived and where very large landed estates persist even to this day.

The Spanish and Portuguese conquerers carried these concepts to the lands they conquered and colonised in what is now Latin America and there they reproduced this Roman pattern of land ownership.

Today in Latin American lands, from the Philippines to Chile, from Mexico to Terra del Fuego, the pattern of land tenure is the ownership of land by a small privileged elite and a swarming degraded peasantry labouring on the large estates or tilling exhausted lands by primitive methods. The results you know. Armed forces are maintained not so much for national defence as to suppress internal revolt. Democratic government is the exception and attempts at reform are periodically drowned in blood. Any patriot, any lover of liberty, any champion of the poor who may arise is a communist and as such an enemy of society. Latin America is a scandal to the Western World and the Christian faith.

But I must not be carried away by my indignation. I must stick to my main point. That point is that the present condition of affairs in Latin American lands stems basically from Roman concepts of land tenure. I will not develop the theme. You must all know something of the facts.

Constantine the Great divided the Roman Empire into two parts. There were henceforth two capitals — Rome in the west and Constantinople in the east. In the course of time Western Europe was over-run by barbarians and the lights of civilisation went out over half of the known world.

The Eastern Empire lived on as a great and powerful Christian state for another thousand years. Constantinople did not fall to the Turks until 1452 — only forty years before Columbus discovered the New World.

Constantinople was the spiritual home of Russia. From the Eastern Empire, Russia drew her culture, her religion, and her law — and the law was Roman law. The Roman absolutism in government and absolute ownership of the soil harmonised perfectly with Russia's Asiatic inheritance. Russia in my youth was ruled by an emperor as absolute in his power as any Roman

emperor ever was. It was a rural polity of vast estates worked by serfs little removed from slavery who were bought and sold like cattle with the land.

In this fertile soil the seeds of revolution flourished and in 1917 the Russian Empire came to an end. Karl Marx had taught that the modern capitalist industrial state would evolve by an inevitable, predetermined process into the communist state. That is not how it happened. Roman absolutism in government and land ownership produced the revolutionary force and the Marxists merely inherited the new state which was born.

When Constantinople fell to the Turks in 1452 refugees flooded into the West. They brought books and manuscripts and all the knowledge of the ancient world back to a Europe where they were long forgotten and unknown. This cultural influx gave rise to the New Birth of knowledge called the Renaissance. They brought back not only all the learning, of the ancient world but its dominant ideas as well. They reintroduced a knowledge of Roman law with its concept of absolutism in government and in land ownership and in time these concepts were to prove to be an important influence.

The Bible

The people whom Joshua led across the Jordan to conquer the Promised Land were a tribal people. The twelve tribes were composed of extended families grouped under their tribal chiefs. The conquered lands were apportioned among the tribes in areas, not necessarily equal in size, but which were judged to be equal in productivity. The only common ruler these people acknowledged was their God and the only law they recognized was His law given them by their great leader Moses.

The law contained no trace of the absolute ownership of land, despite the fact that this concept was general in Egypt where their ancestors had lived for four hundred and fifty years. The law proclaimed: "The earth is the Lord's." "You are strangers and sojourners in the land your Lord has given you." The land was an inheritance to be possessed and not to be bought and sold. These concepts are repeated throughout the scriptures wherever there is reference to land. In Israel no family, no man or woman could legally be dispossessed of land. Each fiftieth year was a Year of Jubilee and any land in alien hands in this year reverted to its original possessor. The land "sold" was in

fact leased until the next Jubilee year and the price paid for its use depended upon how far ahead the year of Jubilee lay. Every man had secure possession of his land but no absolute ownership. He held it as a member of a family and it passed on to his family by inheritance.

The Christian fathers taught that the ethical principles of the Mosaic Law were eternally valid and undoubtedly these principles contributed substantially to the development of the land system of mediaeval England.

The barbarians

Our barbarian ancestors who overran the Western Empire held their land originally under a crude communism like the Celts of Ireland and the Maoris of New Zealand. Their clans or tribes consisted of clusters of extended families and each family and each person participated equally in limited property rights in their tribal land. All free men had access to land to live by, whether as hunters or tillers of the soil. The ancient Britons were no exception to this rule. England was a Roman province for three hundred and fifty years. When the Romans withdrew so total was the conquest of Britain by the barbarians that not a trace of the Roman polity survived and today even archaeological remnants are few. Britain was largely Christianised by Celts from Ireland which had never known the Roman yoke or influence. In this fallow soil the Normans planted the feudal system of land tenure.

The feudal system

The concept of land ownership embodied in the feudal system owed nothing to Roman law. It was evolved in a chaotic and fragmented society where men attached themselves to warrior chiefs for their mutual protection. Thus evolved the concept of fealty to a lord in return for the protection so necessary to survive. Barbarian tribal communism, Biblical law, preserved by the Church, compounded with these social conditions to produce the feudal system.

In the feudal economy the king represented the Lord and was His anointed servant. He also represented the Lord's people to whom the land was given as an inheritance to each family. Hierarchy and fealty were essential parts of the system. The former element came from the structure of the Church and the latter from the military purpose of the system. The chain of hierarchy reached from the king to the humblest labourer

through the baron, the knight, the squire and the yeoman, each pledging fealty and giving military services, labour or produce for the lands he occupied. At the end of the chain were villeins bound to the soil but even they had some rights in common tillage or pasturage.

The Renaissance brought into Europe and into England a knowledge of Roman law with its concepts of absolutism in Government and land rights and they were welcomed by the rulers. The doctrine of the divine right of kings and Tudor tyranny were the fruit thereof. The feudal system was weakened and finally destroyed but it took centuries to disappear. The concepts of absolute ownership — ownership without service — holding land free of rent, service, labour, produce or other payment — freehold land tenure — began to develop.

In time it was to make the relationship of landlord and tenant one of tyrant and slave. It was to turn Scottish chieftains into Earls and Dukes whose fellow clansmen could be driven from their homes like noxious animals to clear the highlands for cattle and sheep. All power all rights at the upper end of the feudal chain were exalted; all power all rights at the lower end were abolished.

The first great break down of the system was in Tudor times when the wool trade stimulated a demand for more extensive areas for grazing sheep. All over the country tenants were evicted from their ancestral lands to provide the needed pasture lands. They could live only by thieving or casual labour. They hung from gibbets all over England. This was the origin of the first Poor Law of Queen Elizabeth's reign.

The social dislocation was enormous but nothing compared with the second period of change produced by social forces in the reign of George III when the full force of the industrial revolution developed.

In these two historic periods was demonstrated the weak position of the tenant at the bottom of the feudal chain when all political power, all social authority, all the influence wealth could bestow, were at the upper end and custom and unwritten law alone protected those at the lower end. Greed, power, Roman concepts and new technology in town and country combined to smash the system to pieces.

Twenty-one years of European war ended with the battle of Waterloo in 1815. A profound depression followed. Taxes were

high and distress was widespread but the process went on.

New industries arose based on iron, coal and steam power. The new industries needed abundant, cheap labour concentrated near the new factories. Machines, spinning cotton from America, in huge factories replaced the spinning of wool in the farmers' cottages.

There was a green revolution on the land. The use of lime and chemical fertilizers, the rotation of crops, improved implements, improved stock breeding, all united to advance the change to ever larger farms. Rural technology drove the people off the land and urban technology pulled them into the towns.

Do you see any parallel with forces operating worldwide today? If you don't it is not because it is not there.

The sturdy beggars and highwaymen of Tudor times appeared again but they were not hanged on quite the same scale. They were transported to the plantations of Virginia as forced labourers, and when the American colonies became independent, convict ships took them to Australia.

During the reign of George III (1760-1820) 3,209 Enclosure Acts were passed by Parliament, where only landowners were represented by landowners and 6,228,901 acres of commonland were enclosed. The process went on until 1876 and by that time 8,250,000 acres were fenced off as private freehold property. Legally the process was not complete till 1922 when the Law of Property Act was passed.

Roman legal concepts had come to full fruit. Nothing remained of the old feudal system which whatever its faults, enshrined a principle eternally valid. Nothing remained but the shell of legal theory of land ownership which still survives today.

That theory says all the land of New Zealand belongs to the Queen as the supreme embodiment of all the people. All landowners are tenants of the Queen, holding their lands from her in fee simple or freehold, i.e. a tenancy free of all obligations of service, labour, produce or rent of any kind. She can take land back or resume it if the public good demands it in terms of the law and the law requires that compensation be paid the tenant according to market value.

At Waitangi the Maori people became tenants of the Queen in this sense and they were confirmed in all the rights of ownership which they enjoyed under their own customary law.

In the middle of this social revolution when the system of

land tenure was undergoing fundamental changes the virgin lands of New Zealand were first colonised in 1840 by refugees from this economic battleground. They came to an inhospitable land, bushclad and mountainous, inhabited by a primitive, cannibal people. They were isolated to an incredible degree. By the land and its produce alone they could survive.

The new settlers had seen and many had personally experienced the weak position of the tenant farmer in England. The ideal they cherished was that of a free man standing on his own land with no squire or landlord between. He wanted freehold land in his new home. Give him this and he would sweat and strive to the limit of his strength to conquer the harsh and alien land whence he had come as an exile from his native land which for four generations he was to still call "Home".

The freehold tenure of the landlord had driven them to exile but freehold land tenure for them could harm none. They were at the end of the feudal chain. There was no one below them to be harmed by their land ownership.

But in thinking this they were wrong. They were not the end of the chain, nor were their children. There were also all the generations yet unborn. This is a fatal weakness of freehold land tenure. It is also the weakness of "land to the tiller" and "peasant proprietor" concepts. A just system of land tenure must provide access to land on equal terms to succeeding generations as did the land laws of Israel and the feudal system for some centuries.

Freehold comes to New Zealand

That freehold land tenure should become general in New Zealand among the Europeans was of course inevitable. It did not obtain at all among the Maoris and the day was to come when its application to Maori lands was to prove the chief instrument in the destruction of Maori tribal society.

The immediate problem for the Imperial Government was to prevent the acquisition of areas of land by individual purchasers from the native people on such a scale as to be seriously unjust to the Maori and at the same time be a barrier to colonisation. Unchecked the country would be divided into a few estates dwarfing in size the ducal estates of England. Claims of vast magnitude were not confined to adventurers like Baron de Thierry and Captain Blenkinsop. William Charles Wentworth, a very prominent and influential citizen of Sydney, claimed that he had purchased twenty million acres of land in

the South Island and he contended strongly with Governor Gipps on the validity of his claim. He did not succeed however and the Governor did. His purchase was disallowed.

Some primary order and legality in land acquisition in early New Zealand was achieved by two quite unique and remarkable expedients — one political and the other social. The former was the Treaty of Waitangi and the latter the Wakefield plan of colonisation.

The Treaty of Waitangi

Article 2 of the treaty reads in part as follows:

"The chiefs of the united tribes and the individual chiefs, yield to Her Majesty the exclusive right of pre-emption of such lands as the proprietors thereof may be disposed to alienate."

Article 3 granted to the chiefs all the rights of British subjects. As soon as the treaty was signed by most of the northern chiefs, Lieutenant Governor Hobson issued a proclamation appointing commissioners to investigate land claims and declared all titles to land in New Zealand null and void unless allowed by Her Majesty.

For the next twenty years the Crown exercised the sole right of purchasing land from the Maoris. Thereafter for thirty years the right was waived with dire results to pakeha, and more especially, Maori society. I will touch on this matter again in a later lecture.

The Wakefield Plan

I am sure I can safely assume a general knowledge among you of the main features of the Wakefield system of colonisation and it is not necessary for me to describe it in detail.

Five of the first six settlements were of the Wakefield type. Auckland was the only exception and, in contrast with the other five, the Auckland settlement was conceived and brought forth in land speculation. Of all the Wakefield settlements Otago and Canterbury were probably the most successful because each was on a defined area of land granted by the Crown on which the native title had previously been extinguished by purchase. Lack of security of title had in Wellington been the cause of a long and bitter quarrel between the New Zealand Company and the Governor because the Crown would not recognise the validity of the Company's purchases until

approved by the Commissioners. Disputed title in Nelson resulted in armed conflict in the Wairau Valley and in Taranaki it led to war.

Within the Wakefield settlements the amount of land each settler could purchase whether town, suburban or rural was limited and the land price was high enough to discourage any attempt to purchase more. The price was set high to prevent labourers acquiring land too quickly and so prevent the situation Wakefield had observed in Sydney in earlier years where progress was severely handicapped by scarcity of labour.

Whatever criticism may be made of the Wakefield plan it did prevent the aggregation of land and this combined with the right of pre-emption by the Crown of land outside the settlements protected the country from the land monopolists.

In 1852 the Imperial Parliament passed the New Zealand Constitution Act and henceforth both these restraints on land aggregation were gradually to cease to be effective.

Under the Act power passed from the Governor to assemblies of landowners elected by their fellow landowners. Land policies in respect of both Crown lands and Maori lands were to change. During the next thirty years many private persons became possessed of very large areas. This concentration of land ownership in few hands was to become the focal point of politics from 1880 right up to the first World War. The story is told in my next lecture.