LAND RIGHTS: THE AUSTRALIAN ABORIGINES HAVE LOST A LEGAL BATTLE, BUT . . .

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Concern for aboriginal rights has been mounting in many former British colonies in the last decade. Nowhere is this more true than in Australia where there are no treaties and few statutes which make any attempt to protect the rights of the original inhabitants of the continent. But the decision in Milirrpum & Ors. *v.* Nabalco Pty. Ltd. & The Commonwealth of Australia *appears to have "blocked further action through the courts and . . . forced the debate into the political arena" by refusing to recognize any legal obligation on the Crown to take cognizance of aboriginal rights based on customary native tenure as "their relationship with the land could not be characterized as a* proprietary *interest." But the authors submit that the* Milirrpum *court "failed to discover the existence of communal native title" because they operated in a conceptual framework, the law of real property, which was not equal to the task. Instead the authors suggest that such rights stem from the aborigines' status as British subjects (and "central to this issue is the distinction between colonies acquired by conquest and those acquired by peaceful settlement"). In colonies acquired by peaceful settlement or annexation the aborigines were British subjects under the protection of the common law. And on the basis of case law, aborigines do have some rights at common law: their title has been characterized as a right of "qualified" or "modified" dominion over the land, to the extent, at least, of occupation or enjoyment of the land, which is consistent with the Crown's right of pre-emption (exclusive right to extinguish native title).*

The authors cite the example of New Zealand and the British experience with the Maoris (where the theory was cessation with consent), offering a detailed and careful examination of historical materials to support their view that there does exist a doctrine of communal native title. They suggest that where aborigines enjoy the status of British subjects, the Crown's pre-emptive right can only be exercised under the common law, *and therefore aboriginal rights could only be extinguished with their consent, by compensation or pursuant to some statutory authority. In* Milirrpum, *Blackburn J. rejected the New Zealand example, because it involved only a statutory* policy, *but the authors submit that this view was incorrect, as a careful analysis of the cases reveal that the legislation was only* declaratory *of the common law, and that aborigines were not "aliens at the mercy of the Crown's prerogative power". The authors further suggest that the cases reveal that "the traditional reasons for denying aborigines their land rights are illusory" as in* Tamaki, *the court rejected arguments that aboriginal land tenure was not cognizable at law, and that extinguishment by the state was not examinable by the courts.*

The authors suggest that a more cogent reason for the differences between the Australian and N.Z. experience, is that aborigines in Australia were considered more primitive than the N.Z. Maoris, but the authors state that the doctrine of communal native title should not *depend on tribal sophistication but upon a system of tenure "known to lawyers or discoverable by evidence". The authors therefore submit that "the expropriation of lands subject to customary tenure has been and still is contrary to the common law unless the Crown can point to consent, compensation or some statutory authority" and that the* Milirrpum *court was "wrong in holding that the plaintiff's rights could be extinguished by the manifest policy of the executive government", and was wrong in rejecting the existence of a doctrine of communal native title.*

The reader is also referred to the following article by Professor Peter Cumming which concentrates on the Canadian experience in this area.

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I

The need for an authoritative statement of the law relating to aboriginal land rights is even more urgent in Australia than in Canada. The Australian aborigines do not even have treaties which have been dishonoured. There are precious few statutes which make any attempt to protect the rights of the indigenes. Admittedly, there are numerous officials administering several reserves but the intruding white society tends to retrieve the lands or restrict their use if they prove valuable to the dominant capitalist society as, for example, tourist resorts or mineral deposits. Certainly Australia is faced with the inevitable destruction of aboriginal society unless some legal or political settlement protects its social and cultural integrity.

In the last decade, a few white Australians have started to feel some concern for the original inhabitants of the continent. The public conscience has been stirred by reminders of the callous and indiscriminate killings which occurred in the early days of settlement when the aborigines were treated little better than kangaroos and other "vermin" who interfered with profitable land development. In the twentieth century, these attitudes were replaced by an equally lethal apathy which has allowed aborigines to exist in appalling conditions, particularly when they have been more or less de-tribalized. In these circumstances, the "fringe-dwellers" on the edge of white society suffered conditions of health, education and housing which were as bad as those found anywhere in the world. Most importantly, aboriginal morale was so low that they started to believe the barely articulated prophecy (or wish?) of white society that the Australian indigene was a dying race.[1]

The recent Australian decision in *Milirrpum & Ors.* v. *NabalcoPty. Ltd. and the Commonwealth of Australia*[2] seems to have effectively blocked any further action through the courts and has forced the debate into the political arena. The court decided that there was no legal obligation on the Crown to recognize and respect aboriginal occupation of traditional tribal land on the basis of customary native tenure.

In response, the following pages will attempt to show that the law should ascribe a proprietary status to the system of customary native tenure, whatever its *indicia,* and that that system can be extinguished only by consent, compensation or pursuant to some statutory authority. There are two subsidiary themes. In future discussions of native rights the centre of gravity of the debate must shift to take into account the aborigines' status as British subjects, with all the rights and privileges which flow from that status. Secondly, that in a colony acquired by peaceful settlement or annexation (as opposed to conquest or cession) there is no prerogative legislative power in the Crown unilaterally to extinguish the property rights of British subjects.

II

The land in question is at the northeastern corner of Arnhem Land in the Northern Territory of Australia. The plaintiffs sued as representatives of thirteen clans, consisting of approximately six hundred people, which had traditionally lived on that land since time immemorial.

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[1] *See* Rowley, *The Destruction of Aboriginal Society, Outcasts in White Australia, The Remote Aborigines;* all three books were published in 1970.

[2] (1971) 17 F.L.R. 141; henceforth cited as *Milirrpum.*

Their claim arose out of a desire to protect these traditional land interests from the mining activities of Nabalco Pty. Ltd., a Swiss-based consortium formed to take up various leases granted by the Commonwealth Government pursuant to the Minerals (Acquisition) Ordinance 1953-1954 and the Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968. Writs were issued in December, 1968, against Nabalco and the Commonwealth seeking, *inter alia*, (a) declarations that the plaintiffs were entitled to occupation and enjoyment of their lands free from interference, (b) an injunction restraining Nabalco from interfering with the land, (c) damages, and (d) a declaration that the Minerals (Acquisition) Ordinance 1953-1954, in so far as it purported to have compulsorily acquired a right for the Crown in various minerals, was *ultra vires* and void. After unsuccessful interlocutory proceedings by the defendants seeking an order that the action be struck out,[3] the court convened in Darwin in March, 1970, to hear the *vive voce* evidence, then moved to Canberra for the argument on the law. Blackburn J. handed down his reserved judgment in April, 1971. The plaintiffs lost.

The true operation, nature and extent of the doctrine relied upon by the plaintiffs was not appreciated by the court. The court insisted that the legal rule which protects land rights is, in essence, a rule of property law, and that in order to succeed, the plaintiffs had to prove that the interests they wished to protect were characterized as 'proprietary' at common law.

The plaintiffs relied on two main arguments. First, that a proviso[4] inserted into the Letters Patent creating the province of South Australia in 1836 operated as a limitation on the power of the Executive to alienate native lands, or as some sort of constitutional guarantee of unimpeded possession of those lands. Secondly, that a common law doctrine exists which obliges the Crown to recognize and respect aboriginal title, and that occupation is a right of property which can be extinguished only on certain conditions.

The amendments made to the statement of claim at the interlocutory proceedings added a number of elements to the second argument.[5] The plaintiffs argued that aboriginal occupation was consistent with the feudal theory that the Crown has the ultimate or radical title to all the land over which it exercised political sovereignty; that in order to be recognized, the aboriginal right or custom must be capable of recognition at common law. In addition, the court was to ascertain what, according to aboriginal law and custom, was the identity of the several

[3] *Mathaman & Ors* v. *Nabalco Pty. Ltd. and the Commonwealth of Australia* (1969) 14 F.L.R. 10.

[4] The proviso was in the following terms:

> . . . Provided always, that nothing in these our Letters Patent contained shall affect or be construed to affect the rights of any Aboriginal Natives of the said Province [of South Australia] to the actual occupation or enjoyment in their own persons or in the persons of their descendants of any lands therein now actually occupied or enjoyed by such Natives.

The authors discuss below the effect of a similar proviso in relation to the erection of New Zealand as a colony separate from New South Wales in 1840. The authors believe that a very important key to a proper analysis of native rights lies in the analysis of the New Zealand case law and historical materials, which will be discussed *infra*.

[5] In Baxi, *The Lost Dreamtime: Now Forever Lost, A Critique of the Gove Land Rights Decision* (a paper, *mimeo*, delivered at the Annual Conference of The Australian Universities Law Schools Association, Hobart, August 1972, at 8), the author comments on the *Mathaman* decision, *supra*, n. 3 when the court allowed (or directed) amendments to the Statute of Claims:

> The flexibility and liberalness in declining summary dismissal of the plaintiff's claims was thus tinged with the clarity and firmness of the directives for the preparation of a fresh statement of claim. The *Mathaman* Court, and parties before it, had no means of foretelling that the ultimate losses arising from such firmness will cancel away the immediate gains stemming from flexibility on matters of procedure. The *Mathaman* Court made look possible for the plaintiffs what the *Milirrpum* Court was to demonstrate as impossible. Here we have in miniature the dialectical processes of history doing their silent work.

plaintiff clans claiming the land, the limits of the land claimed, whether the interest was proprietary, and the incidents of that interest. Once established, the native title owed its validity to the common law. The native title could only be extinguished by the Crown, or, perhaps, by purchase or voluntary surrender, or by forfeiture after insurrection; in the other alternative, extinguishment was possible by explicit legislation or Act of State.

This structure of argument, which sought to prove the "doctrine of communal native title" (to use the term employed by the judge)[6] was imposed upon the plaintiffs at the interlocutory proceedings. This made a decision adverse to the plaintiffs almost inevitable. To state the argument in those terms was open to serious question. A better formulation of the plaintiffs' case would be stated as follows:

> The doctrine of communal native title accords a proprietary status to the native socio-economic-legal system. The court need not go behind that system to discover whether, as part of that system, there are *indicia* which can be characterized as proprietary.
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> This proprietary status can be interfered with or extinguished only by the Crown. In a colony acquired by peaceful settlement or annexation, property rights can be extinguished only by consent, compensation, or pursuant to statutory authority. There is no prerogative power in the Crown unilaterally to extinguish the property rights of British subjects.
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> The doctrine binds the Crown only in settled colonies and has no operation in conquered colonies. In a conquered colony, respect for native rights is a political matter and within the prerogative legislative power.
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> The rationale of the doctrine is that in a settled colony the aboriginal inhabitants are British subjects at common law, with all the rights and privileges flowing from that status.

As we shall see, this was not the way in which Blackburn J. approached the problem.

III

The existence of the doctrine of communal native title, and its operation and extent, were treated by Blackburn J. as one and the same question. If the plaintiffs could prove, on the legal authorities, that there was an obligation on the Crown to recognize and respect their rights, they then had to show that those rights were 'proprietary' at common law. Moreover, because the Crown was a defendant to the proceedings, the plaintiffs must demonstrate that their interests were valid as against the Crown or its grantee.

In addressing his mind to the existence of the doctrine, Blackburn J. discussed the application of the common law to England's overseas possessions.[7] In the great majority of cases, all land was obtained by Crown grant. In these grants there was apparently no exception, reservation or qualification of any kind relating to the title of the native inhabitants to any part of the lands granted. He was satisfied that:[8]

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[6] *Milirrpum, supra*, n. 2 at 198.

[7] *Id.* at 201 *et seq.*

[8] *Id.* at 204.

> . . . *in the law*, as it was expressed at any time before the Revolution, relating to title to land in the North American colonies, there is no trace of any doctrine of communal native title of Indians to tribal land. (Emphasis added.)

He went on to note, however, that colonization did not proceed in entire disregard of native occupation. A policy of treatying with the Indians (often enshrined in Instructions to the Governors) and of creating reserves was maintained and taken seriously.[9] Because the plaintiffs were seeking a common law basis for the doctrine, however, such treaties were evidence only of colonial practice, and not of an obligation on the Crown.

He next discussed the law both before and after 1788, the date when New South Wales was first settled by Britain, and the date when the common law was first received into Australia.[10] Blackburn J. did not demand that the plaintiffs show the doctrine fully developed by 1788; he was prepared to consider the comparative case law if it would help the plaintiffs and such law contained the seeds for growth of the doctrine. After a long discussion of the early (post-Revolution) American cases, and of the classic statement of Marshall C.J. in *Johnson* v. *McIntosh*,[11] Blackburn J. concluded, with justification, that:[12]

> . . . These statements of law by the great Chief Justice do not affirm the principle that the Indian 'right of occupancy' was an interest which could be set up against the sovereign, or against a grantee of the sovereign, *in the same manner as an interest arising under the ordinary law of real property.* (emphasis added.)

He conceded that there were *dicta* in that case[13] which were inconsistent with his explanation but concluded that *Johnson* v. *McIntosh*:[14]

> . . . does not support the view that communal native title, not extinguished by consent or legislation, prevails over a title derived from the sovereign having the same ultimate title.

The crucial point is that Blackburn J. was looking for an Indian right of occupancy which was a proprietary right "in the same manner as an interest arising under the ordinary law of real property."[15] Consequently, he examined several more American cases and concluded that although those cases showed a tendency to elevate the status of Indian occupancy, and that the Indian title was not inconsistent with the sovereign's radical or ultimate title, yet:[16]

> . . . native occupancy never achieves the status of being unequivocally defined as a proprietary interest in relation to a proprietary interest derived from the sovereign.

Furthermore, expectations that Indian title might enjoy the protection of the Constitution have been dashed by the decision in *Tee-Hit-Ton Indians* v. *U.S.*[17] Where, asked Blackburn J., are the cases "which show the Indians upholding their right as if it were an estate in fee simple?"[18]

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[9] *Id.* at 206; *see* 1 Labaree, *Royal Instructions to British Colonial Governors*; instructions were in the nature of private advices rather than public orders—*see* Swinfen, *The Legal Status of Royal Instructions to Colonial Governors*, (1968) Juridical Review 21-39.

[10] *Cooper* v. *Stuart* (1889) 14 App. Cas. 286; *see also* Castles, *An Introduction to Australian Legal History* (1971).

[11] (1823) 8 Wheaton 543.

[12] *Milirrpum, supra*, n. 2 at 213.

[13] *Johnson* v. *McIntosh, supra*, n. 11 at 592.

[14] *Milirrpum, supra*, n. 2 at 214.

[15] *Id.* at 213.

[16] *Id.* at 217.

[17] (1955) 348 U.S. 272.

[18] *Milirrpum, supra*, n. 2 at 216.

Blackburn J. was, then, unable to find any compelling statement of law in the American cases which could help the plaintiffs. He also examined cases from India, Africa, Canada and New Zealand, as well as a wealth of historical material relating to official Government policy towards the treatment of the aborigines between 1788 and 1850. He held, with justification, that the Indian and African cases raised questions different from those in the instant case.[19] He thought that the decisions in *St. Catherine's Milling and Lumber Co.* v. *the Queen*[20] and *Calder* v. *Attorney-General of British Columbia*[21] did not help the plaintiffs either, and commented that, if the latter case was correct in its leading conclusion (in a settled colony, assuming aboriginal title to exist, then it can be extinguished by legislative or executive policy which treats the land of the colony as open to grant by the Crown), then *Calder* was very persuasive authority against the plaintiffs.[22] Similarly, the New Zealand authorities were treated, not as statements of common law, but as canons of statutory interpretation.[23]

His Honour concluded that the argument for the doctrine of communal native title must fail for lack of authority. Furthermore, Blackburn J. observed that wherever the principles argued on the plaintiffs' behalf have "to any extent been put into practice, that has been done by statute or by executive policy",[24] but it was not *obligatory* on the Crown to recognize native land rights.

IV

Blackburn J. searched diligently for the existence of the doctrine of communal native title. One must keep being reminded that this was done within the confines of the ordinary principles of property law. He felt the doctrine could not be satisfied by abstract principles alone.[25] Therefore the evidence presented by the plaintiffs to establish the doctrine had to be subject to serious examination. The submissions on behalf of the aborigines were rejected by Blackburn J. who said:[26]

> . . . there is so little resemblance between property, as our law, or what I know of any other law, understands that term, and the claims of the plaintiffs for their clans, that I must hold that these claims are not in the nature of proprietary interests.

Three separate but related issues arose in reaching this decision. To attract the doctrine of communal native title, the plaintiffs had to lead evidence of their own system in order to disclose proprietary relationships.

Secondly, as pleaded, they had to show that they laid claim, according to their own systems, to particular tracts of land.[27]

Thirdly, because they were arguing that the doctrine was part of

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[19] *Id.* at 223-233; these cases concerned either questions of statutory interpretation following a cession, or of private rather than *communal* title.

[20] (1889) 14 App. Cas. 46.

[21] (1970) 8 D.L.R. (3d) 59; *aff'd* (1970) 13 D.L.R. (3d) 64.

[22] Blackburn J. thought that the whole history of land policy and legislation in New South Wales, South Australia and the Northern Territory 'was similar in kind to the history which the judges found so cogent in *Calder's* case.' He had doubts, however, about the correctness of the reasoning of the *Calder* Court: *Milirrpum, supra,* at n. 2 at 253-254. The question of extinguishment is discussed, *infra.*

[23] *Milirrpum, supra,* n. 2 at 234 *et seq.*

[24] *Id.* at 262.

[25] For example, Marshall C. J.'s comments in *Johnson* v. *McIntosh, supra,* n. 11.

[26] *Milirrpum, supra,* n. 2 at 273.

[27] *Cf.* the remarks of Davey C. J. in *Calder's* case (1970) 13 D.L.R. (3d) 64 at 66.

the common law in 1788, they had to be able to show that the land claimed at the date of the action was, on the balance of probabilities, the same land as they could have claimed in 1788.

The first two issues were matters of law to be decided on the conceptual demands of the doctrine. In other words, the general question of the application of the doctrine required items of proof. But the third issue was purely one of fact, raising questions peculiar to the particular plaintiffs. An adverse decision on this issue would not be binding on other plaintiff clans.[28]

In examining the first issue of whether the plaintiffs socio-economic-legal system disclosed relationships which could be characterized as proprietary, a preliminary question arose as to whether their system was of a nature which could be recognized by a court of common law and dignified with the epithet 'system'.[29] Blackburn J. held in favour of the plaintiffs on this preliminary point,[30] but decided however, that their relationship with the land could not be characterized, in common law terms, as a proprietary interest. In dealing with this question His Honour said:[31]

> In my view the proper procedure is to bear in mind the concept of 'property' in our law, and in what I know of other systems which have the concept, as well as my understanding permits, and look at the aboriginal system to find what there corresponds to or resembles 'property'.

Blackburn J.'s criteria for deciding whether the aboriginal system disclosed proprietary relationships:[32]

> . . . the right to use or enjoy, the right to exclude others, and the right to alienate . . . [He did not say that] all these rights must co-exist before there can be a proprietary interest, or deny that each of them may be subject to qualifications.

He found as a matter of fact that the clans as such had no direct economic relationship to the land. It was not the clan, *qua* clan,[33] but the land-using band, composed of different members of the several clans, which could lay claim to an economic interest. On the other hand, the spiritual links with the subject land were proved. Evidence of traditional aboriginal beliefs showed that:[34]

> . . . the aboriginals have a more cogent feeling of obligation to the land than of ownership of it. It is dangerous to express a matter so subtle and difficult by a mere aphorism, but it is easier, on the evidence, to say that the clans belong to the land than that the land belongs to the clan.

Unfortunately, the spiritual interest, as such, was not characterizable as proprietary.

The plaintiffs were successful in sustaining the second conceptual demand of the doctrine. The evidence showed that they did think of their

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[28] Nor, of course, would an adverse decision on the second. It is assumed, however, for the purposes of the argument advanced that there is high degree of homogeneity in aboriginal society in Australia as regards the nature of the socio-economic-legal system; *see e.g.*, Elkin, *The Australian Aborigines: How to Understand Them* (4th. ed., 1964).

[29] This question caused great controversy during the argument. For a penetrating analysis of the arguments of the Solicitor-General (who appeared on behalf of the Commonwealth) and of Blackburn J.'s treatment of the aboriginal evidence in general *see* Baxi, *supra*, n. 5.

[30] *Milirrpum*, *supra*, n. 2 at 262 *et seq.*, especially at 267.

[31] *Id.* at 270.

[32] *Id.* at 272.

[33] *Id.* at 165-171, especially at 171.

[34] *Id.* at 270-271.

land as consisting of a number of tracts, linked to each clan. Although the boundaries were not precise, they were sufficient for the regulation of the inter-clan relationships. The judge rejected the defendants' argument that all the evidence showed was not several tracts, but rather isolated places or objects, such as a tree, which were held to be of great spiritual significance.[35]

The pleadings required the plaintiffs to show that if the doctrine was part of the common law in 1788,[36] that the land claimed was the same as they could have claimed at that date. They were unable to discharge this very onerous burden of proof. Evidence was led to show that, because the aboriginal clan system revolved around the concept of patrilineal descent, when all male members of a particular clan died out, the clan would inevitably become extinct. Other clans might take over that clan's land, and act as trustee, but it was highly likely that over a period of time the trustee clan would forget that it was trustee and assume full "rights" over it. Blackburn J. concluded that he was not satisfied that the plaintiffs' contention was more probably correct than incorrect.[37]

V

The *Milirrpum* court failed to discover the existence of the doctrine of communal native title because it carried out its task in an inadequate or narrow conceptual framework. The assumption that the doctrine operated as part of the law of property was simply unequal to the task of coming to grips with the real thrust of the doctrine. The court consciously rejected the idea that there was an *obligation* to recognize and respect native rights. Yet the judge was scrupulously conscientious in examining all possible facets of the common law of property even though the discussion was purely academic because Blackburn J. had already found that there was no such rule of law. Throughout his judgment, Blackburn J. gave few clues as to why native rights of occupancy should be discussed in terms of property law and not, for example, as constitutional or administrative law.[38]

Questions of property law are irrelevant to native rights. With the obvious exception of broad humanitarian grounds, the obligation to respect native rights is found in a consideration of the aborigines' status as British subjects and of the Crown's power to abrogate the property rights of British subjects. This alternative conceptual framework, based squarely on constitutional law, explains and establishes the Crown's obligation.

Central to the issue of the aborigines' status is the distinction between colonies acquired by conquest or cession on the one hand, and

[35] *Id.* at 176-181, especially at 179.

[36] *Supra*, n. 10.

[37] *Milirrpum, supra*, n. 2 at 183-198.

[38] The simple answer, as has been suggested by Baxi, *supra*, n. 5, is that the amended pleadings compromised the aborigines and stopped any attempt to pursue a more wide-ranging discussion of "rights" in general. Blackburn J. admitted, at 262, that the common law "has often grown by way of generalization from diverse instances, and that practice has often grown into, or helped to produce new doctrine . . . . But I cannot come to a decision of that kind on the materials before me." A sociologist, unversed in the mysteries of pleadings and procedure, would rejoin that the court could not come to a different decision because of the materials which it allowed to come before it.
Blackshield, "Some *Catch-22* Logic Foils the People of Gove Peninsula" The Australian, June 29, 1971, suggested a different approach. He thought that "In retrospect, the plaintiffs might have done well to assert the 'doctrine of communal native title' as one of international law. They could then have claimed that it was incorporated in common law."

those acquired by peaceful settlement or annexation. During the gestation of the First British Empire, the constitutional law relating to the overseas possessions of the King was controlled by the principles laid down by Lord Coke in *Calvin's Case*.[39] The issue was whether Calvin, a Scot, born after the accession of James VI to the throne of England, could bring an action at law or in equity in England. The plea that he was an alien, and therefore had no standing, was rejected.

The importance of the case lies in the reasoning of Coke C.J. who analyzed the question of Calvin's status under four headings: allegiance, kingdoms, laws and alienage, concepts which were in essence rooted in feudal property law. Fundamental to the discussion was the status of the overseas possessions of the King. The judgment proceeded on the basis that there were only two methods by which the King could succeed to his royal possessions: title stemmed either from descent, or conquest. Because the King's writ did not run *in patribus transmarinis*, acceptance of this conquest-descent dichotomy inevitably involved conceding a wide prerogative power to the King in his overseas dominions. Lord Coke drew a crucial distinction, however, between two different classes of conquest, turning on whether the conquered peoples were Christians or infidels. In a Christian conquest, the King could, through his prerogative, abrogate the *lex loci* which regulated the private rights of the conquered; however, there was a presumption that until he altered the local laws they would remain. On the other hand in a conquest of the infidel, then:[40]

> . . . *ipso facto* the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and nature, contained in the decalogue; and in that case, until certain laws be established among them, the King by himself, and such Judges as he shall appoint, shall judge them and their causes according to natural equity. . . .

In any dominion of the King, be it acquired by conquest or descent, once the King had introduced the common law, he had no prerogative power to alter the law without the consent of Parliament.

Coke C.J. laid down another important rule of law. He said that the general rule was that the conquered peoples came within the allegiance of the King and were entitled to his protection. This did not mean that they were accorded all the rights and privileges of British subjects because they were still subject to the over-riding and residual prerogative power to abrogate the *lex loci*. The King succeeded to the public rights of the conquered sovereign, while the private rights of the conquered people remained intact until abrogated. This general rule was subject to an exception which is crucial for a proper interpretation of the colonial case-law relating to aboriginal rights. The *lex loci* of the infidel was instantly abrogated by conquest, because it was against the law of nature and the law of God. Moreover, being disciples of the Devil, the infidels were *perpetui inimici*, perpetual enemies, and had no rights which could be enforced. The only obligation on the King was to judge their causes according to natural equity and being aliens they had no rights as subjects or citizens.

The above principles of law regulated relationships between England

[39] 7 Co. Rep. 1; 2 Howell St. Tr. 559. The best analysis of *Calvin's Case* and its implications for colonial legal history is Smith, *Appeals to the Privy Council from the American Plantations* (1950). This work provides the basis for the argument in this section. *See also* Roberts-Wray, *Commonwealth and Colonial Law* c. 14 (1966).

[40] 7 Co. Rep. 1 at 17b.

and its overseas possessions for the next eighty years. To describe the original American possessions as "colonies" is possibly a misnomer. They were not considered as centers of population or political administration but more as tenancies, negotiable sources of wealth in the patronage of the King. Moreover, there was no coherent theory of colonization. Crown prerogative intervention was moved more by the prevailing idea that the maritime kingdoms of Europe should keep the wealth produced by these tenancies to themselves.[41]

With the growing threat of French competition in the Americas, England became alive to the danger of a poorly managed and loosely controlled colonial system and saw the desirability of bringing them into closer unity with the Crown. The activities of the Lords of Trade from 1678 is witness to this increasing awareness. With the revival of royal interest in the American colonies the question of their mode of acquisition and status became increasingly urgent in a practical political and legal context.

During argument in *Calvin's Case* Bacon, the Solicitor-General and Calvin's counsel, had suggested that the European example of colonial practice based on the Roman doctrine of *res nullius* showed that overseas possessions might be acquired by "occupation".[42] The view that the conquest-descent dichotomy was not exhaustive became more prominent in the changed political situation.[43] In 1670, in *Craw* v. *Ramsay*[44] there was a hint that dominions acquired by "plantation" might have a different status from those acquired by conquest or descent, but, in 1685, in *East India Co.* v. *Sandy's*,[45] the decision in *Calvin's Case* was accepted without question. In *Blankard* v. *Galdy*[46] Holt C.J. held, following the *Calvin Case*, that Jamaica had been subject to conquest, but he is reported to have said that different principles would apply to an "uninhabited country newly found out by English subjects".

The distinction gained further currency in 1693 in *Dutton* v. *Howell*[47] and, in 1720, counsel to the Board of Trade advised that the:[48]

> . . . common law of England is the law of the plantations, and all statutes passed in affirmance of the common law passed in England, antecedent to the settlement of a colony, are in force in that colony, unless there is some private Act to the contrary; though no statutes made since those settlements are there in force, unless the colonies are particularly mentioned. Let an Englishman go where he will, he carries as much of law and liberty with him as the nature of things will bear.

This opinion was formally recognized, although with some distortion in wording, in a memorandum of the Privy Council in 1722[49] which stated that:[50]

> . . . if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go, they carry their law

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[41] *See* Andrews, *The Colonial Background of the American Revolution* c. 1 (1924).

[42] 2 Howell St. Tr. 559 at col. 590-591.

[43] The struggle with the Stuarts should be kept in mind in relation to the limits on the prerogative legislative power in England.

[44] (1670) Vaughan 274; 124 E.R. 1072.

[45] 10 Howell St. Tr. 371.

[46] (1693) 2 Salk. 411; Holt K.B. 342; 4 Mod. 215; 91 E.R. 356.

[47] (1693) Shower P.C. 24; 1 E.R. 17.

[48] Forsyth, *Cases and Opinions on Constitutional Law 1* (1869); 1 Chalmers, *Opinions of Eminent Lawyers* 194-195 (1814).

[49] *Case 15 Anonymous*, 2 Peere Williams 75; also noted in *Calvin's Case* 7 Co. Rep. 1 at 17b, n. K; 77 E.R. 377 at 398.

[50] 77 E.R. 377 at 398.

> with them, and therefore such new found country is to be governed by the laws of England....

Following the *Calvin Case* as to the principles applied to a conquest, the Memorandum continued:[51]

> . . . the conqueror, by saving the lives of the people conquered, gains a right and property in such people, in consequence of which he may impose upon them what law he pleases.

The presumption was that until the sovereign exercised his prerogative to introduce what law he wished:[52]

> . . . the laws and customs of that conquered country shall hold place, unless they are contrary to our religion, or enact anything that is *malum in se*, or are silent; for in all such cases the laws of the conquering country shall prevail.

The postulate of another category of colony, and of the rule that the common and statute law ran to the plantations—later to be called "settled" colonies—created many problems; particularly in relation to the applicability of statutes which did not name a particular colony, together with the problem of locally enacted laws which were inconsistent with the common law. Up to this point, the *Calvin* doctrine had decreed that a non-inherited possession was a conquest. The question could now arise as to whether any given colony was in law a conquered or settled colony, with the attendant consequences of the differences in the application of the common law.[53]

The extent of the Crown prerogative came under attack in *Campbell* v. *Hall*.[54] Lord Mansfield made some remarks which significantly restricted the doctrine in *Calvin's Case*. The diminution of the prerogative arising from the struggle with the Stuarts is reflected in Mansfield C.J.'s *dictum* that:[55]

> . . . a country conquered by British arms becomes a dominion of the King in right of his Crown, and therefore necessarily subject to the legislative power of the Parliament of Great Britain.

But more than this, the King's power to decide what laws would be introduced was also diminished:[56]

> . . . if the King (and when I say the King I mean the King without the concurrence of Parliament) has a power to alter the old and introduce new laws in a conquered country, this legislation being subordinate, that is subordinate to his authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion [for example, through his dispensing power]; as for instance from the laws of trade or from the power of Parliament.

Lord Mansfield dismissed the distinction between the conquest of Christian and of infidel as absurd: the rule that the laws of the conquered country continued in force until altered by the conqueror existed before the Christian era, and "in all probability arose from the mad enthusiasm of the Croisades".[57]

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[51] *Id.*

[52] *Id.*

[53] This was the root of the controversy in *Winthrop* v. *Lechmere*, discussed at length in Smith, *supra*,, n. 39 at 537 *et seq.*

[54] (1774) Lofft 655; 1 Cowp. 204; 20 Howell St. Tr. 559; 98 E.R. 848.

[55] Lofft 655 at 741.

[56] *Id.*

[57] *Id.*

By 1774, then, the constitutional law relating to the application of the common law to overseas possessions was well settled. On the strict *Calvin* doctrine the infidels were, being perpetual enemies, aliens with no rights against the Crown. They could be put to the sword. As a matter of administrative reality, however, the power of the Amerindians had to be recognized, if only to protect the property rights of the King. Thus it was prudent to concede some degree of sovereignty to the Indians as sovereign, independent alien nations. It cannot be overemphasized, however, that these concessions as expressed in treaties and colonial administrative practice were moved by considerations of policy and not legal obligation.

Campbell v. *Hall* affirmed a further important proposition: no colony could be established without authority from the Crown.[58] Therefore the King retained an important prerogative to refuse to accept sovereignty over overseas territories. This discretion could be of great importance when a new settlement was being contemplated, for the Crown could manipulate policy and principle to confer an alternative status on the new colony—to choose whether it was to be "settled" (and therefore subject to the common law) or "conquered" (and thus retain the Crown's prerogative legislative powers until the common law was introduced).[59]

Blackburn J. stated that he could not be concerned with historical controversies about whether this land was waste and uncultivated (and therefore discovered and settled) or whether it was occupied (and needed to be conquered). Instead he agreed with Chancellor Kent that the title to land, however acquired is "the law of the land, and no court of justice can permit the right to be disturbed by speculative reasoning on abstract rights".[60] To the judge in *Milirrpum* this meant that clearly established rules of law could not be questioned by revisions of history. As a statement of judicial behaviour, that cannot be questioned so long as the very narrow view of historical data is taken, along with the equally constricted view of law based on common law property principles.

VI

The question of the nature of aboriginal rights of occupancy has been widely reported and discussed in recent years.[61] There is a wealth of judicial statement to the effect that the Amerindians had some sort of title to the soil and that in many ways that title was not entirely disregarded.[62] As has been seen, at common law, the King's title flowed from his conquest and the radical title vested in him on the assertion of his sovereignty. The existence of aboriginal title was not inconsistent with the King's. He had the radical title which was subject to the aboriginal right of occupancy. There is also a wealth of judicial statement as

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[58] *Id.* at 708.

[59] In many ways, the history of the exercise of this discretion is crucial to a discussion of the history of the settlement of Canada and may lead to the necessary concession that some provinces were conquered colonies. Arguably, any colony acquired prior to 1722 would by definition be a conquered colony because this was the only category to which it could belong, it not having been acquired by descent. Forsyth, *supra*, n. 48 at 26-27, however, says that the following Canadian colonies were acquired by settlement: Newfoundland, 1497; New Brunswick and Nova Scotia, 1497; Prince Edward's Island, 1497; and British Columbia, 1858.

[60] III *Kent's Commentaries* 381, cited in *Milirrpum*, *supra*, n. 2 at 202.

[61] *See e.g.* Cumming and Mickenberg, *Native Rights in Canada* (2nd ed., 1972) and references cited.

[62] *See* Cohen, *Original Indian Title*, (1947-1948) 32 Minn. L. Rev. 34, and Washburn, *Red Man's Land—White Man's Law: A Study of the Past and Present Status of the American Indian* (1971) at 109 *et seq.*

to the nature of those rights of occupancy ranging from being a usufructary right, dependent on the goodwill of the sovereign in the *St. Catherine's Milling and Lumber* case[63] to a "modified dominion" as against the Crown in *Regina* v. *Symonds*.[64] The Crown clearly had an exclusive "right of pre-emption"; only the Crown could extinguish native title. This rule had its roots both in the doctrine of international law that discovery conferred the ultimate title on the discoverer, and the medieval rule that all titles stemmed from the Crown and no subject could acquire land for himself without authority from the Crown. The Crown therefore needed to extinguish native title before it was alienated to individuals.[65] In one of the many American cases which state this point, Marshall C.J. said:[66]

> . . . discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans, necessarily gave the nation making the discovery the sole right of acquiring the soil of the natives, and establishing settlements on it . . . .

Chapman J. in the New Zealand case of *Regina* v. *Symonds,* puts the emphasis more on the medieval rule:[67]

> It is a fundamental maxim of our laws, springing no doubt from the feudal origin and nature of our tenures, that the King was the original proprietor of all the lands in the kingdom, and consequently the only legal source of private title: 2 *Bl. Com.* 51: *Co. Litt.*. 65.a. In the language of the yearbook—M. 24 Edw. 111—'all was in him, and came from him at the beginning'. This principle has been imported, with the mass of the common law, into all the colonies settled by Great Britain.

The corollary of this exclusive right of pre-emption was that the aborigines could not sell to white settlers, but only to the Crown, which is one reason why their title was described as limited, or only a modified dominion.

Marshall C.J. did not consider that aboriginal rights were inconsistent with the radical title in the Crown (or sovereign power):[68]

> It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of the government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right.

Chapman J. made a similar observation:[69]

> The assertion of the Queen's pre-emptive right supposes only a modified dominion as residing in the Natives. But it is also a principle of our law that the freehold never can be in abeyance: hence the full recognition of the modified title of the Natives,

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[63] *Supra*, n. 20.

[64] (1847) N.Z.P.C.C. 387.

[65] This of course was not always adhered to and *Johnson* v. *McIntosh* is an example. On the necessity of extinguishing aboriginal title prior to alienation to white settlers, Sir James Stephen, Permanent Under-Secretary to the Colonial Office said that *Johnson* v. *McIntosh* showed that 'the whole territory over which those Tribes wandered was to be regarded as the property of the British Crown in right of discovery and conquest—and the Indians were mere possessors of the soil on sufferance.
"Such is American Law. The British Law in Canada is far more humane, for there the Crown purchases of the Indians before it grants to its own subjects." (Memorandum, Stephen to Parliamentary Under-Secretary Smith, July 28, 1839, C.O., 209:4, quoted in Knaplund, *James Stephen and the British Colonial System, 1813-1847* 89 (1953). Stephen said this was "law", and not "policy". This seems to be the proper interpretation of the Batman Deeds Affair in the Port Phillip District, 1835; Blackburn J. seems to have misunderstood the operation of the rule as to the Crown's exclusive right to pre-emption. *See Milirrpum, supra*, n. 2 at 257.

[66] *Johnson* v. *McIntosh, supra*, n. 11 at 573, 574, 576.

[67] *Supra*, n. 64 at 388.

[68] *Johnson* v. *McIntosh, supra*, n. 11 at 603.

[69] *Regina* v. *Symonds, supra*, n. 64 at 391.

> and its most careful protection, is not theoretically inconsistent with the Queen's seisin in fee as against her European subjects. This technical seisin against all the world except the Natives is the strongest ground whereon the due protection of their qualified dominion can be based.

The crucial question is, therefore, under what circumstances are those native rights of occupancy protected?

Mr. Justice Blackburn thought that the lofty statements of principle in the American cases were inconclusive, and wanted the plaintiffs to produce examples of the American courts upholding the Indian rights as if they were an estate in fee simple.[70] The plaintiffs could not do so simply because such cases do not exist; after all, the Amerindians were supposedly conquered infidels[71] who could not assert rights against the Crown. Nevertheless, it is possible to salvage from the cases the proposition that aboriginal occupants do have *some* rights at common law. The inquiry should be directed toward colonies which were acquired by peaceful settlement or annexation, rather than by conquest. In the first type of colonies, the aborigines were not infidels at the mercy of the King's prerogative power, but British subjects under the protection of the common law.

There is further legal ammunition a little closer to home. The case law and historical materials relating to the settlement of the colony of New Zealand provide evidence for the existence of the doctrine of communal native title. Blackburn J. dismissed the New Zealand experience on the ground that:[72]

> . . . the recognition of Maori occupancy of tribal lands was at first a matter of practice put into effect by deliberate policy, and it was the same policy which made the detailed legislative provisions which now regulate the matter.

Admittedly, recognition was a matter of policy, but only to the extent that Britain was able to implement the common law obligation to recognize and respect aboriginal occupation of their traditional tribal lands. In other words, the colonial policy was to accord the aborigines their just rights. This policy was soundly based in the common law. The history of colonial policy in Australia, on the other hand, is essentially a denial of the aborigines' rights to have their property (as well as their personal) rights protected. The legislation which gave effect to the policy of protection was merely declaratory of the common law. The fact that legislation was passed to regulate the matter is not sufficient reason for holding that the New Zealand precedent either proves or disproves the pre-existence of the doctrine.

When New Zealand was first annexed to New South Wales in 1839 the treatment of black peoples had been one of the great questions of the day, culminating in the Abolition of Slavery Act of 1834. There was also a rich tradition of attempts to respect aboriginal rights that was an important element in British colonial practice; the numerous treaties and compacts with the Amerindians, the dealings with the Cherokees, the 1763 Proclamation and the Instructions to Captain Cook when he took possession of New South Wales in the name of George III to do so with the consent of the natives, form the backbone of this tradition.

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[70] *Milirrpum, supra*, n. 2 at 216.

[71] This follows from the above analysis *pace* Lord Mansfield in *Chapman* v. *Hall*. For statements on the Indian's status *see Johnson* v. *McIntosh, supra*, n. 11 at 589 per Marshall C.J. For a brief discussion of United States policy towards the Indians *see* Forbes, *The Indians in America's Past* (1964).

[72] *Milirrpum, supra*, n. 2 at 242.

Increasing Parliamentary intervention in colonial policy after the reform of the House of Commons was another important influence.

Up to the eighteen-thirties, aboriginal policy had been a complete failure.[73] The lack of understanding of aboriginal society by the Government and the pressure by white settlers to unlock the land meant that the aborigines lost the unequal struggle. With the settlement of New Zealand, an attempt was made to avoid the mistakes of the past and to recognize that the property rights of aboriginal British subjects were supposed to be protected at common law.

VII

The historical materials relating to this period reinforce the view that aborigines, consistent with the statements of the American courts, had some rights. In the eighteen-thirties, there emerges a realization that it was high time that those rights were respected. The reasons for this impulse and the role of the humanitarian movement culminating in the Abolition of Slavery Act cannot concern us further in this study. But it must be remembered that, by this time, the views of Mansfield C.J. in *Campbell* v. *Hall* had become the touchstone for colonial policy; that colonies could be obtained by annexation or settlement was received law. From a strictly legal point of view, then, the question of the treatment of black British subjects could be discussed free from any ambiguity or doubts as to their status. The pre-occupation of Parliament was not whether aborigines had any rights; nor was there any doubt as to the obligation to respect those rights. The controversial point was always the *extent* of those rights and it was at this point that the strict legal obligation to respect land rights came into conflict with the realities of colonial life. Policy was defined in terms of adjusting the rights of two groups competing for the same resources, *viz.*, land. Resolution of this tension in Australia was more often than not determined by the view that the benefits of Christianity and civilization were reward enough for ignorant savages. The Government's brutal ignorance of the delicate nexus between the aborigine and his land meant the destruction of the aborigine. This did not seem to matter so long as he died a Christian.

One of the earliest manifestations of Parliamentary concern for the plight of aboriginal peoples was an Address of the House of Commons in 1834. This document is clear evidence of the new awareness of Britain's moral and legal responsibilities. The House of Commons resolved unanimously:[74]

> That His Majesty's faithful Commons in Parliament assembled, are deeply impressed with the duty of acting upon the principles of justice and humanity in the intercourse and relations of this country with the native inhabitants of its colonial settlements, of affording them protection in the enjoyment of their civil rights, and of imparting to them that degree of civilization, and that religion, with which Providence has blessed this nation, and humbly prays that His Majesty will take such measures, and give such directions to the Governors and officers of His Majesty's colonies, settlements and plantations, as shall secure to the natives the due observance of

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[73] One of the best accounts of the treatment of the Australian aborigines is Rowley, *The Destruction of Aboriginal Society* (1970).

[74] Annexed to the Report of the Select Committee of the House of Commons on Aborigines (British Settlements) 1837, H.C.P.P. Vol. 7, at 3 *et seq.* Hereafter cited as 1837 Report.

> justice and the protection of their rights, promote the spread of civilization amongst them, and lead them to the peaceful and voluntary reception of the Christian religion.

The Address recalled the duty on the King to rule the infidel with justice and humanity, but also sought a recognition that justice and humanity demand the enjoyment of civil rights. There was no longer a duty to exterminate the infidel, but simply to proselytize.[75] The Lord Chancellor remarked of this Address that, so far from being the expression of any new policy, it only embodied and recognized principles on which the British Government had for a considerable time been disposed to act.[76]

The 1837 Report also illustrated the contemporary understanding of aboriginal land rights. Blackburn J. discussed this Report but did not see its significance in elucidating the principles underpinning the doctrine of communal native title.

The Committee saw the importance of ascertaining the results of Britain's relations with the "uncivilized nations of the earth" and to "fix the rules of our conduct towards them". Even though the natives might be classed "under the sweeping terms of savages", this still did not relieve Britain of her obligations towards them.[77] The question of Britain's responsibilities had been constantly discussed, it said, but the introduction of effective laws and justice had been rarely accomplished in practice; instead ". . . as a nation we have not hesitated to invade many of their rights which they hold most dear . . . ."[78] The evidence showed that monstrous barbarities had been committed; these were as unjust as they were un-Christian. Moreover, it was a short-sighted policy, impeding the progress of their civilization and colonization.[79] In relation to the colonization of Australia, the claims of the aborigines, whether as "sovereigns or proprietors of the soil" had been entirely disregarded, because they were "so entirely destitute of even the rudest forms of civil polity."[80] The Committee continued:[81]

> Their land has been taken from them without the assertion of any other title than that of superior force, and by the commissions under which the Australian colonies are governed Her Majesty's sovereignty over the whole of New Holland is asserted without reserve.

This state of affairs, the Report insisted, "must surely be attributed to oversight".[82] The doctrine of *Calvin* as modified by *Campbell* v. *Hall* in

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[75] These views have a long but not very honourable ancestry. Washburn, *supra*, n. 62 at 7 quotes from the *Requerimiento* of the Spanish conquerors who were required to give the following warning to native peoples who "wickedly and intentionally" delayed to give up their land:

> . . . with the help of God, we shall forcibly enter into your country and shall make war against you in all ways and manners that we can, and shall subject you to the yoke and obedience of the Church and of their Highnesses; we shall take you and your wives and your children, and shall make slaves of them, and as such shall sell and dispose of them . . .; and we shall take away your goods, and shall do all the harm and damage that we can as to vassals who do not obey . . . .

Compare the remarks of Salmond on the application of feudal law to new territory, *Jurisprudence* 520-521 (10th ed.) App. IV.

Washburn, *supra*, n. 62 at 40, also discusses More's views as expressed in Utopia. If the natives resist the benevolence of living under the obviously superior Utopian laws, they are driven off the land, with war-like force if necessary. This war was considered by More to be the most just form of war because "when any people holdeth a piece of ground void and vacant to no good or profitable use: keeping others from the use and possession of it . . . ."

[76] *Id.* at 5.

[77] *Id.* at 3.

[78] *Id.*

[79] *Id.* at 75-76.

[80] *Id.* at 82.

[81] *Id.*

[82] *Id.* at 4.

relation to people within the allegiance of the King was to be applied with all its vigour. The Report concluded by saying:[83]

> It follows, therefore, that the Aborigines of the whole territory must be considered as within the allegiance of the Queen, and as entitled to her protection. Whatever may have been the injustice of this encroachment, there is no reason to suppose that either justice or humanity would be consulted by receding from it. On the contrary, it would be eminently desirable to impress upon the Australian Government, and upon the inhabitants of those colonies, the consequences of the principles upon which they have been founded. If the whole of New Holland is part of the British Empire, then every inhabitant of that vast island is under the defence of British law as often as his life and property may be attacked....

Blackburn J. minimized the value of this Report as a source for the doctrine of communal native title because it did not recommend that any system of recognition of native title should be set up. But what the Report did recommend was, *inter alia,* the ruthless assertion of the Crown's right of pre-emption. Moreover, the Report contemplated more than as a theoretical possibility that aborigines might stand in a proprietary relationship with the land.[84] The aborigines were said to be "proprietors of the soil". Blackburn J.'s pre-occupation with proprietary relationships blinded him to the nexus between the concept of the Crown's exclusive right of pre-emption and the proposition, pure and simple, that the aborigines were proprietors of the soil.

We have already made it clear that the aborigines have some rights to the soil; that they are British subjects entitled to have those rights protected; and that the Crown has the exclusive right of extinguishing those rights. Logic demands that built into the principle of pre-emption is the further notion that there must be some 'thing' or right to be pre-empted. So far there has been absolutely no suggestion in the contemporary statements relating to land rights that, before the aborigines can be said to be proprietors of the soil, they have to establish that their sytem discloses proprietary relationships to that they can lay claim to particular tracts of land *inter se.* We have the very simple propositions that the aborigines do have the rights to their land, and only the Crown can extinguish those rights. The question is how are those rights protected, and under what circumstances can they be extinguished?

VIII

Whalers, adventurers and escaped convicts had been active in New Zealand since the last decade of the eighteenth century. During the eighteen-thirties, Edward Gibbon Wakefield canvassed the idea of establishing settlements in South Australia, and later in New Zealand. In order to take control of the settlement and bring the British colonists within the pale of British law, it was decided to establish a consular post in New Zealand. Sir James Stephen, an active member of the anti-slavery movement (he drafted the Abolition Bill) and the Clapham Sect, began to draw up Lieutenant Hobson's Instructions in January, 1839. They were finally sealed by Normanby in August of that year. During this hiatus a new colonial policy developed. Instead of setting up a con-

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[83] *Id.*

[84] *Milirrpum, supra,* n. 2 at 258.

sulate in a foreign country, it was decided to establish New Zealand as a British colony.[85]

Stephen was concerned to protect the rights of the aborigines within the terms of the 1837 Report, and his memorandum on *Johnson* v. *McIntosh*.[86] He did not see New Zealand as vacant territory open to the first-comer, and so he used his influence to lay down a method of acquiring sovereignty and a complementary native policy. Normanby's Instructions to Hobson issued on August 14, 1839 provide evidence of this policy. Britain only annexed New Zealand because if it had not, it would have had to bow to a *fait accompli*. It had repeatedly denied that it had any rights to it as a tactic to stave off the enthusiasms of Wakefield. Normanby said that the recognition of New Zealand's independence[87] was binding on the British Crown. Hobson was instructed that:[88]

> The Queen . . . disclaims, for herself and her subjects, any pretension to seize on the islands of New Zealand, or to govern them as part of the dominion of Great Britain, unless the free and intelligent consent of the natives, expressed according to their established usages, shall be first obtained . . . Therefore Her Majesty's Government has resolved to authorise you to treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any parts of those islands which they may be willing to place under Her Majesty's domain.

The aborigines were to yield to the Crown the exclusive right of pre-emption, and with regard to lands already alienated by the aborigines to white settlers, Hobson was to issue a Proclamation that the Crown:[98]

> . . . will not acknowledge as valid any title to land which either has been, or shall hereinafter be acquired, in that country which is not either derived from, or confirmed by, a grant to be made in Her Majesty's name, and on Her behalf.

Hobson was, however, to make clear that fair and just bargains would not necessarily be repudiated. To effect this aim, Gipps, the Governor of New South Wales, had been authorised to pass a bill in the Legislative Council of New South Wales enabling Commissioners to investigate titles and put them on a regular footing. This aimed primarily at land-jobbing and speculation.[90]

Once Hobson had explained his mission to the Maori chiefs and sovereignty had been proclaimed, he was to proceed to obtain:[91]

> . . . by fair and equal contracts with the natives, the cession to the Crown of such waste lands as may be progressively required for the occupation of settlers resorting to New Zealand.

The wording here was critical. "Of such waste lands as may be progressively required" was intended to mean that aboriginal occupation was to be respected. The limitation imposed on their rights was the

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[85] Williams has commented: "The change is evidence of the immense power of the Colonial Office, its vast responsibility, and Stephen's importance in shaping its policies". *James Stephen and British Intervention in New Zealand*, (1941) 13 Journal of Modern History 19 at 23-24.

[86] *Supra*, n. 65.

[87] For an analysis of the tactical manoeuvres within the Government *see* Foden, *The Consitutional Development of New Zealand in the First Decade, 1839-1849* (1938). Normanby realised that the recognition of New Zealand's independence was of doubtful validity in view of the fact that, at international law, attributes of sovereignty and capacity to enter into legal relations depended on a degree of civilization which was not apparent in the New Zealand aborigines. *See* Normanby to Hobson, August 14, 1839, H.C.P.P., 1840, Vol. 33 at 38.

[88] Normanby to Hobson, *supra*, n. 87. The provision for the consent of the natives was not solely due to the influence of Stephen. The Treasury was anxious to avoid armed conflict similar to the then recent Kaffir war; *see* Williams, *supra*, n. 85 at 29.

[89] H.C.P.P., 1840 (238) at 38-39, No. 16, Normanby to Hobson, August 14, 1839.

[90] *Id.* at 39.

[91] *Id.*

Crown's pre-emption; they could sell only to the Crown, who would in turn sell to the white settlers. Hobson had to purchase the land. The assertion of sovereignty only vested the radical title in the Crown, and was encumbered by the aboriginal rights.

The formula adopted for obtaining consent to the assertion of sovereignty was the famous Treaty of Waitangi, signed on February 6, 1840. Anxious to protect the "just rights and property" of the aborigines, and to "secure to them the enjoyment of peace and good order", the Government had deemed it expedient to appoint a functionary "properly authorised to treat with the aborigines of New Zealand for the recognition of Her Majesty's sovereignty over the whole or any part of these islands". Article I ceded:

> . . . without reservation . . . all the rights and powers of sovereignty which the said confederation of independent chiefs respectively exercise or possess . . . as the sole sovereigns thereof.

Article II confirmed and guaranteed to the chiefs and tribes:

> and to the respective families and individuals thereof, the full, exclusive and undisturbed possession of their lands and estates, forests, fisheries and other properties which they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession: but the chiefs of the united tribes and the individual chiefs yield to Her Majesty the exclusive right of pre-emption over such lands as the proprietors thereof may be disposed to alienate . . . .

Article III put the aborigines under the Queen's protection and accorded them all the rights and privileges of British subjects.[92]

In international law, the Treaty was a nullity in so far as it purported to cede sovereignty to Great Britain,[93] but it was treated as being morally binding on the British Crown. Any attempt to depart from its principles was vigorously resisted.[94]

The Treaty was essentially a device for effecting the principles of consent, and clarifying the Crown's right to pre-emption. Nothing new or inconsistent with the principles enunciated in the Address or the 1837 Report was introduced; it merely regularized the common law position. Its importance is more political than legal. Taken together with the Instructions to Hobson, it is clear, however, that the manipulation of the above principles was intended to favour the position of the aborigines. This was to create grave problems and a Select Committee of the House of Commons was later to denounce this policy. What cannot be overemphasised is that contemporary understanding of the question of aboriginal rights was that they had to be respected. While the Treaty itself is an important mechanism in implementing this view, in practical and legal terms, the most important aspect of the Treaty was its reservation to the Crown of the exclusive right of pre-emption. There was absolutely no suggestion that aborigines had to show, as a condition precedent to recognition of their rights, that those rights were, in essence, proprietary at common law. Indeed, the evidence shows that the re-

[92] H.C.P.P. 1841 (311) at 98, enclosure in No. 35, Hobson to Russell, October 15, 1840.

[93] *Wi Parata* v. *The Bishop of Wellington* (1877) 3 N.Z. Jur. (N.S.) 72. For the historical background to the annexation of New Zealand, *see* Tapp, *Early New Zealand, 1788-1841* (1958), and Foden, *supra*, n. 87.

[94] The importance of the fact that New Zealand had been annexed to New South Wales is twofold. First, it was a settled colony and hence the common law and statute law ran, subject to the principle relating to the circumstances of the new colony. It was therefore not subject to the Crown's prerogative legislative power. The Legislative Council of New South Wales provided the New Zealanders with the shadow but not the substance of representative institutions. Secondly, the remarks of Governor Gipps, (*see infra.*), on the Land Claims Bill may be taken as representing the general principles which would be equally applicable to Australia.

verse was the case, and the speech of Governor Gipps in the Legislative Council is the decisive argument against Blackburn J.'s approach to the doctrine. Gipps knew that aborigines had no notions of individual ownership, an exclusive right of possession or a right to alienate. If colonial policy relating to recognition of aboriginal rights could proceed on this basis in 1840, it seems absurb for Blackburn J. to hold that the plaintiffs should fail in the present case because they could not show such interests.

As part of the strategy for regularizing the titles of white settlers who had purchased land from the Maoris, Gipps sponsored a Bill to enable Commissioners to be appointed to investigate the situation. W. C. Wentworth had purchased some twenty million acres in the South Island and vigorously opposed the Bill. The debate is further evidence of contemporary understanding of aboriginal land rights. In reply to Wentworth, Gipps said:[95]

> The Bill is founded upon two or three general principles, which, until I heard them here controverted, I thought were fully admitted, and indeed, received as political axioms. The first is, that uncivilized inhabitants of any country have but a qualified dominion over it, or a right of occupancy only; and that, until they establish amongst themselves a settled form of government, and subjugate the ground to their own uses, by cultivation of it, they cannot grant to individuals, not of their own tribe, any portion of it, for the simple reason, that they themselves have no individual property in it.
>
> Secondly, that if a settlement is made in any such country by a civilized power, the right of pre-emption of the soil, or in other words the right of extinguishing native title, is exclusively in the government of that power, and cannot be enjoyed by individuals without the consent of their government.

Wentworth argued that these were not principles of the common law, but were American law. In rebuttal, Gipps cited the opinions of three eminent London counsel who had put forward those principles in denying similar "purchases" by Batman of the present site of Melbourne. To the argument that he was estopped from arguing that settlers could not buy land from the Maoris because Normanby had repeatedly recognised New Zealand as being an independent State, Gipps pointed out that Normanby had qualified his remarks, and that, in any event, recognition applied only to a few isolated tribes in the North Island and was the work of the foolish resident, Busby. It was not independence which conferred on any people the right of disposing of the soil they occupied; it was civilization:[96]

> . . . and the establishment of a government capable at once of protecting the rights of individuals, and of entering into relations with foreign states; above all, it is the establishment of law, of which property is justly said to be a creature.

Far from being an arbitrary and tyrannical confiscation of the subject's *tenementum,* Gipps argued that the main object of the Bill was to vest the *tenementum* in the subject. The Colonial Office approved Gipps' arguments and statement of the law.

There were, then, in Gipps' view three legal principles. Aboriginal inhabitants had only a qualified dominion—they have no notion of individual rights in property: these only come with civilization and the

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[95] Speech of Governor Gipps in Legislative Council of New South Wales, July 9, 1840 on second reading of a Bill appointing Commissioners to enquire into claims for land in New Zealand, H.C.P.P. 1842 (61) at 63, enclosure in No. 29, Gipps to Russell, August 16, 1840.
Gipps also stated a third principle, based on *Campbell* v. *Hall,* that no individual could found a colony without consent from the Crown. Any such "colony" accrued *de jure* to the Crown.

[96] *Id.* at 75. *See also* H.C.P.P. 1841 (311) at 78, No. 30, Russell to Gipps, January 16, 1841.

establishment of a civil government and upon husbanding the soil. Secondly, the Crown had the exclusive right of pre-emption. Thirdly, individuals could not found colonies by extinguishing the native title; any such colonies accrued to the Crown. In other words, the aborigines had some rights, and they could be extinguished only by the Crown. These principles remain the essence of the doctrine of communal native title.

Further support for these views is to be found in the Report of the Select Committee of the House of Commons on New Zealand, 1840.[97] The Committee noted with dismay the exploitation of the aborigines by profiteers and adventurers and said that the only preventive measure would be proper legislation regulating the sale of land. Such legislation was not envisaged as a departure from the common law position, but it was needed to make the law enforceable.

The Committee recommended that the common law be observed and that the radical title be vested solely in the Crown, together with the right of pre-emption "over all those lands" which the natives "may be disposed to alienate."[98] It criticised as too vague the Proclamation of Hobson and Gipps that pre-sovereignty purchases would, on investigation, be recognised.[99] It concluded with a recommendation that the "possessory rights of the natives" were "to be retained in full".[100] This Report maintains the consistent theme of respect for native rights through adherence to the common law.

IX

Hobson steadily progressed through the islands and secured the signatures of the aboriginal chiefs submitting to British sovereignty. New Zealand was soon separated from New South Wales and became a colony in its own right. The Charter erecting New Zealand as a separate colony is important evidence of the Crown's attitude to respect for the aborigines' land rights. After empowering the Governor to make grants of waste land, a proviso was inserted which was practically identical in terms to that in the letters patent creating the colony of South Australia:[101]

> . . . provided always, that nothing in these our letters patent contained shall effect or be construed to effect the rights of any aboriginal inhabitants of the said colony of New Zealand, to the actual occupation or enjoyment in their own persons, or in the persons of their descendants, of any lands in the said colony now actually occupied or enjoyed by such natives.

The plaintiffs in *Milirrpum* had relied on the 1836 South Australian proviso as a constitutional guarantee of their land rights in the subject land. Blackburn J. rejected this argument and held, after considering the legislative history of South Australia and the Northern Territory, that the proviso did not extend to the subject land and therefore could not be

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[97] Report of the Select Committee appointed to inquire into the Statements contained in the Petition of the Merchant Bankers and Shipowners of the City of London, respecting the colonization of New Zealand, presented May 22, 1840; H.C.P.P. 1840, Vol. 7, at iii.

[98] *Id.* at ix.

[99] H.C.P.P. 1841 (311) at 1, enclosure in No. 1, Gipps to Russell, February 6, 1840. Gipps issued three Proclamations on January 14, 1840. The first extended his jurisdiction to New Zealand; the second announced that Hobson was to be Lieutenant-Governor of New South Wales; the third warned that purchases from the aborigines in New Zealand would be invalid and subject to investigation. Gipps introduced the 1840 Bill, *supra*, n. 95, so as to put the third Proclamation on a sound legal basis. H.C.P.P. 1841 (311) at 1, enclosure in No. 1, Gipps to Russell, February 6, 1840.

[100] *Supra*, n. 97 at ix.

[101] H.C.P.P. 1841 (311) at 31, enclosure 1 in No. 17, Russell to Hobson, December 9, 1840. *See also supra*, n. 97, enclosure 3, at 34.

invoked in their favour. He also decided that it did not operate as a constitutional guarantee, but was rather the expression of a "principle of benevolence, inserted in the Letters Patent in order to bestow upon it a suitably dignified status."[102]

Blackburn J.'s conclusion stands in marked contrast to that of Lord Russell, Secretary of State for the Colonies who remarked of the New Zealand proviso that:[103]

> Her Majesty . . . has distinctly established the general principle that the territorial rights of the Natives, as owners of the soil, must be recognised and respected . . .

Russell saw the proviso as having a decided legal effect; it was not simply an affirmation of a principle of benevolence, nor was it simply policy which could be changed in the future. It was an attempt to accord legal protection to aboriginal land rights.

With New Zealand free from the Legislative Council of New South Wales, difficulties could have arisen about the application of the Bill sponsored by Gipps relating to investigation of titles. Hobson was given a discretion, however, of withholding publication of its inevitable disallowance by the Imperial Parliament if he thought that such disallowance would, "on the whole, be injurious to the public service".

The New Zealand Land Claims Ordinance 1841 replaced the now irrelevant New South Wales legislation, and declared that:[104]

> . . . all unappropriated lands within the Colony of New Zealand, subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants of the said Colony, are and remain Crown or domain lands of Her Majesty and that the rule and absolute right of pre-emption from the said aboriginal inhabitants vests in and can only be exercised by Her Majesty . . .

The proviso to the Charter, itself an expression of the common law, was put into legislative form.

In theory, Crown purchases from the aborigines were to keep ahead of white demand for land, and the sales would in turn finance further purchases and the implementation of a protective aboriginal policy.[105] The theory broke down in practice due to economic depression and a failure to formulate and execute a practical policy.

That policy was founded on two conflicting principles: the humanitarian aims of the missionaries (who had been instrumental in securing the consent of the chiefs to the Treaty of Waitangi), and the colonizing theories of the New Zealand Company. These two groups were at loggerheads and the Executive, due to ill-health, inability or poor communications was unable to satisfy the demands of either. Wakefield's purchases had been doubly premature in that he had bought vast tracts of land from the aborigines without prior government permission, and had assumed that aboriginal consent to white occupation would be readily forthcoming.[106] Commissioner Spain held most of the Company's purchases defective.

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[102] *Milirrpum, supra*, n. 2 at 281.

[103] H.C.P.P. 1841 (311) at 51, No. 19, Russell to Hobson, January 28, 1841, at 52. *See also* at 60, No. 24, Russell to Hobson, April 16, 1841.

[104] Sess. 1, No. 2.

[105] For an account of the problems confronting New Zealand in its formative years, *see* Rutherford, *Sir George Grey, K.C.B., 1812-1898* c. 11, c. 13 and c. 14 (1961).

[106] Lord Russell tried to remedy the first defect by granting the Company a charter and charging five shillings *per* acre; but the agreement was made on the understanding that the Company had extinguished aboriginal title to a much larger area, the surplus of which would accrue to the Crown and be sold to other settlers.

The government's decision to investigate titles had raised aboriginal hopes and angered the settlers. Instead of the millions of acres that Wakefield had bargained for, he was granted less than 300,000, and some title to this was suspect. Skirmishes with the aborigines resulted in bloodshed, causing uproar in the colony. Governor Fitzroy took desperate measures to stave off economic depression, caused by confusion over titles, by abolishing various customs duties to discourage smuggling and encourage legitimate trade. To stimulate land sales, he waived the Crown's exclusive right of pre-emption.

The aboriginal situation worsened. Lack of funds made it impossible for Chief Protector Clarke to carry out a protective aboriginal policy. The missionaries had told the aborigines that their chiefships would be preserved and that a strong British government would protect them against French invasion and white spoliation of their lands. The fact of British authority had not been stressed by the Treaty makers, and the chiefs thought they could continue to rule the tribes, with the government merely regulating relations between whites and the aborigines. The idea that as British subjects they owed allegiance to the Crown was new to them. They had signed the Treaty expecting that they would gain from white settlement and trade. Instead, they found petty interferences and regulations. There was a breakdown of the moral authority of the chiefs over the younger men. There were rumours that the government was about to seize their lands.

Governor Fitzroy issued three Proclamations waiving the Crown's right of pre-emption over certain tracts of land;[107] individuals were to be allowed to treat with the aborigines "for a few hundred acres".[108] The proclamations met with widespread opposition from the missionaries who were concerned that the aborigines would be defrauded, and from white settlers who saw their land values being depressed.[109] Stanley, faced with Fitzroy's *fait accompli,* reluctantly acquiesced.[110]

X

A degree of ambiguity exists in the evidence adduced so far. Clearly, native rights existed. The 1834 Address had urged the King to protect those rights. The 1837 Report noted that the rights of the aborigines as proprietors of the soil had hitherto been disregarded and recommended the assertion of the Crown's right of pre-emption. A question remains as to the extent of those rights: over which "soil" could the aborigines be said to be "proprietors"? Gipps does not advert to this question in his speech; the real thrust was to assert that aboriginal rights were in the nature of a "qualified dominion" only, in the sense that because they were not possessed of notions of individual ownership they could not lay claim to a bundle of rights which were as strong as ownership in fee simple. Similarly, Hobson's Instructions do not provide a clear answer. He was instructed to obtain cessions of land as they were required but there was no condition precedent that the aborigines had to be able to

[107] Proclamations were issued on March 26, October 1 and 10. H.C.P.P. 1845 (378) at 8 *et seq.*, No. 3 *et seq.*

[108] These purchases, however, were still subject to investigation by the Commissioners and confirmation by letters patent.

[109] *See e.g.* H.C.P.P. 1845 (378) at 13, No. 6, Memorial to Port Nicholson Land-Owners.

[110] H.C.P.P. 1846 (337) at 85, No. 36, Stanley to Grey, August 14, 1845, A House of Commons Select Committee denounced the policy of the Treaty; Report from the Select Committee on New Zealand, July 29, 1844, H.C.P.P., 1844, volume 13 at i. (Afterwards cited as 1844 Report.).

lay claim to any particular parcel according to their customary native tenure. Rather, this was implied along with the notion that all the land was subject to the aborigines' qualified dominion. Similarly, there was no limiting condition in the wide words of Article II of the Treaty when it laid down a guarantee of full, exclusive and undisturbed possession of "their lands and estates", forests, fisheries and other properties which they "collectively or individually" possessed so long as it was their wish and desire to retain the same in their possession.[111]

Perhaps the first attempt to come to grips with these ambiguities was the proviso to the Charter. The Crown's power to deal with its radical title was limited in the case of lands"*actually* occupied or enjoyed" by the aborigines. Determination of whether lands were actually occupied or enjoyed was a matter of fact, to be determined by reference to the system of customary native tenure. The Land Claims Ordinance provided that all unappropriated lands "subject to the rightful and necessary occupation and use thereof" by the aborigines were Crown lands. The terms "rightful and necessary" are ambiguous; do they refer to customary tenure or some economic use, or some vague, abstract principles of justice? A search for a definition need not delay us at this point because the ambiguities are peripheral to the important contemporary view that the aborigines did have some rights and those rights had to be respected.

Another Select Committee reported to the House of Commons in 1844 and sought to interpret the ambiguities in favour of the colonists. There was vigorous and successful opposition from the judiciary and the Church.

The Committee argued that the recent troubles were due to the failure to observe the principles of colonization referred to by Gipps on the second reading of the Lands Claims Bill. It was a mistake, the Committee said, to disclaim sovereignty over New Zealand prior to annexation[112] for the Government must have foreseen that settlers would stream out.[113] The Treaty was a blunder because the aborigines could not understand it; it would have been better to have asserted sovereignty by right of discovery.[114] The aborigines had misunderstood the terms of the Treaty in thinking that they had a right to unoccupied lands. Rather, they had (invoking Gipps in support) only a "qualified dominion". Their misapprehension was due to Hobson's loosely-worded and mistaken Instructions which did not make clear that the aborigines had no right to unoccupied lands.[115] In the Committee's view, the Charter establishing New Zealand as a separate colony had attempted to salvage the situation

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[111] Does "their lands and estates" refer to the aborigines of New Zealand as a whole, or only to each single group which collectively comprised the aborigines as a whole? Should "collectively or individually" be read as postulating similar alternatives? The 1840 Report does not answer these questions either. What is the meaning of its recommendation that exclusive right of pre-emption vested in the Crown over those lands which the aborigines may be disposed to alienate? Did this imply that there are instances where the pre-emption would not vest because the aborigines did not wish to alienate? Or could it be interpreted as merely stressing the need for a clear formulation and recognition of the Crown's right of pre-emption so that white settlers would be warned of the futility of seeking private bargains with the aborigines.
Of course, there may simply be a looseness in wording and the recommendation is to be read subject to the implicit assumption in Hobson's Instructions that the aborigines could claim the whole of New Zealand according to their own custom and so the pre-emptive right accrued by operation of law on the assertion of sovereignty.

[112] *See* Memorandum from Stephen to Backhouse, where Stephen detailed the occasions on which Britain had denied that it held sovereignty over New Zealand. H.C.P.P. 1840 (238) at 68, enclosure in No. 38, Stephen to Backhouse, March 18, 1840.

[113] H.C.P.P. 1844, volume 13 at iv, v.

[114] *Id.* at v.

[115] *Id.* at vi.

by laying down that "occupation and enjoyment" alone established a right of property; the residue vested in the Crown, and had Hobson realised this, the chaos could have been avoided without injustice being caused. The Committee considered it was absurd to introduce English notions of real property into primitive society[116] and concluded that:[117]

> The acknowledgement of the local authorities of the right of property in the natives of New Zealand, in all *wild* lands in those Islands, after the sovereignty had been assumed by Her Majesty, *was not* essential to the true construction of the Treaty, *and was an error* which has been very productive of injurious consequences. (emphasis added.)

It recommended that means ought to be forthwith adopted for:[118]

> . . . establishing the exclusive title of the Crown to all lands not actually occupied and enjoyed by Natives, or held under grants from the Crown: such land to be considered as vested in the Crown for the purposes of being employed in the manner most conducive to the welfare of the inhabitants, whether Natives or Europeans.

In its concern to elevate the interests of the colonists the Committee was obliged to limit the territorial extent of the aborigines' rights. The Committee, however, clearly misconstrued the effect of the Charter. The wording of the Charter is that the right of property is established by "actual occupation *or* enjoyment", not "actual occupation *and* enjoyment". The attack on Hobson's interpretation of his Instruction was therefore misconceived. For the Committee to ignore the verbal distinction was to do violence to the wide language of those Instructions, the Treaty, the 1840 Report and Lord Russell's *dictum*. This language could not be limited in this way. Yet even allowing for a verbal slip, there was no suggestion that aboriginal rights should not be recognised and respected. Having conceded that the aboriginal rights were to be recognised and respected, the real dilemma facing the Committee was to devise a formula which allowed those rights a minimal territorial extent. If the formula was to be actual occupation and enjoyment, this would in no way quieten land titles nor solve the question whether a particular tract of land as yet unalienated was subject to territorial rights. Likewise, it would have been no solution to have asserted sovereignty by right of discovery: the factual question still had to be decided. The best way for the New Zealand Company to keep its titles would have been for the Committee to deny, as did Wentworth, the Crown's right of preemption. Alternatively, the Committee could have negated Gipps' view that individuals have no right to found colonies, and instead have given the Company its blessing to proceed as private adventurers, weighing the risks of going ahead without British protection against the profits that could be expected to be made. The Report did not do this. So even if the Committee views had been correct, aboriginal title was still to be recognised, although weakened in its territorial extent. The verbal mistake did not pass unnoticed by contemporaries. The Church Missionary Society said it was :[119]

> . . . clear that the rights of property in land to an indefinite extent may exist, or, in other words, be "enjoyed" quite distinct from actual occupation of it.

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[116] *Id.* at vii.

[117] *Id.* at xii.

[118] *Id.*

[119] H.C.P.P. 1844 (641) at 1, Letter from the Secretary of the Church Missionary Society to Stanley, August 14, 1844; *cf.* letter from Willoughby Shortland to Stanley, H.C.P.P. 1845 (108) at 1, Shortland to Stanley, January 18, 1845.

According to this view, occupation and enjoyment were not synonymous. Of greatest significance was the complete repudiation of the Committee's assumptions by Stanley.[120] It is clear from the reaction to this Report that it was seen to represent an untenable departure from firmly established principle.

XI

When Governor Grey arrived to take up office in New Zealand, the land situation was desperate. There were four broad areas of controversy: the Commissioners had scarcely investigated the pre-sovereignty purchases; there were outstanding claims under Fitzroy's waiver proclamations; doubts had arisen over Crown grants already issued; and there was the problem of grants exceeding 2,560 acres made by Fitzroy against the recommendations of the Commissioners. Earl Grey seized the initiative in December 1846 and announced proposals for self-government and "the necessity of a fundamental change in the system adopted by the Charter of November 1840."[121]

Earl Grey opened his remarks with the conventional wisdom relating to aboriginal land rights:[122]

> The opinion assumed, rather than advocated, by a large class of writers on this and kindred subjects is, that the aboriginal inhabitants of any country are the proprietors of every part of its soil of which they have been accustomed to make any use, or to which they have been accustomed to assert any title. This claim is represented as sacred, however ignorant such natives may be of the arts or habits of civilized life, however small the number of their tribes, however unsettled their abodes, and however imperfect or occasional the uses they make of the land. Whether they are nomadic tribes depasturing cattle, or hunters living by the chase, or fishermen frequenting the sea-coasts or the banks of rivers, the proprietary title in question is alike ascribed to them all.

Clearly then, according to Grey, the Charter did not attempt to clarify the ambiguities discussed above in Part X. Rather, it envisaged that no matter whether the aborigines were nomads, depasturers of cattle, or fishermen, proprietary title was ascribed to them all. In this respect, Grey thought it was wrong; a "fundamental change" was necessary in the law as interpreted to date.

Earl Grey then elaborated what he conceived to be the true view, relying on a passage from Dr. Arnold, whom he considered an unimpeachable source:[123]

> Men were to subdue the earth: that is, to make it by their labour what it would not have been by itself; and with the labour so bestowed upon it came the right of property in it. Thus every land which is inhabited at all belongs to somebody: that is, there is either some one person, or family, or tribe or nation, who have a greater right to it than anyone else has: it does not and cannot belong to everybody. But so much does the *right of property go along with labour* that civilized nations have never scrupled to take possession of countries inhabited only by tribes of savages—countries which have been hunted over, but never subdued or cultivated. It is true, they have often gone further and settled themselves in countries which were cultivated, and then it becomes robbery: but when our fathers went to America and took possession of the *mere* hunting grounds of the Indians—of lands on which hitherto man had bestowed no labour—they only exercised a right which God has inseparably united with industry and knowledge. (emphasis added.)

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[120] H.C.P.P. 1845 (1) at 1, No. 1, Stanley to Fitzroy, August 13, 1844.

[121] H.C.P.P. 1847 (763) at 64, No. 43, Earl Grey to Gov. Grey, December 23, 1846.

[122] *Id.* at 67-68.

[123] *Id.* at 68.

The consequences of this reasoning were fatal to the pretensions of the New Zealand aborigines who claimed vast areas of "fertile but unoccupied land". It was true, Grey admitted, that when the British arrived, the aborigines practised a rude form of agriculture, but the area so used was insignificant. Thus:[124]

> . . . to contend that under such circumstances civilized men had not the right to step in and take possession of the vacant territory, but were bound to respect the supposed proprietary title of the savage tribes who dwelt in but were utterly unable to occupy the land, is to mistake the grounds upon which the right of property in land is founded.

But Earl Grey did not deny property rights completely: "Barbarous as they were", the aborigines still had a "clear and undoubted claim" to "that portion of the soil, whatever it might be, which they really occupied".[125] To have denied their rights to that area which they cultivated, or needed to move about in, would have been "in the highest degree unjust".[126] But:[127]

> . . . so long as this injustice was avoided, I must regard it as a vain and unfounded scruple which would have acknowledged their right of property in land which remained unsubdued to the purposes of man.

Because the inhabitants did not have property rights in unoccupied lands, they could not convey them; so vast tracts of unoccupied land founded on pretended sales were void. From the moment sovereignty was proclaimed[128] it should have been made clear that all lands not actually occupied in the sense in which occupation alone can give a right of possession, ought to have been considered the property of the Crown, unencumbered by aboriginal title.[129]

To support his argument as to the true foundation of property rights, Grey made another interesting point, one which puts beyond all doubt that New Zealand was considered to be a colony acquired by settlement or annexation, and not by cession. Had the aborigines been civilized and had private notions of property, the situation would have been entirely different. Echoing the language of *Calvin's Case* and *Campbell* v. *Hall* he said:[130]

> . . . while all the property of individuals would have been respected, all public property, all rights of every description which had appertained to the previous Sovereigns, would have devolved as a matter of course, to the new Sovereign who succeeded them.

But because the aborigines were not civilized, and had no notions of property the only basis on which they could claim their property rights was through the sovereignty of the tribe. If this were so, the rule of *Calvin* destroyed those sovereign rights. It could "hardly be contended that these tribes, as such, possessed rights which civilized communities could not have claimed."[131]

Earl Grey was aware that these views were a departure from the principles which had guided the colonization of New Zealand. Had he

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[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] Clearly, for sovereignty to run over the whole of New Zealand was in no way conditional on the submission of the aborigines.

[129] *Supra*, n. 121 at 69.

[130] *Id.*

[131] *Id.*

been able, he said, to turn the clock back and start the whole venture again, these were the principles he would have adopted. But because they would be a departure from established views, he realized that their implementation might be impracticable.[132] He therefore authorised Governor Grey to maintain the *status quo* where necessary, enjoining him to act on the recommended principles where possible.

Despite these arguments, it still could not be denied that the aboriginal inhabitants of a settled colony had property rights and that those rights should be respected. The question was the extent of those rights.

The reaction to this question was swift and energetic. Governor Grey concentrated on persuading the Colonial Office that New Zealand was not yet ready for the new Constitution.[133] Sir William Martin, Chief Justice of the New Zealand Supreme Court, and Bishop Selwyn, set about demolishing Earl Grey's argument.

Sir William's views are to be found in his judgment in *The Queen* v. *Symonds*[134] and in a pamphlet (circulated anonymously[135]) entitled *England and the New Zealanders.*[136]

In Part I of the pamphlet, entitled "Proof that Earl Grey's Instructions involve a breach of the National Faith of Great Britain", the author assumed that the Treaty of Waitangi was a valid cession of sovereignty, and argued that Britain had, as a matter of national faith, an obligation to honour its promises in the dispatches and Parliamentary papers. In the Instructions to Hobson, for example, there was no claim on the part of the Crown to the possession of the territory in consequence of sovereignty.[137] Therefore private rights were respected. Under the cession, Great Britain:[138]

> . . . has not acquired any land of any sort in the country, if that land have an owner among the natives, according to their own customs. Whether that land be actually occupied by its owner is not the question; but only, *whether it have an owner* . . . (emphasis added.)

This would have been the case even had the Treaty not referred to the property rights of the aborigines, but the point was that the Treaty "did contain an express guarantee, and in the strongest and amplest words". The cession, the assurances accompanying it, and the very words of the Treaty could only mean one thing:[139]

> The Natives could not understand them by anything else than this: that whatever they, amongst themselves, called and considered their own, should be as much their own after our coming as before.

The Government had, on every occasion, used the widest terms, and could not now revert to a narrow construction. Moreover, in conformity with the assurances given, the "territorial rights of the Natives have been repeatedly recognised by Acts of the Colonial Governments". Martin continued: the reports of the Land Commissioners, the purchase of large

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[132] *Id.* at 69-70.

[133] *E.g.*, H.C.P.P. 1849 (1120) at 22, No. 11, Governor Grey to Earl Grey, May 15, 1848.

[134] *Regina* v. *Symonds, supra*, n. 64.

[135] There can be no doubt as to the authorship of this pamphlet; *see* H.C.P.P. 1849 (1120) at 34, No. 20 and enclosures, Governor Grey to Earl Grey, August 23, 1848.

[136] *England and the New Zealanders. Remarks on a Despatch from the Rt. Hon. Earl Grey to Governor Grey, dated December 23, 1846* (1847).

[137] *Id.* at 3-4.

[138] *Id.* at 16.

[139] *Id.*

tracts of country had been made without any distinction between land already subdued to men's labour and land wholly unsubdued. He concluded that the national faith was pledged to the rule that:[140]

> All those lands which have any owners according to native custom, do still belong to those owners: whilst all lands which have no owners, fall to the Crown by virtue of the Cession of Sovereignty.

In Part II Martin sought to establish that Earl Grey's dispatch involved "a violation of established law". Even had there been no Treaty or cession, no legislative enactments or assurances of undisturbed possession, the same rule would apply. He then elaborated the view that from the commencement of English colonization of North America "the territorial rights of the native race, as owners of the soil, have been asserted and protected by the law".[141] Following *Kent's Commentaries,*[142] he concluded that "it was the general practice to extinguish native title by fair purchases."[143] It was true, Martin said, that this policy which "anciently guided the Colonizing operations of Great Britain" was practically abandoned in the colonization of Australia. The atrocities flowing from this aberration in Australia were "among the chief causes of the national assertion of the old and righteous principle in the case of New Zealand."[144] He then quoted, from his judgment in *Symonds,* the *dictum* that when the right of the native occupier has been extinguished, the soil vests not in any individual, but in the Crown for the benefit of the whole people.[145] He quoted Chapman J., in the same case, that the rule that aboriginal title could not be extinguished (at least in times of peace) without the consent of the native occupiers had been maintained in favour of people who were not British subjects, and argued that there could be no doubt as to its application in favour of aborigines who were British subjects. Kent pointed out that the Indians were not considered to be British subjects and Martin concluded that:[146]

> The New Zealanders are British subjects . . .
>
> No right of any British subject can justly be, or in practice ever is, taken away from him, even by the Legislature in which he is represented, without compensation for the loss of that right.
>
> Therefore, (1) by National Compacts and Assurances on the part of Great Britain, (2) by the Common Law of British Colonies, and, (3) by the Constitutional rights of British subjects, the New Zealanders are entitled to retain against the Crown all the lands in New Zealand which are *owned,* according to native custom: whilst all lands not so owned fall to the Crown.

In Part III Martin set out his final argument entitled a "Protest against the general doctrine put forth by Earl Grey, as the general principles upon which colonization should henceforth be conducted by Great Britain". The substance of the attack was that the policy was tantamount to a "principle of colonization by seizure" and a gross departure from the "old national principle of Colonization by fair purchase".[147] Bishop Selwyn also joined issue against Earl Grey and protested against the

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[140] *Id.* at 18.

[141] *Id.* at 19.

[142] Vol. III, Lec. 51.

[143] *Supra,* n. 136 at 20.

[144] *Id.* at 24-25.

[145] *Regina* v. *Symonds, supra,* n. 64 at 395.

[146] *Supra,* n. 136 at 28-29.

[147] *Id.* at 43.

denial of the aborigines' rights and privileges as British subjects, and vowed a single-minded purpose to protect those rights.[148] In the face of this opposition the Secretary of State beat a hasty retreat,[149] and, henceforth, aboriginal land rights were to be protected by the rule of law.

XII

The historical materials elucidated above show that the most important mechanism for protecting aboriginal land rights was the Crown's exclusive right of pre-emption. The rationale for the rule was the double one; that sovereignty was assumed by right of discovery and at international law, the discoverer could exclude all other European powers; and the medieval doctrine that the King was proprietor of all the soil and private titles could only be recognised if proved by letters patent and a grant from the Crown. Theoretically, this was an important device for controlling the spread of white settlement, to be used in conjuction with the *Campbell* v. *Hall* doctrine that unauthorised settlements *de jure* accrued to the Crown. More important was its value in preventing the aborigines from being over-reached and defrauded by the colonists.

The materials clearly demonstrate that it was admitted on all sides there was an obligation on the Crown to recognise and respect aboriginal rights in some form or another. Indeed, the removal of the distinction between conquests of infidels and Christians, inevitably resulted in such an admission. The rule was that the public rights of the conquered sovereign were inherited by the conqueror, while there was a presumption that the private rights of the people would be and were respected until abrogated by the conqueror's prerogative legislative power. A necessary consequence of the equation of infidels with Christians was that they *possessed* private rights which *could* be respected. Admittedly, the rights could not be asserted against the Crown until the King had abandoned his prerogative power by introducing the common law. But once it was clear that it was possible to acquire overseas possessions other than by conquest or cession, it was then possible to hold the view that they should be respected. Acquiring a colony by "settlement" meant that England occupied vacant land, or land inhabited only by savages. The introduction of the common law meant, however, that those savages were British subjects. The timely intervention of enlightened men who were sensitive to the property rights of British subjects enabled the devising of a formula which respected those rights. Obviously, the fact that the aborigines had no notions of property which resembled those at common law did not prevent respect for native rights. The logic was very simple: *because* the aborigines only had a "qualified dominion" and *because* title could be recognised only if verified by letters patent; and *because* the King was proprietor of all the soil, to make the Crown title complete and unencumbered, and to enable land titles to be issued and evidenced by letters patent, the Crown possessed the exclusive right of pre-emption. In a colony which was governed by the common law, this pre-emptive right could be exercised only under the common law. This meant that aboriginal title could be extinguished only with their consent, by com-

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[148] H.C.P.P. 1847-48 (892) at 82, enclosure in No. 42, Selwyn to Governor Grey, July 1, 1847.

[149] H.C.P.P. 1847-48 (1002) at 138, No. 9, Earl Grey to Governor Grey, March 18, 1848. *See also supra*, n. 148 at 179, No. 36, Grey to Grey, July 27, 1848.

pensation or pursuant to some statutory authority. It could not be extinguished by the prerogative legislative power

Earl Grey's assertion that the aborigines' rights would not have been respected had the cession been a valid instrument at international and common law is also untenable. Lord Coke and Lord Mansfield made it clear that once the common law was introduced into the conquered or ceded colony as had been done in 1840, the prerogative power was strictly limited. If the doctrine of *Calvin* and *Campbell* v. *Hall* was relevant to New Zealand, a strict application of that doctrine would lead to the conclusion that there is *no obligation to respect any rights.* There was only a *presumption* that the rights had been respected unless or until abrogated by some legislative act or course of dealing. Grey, in conceding that the aborigines had a right to soil which they had subdued to their own purposes, was not prepared to accept the consequences of the doctrine he was seeking to implement.

Earl Grey's dispatch and the 1844 Report raised a genuine issue of principle in relation to the operation and extent of the Crown's obligations to extinguish native title. The balance of evidence clearly suggested that the criterion for elucidating the extent of the land over which the Crown was obliged to obtain the consent of the aborigines to cession or purchase was that land held according to customary native tenure. There was a progression in the evidence from the desire in the 1834 Address to protect the "civil rights" of the aborigines to the assertion in the 1837 Report that they are "proprietors of the soil". Hobson's Instructions were to obtain by fair and equal purchase cessions of that "waste land" which might progressivly be required. Waste land could not possibly mean land which was unencumbered by aboriginal title: there would be no need to obtain cession; land not occupied according to custom accrued to the Crown on the assertion of sovereignty. The big question was how much land was not so occupied, and hence vested in the Crown without encumbrance. The wide words of the Treaty that the estates, forests, and fisheries of the aborigines were guaranteed to them re-inforces the view, indeed proceeds on the assumption, that their title in no way depended on their *actual* occupation *and* enjoyment, or their having subdued the soil to the purposes of man. The Ordinance repealing Gipps' Lands Commissioners Act was interpreted by Grey to have a similarly broad scope. According to Grey the Ordinance expressed the wrong principle; this was why it had to be fundamentally changed. Finally, the legislative attempts to implement the principles of the Treaty substantiate our submission. The Native Rights Act (No. 3 of 1865) (which had been passed after a bitter war with the aborigines) recited in the preamble that great confusion had arisen with regard to native property rights, and enacted in section 3 that there was no doubt that the Supreme Court had jurisdiction over cases touching "the titles to land held under Maori Custom and Usage." The political moves of the 1844 Report and Earl Grey failed to change the common law. Henceforth aboriginal occupation and enjoyment of their traditional tribal land according to customary native tenure was to be the criterion for deciding whether or not the Crown had validly extinguished aboriginal land rights. Finally, not once in all the evidence discussed so far, has there been any suggestion that respect for native rights was conditional on their disclosing property relationships analogous to the common law. All that had to be shown was there was a system of customary tenure or usage. The

right of property flowed from the existence of such a system. In other words, the common law ascribed a proprietary status to the system, and did not go behind it.

Three important questions arose at this juncture. Was the aboriginal system of tenure cognizable in a court of common law?

Secondly, were they enforceable at common law? And, thirdly, did a court of common law have jurisdiction to enforce them? Was it necessary to constitute special courts to hear and determine questions regarding aboriginal rights? To answer these questions in the affirmative requires analysis of the case law referring to the legislation which was enacted to declare those principles of common law already discussed.

XIII

The New Zealand example is relevant to the Australian situation. Up to the passing of the Land Claims Ordinance, the Imperial Waste Lands Act, which applied to New South Wales, also governed New Zealand. Therefore Gipps' argument must be taken as completely consistent with that Act and applicable to Australia. There is absolutely nothing in that Act which denies aboriginal rights in Australia, yet Gipps saw in it, by arguing from first principles, that aboriginals had a qualified dominion, that the Crown had a right of pre-emption and no settler could take the initiative of starting his own colony. Secondly, New Zealand was a settled colony and as such is directly relevant and an authoritative source for the doctrine of communal native title.

Mr. Justice Blackburn thought that the New Zealand example did not help the plaintiffs because it was merely evidence of a policy to respect native rights, which policy was later put into statutory form. We believe that Blackburn J. was wrong in this view. Analysis of *The Queen* v. *Symonds*[150] and *Nireaha Tamaki* v. *Baker*[151] shows the courts saw the legislation as declaratory of the common law, and not a departure from it.

As part of an attempt to assert his political authority, Governor Grey arranged for a case to be brought before the Supreme Court to test the validity of grants made by Governor Fitzroy under his proclamations waiving the Crown's exclusive right of pre-emption. In our view, the court in *The Queen* v. *Symonds* correctly stated the law relating to respect for aboriginal rights, and is an example of the application of that law to a settled colony. In later cases, courts have experienced great difficulty, even reluctance, in applying that decision.

In *The Queen* v. *Symonds*, the claimant, in *scire facias* proceedings, sought to have a Crown grant to the defendant set aside and, in its place, recognition of his claim to a parcel of land purchased direct from the aborigines, coupled with a certificate from Fitzroy waiving the Crown's right of pre-emption.

Chapman J. was conscious of the importance of the issues raised. The question involved "principles of universal application to the respective territorial rights of the Crown, of the aboriginal Natives, and the European subjects of the Queen".[152] The common law relating to respect for aboriginal rights, which was deducible, he said, from principles of

[150] *Regina* v. *Symonds*, *supra*, n. 64.

[151] [1901] A.C. 561.

[152] *See* Rutherford, *supra*, n. 105 at 126.

colonial practice which had "anciently" guided England's colonizing activities in America. It was also derived from those "higher principles" of the Crown being the original proprietor of the soil and consequently the only source of private title, and from treaties and charters made in conformity with them, and judicial decisions affirming them. He conceded that although these principles had on occasion been lost sight of, yet:[153]

> . . . animated by the humane spirit of modern times, our colonial courts, and the courts of such of the United States of America as have adopted the common law of England, have invariably affirmed and supported them; so that at this day, a line of judicial decision, the current of legal opinion, and above all, the settled practice of colonial Governments, have concurred to clothe with certainty and precision what would have otherwise have remained vague and unsettled. These principles are not the new creation or invention of colonial courts. They flow not from what an American writer has called 'the vice of judicial legislation'. They are in fact to be found among the earliest settled principles of our law . . . .

The short answer to the claimant's application was that at common law and under the Charter and Governor's commission the only way of acquiring land was by Crown grant, verified by letters patent under the great seal of the Colony. He must therefore fail.[154]

Because of the peculiar nature of the instrument under which the claimant made his application, Chapman J. specified those ancient principles which denied the validity of the waiver proclamations. Simply to state the feudal maxim that the King was the only source of all private title and that title had to be verified by letters patent was not sufficient; it also had to be shown that those rules were applicable to New Zealand. The judge explained that the long-established and legally recognized practice of extinguishing native title by fair purchase had been adopted by the British in their American colonies, and then by the United States. He referred to *Cherokee Nation* v. *State of Georgia*[155] where the U.S. Supreme Court protected the plaintiff-nation, "against a gross attempt at spoliation". The court clearly relied on these long-standing principles[156] in saying:[157]

> Whatever may be the opinion of jurists as to the strength or weakness of Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, and that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers.

For the protection of the aborigines, and for the sake of humanity, the Government was bound to maintain, and the courts to assert, the Crown's exclusive right to extinguish aboriginal title. For the courts to recognize and protect private purchases from the aborigines would be "to confiscate the lands of the Natives in a very short time."[158] Maintenance of the Crown's pre-emptive right was calculated to give equal security to both races. Although the power of alienation by the aborigines was strictly limited, in that they could only sell to the Crown, they

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[153] *Regina* v. *Symonds, supra*, n. 64 at 388.

[154] *Id.* at 388.

[155] [1831] 5 Peters 1.

[156] *Regina* v. *Symonds, supra*, n. 64 at 390. III *Kent's Commentaries*, lecture 51.

[157] *Id.* at 390.

[158] *Id.* at 391.

were still free to deal with their land among themselves. Chapman J. added:[159]

> The assertion of the Queen's pre-emptive right supposes only a modified dominion residing in the natives. But it is also a principle of our law that the freehold never can be in abeyance: Hence the full recognition of the modified title of the Natives, and its most careful protection, is not theoretically inconsistent with the Queen's seisin in fee as against her European subjects. this technical seisin against all the world except the Natives is the strongest ground whereupon the due protection of their qualified dominion can be based.

He conceded that "this extreme view" had not been taken by any colonial court of which he was aware, nor in any decision in the United States which recognized the common law. Yet, in one case,[160] a judge had said that with the exception of their power to alienate to no-one but the sovereign, the natives were to be considered as the absolute proprietors of the soil. Thus:[161]

> . . . even abstaining from regarding the Queen's territorial right, pending the title of the natives as of so high a nature as an actual seisin in fee as against her European subjects, and regarding it in the view most favourable to the claimant's case, as the weakest conceivable interest in the soil, a mere possibility of seisin, I am of opinion that it is not a fit subject of waiver either generally by Proclamation, or specially by such a certificate as Mr. McIntosh holds. Both by the common law of England (now the law of the Colony in this behalf) and by the express words of the Charter, such an interest can only be conveyed by letters patent under the public seal of the colony.

Martin C.J. concurred with Chapman J. in characterizing aboriginal occupancy as a "right".[162] In guaranteeing their rights of possession and the right of pre-emption of the Crown, it followed that the Treaty of Waitangi, confirmed by the Charter of the Colony, did "not assert either in doctrine or in practice anything new or unsettled.[163] There was no suggestion that the rights were not legal rights, and in explicitly holding that aboriginal title could be extinguished only by their consent (at least in times of peace), Chapman J. was repudiating any argument that these legal rights could be overridden by act of State or extinguished by the prerogative legislative power.

The judgment proceeded on two bases: colonial title could be recognized only if gained in accordance with the appropriate machinery of Crown grant; and that the aborigines' legal rights to occupation and enjoyment were protected by the Crown's exclusive right of pre-emption. True, Chapman J. said, some aborigines may have reduced their communal title to individual ownership and may be able to protect their own interests, but the great mass could not. The rule contemplated the aborigines under a species of guardianship. Technically, it contemplated the aboriginal dominion over the soil as:[164]

> . . . inferior to what we call an estate in fee: practically, it secures to them all the enjoyments from the land which they had before our intercourse, and as much more as the opportunity of selling portions, useless to themselves, affords. From the protective character of the rule, then, it is entitled to respect on moral grounds, no less than to judicial support on strictly legal grounds.

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[159] *Id.*

[160] Clearly referring to *Fletcher* v. *Peck* (1809) 6 Cranch 87; *cf. Cherokee Nation* v. *State of Georgia* (1831) 5 Peters 1 at 48 per Baldwin J.; *Mitchel* v. *United States* (1834) 9 Peters 711 at 746 per Baldwin J.

[161] *Regina* v. *Symonds, supra*, n. 64 at 392.

[162] *Id.* at 395.

[163] *Id.* at 390 per Chapman J.

[164] *Id.* at 391.

Subsequently, *Symonds* has been cited as authority for the proposition that aboriginal land claims cannot be recognized in courts of common law, but only in the special native land courts established for the purpose of enquiring into aboriginal title. This is allegedly found in Chapman J.'s remark that:[165]

> As a necessary corollary from the doctrine, 'that the Queen is the exclusive source of *private* title', the colonial Courts have invariably held (subject of course to the rule of prescription in the older colonies) that they cannot give effect to any title not derived from the Crown (or from the representative of the Crown duly authorized to make grants), verified by letters patent.

When seen in context, it is obvious that these *dicta* are not authority for the proposition that aboriginal title is not cognizable at common law, because they referred to *white* title, not aboriginal title. Martin C.J. made this clear when he said that whether or not colonists appropriated and occupied lands, with or without consent of the aborigines, they gained no rights against the Crown because individuals could not found colonies. As soon as the aboriginal rights were withdrawn, the soil vested in the Crown for the benefit of the whole nation.

The *Symonds* court correctly stated the law with respect to protection of aboriginal rights. There were (and are) clear rules of common law that the Crown possessed the exclusive right of pre-emption, and the white titles had to be verified by letters patent. The pre-emptive right protected the aborigines from being defrauded and enabled the Crown to retain some measure of control over the spread of settlement.[166]

In 1848, certain aboriginal chiefs had granted a parcel of land to the Bishop of Wellington. Three years later, the Crown, without the knowledge of the aborigines, issued a grant to the Bishop, and trusts were executed for the purpose of establishing a school. No school was ever erected or established and the plaintiff sought a declaration that his tribal land rights had not been validly extinguished, that the Crown grant was void and the land should revert to the tribe. The Attorney-General demurred, arguing that the grant could only be set aside by *scire facias* proceedings. The New Zealand Supreme Court allowed the demurrer.[167]

Plaintiff's counsel argued that the court should take notice of the Instructions to Hobson and his successors and set aside the grant. Richmond J. replied that the Court of Appeal had held that fee simple was in the Crown, subject to the aboriginal tribes, and subject to such Crown grants as had been executed:[168]

> The natives were to have a right of occupancy which, if we were left to the common law, this Court could know nothing about. . . . This Court cannot enquire whether the Crown had properly extinguished native title.

He rejected counsel's argument that only questions of fact, and not

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[165] *Id.* at 388. Similarly, *id.* at 393, Martin C.J. said that "colonial titles have uniformly rested upon grants from the Crown".

[166] The New Zealand cases which hold, together with Blackburn J., that the Treaty and the Charter merely enacted a policy rather than legal principles fail to realize that what the Colonial Office and the *Symonds* court were doing was to manipulate certain, clear principles and apply them to a colony acquired by peaceful settlement or annexation. The later cases in no way impair the authority of *The Queen* v. *Symonds* in so far as they contain statements which cannot be reconciled with the opinion of the Judicial Committee in *Nireaha Tamaki* v. *Baker* [1901] A.C. 561. The Privy Council, in endorsing Chapman J.'s remarks, put beyond doubt that aboriginal land rights are protected at common law.

[167] *Wi Parata* v. *The Bishop of Wellington*, *supra*, n. 93.

[168] *Id.* at 75.

title, were to be heard by the specially constituted native land courts established by the Native Rights Act, 1865; disputes *inter se* went to those courts, but whether or not the aborigines had duly ceded their title to the Crown was not a question of title, and the Supreme Court thus had no jurisdiction. He also said that it would be "a monstrous thing"[169] if the court could be required to decide the question whether native title had been extinguished. Richmond J. then discussed the 1846 'Notorious Instructions' of Earl Grey and noted that they had never been acted on. He then said:[170]

> Subject to a principle of common law, which has been repeatedly recognized by the Colonial statutes, applicable to newly-settled countries in which there is an aboriginal race, . . . [T]he Crown takes all their lands, subject to a rightful and necessary occupation of the land by the aborigines.

These judicial remarks seem to be contradictory: the aborigines have a rightful occupation at common law, which the common law cannot recognize. Does Prendergast C.J. provide an answer? He viewed the Treaty of Waitangi as a nullity in so far as it purported to cede sovereignty. On the foundation of the colony no body politic existed which could cede sovereignty, or write with a political pen, but, so far as aboriginal property rights were concerned, the Treaty merely affirmed the rights and obligations which by *jure gentium* devolved on the Crown. He quoted Normanby's contradictory dispatch[171] and added that the Maoris were incapable of performing the duties, and therefore of assuming the rights. of a civilized community;[172] the framers of 1841 Land Clause Ordinance assumed that no notions of property in land or any regular system of territorial rights existed among the aborigines. They had no system of law which was "capable of being understood and administered by the courts of a civilized country".[173] Had such a system existed, he argued, steps would have been taken for its recognition and protection.

Perhaps it could be argued that in New Zealand, a colony acquired by annexation:[174]

> . . . the sovereign of the settling nation acquiring on the one hand the exclusive right of extinguishing native title, assumes on the other hand the correlative duty, as supreme protector of the aborigines, of securing them against any infringement of their right of occupancy.

In the case of primitive barbarians, the supreme executive government must acquit itself as best it can, and because there are no known principles of adjudication, its acts cannot be called into question and, of necessity, it is the arbiter of its own justice. In New Zealand, therefore, "the issue of a Crown grant undoubtedly implies a declaration by the Crown that the native title over the land which it comprises has been extinguished."[175]

The alternative resolution of the contradiction seems illogical. Prendergast C.J. saw the extinguishment of aboriginal title as an act of state, and therefore unexaminable at common law. While the Crown possessed

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[169] *Id.*

[170] *Id.* at 76.

[171] *Supra*, n. 87.

[172] *Wi Parata, supra*, n. 93 at 77.

[173] *Id.* at 77, 78. He quoted Gipps' speech in support.

[174] *Id.* at 78.

[175] *Id.*

the exclusive right of pre-emption, it also assumed a treaty-like obligation to protect the aborigines. A court could not question the discharge of these extraordinary powers exercised under the prerogative, but could only assume that the sovereign power had been properly exercised in respecting all native proprietary rights.[176]

This reasoning is unacceptable because it ignores Richmond J.'s statement that the aborigines have a rightful occupation at common law. By equating Maoris with foreigners and talking about treaty obligations, Prendergast C.J. was, in effect, relying on international law. On the other hand, the court had already stated that the aborigines were primitive barbarians and incapable of ceding sovereignty and that the Crown was forced to be arbiter of its own justice because there were no known principles of adjudication. The Chief Justice regarded the Treaty of Waitangi as a nullity for most purposes but not, it seems, when it gave rise to duties imposed on the Crown. If this reasoning is correct, then aboriginal rights were derived not from the common law, but international law.

The court also decided that the Native Rights Act 1865 did not alter the situation. Prendergast C.J. cited section 3[177] and remarked that the words "the persons or property, whether real or personal, of the Maori people and touching the titles to land . . ." only signified that the court was enabled and required to determine questions of native title. The Chief Justice admitted that the words of section 4 of the Act which stated that "every title or interest in land over which the Native Title shall not have been extinguished shall be determined according to the Ancient Custom and Usage of the Maori people so far as the same can be ascertained" seemed to suggest the existence of some body of customary law. But, he said, "a phrase in a statute cannot call what is non-existent into being"; and indeed the:[178]

> . . . proceedings of the British Government and the legislation of the Colony have at all times been practically based on the contrary supposition, that no such body of law existed; and herein have been in entire accordance with good sense and indubitable facts.

This is surely a remarkable comment: the whole point of the dispute over whether the Crown was obliged only to respect land in actual occupation and enjoyment is only intelligible on the assumption that there was a system of tenure to which that occupation and enjoyment was referable.[179]

Prendergast C.J. avoided a final decision by side-stepping the statute; because it did not name the Crown, it did not bind it, and therefore could not deprive it of its prerogative right to decide whether native title had been properly extinguished. If the prerogative were left intact, then "the issue of a Crown grant must still be conclusive in all courts against any native person asserting that the land therein was never duly ceded.[180]

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[176] *Id.* at 79.

[177] Section 3: The Supreme Court and all other Courts of Law within the Colony ought to have and have the same jurisdiction in all cases touching the persons and the property whether real or personal of the Maori people and touching the titles to land held under Maori Custom and Usage as they have or may have under any law for the time being in force in all cases touching the persons and property of natural-born subjects of Her Majesty.

[178] *Wi Parata, supra,* n. 93 at 79.

[179] Moreover, the Judicial Committee in *Nireaha Tamaki* v. *Baker* in effect said that Prendergast C. J. was wrong.

[180] *Wi Parata, supra,* n. 93 at 80. Yet the Chief Justice was in part correct when he remarked on the words "property, whether real or personal, of the Maori people, and touching the titles to land held under Maori

The Judicial Committee decision in *Nireaha Tamaki* v. *Baker*[181] all but destroyed the authority of *Wi Parata* v. *The Bishop of Wellington.* The appellant aborigine based his claim against the Commissioner of Crown Lands on section 136 of the Land Act 1892, claiming that his interest had not been lawfully extinguished. The respondent argued that the Crown had the sole right, based on prerogative, of determining whether the aborigines' interests had been 'ceded' to the Crown. Such transactions were acts of State which could not be enquired into by the courts. In other words, *vis-à-vis* the Crown, aboriginal land rights were not protected by law because the prerogative over-rode the law. *The Queen* v. *Symonds* was invoked to support the argument that the Crown alone can determine whether native title had been extinguished.

The Judicial Committee's answer to these arguments must be seen in the perspective of its wide experience in colonial constitutional law, the constitutional rights of British subjects and of the Crown's lack of prerogative legislative power. The Committee said that the right of extinguishing aboriginal title was now clearly exercised by Ministers of the Crown in accordance with statutory authority and there could be no suggestion of the extinction of the appellant's title by the exercise of the prerogative outside the statutes "if such a right still exists".[182] The court below, in explicitly following *Wi Parata* had misunderstood the true nature of the proceedings. That court had interpreted the action as an attack on the Crown, and treated the respondent as if he were the Crown or acting under its authority, whereas the real scope of the action was to restrain the respondent from infringing the appellant's rights by not complying with the statute.

The Judicial Committee would not countenance the argument that the Crown could extinguish aboriginal title by prerogative act, and that a court of common law had no jurisdiction to decide whether aboriginal title had been validly extinguished. Some formal exercise of the prerogative had to be shown. Thus the aborigines were to be accorded equal protection at common law. They were British subjects, not aliens at the mercy of the Crown's prerogative power. The Committee respected aboriginal right of occupation according to customary native tenure and endorsed Chapman J. who had said those rights could not be extinguished except "in strict compliance with the provisions of the statutes."[183]

In reply to the assertion that the aborigines had no system of tenure which was cognizable in a court of common law, the Committee said this argument "went too far", and that it was too late in the day for such an argument to be addressed to a New Zealand court. It was:[184]

Custom and Usage", that either those titles existed as legal creatures prior to the passing of the Act or they did not. The 1865 Native Rights Act had reversed the 1862 Native Land Act which had declared that:

> . . . nothing herein contained shall be construed as rendering the rights of the Natives with respect to such lands, or the usages or customs on which such rights depend, cognizable or determinable by any Court of law or equity or other judicature until . . .

certain formulas had been complied with. The 1865 Act did not call titles under aboriginal custom into being. Because titles and proprietary rights were not subjects of international law, the only other possible source from which they could have been derived was from the common law.

[181] *Nireaha Tamaki* v. *Baker, supra,* n. 151.

[182] *Id.* at 576 per Lord Davey who delivered the opinion of the Board.

[183] *Id.* at 579. This appears to be incorrect in so far as it purports to be Chapman J.'s holding (*Regina* v. *Symonds, supra,* n. 64 at 390) but it is nevertheless the strongest authority that, in 1847, aboriginal title could not be extinguished other than by consent or in strict compliance with statute. The Judicial Committee may, however, have been referring to the 1841 Land Claims Ordinance and the Imperial Waste Lands Act, 5 & 6 Vict. c. 36.

[184] *Id.* at 577.

> . . . the duty of the Court to interpret . . . [the 1865 Native Rights Act] which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them by evidence.

Admittedly, the Committee spoke of and relied on statute, but we have already seen the common law basis for that section. Common law recognition was not argued because it was not necessary.

The Judicial Committee did not deal explicitly with the other basis for the *Wi Parata* decision, but implied that aboriginal land rights are protected by the rule of law. It was unimpressed by arguments on act of State, and rejected the argument that the Supreme Court had no jurisdiction, by *scire facias* or other proceedings, to annul a Crown grant for matters not appearing on the face of it, and that the issuing of a Crown grant implied a declaration by the Crown that the aboriginal title had been extinguished. The Committee said that the *dicta* in *Wi Parata* went beyond what was necessary for the decision. This is a clear indication that not everything said in *Wi Parata* was to be considered binding. The decision was merely accepted as correct on its facts.

The Judicial Committee criticized the attempt of Prendergast C.J. to limit the effect of the Native Rights Act 1865. In addition, it commented on the 1841 Land Claims Ordinance and said that by the words 'subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants', the Act:[185]

> . . . did not confer title on the Crown, but it declares that the title of the Crown to be subject to the 'rightful and necessary occupation' of the aboriginal inhabitants . . . .It would not of itself, however, be sufficient to create a right in the native occupiers cognizable in a Court of law.

What, then, did create the title? The Judicial Committee must be taken to be confirming a point made earlier—that Crown title was conferred, and aboriginal title created, before the Ordinance became law.

Last, and perhaps most significantly, the Judicial Committee did not see the action as an attack on the Crown's interest:[186]

> . . . the native title of possession not being inconsistent with the seisin in fee of the Crown. Indeed, by asserting his native title, the appellant impliedly asserts and relies on the radical title of the Crown as the basis of his own title of occupancy and possession.

Nireaha Tamaki v. *Baker* is, therefore, authority for the following propositions: (a) Aboriginal land rights in a colony acquired by peaceful settlement or annexation cannot be extinguished except in strict accordance with statute, or, to adopt the language of Chapman J., aboriginal rights are entitled to be respected and cannot be extinguished, at least in times of peace, without the consent of the native occupiers. (b) In a country which has been granted representative institutions and is subject to the common law, the Crown has no prerogative power to extinguish aboriginal occupation of their traditional tribal lands according to customary native tenure. Cession of aboriginal title is not an act of State unexaminable by a court of law. (c) Where aborigines have a system of tenure which is either known to lawyers or discoverable by evidence, then a common court can take cognizance of that system and give effect to it. (d) A common law court has an inherent jurisdiction, by *scire facias* or other proceedings, to annul a Crown grant for matters not

[185] *Id.* at 567.

[186] *Id.* at 574.

appearing on its face. (e) *Tamaki* countenanced the possibility of bringing an action based on aboriginal title against the Crown if that title has not been properly extinguished.

The extinguishment of aboriginal land rights was a complicated and identifiable legal procedure. Blackburn J. dismissed *Tamaki* in only three lines.

Hohepa Wi Neera v. *The Bishop of Wellington*[187] was an action for a declaration for land rights on facts similar to *Wi Parata*. The Solicitor-General argued that *Tamaki* had not damaged the authority of *Wi Parata* so far as the present case was concerned. In *Tamaki*, the respondent was a statutory officer with statutory powers, and the proceeding was not against the Crown. There was no statute in force with regard to the extinguishment in 1848, the date of the alleged cession. This was plainly a specious argument. The Native Rights Act 1865 was in force at the time the action was brought, as the court in *Wi Parata* was uncomfortably aware—hence its pains to restrict its meaning. The Solicitor-General then relied on the arguments already discredited by *Tamaki*. The prerogative of the Crown to extinguish aboriginal rights had been recognized by an unbroken chain of authority beginning with *The Queen* v. *Symonds*, and *Tamaki* did not touch them.[188] In reply, the plaintiff argued that there could be no act of State between Crown and subject; the Treaty of Waitangi simply recognized the rights which the natives had according to the law of nations, and the Instructions, Charter and Ordinances and Statutes had throughout confirmed and continued these. The Governor had no prerogative right to grant, except in strict accordance with the Charters and Instructions.

Stout C.J. noted that the Judicial Committee in *Tamaki* had wrongly thought that New Zealand had remained a part of New South Wales until 1852, when in fact this was the date when a representative constitution had been granted. He pointed out that so far as the Native Rights Act 1865 was concerned, it could not bind the Crown. He rejected the Judicial Committee's interpretation of the Native Rights Act, as contrary to legislative intent or judicial interpretation. The important thing, he said, was not to consider how far *Tamaki* had altered the law and procedure of the Supreme Court in dealing with aboriginal land claims, but that *Wi Parata* had been held to be correct on the facts.[189] He then added that *Tamaki*:[190]

> . . . affirmed that the Supreme Court had no jurisdiction to annul a Crown grant for matters not appearing on its face, and that 'the issue of a Crown grant implies a declaration by the Crown that the Native title has been extinguished'.

On the contrary, the Judicial Committee said that if this were so, then:[191]

> . . . it was all the more important that natives should be able to protect their rights (whatever they are) before the land is sold and granted to the purchaser. But the *dicta* in [*Wi Parata*] go beyond what was necessary for the decision.

Stout C.J. went on to hold that the letter from the aborigines to the Governor in 1848, expressed as a 'full and final giving up' of the land

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[187] (1902) 21 N.Z.L.R. 655.

[188] "The Crown grant having been good when issued, the Native title was extinguished. The cession, having been accepted by the Crown, was an act of State, and cannot be enquired into". *Id.* at 659.

[189] *Id.* at 667.

[190] *Id.*

[191] *Nireaha Tamaki* v. *Baker*, *supra*, n. 151 at 579.

was a valid cession. He added, however, that the issue of the Crown grant was also conclusive of the question; he therefore accepted *Wi Parata* as good law.[192] It is therefore difficult to determine whether Stout C.J. based his decision on the question of extinguishment or, adopting his view that *Tamaki* did not materially alter *Wi Parata*, that the grant operated as an extinguishment and the letter could have been a nullity and hence not have affected the validity of the Crown or the grantee's title.

Williams J. said that prior to the 1865 Native Rights Act there were no statutes regulating extinguishment, and that they had no rights cognizable in a court of law. It was difficult, therefore, to see how the aborigines could transfer any rights to the Bishop. "A man cannot give what he has not got."[193] Williams J. persisted in the view that the 1865 Act created those rights. As we have seen, the rights of the Crown and of the aborigines existed before the 1841 Ordinance. He misconstrued the Judicial Committee's *dicta* to mean that those rights were simply statutory; instead, they are common law rights.

Williams J. continued by saying that, whether the court was right or wrong, there was an unbroken line of authority that the aborigines do not have a right in land which was cognizable in a court of law, and hence they could not transfer that right; that the Crown grant was not merely a piece of conveyancing machinery, but essential to create the right; and that not having any rights, they had no *locus standi* to impeach the grant. All of this was contrary to the Judicial Committee's decision. He added that the natives:[194]

> . . . had no rights cognizable in this Court. Nor could this Court examine in any way what those rights were. If the Crown by its representatives asserted the existence of any duty to the Natives, it seemed to us that the above principles might require the acceptance by the Court of the assertion, and so have placed us in the difficulty suggested.

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[192] *Hohepa Wi Neera, supra*, n. 187 at 667. Williams J., Denniston J. concurring, was of the same opinion; but he made no advertance to the validity of the supposed cession. Taking the narrow view of Stout C.J. that the issue of the grant implied a declaration that title had been extinguished, Williams J. was in apparent contradiction, for he said that the doubts expressed in *Tamaki* as to this point obviously rested on the fact that it was now regulated by statute. *Id.* at 670. Williams J. is mistaken. The doubt expressed by the Judicial Committee was a constitutional doubt, and had nothing to do with statute: the right to extinguish title was exercised by constitutional ministers of the Crown. This objection to Williams J. gains added force in the light of the Supreme Court's attempt to turn the Privy Council's error about the contemporary history of New Zealand to its own advantage. If these considerations are as important as the Supreme Court thought, the Judicial Committee must be expressing the pure doctrinal position. It is futile to try to turn the Committee's ignorance against it. Had the Committee been aware of the various provisions Stout C.J. considered relevant, it might well have decided the other way. Only then could it have been said that its reasoning was based on statute.

Williams J. then added that whenever the question of extinguishment arose it must have been for the Governor to decide whether the Crown accepted the cession, and he could be overruled by the Ministers in England, acting as administrators, not in a judicial capacity. This must be incorrect. We have seen that Chapman J. considered the aborigines' rights to be legal rights, that the Judicial Committee rejected the argument that the Crown had an absolute prerogative power to extinguish. Furthermore, Williams J's view flies in the face of the Judicial Committee's opening remarks in *Tamaki*: "This is an appeal by an aboriginal inhabitant of New Zealand . . . in which question of great moment affecting the status and civil rights of the aboriginal subjects of the Crown have been raised by the respondent". *Supra*, n. 181 at 566. To treat the matter as one of administration was to flout the aborigines' rights as British subjects, a matter which the Judicial Committee was at pains to protect. Resort to the act of State argument stands condemned on the same principles. In *Wallis & Ors* v. *Solicitor-General* [1903] N.Z.P.C.C. 23 the Judicial Committee was critical of the conduct of the Solicitor-General and the apparent political bias in the Supreme Court. The profession was outraged and entered a protest. *Hohepa Wi Neera, supra*, n. 187 at 730, Appendix: Protest Bench and Bar (April 25, 1903). In condemning the Judicial Committee, they reopened discussion of *Symonds* and *Tamaki*. Stout C.J. said that from the date of annexation all the lands belonged to the Crown, and title could be recognized only if verified by letters patent, citing *Symonds* and *Wi Parata* as authorities. Nor did *Tamaki* over-rule this view, although it was critical of some *dicta* in *Wi Parata*. Stout C.J. has misconstrued the effect of *Symonds*: Chapman J. was referring to white title, not aboriginal.

[193] *Id.* at 749.

[194] *Id.* at 754, 755.

The Supreme Court also accepted the authority of *Tamaki* in 1912 in *Tamihana Korakai* v. *Solicitor-General*[195] which was an action for a declaration of native rights pertaining to a lake. The plaintiffs argued that the Treaty had been recognized and put into effect by statute; that the Crown was bound by the common law and its own engagements to a recognition of aboriginal rights,[196] and they could not be extinguished in times of peace except by cession, and that the court had jurisdiction to ascertain private rights according to native custom and usage.[197]

The Solicitor-General recognized that *Tamaki's* case had reversed *Wi Parata* but argued that the principle remained intact: native title was not available for any purposes against the Crown; as against the Crown it was not legal title at all. Thus in any dispute as to whether land was aboriginal or Crown land the *ipse dixit* of the Crown was conclusive, and the question could not be litigated before any court. This was the principle which had dominated all the native land law since the foundation of the Colony and if this were not the principle, then apart from the fact that there was no criterion by which the validity of the cession could be decided, the security of all Crown lands would be jeopardized. *Tamaki* did not say that native title was available against the Crown, and anyhow, the Judicial Committee was wrong in saying that extinguishment was regulated by statute; at any rate, it no longer is. Native title, it was argued, is like alien title, and New Zealand native law was an importation from the United States settlement law, where, too, despite differences, it was not available against the Government.[198] The Treaty was not an international treaty, but merely a compact between individuals.[199]

Stout C.J. again misconstrued the *Symonds* judgment when he said that all title could not be recognized unless it flowed from Crown grant. Nevertheless he did recognize that:[200]

> . . . to interfere with Native lands merely because they are Native lands and without compensation would, of course, be such an act of spoliation and tyranny that this Court ought not to assume it to be possible in any civilized community.

Wi Parata did not derogate from that position, he said. Ignoring the common law basis for the 1841 Land Claims Ordinance and sections 3 and 4 of the Native Rights Act 1865 he went on to say that *Wi Parata:*[201]

> . . . only emphasized the decision in *R.* v. *Symonds* that the Supreme Court could not take cognizance of treaty rights not embodied in a statute, and that Native customary title was a kind of tenure that the Court could not deal with. In the case of *Nireaha Tamaki* v. *Baker* the Judicial Committee of the Privy Council recognized, however, that the Natives had rights under our statute law of their customary lands.

But Stout C.J. went on to derive the aborigines' statutory right from the 1909 Native Land Act, not, as did the Judicial Committee, the 1865 Native Rights Act. He was obliged to make this shift so he could reconcile

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[195] (1913) 32 N.Z.L.R. 321.

[196] *Id.* at 328-331.

[197] Several American authorities were cited in support; *United States* v. *Auguisola* 1 Wallace 352; *Strother* v. *Lucas* 12 Curtis 763; *United States* v. *Morino* 1 Wallace 400; *United States* v. *Arredondo* 10 Curtis 315.

[198] For a discussion of these differences and the consequences *see Tamihana Koraka, supra*, n. 195 at 333.

[199] *Id.* at 331-336.

[200] *Id.* at 344.

[201] *Id.* In *Hohepa*, Stout C.J. had held that the Native Rights Act 1865 could not have clothed the aborigines with *locus standi* to sue on native title because this would, in all probability, have led to civil war. Furthermore, he held that the 1865 Act did not bind the Crown. *Supra*, n. 187 at 666.

his remarks on the 1865 Act in *Hohepa's* case with the now accepted authority of *Tamaki*. On the strength of the 1909 Act, therefore, he dismissed the claim that the Solicitor-General could unilaterally declare land to be Crown land.

The implications of *Tamaki* were accepted by Chapman J. The conservation of the rights of the natives and recognition of the laws, customs and usages of the natives were reflected in the language of the enactments already discussed:[202]

> The expressions 'land over which Native title has not been extinguished', and 'land over which Native title has been extinguished', are both pregnant with the same declaration. In the judgment of the Privy Council in *Nireaha Tamaki* v. *Baker* importance is attached to these and similar declarations in considering the effect of colonial legislation.

The whole legislation was summarized in the opinion of the Judicial Committee, he said, and he quoted the Committee's views on section 3 of the 1865 Act:[203]

> . . . one is rather at a loss to know what is meant by the expressions 'Native title', 'Native lands', 'owners', and 'proprietors', or of the careful provision against sale of Crown lands until the native title has been extinguished if there be no such title cognizable by the law and no title therefore to be extinguished.

He concluded his remarks on the effect of *Tamaki* by saying that the various statutory recognitions of the Treaty of Waitangi "mean no more, but they certainly mean no less, than these recognitions of Native rights."[204]

To the extent that the Treaty of Waitangi did not assert "either in doctrine or in practice anything new or unsettled"[205] and that it implemented the common law obligation to recognize and respect aboriginal rights, Chapman J. accepted the full force of *Tamaki*:[206]

> The due recognition of this right or title by some means was imposed on the Colony as a solemn duty: *Nireaha Tamaki* v. *Baker*. That duty the Legislature of New Zealand has endeavoured to perform by means of a long series of enactments culminating in the Native Land Act, 1909. In this series of statutes one of the most important provisions is that which sets up a special court charged with the duty of investigating Native titles. The creation of that court shows that Native titles have been regarded as having an actual existence. It is quite true that the courts administering the ordinary laws have never had the means of conveniently investigating such titles. There arose, therefore, a case calling for a special tribunal, and such a tribunal was provided.[207] The lands may be Crown lands, but they are not vacant Crown lands. Such an expression as 'Crown lands' may have its fullest meaning or a very modified meaning according to what the Legislature has declared concerning the thing described: *McKenzie* v. *Couston*.[208] . . . To say that these customs are not cognizable by the Supreme Court, and that the Supreme Court does not know the nature of the customs and resulting tenure, does not dispose of the legally ascertained fact that the tenure exists. If forced to undertake the task the Supreme Court might have to ascertain them by means of evidence: *Nireaha Tamaki* v. *Baker* . . . which is an authority which obliges us to say that, though this Court does not know and cannot recognize the nature of the Native title, it at least amounts to a right to have the nature of that title ascertained.

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[202] *Tamihana Korakai, supra*, n. 195 at 356.

[203] *Nireaha Tamaki* v. *Baker, supra*, n. 151 at 578.

[204] *Tamihana Korakai, supra*, n. 195 at 356.

[205] *Regina* v. *Symonds, supra*, n. 64 at 390 per Chapman J.

[206] *Tamihana Korakai, supra*, n. 195 at 356-357.

[207] Erected under the Native Lands Act 1865.

[208] 17 N.Z.L.R. 228.

And in our submission, on the authority of *Symonds* and *Tamaki,* protected.

In *In re the Ninety Mile Beach,*[209] counsel for the appellants argued that the introduction of the common law did not supplant aboriginal rights, but the Native Land Act and Native Rights Act merely required the aborigines to prove which land was in fact theirs, and on proper proof the lands became theirs.[210] The Solicitor-General agreed that New Zealand had been acquired not by cession but by annexation, which thus introduced the common law, and conceded that *Symonds* recognized that the natives had a title which had to be extinguished in a particular fashion.[211] North J. misunderstood the true meaning of the *Symonds* case when he said on the assumption of sovereignty:[212]

> . . . the rights of the Maoris to their tribal lands depended wholly on the grace and favour of Her Majesty Queen Victoria, who had an absolute right to disregard the Native title to any lands in New Zealand . . .

He acknowledged, however, that aboriginal rights were protected by statute. Gresson J. said that there was an absolute right in the Crown, but added that prior to the 1865 Native Rights Act it might have been possible to argue that aboriginal title had been extinguished by operation of the common law, or at least by the Public Reserves Act, 1854. But he said:[213]

> . . . I doubt the validity of these submissions even prior to 1862, and the acceptance of either contention would involve a serious infringement of the spirit of the Treaty of Waitangi and would in effect amount to depriving the Maoris of their customary rights over the foreshore by a side wind rather than by express enactment.

This analysis shows that the two traditional reasons for denying aborigines their land rights are illusory. The Judicial Committee in *Tamaki* expressly denied the arguments that the aborigines had no system cognizable at common law, and that extinguishment was an act of State and therefore unexamined by the municipal courts.

XIV

We are not presently concerned with a detailed discussion of why aboriginal rights were not recognized in Australia and Canada in the same way as they were in New Zealand. A few comments seem appropriate. In Australia in particular, the aborigines were viewed as being amongst the lowest and most primitive forms of humanity.[214] They had no obvious and easily identifiable social system which would be recognized,[215] given the premises of the newcomers and the social conditions of the time. The demand for land, co-inciding as it did with the economic consequences of industrial development in England, persuaded the colonists that drastic action was needed. Dispossessed of their traditional lands and spiritual succour, liable to be shot on sight or poisoned, the aboriginal population declined dramatically.[216] Attempts by the

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[209] [1963] N.Z.L.R. 461.

[210] *Id.* at 462.

[211] *Id.* at 465.

[212] *Id.* at 468.

[213] *Id.* at 477, 478.

[214] *See e.g.*, the 1837 Report, *passim*, and at 10, *supra*, n. 74.

[215] *See e.g.*, Collins, *An Account of the English Colony in New South Wales* 327 (1911).

[216] *See* Rowley, *The Destruction of Aboriginal Society* (1970), *passim*.

Government to protect the civil rights of the aborigines were doomed to founder on ignorance and paternalism. In time it was the Government's function to 'smoothe their dying pillow'; their inevitable extinction was to be as painless as possible.[217] The principles of the 1834 Address and 1827 Report were lost amid the tensions within colonial society.[218]

The existence of the doctrine of communal native title, and its implementation, do not depend on the sophistication of the aborigines, except in so far as they have a system of tenure which is known to lawyers or discoverable by evidence. One reason why the law was applied in New Zealand in favour of aboriginal rights was because the Maoris were considered to be relatively more sophisticated than the Australian aborigines. Some had even been converted to Christianity prior to annexation while others had reduced their tenure to individual title. Indeed, Stanley argued that one reason why the recommendations of the 1844 Report should not be implemented to the detriment of the Maoris was because they were more civilized than their Australian brethren, and therefore deserved a better deal.[219] Russell also made it clear that no matter what ideas the New Zealanders had about their rights to the soil, the pre-emptive right was to be maintained.[220] Sophistication is a matter of fact which only becomes relevant to the question whether the aborigines possess a system of tenure which is sufficiently precise to be called a system as envisaged by the Judicial Committee in *Re Southern Rhodesia,*[221] and it is capable of being proved by evidence as envisaged in *Tamaki* v. *Baker.* The apparent barbarity of the Australian aborigines should have in no way operated as a legal impediment to recognition of their rights and the implementation of the doctrine to protect them. The obligation to recognize arises as a matter of law once the conditions of *Re Southern Rhodesia* and *Tamaki* are met. Actual implementation of course, depends to a large extent on the current level of scientific and anthropological knowledge. Britain's recognition of its obligations to respect aboriginal rights in New Zealand depended on a variety of factors, not least of which was the existence of chiefs with whom they could meet on a more or less equal footing. Admittedly the Maori social system was much more intelligible to the British. (The Australians' system was not more primitive, simply more subtle.)

There is an obligation to recognize and respect aboriginal rights. Britain's failure to carry out that obligation in Australia and Canada must not be based on any proposition that the aboriginals have no rights or that there is a presumption at law that they are savages. The expropriation of lands subject to customary native tenure has been and still is contrary to the common law, unless the Crown can point to consent, compensation or some statutory authorization.

XV

The law relating to extinguishment of aboriginal title was correctly stated in *Symonds* and *Tamaki* which make it clear that aboriginal land

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[217] *Cf.* Biskup, *White-Aboriginal Relations in Western Australia: An Overview,* Comparative Studies in Society and History, Vol. 10 (1967-68) 447 *et seq.*

[218] For a brief discussion of these questions *see* Roe, *Quest for Authority in Eastern Australia, 1835-1851* (1965).

[219] H.C.P.P., 1845(1) at 3, No. 1, Stanley to Fitzroy, August 13, 1844.

[220] H.C.P.P., 1841(311) at 51, No. 19, Russell to Hobson, January 28, 1841, at 52.

[221] [1919] A.C. 211.

rights can be extinguished only by consent or in compliance with statute. Since *Campbell* v. *Hall,* the infidel inhabitants of a conquered colony had been considered perpetual enemies whose rights were *ipso facto* abrogated, and hence they were unable to be asserted against the Crown.[222] In a settled colony, however, the rule was that the colonists brought the common law—their 'birthright and inheritance'—with them as well as the statute law in so far as it was appropriate to the circumstances of the newly settled colony. Part of that law, we have argued, was the doctrine of communal native title. Further, when the distinction between infidel and Christian conquests was abolished, the aborigines in a settled colony were not perpetual enemies, but British subjects because they were within the allegiance and protection of the King. The King had to rule subject to the law of the colony and had no prerogative power to extinguish their property rights any more than he could extinguish those of the colonists. Chitty states the rule roundly when he says:[223]

> . . . if an uninhabited country[224] be discovered and peopled by English subjects, they are supposed to possess themselves of it for the benefit of their Sovereign, and such of the English laws then in force, as are applicable and necessary to their situation, and the condition of that infant colony; as for instance, laws for the protection of their persons and property, are immediately in force. Wherever an Englishman goes he carries with him as much of English law and liberty as the nature of his situation will allow.

The are difficulties in rigorously applying this reasoning to Australia. The question of what the Crown or its agents could or could not do is not yet settled.[225] The difficulty arises from the fact that New South Wales was not granted a representative assembly until 1823. However, in our submission, there can be no doubt as to the extent of the prerogative legislative power in relation to *property* rights of British subjects on the basis of the well-established rule that in a settled colony[226] where there is no charter or it is silent, the prerogative power in that colony is no greater than it is in England.[227] Because there is no prerogative power in England unilaterally to extinguish the property rights of British subjects, there is no such power in a settled colony. (The application of this reasoning to Canada depends on a detailed analysis of the legal history of the land over which it is alleged the plaintiff's land rights have not been validly extinguished.)

It follows that both the *Milirrpum* and *Calder* courts were wrong in holding that the plaintiffs' rights could be and had been extinguished by the manifest policy of the Executive Government. The rule of extinguishment in *In re Southern Rhodesia*[228] and *Cook* v. *Sprigg*[229] should

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[222] *Supra,* Pt. *V.*

[223] Chitty, *Prerogatives of the Crown* 30 (1820).

[224] For the evolution of the concept of plantations and its relation to uninhabited countries *see* Clark, *A Summary of Colonial Law* 1 (1834) at n. 1.

[225] Especially in relation to regulating the importation of spirituous liquors. The issues are raised in Evatt, *The Rum Rebellion* (1832) Chap. XVII; Windeyer, *A Birthright and Inheritance: The Establishment of the Rule of Law in Australia,* 1 Tas. Uni. Law Review 635; Bentham, *A Plea for the Constitution of New South Wales,* Works (Bowring), Vol. IV at 253; Campbell, *A Note on Jeremy Bentham's "A Plea for the Constitution of New South Wales"* (1951) 25 Aust. Law Journal 59; Evatt, *The Legal Foundations of New South Wales,* (1938) 11 Aust. Law Journal 409; Campbell, *Prerogative Rule in New South Wales, 1788-1823,* 50 R.A.H.S. (Jo. & Proc.) 161.

[226] *See generally* Roberts-Wray, *Commonwealth and Colonial Law* (1966).

[227] Chitty, *supra,* n. 223 at 33.

[228] *Re Southern Rhodesia, supra,* n. 221.

[229] [1899] A.C. 572.

have been distinguished on the basis that those cases involved questions of property rights following a cession, and had no application to a settled colony. The law as laid down in *Symonds* and *Tamaki* v. *Baker* could have been applied to protect their rights.

XVI

We have not grappled with the problem of proving the plaintiffs' system of tenure beyond arguing that the common law must recognize it when it fulfills certain criteria. The way in which the argument was structured in *Milirrpum* meant that the plaintiffs had to prove that their links to the subject land extended as far back as 1788, the date when the obligation to respect those links arose. This was one of the most difficult questions of fact in the whole case, not only because of problems of hearsay,[230] but also because of the tentative state of anthropological knowledge. This question should have been irrelevant; it is the system which is important, not the relationships within that system. Even if the conceptual demands of the doctrine are ignored, this raises the question of how ancient the system must be in order to meet the general rules relating to customary rights.

Blackburn J. held that the plaintiffs' burden of proving the antiquity of their links with the land was based on the standard of the balance of probabilities. Proving that the links extended back to 1788 seemed impossible. The general rule is that customary rights must date from 1189, the date of English legal memory (and logically 1788 in Australia). Nowadays, however, there is a presumption that the custom exists if it is obviously of respectable antiquity.[231] In *Bastard* v. *Smith,*[232] Tindal C. J. required proof, to the limits of living memory of a continuous, reasonable, uninterrupted user of the custom. Admittedly, Blackburn J. found that the links to the land may not have existed since 1788, but he did not make it clear why the presumption, once it had been shown that the links could be extended to the beginning of living memory, should not have been applied in favour of the plaintiffs.

In the pre-trial negotiations, the defendants made an important concession about the existence of the *system* of tenure (as opposed to the antiquity of the linkage). They were prepared to admit that the system existed in 1788 if it could be proved that it existed in 1935, the date of the first permanent contact with whites. This did not, of course, involve a similar concession relating to the links. Yet there would appear to be no difficulty in proving that the system should be recognized on general principles. All the plaintiffs had to show was a continuous enjoyment during living memory. In those circumstances, evidence as to prior fluctuations in the patrilineal descent groups, which was relevant to the question of the links, would be irrelevant.[233] The burden was on the defendants to prove that the system of tenure was of a different kind before or after living memory. Thus the difficulties of proof facing the plaintiffs in *Milirrpum* would become the burden of the defendants. Just as it was virtually impossible for the plaintiffs to prove the anti-

[230] *Milirrpum, supra,* n. 2 at 151-159; Baxi, *supra,* n. 5, *passim.*

[231] Cheshire, *The Modern Law of Real Property* 292 (5th ed.).

[232] (1837) 2 Mood. & R. 129 at 136; 174 E.R. 238 at 240.

[233] *Cf.* Cumming and Mickenberg, *supra,* n. 61 c. 8.

quity of the links, so it would be impossible for the defendants to disprove the antiquity of the system. The defendants would have been forced to make an attack based on solid anthropological research.[234]

CONCLUSION

Mr. Justice Blackburn was wrong in his approach to the existence, operation and extent of the doctrine of communal native title. *The Queen* v. *Symonds* had clearly shown that the origins of the doctrine were found in the policies and practice of Britain in the colonization of North America; there was a clear rule of law which protected aboriginal land rights. That rule and principles of international law relating to the rights of the sovereign showed that the Crown had the exclusive right to extinguish native title. In our view, the *Symonds* court simply applied those principles to a colony acquired by peaceful settlement or annexation in favour of aborigines who were British subjects. The analysis of the *Symonds* and *Tamaki* decisions shows that the several measures taken to regulate the question of aboriginal title were more than merely attempts to implement a policy: the legislative enactments were soundly based in the common law as applied to a settled colony.

The historical evidence, beginning with the 1834 Address and concluding with Earl Grey's dispatch in 1846, made clear that the Crown felt bound to recognize and respect aboriginal occupation of traditional tribal land according to customary native tenure. A formula had to be devised to protect the property rights of British subjects who had no notions of property comparable to common law. The formula was to accord the *system* of tenure a proprietary status. Later glosses make it clear that the only condition precedent to recognition is that the systems which can be dignified with the epithet "system" and that it be either known to lawyers or discoverable by evidence. There is no good reason, therefore, for the *Calder* court[235] to hold against the plaintiffs on the basis that their rights were "territorial" rather than "proprietary". Sir William Martin stated this cogently:[236]

> All those lands which have any owners according to native custom, do still belong to those owners: whilst all lands which have no owners, fall to the Crown. . . .

On this basis, therefore, it was open to Blackburn J. in *Milirrpum*[237] to

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[234] On the question of private ownership of land by Australian aboriginals, *see* Wheeler, *The Tribe, and Inter-tribal Relations in Australia* (1910) at 38-46. The author discusses many of the nineteenth century authorities who cannot agree. The custom also seems to vary by tribe and location. The most positive statement in the book comes from Sir George Grey in his *Journals of Two Expeditions of Discovery in North West and Western Australia During the Years 1837, 1838, 1839*, vol. ii at 252:

> . . . every native knows [the limits] of his own land and can point out the various objects which mark his boundary.

A modern anthropologist has collected the views of twentieth century researchers including Malinowski (*The Family Among Australian Aborigines: A Sociological Study, 1913*):

> Their data show that Aboriginal spacing behaviour involved rights to land and its products, whether plant, animal or mineral: they were defended when necessary, they followed patterns of inheritance, and they varied adaptively.

Birdsell, "Ecology, Spacing Mechanisms and Adaptive Behaviour in Aboriginal Land Tenure", in Crocombe, *Land Tenure in the Pacific* 334 at 340 (1971).

Birdsell also pointed out at 341 that:

> The maintenance of tribal boundaries (as well as those of local groups) persisted as the result of a complex system of tensions manifest in the behaviour of constituent local groups. Tribal boundaries were merely the exterior envelope on the boundaries of the competent local groups.

[235] (1970) 13 D.L.R. (3d) 64 per Davey C.J.B.C.

[236] Martin, *supra*, n. 136 at 16.

[237] *Milirrpum*, *supra*, n. 2 at 165-176 and 262-274. Birdsell, *supra*, n. 234 at 349, emphasized that:

> . . . the Australians had a mystical, symbolic and ceremonial relationship to their land. The shortage of

find that the spiritual nature of the system of tenure could be accorded a proprietary status by the doctrine of communal native title. Respect for land rights in New Zealand proceeded on the basis that common law notions of property were irrelevant, indeed even alien to the concept of native rights. The Judicial Committee made this clear in simple language:[238]

> . . . if the appellant can succeed in proving that he and the members of his tribe are in possession and occupation of lands in dispute under native title which has not been lawfully extinguished, he can maintain this action to restrain an unauthorized invasion of his title.

The American authorities are useful in elucidating the propositions that aboriginal rights exist and are consistent with the radical or ultimate title being in the Crown. But they are of little help when considering the question of the obligation to respect, and of the right to extinguish native rights because they were dealing with conquered infidels. *Symonds* and *Tamaki* held that in wielding the protective device of the exclusive right of pre-emption, the Crown must do so with the consent of the aborigines or in strict compliance with status. The Judicial Committee held on the facts of *Tamaki* v. *Baker* that there was no prerogative legislative power to extinguish without consent. We have suggested that this is the case on general principles. The contrary would apply to a conquered colony, at least one which was acquired before 1774 when Mansfield C. J. significantly curtailed the prerogative legislative power in a conquered colony. (The extent of that power after 1774 is still an open question.)

The Blackburn judgement has struck what will probably be the decisive blow against judicial recognition of aboriginal land rights in Australia. The debate has already moved from the courts to the political arena. It could quite easily move into the streets.

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surface water required the aborigines to remain in small wandering groups each with its own set of widely spaced waters. Yet these nomads had a strong emotional attachment to their own land.

He continued:

> Religious and totemic ties united whole groups to their local area and individuals of each group with one or more defined mythological centres within the area.

See also Strehlow, "Culture, Social Structure and Environment in Aboriginal Central Australia", in Berndt, *Aboriginal Man in Australia* 128 (1965).

[238] *Nireaha Tamaki* v. *Baker*, *supra*, n. 151 at 578. Furthermore, the question of whether the plaintiffs could lay claim to particular tracts of land, although decided in their favour, was therefore a red herring.