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Prepared by

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Assisted by Jeffrey Ross

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ABORIGINAL RIGHTS

GUIDE TO USE:-

The cases reported in these volumes appear under their main subject at final instance and/or at all levels.

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Volume IX contains resumés of all the cases with specific details noted, i.e. the cases referred to and the statutes considered in each judgment. The list of cases referred to notes only those cases which are reported in these volumes.

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Aboriginal Rights

a) Royal Proclamation of 1763

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Tee-Hit-Ton Indians v. U.S., 348 U.S. 272 (1955).

Minnesota v. Hitchcock, 185 U.S. 373 (1902).

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c/f: Extinguishment cases:

Holden v. Joy, 84 U.S. 211 (1872).

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United States v. Alcea Band of Tillamooks, 329 U.S. 40 (1946).

Sac and Fox Tribe of Indians of Oklahoma, et al v. U.S., 315 F. 2d 896 (ct. cl. 1963).

Tlingit and Haida Indians v. United States, 389 F. 2d 778 (ct. cl. 1968).

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c/f: Royal Proclamation of 1763 cases:

Mitchel et al v. U.S. 34 U.S. (9 Pet.) 711 (1835).

Fletcher v. Peck 10 U.S. (6 Cranch.) 87 (1810)

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b) Nature of Aboriginal Title...cont.

c/f: Hunting, Fishing and Trapping cases:

R. v. Dennis and Dennis, (1975) 22 C.C.C. (2d) 152.

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c) Compensation:

United States v. Shoshone Tribe, 304 U.S. 111 (1938).

Choctaw Nation v. United States, 119 U.S. 1 (1886).

United States v. Klamatch and Moadoc Tribes, 304 U.S. 119 (1937).

Otoe and Missouria Tribe of Indians v. United States, 131 F. Supp. 265 (ct. cl. 1955).

Osage Nation of Indians v. United States, 97 F. Supp. 381 (ct. cl. 1951).

Sac and Fox Tribe of Indians of Oklahoma, et al v U.S., 315 F. 2d. 896 (ct. cl. 1963).

Sioux Tribe v. U.S., 146 F. 229 (ct. cl. 1956).

Tlingit and Haida Indians v. United States, 389 F. 2d 778 (ct. cl. 1968).

Miami Tribe v. United States, 281 F. 2d 202 (ct. cl. 1960).

Upper Chehalis Tribe v. U.S. 155 F. Supp. 226 (ct. cl. 1957).

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Shoshone Tribe of Indians v. United States, 299 U.S. 476 (1937).

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c/f: Nature of Aboriginal Title cases:

Amodu Tijani v. the Secretary of Southern Nigeria, (1921) 2 App. Cas. 399.

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(1971) 13 D.L.R. (3d) 64;

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d) Extinguishment

Holden v. Joy, 84 U.S. 211 (1872).

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Butz v. Northern Pacific Railroad Co., 119 U.S. 55 (1886).

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d) Extinguishment...cont.

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R. v. Sikyea, (1964) S.C.R. 642;

(1964) 43 D.L.R. (2d) 150;

(1962) 40 W.W.R. 494.

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c/f: Compensation Cases:

United States v. Shoshone Tribe, 304 U.S. 111 (1938).

Tlingit and Haida Indians v. United States, 389 F. 2d 778 (ct. cl. 1968).

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R. v. Symonds, (1847) N.Z.P.C.C. 387.

Nireaha Tamaki v. Baker (1901) A.C. 561.

Milirrpum and Others v. Nabalco Pty. Ltd. and the Commonwealth of Australia, (1970-71) 17 F.L.R. 141.

Calder v. A.G.B.C. (1973) S.C.R. 313;

(1971) 13 D.L.R. (3d) 64;

(1970) 8 D.L.R. (3d) 59.

Re Southern Rhodesia, (1918) App. Cas. 211.

St. Catharines Milling and Lumber Co. v. R., (1888) 14 App. Cas.; 13 S.C.R. 577; 13 O.A.R. 148; 10 O.R. 196.

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Aboriginal Rights

e) Treaties of Friendship.

c/f: Hunting, Trapping and Fishing cases:

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c/f: Nature of Aboriginal Title cases:

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f) "Lex Loci"

Campbell v. Hall (1774) 1 Cowp. 204.

Attorney General of Southern Nigeria v. Holt, (1915) App. Cas. 599.

Cook v. Sprigg, (1899) App. Cas. 572 (P.C.).

c/f: Nature of Aboriginal Title cases:

Amodu Tijani v. The Secretary of Southern Nigeria, (1921) App. Cas. 399 (P.C.).

re Southern Rhodesia, (1918) App. Cas. 211.

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c/f: Royal Proclamation of 1763 cases:

Mitchel et. al v U.S., 34 U.S. (9 Pet.) 711 (1835).

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balance. It may be that this is the effect of the statute, but we do not think it necessary to determine the question now. Dicta are to be found indicating that Mr. McLean's contention is well founded, but these dicta do not face the difficulty involved in the construction contended for, and require very careful consideration. None of them is necessary for the decision of the case in hand, and in all it is assumed, without reasoning or discussion that this is the true construction of the statute. I refer to what is noted as being said by Lennox, J., in *Shanahan* v. *Brown* (1918), 13 O.W.N. 447, and to what was said by the British Columbia Court of Appeal in *Chan* v. *C. C. Motor Sales Ltd.*, [1926] 1 D.L.R. 1065, 36 B.C.R. 488, and on appeal to the Supreme Court of Canada, [1926] 3 D.L.R. 712. In the Supreme Court it is pointed out that this provision in the statute is quite irrelevant to the point then under consideration, and it is in fact relied upon in the Court below both by the majority and by the minority as supporting their respective views.

It follows that the appeal will be dismissed; but, as the respondents were not represented, there will be no order for costs.

Appeal dismissed.

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THOS. BROOKS & SON v. DRURY.
Middleton, J.A.

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Re LABRADOR BOUNDARY.

Judicial Committee of the Privy Council, Viscount Cave, L.C., Viscounts Haldane, Finlay and Sumner and Lord Warrington. March 1, 1927.

Boundaries I—Between Labrador and Quebec—"Coast" or "Coasts"—Evidence—Inferences to be drawn from maps.

REFERENCE to the Judicial Committee of the Privy Council of a question as to the location of the boundary between Canada and Newfoundland in Labrador.

Sir John Simon, K.C., *Barrington-Ward*, K.C., and *W. J. Higgins*, K.C., *W. T. Monckton*, and *C. H. Pearson*, for Colony of Newfoundland: *H. P. Macmillan*, K.C., *Geoffrion*, K.C., *M. Alexander*, K.C., *H. S. Moore* and *C. P. Plaxton*, for Dominion of Canada.

The judgment of the Board was delivered by

VISCOUNT CAVE, L.C.:—The Government of the Dominion of Canada and the Government of the Colony of Newfoundland having petitioned His Majesty to refer to the Judicial Commit-

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tee of the Privy Council the following question:—"What is the location and definition of the boundary as between Canada and Newfoundland in the Labrador Peninsula under the Statutes, Orders in Council and Proclamations?" that question has been referred to this Board under the Judicial Committee Act, 1833 (Imp. , c. 41, s. 4, for its consideration and advice. The Board has accordingly heard evidence and arguments upon the matter, and has now arrived at a conclusion.

The Orders in Council and Proclamation upon which the decision must mainly depend were made in the year 1763, and it may seem strange that a question which affects (as it now appears) the jurisdiction over more than 100,000 square miles of territory has remained so long undecided. But an explanation is to be found in the fact that the region in dispute consists mainly of dense forests and bleak and inhospitable table-lands, of which the greater part is uninhabited (except by a few Indian families) and was until recently unexplored, being visited only occasionally by a few trappers in search of furs. The country has accordingly been regarded as having little or no value, and it is only in recent years, when the growing demand for paper has attracted attention to the vast quantity of timber suitable for pulping, that a serious controversy as to its ownership has arisen. The question of boundary was first raised in or about the year 1888, and was the subject of discussion at the Halifax Conference of 1892; but no solution was then reached, and it was not until the year 1903 that the Government of Canada, having been informed that the Government of Newfoundland had issued a licence for cutting timber in the neighbourhood of the Hamilton River, raised the question in a serious form. Since that time the matter has been the subject of close and skilled investigation, and it now comes before this Board for decision. The issue so raised is, as Lord Hardwicke, L.C., said in another connection, of a nature "worthy the judicature of a *Roman* Senate" (*Penn* v. *Lord Baltimore* (1750), 1 Ves. Sen. 444, at p. 446, 27 E.R. 1132), but the duty of the Board is not to consider where the boundary in question might wisely and conveniently be drawn, but only to determine where, under the documents of title which have been brought to their notice, that boundary is actually to be found.

The capture of Quebec in the year 1759 was followed by other British successes; and by the Treaty of Paris, signed on February 10, 1763, the Most Christian King ceded to His Britannic Majesty in full right "Canada with all its dependencies

as well as the island of Cape Breton and all the other islands and coasts (côtes) in the gulf and river of St. Lawrence and in general everything that depends on the said countries, lands, islands and coasts"—a description which included the whole of the great peninsula of Labrador, except such parts of it as had been already granted to the Hudson's Bay Co. by their charter of 1670 and confirmed to them under the Treaty of Utrecht.

British sovereignty over the whole of the vast region which had belonged to or been claimed by France having been thus secured, it became the duty of the advisers of King George III to consider what government or governments should be established in the territories so acquired; and the Lords of Trade (a name then usually given to the Lords Commissioners for Trade and Plantations) first turned their attention to Labrador. On March 15, 1763, in reporting to The King upon the steps proper to be taken for the protection of the fisheries upon the coasts of Newfoundland and in the gulf and river of St. Lawrence, they observed that "upon the coast of Labrador it will be impossible to prevent the French continuing to have the full benefit of their former commerce with the Indians of that coast unless some British settlement should be made there, or sufficient cruisers stationed with instructions to the Commanders to seize all French ships coming within a certain distance of that coast." Shortly after receiving this report the Secretary of State (Lord Egremont) caused a letter to be written to the Hudson's Bay Co., whose territory extended to the entrance of Hudson Straits at the extreme northern end of the peninsula of Labrador, expressing his desire to know as soon as possible "what were the limits upon the coast between the Hudson's Bay Company and the coast of Labrador;" and on the morning of March 24 Sir William Baker, the Governor of the Company, waited on the Secretary of State and had an interview with him. Immediately after this interview, namely, on March 24, the Secretary of State wrote a letter to the Lords of Trade informing them that The King had "judged it proper that all the coasts of Labrador from the entrance of Hudson's Straits to the River of St. John's, which discharges itself into the sea nearly opposite the west end of the island of Anticosti, including that island with any other small islands on the said coast of Labrador, and also the islands of Madelaine in the gulf of St. Lawrence, should be included in the government of Newfoundland," and requesting them to prepare for The King's approval the draft of a new Commission for Capt. Thomas

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Graves (who was then Governor of Newfoundland) to be "Governor of the island of Newfoundland and of the coast of Labrador with the several islands as above described," and revised instructions for the Governor's guidance. Drafts were accordingly prepared, and on March 30 both drafts were submitted to The King in Council and approved for issue in regular form. On April 25 the revised commission was duly sealed and the revised instructions signed by The King; and, armed with these documents, and also with separate Admiralty instructions issued to him as Commander-in-Chief of His Majesty's ships on the Newfoundland station, Capt. Graves sailed on May 2 to take up his duties.

By the commission as passed under the Great Seal on April 25, 1763, in accordance with the Order in Council of March 30, King George III revoked the former commission (dated May 29, 1761) by which Capt. Graves had been appointed Governor and Commander-in-Chief of the Island of Newfoundland and constituted and appointed him to be The King's "Governor and Commander-in-Chief in and over our said island of Newfoundland and all the coasts of Labrador from the entrance of Hudson's Straits to the river St. John's, which discharges itself into the sea nearly opposite the west end of the island of Anticosti, including that island with any other small islands on the said coast of Labrador and also the islands of Madelaines in the gulf of St. Lawrence, as also of all our forts and garrisons erected and established or that shall be erected and established in our said islands of Newfoundland, Anticosti and Madelaine, or on the coast of Labrador within the limits aforesaid," and required him to conform to the instructions given or to be given to him. By the same document power was given to the Governor to administer the oath of allegiance to all persons who should at any time "pass into our said islands or shall be resident or abiding there or upon the coasts of Labrador within the limits aforesaid;" to constitute and appoint Judges and Justices of the Peace for the administration of justice and keeping the peace and quiet of "the said islands and coasts," with power to hold quarter sessions and adjourn the same as might be convenient "for the peace and welfare of our subjects inhabiting there;" and to erect and set apart Court Houses for such Justices of the Peace and prisons for the keeping of offenders. The commission required all officers, civil and military, "and all other inhabitants of our said islands and the coasts and territories of Labrador and islands adjacent thereto or dependent thereupon within the limits aforesaid," to

be obedient, aiding and assisting to the Governor in the execution of the commission.

By the instructions to Capt. Graves, as passed under the Royal Sign Manual in accordance with the same Order in Council, the Governor was directed (among other things) to use his best endeavours to prevent aliens or strangers from fishing or drying fish "on any of the coasts or in any of the harbours of the islands and territories under your government" except as allowed by art. 13 of the Treaty of Utrecht and art. 5 of the Treaty of Paris; to visit all "the coasts and harbours of the said islands and territories under your government" in order to inspect and examine the state of the fisheries carried on there; to endeavour to procure accurate maps of "the several harbours, bays and coasts of Newfoundland and the other islands and territories under your government," and in particular to cause a vessel under his command to "search and explore the great inlet commonly known by the name of Davis' inlet, in order to discover whether the same has or has not any passage to Hudson's Bay, or any other enclosed sea." The instructions also required the Governor to enquire and report "whether any or what further establishment may be necessary to be made or forts erected in any part of Newfoundland or the other islands or territories under your government either for the protection of the fishery, the security of the country, or the establishing and carrying on a commerce with the Indians residing in or resorting to the said islands or inhabiting the coast of Labrador."

It is worthy of notice that in these two documents, which are of primary importance for the purposes of this enquiry, no distinction was made between the Island of Newfoundland and the coast of Labrador, both being included in identical terms in the territories placed under the care of the Governor, and the powers applicable to one being equally applicable to the other.

The business relating to Capt. Graves's command having been thus disposed of, Lord Egremont turned his attention to the ceded territory in general, and by a letter dated May 5, 1763, requested the Lords of Trade to consider and report upon a number of questions relating to that territory, including the question what new governments should be established and what form should be adopted for such new governments. In the same letter he called attention to the desirability of conciliating the Indians in the "Indian country" by protecting their persons and property and securing to them the rights and privileges which they had hitherto enjoyed. The Lords of Trade replied

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by an elaborate report dated June 8, 1763, in which, after setting out the advantages which, in consequence of the cession of French Canada, would accrue to the fishing and fur trades and the planting and settlement of North America, they recommended that three new Governments should be erected under the names of Canada, East Florida and West Florida, with certain boundaries indicated in the report, and that certain lands outside those limits—described in the report as "all the lands lying about the Great Lakes and beyond the sources of the rivers which fall into the river St. Lawrence from the north"—should be left as an Indian country, open to trade, but not to grants or settlements. After some discussion as to the boundaries of the proposed new Government of Canada (which it was decided to call Quebec), The King agreed to the proposals of the Lords of Trade, with the addition of a provision that the "interior country" to be reserved for the use of the Indians should be placed under the control of a military Commander-in-Chief. A draft Proclamation for giving effect to this decision was accordingly prepared by the Lords of Trade, and was approved for issue at a meeting of the Privy Council held on October 5.

By this Proclamation, which was dated October 7, 1763, The King declared that he had, with the advice of his Privy Council, granted letters patent under the Great Seal to erect within the countries and islands ceded and confirmed to him by the Treaty of Paris, four distinct and separate Governments styled and called by the names of Quebec, East Florida, West Florida and Grenada. The limits and boundaries of these Governments were defined by the Proclamation, those of the Government of Quebec being described as follows:—

"Firstly.—The Government of Quebec, bounded on the Labrador Coast by the river St. John, and from thence by a line drawn from the head of that river, through the Lake St. John, to the south end of the Lake Nipissim; from whence the said line, crossing the river St. Lawrence, and the lake Champlain in forty-five degrees of north latitude, passes along the high lands which divide the rivers that empty themselves into the said river St. Lawrence from those which fall into the sea; and also along the north coast of the Baye des Chaleurs, and the coast of the gulph of St. Lawrence to Cape Rosieres, and from thence crossing the mouth of the river St. Lawrence by the west end of the Island of Anticosti, terminates at the aforesaid river St. John."

After defining the boundaries of the three other new Governments, the Proclamation proceeded:—

"And to the end that the open and free fishery of our subjects may be extended to and carried on upon the coast of Labrador and the adjacent islands, we have thought fit, with the advice of our said Privy Council, to put all that coast, from the river St. John's to Hudson's Streights, together with the islands of Anticosti and the Madelaine and all other smaller islands lying upon the said coast, under the care and inspection of our Governor of Newfoundland."

The Proclamation also contained the following further declarations:—

"And whereas it is just and reasonable, and essential to our interest and the security of our colonies, that the several nations or tribes of Indians with whom we are connected and who live under our protection, should not be molested or disturbed in the possession of such parts of our dominions and territories as, not having been ceded to or purchased by us, are reserved to them or any of them as their hunting-grounds; we do therefore, with the advice of our Privy Council, declare it to be our Royal will and pleasure, that no Governor or Commander-in-Chief in any of our colonies of Quebec, East Florida, or West Florida, do presume upon any pretence whatever to grant warrants of survey, or pass any patents for lands beyond the bounds of their respective governments as described in their commissions; as also that no Governor or Commander-in-Chief in any of our other colonies or plantations in America do presume for the present, and until our further pleasure be known, to grant warrants of survey, or pass patents for any lands beyond the heads or sources of any of the rivers which fall into the Atlantic Ocean from the west and northwest, or upon any lands whatever which, not having been ceded to or purchased by us as aforesaid, are reserved to the said Indians or any of them.

"And we do further declare it to be our Royal will and pleasure, for the present as aforesaid, to reserve under our sovereignty, protection, and dominion, for the use of the said Indians, all the land and territories not included within the limits of our said three new governments or within the limits of the territory granted to the Hudson's Bay Company; as also all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and northwest as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our especial leave and licence for that purpose first obtained."

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It is to be noted that this Proclamation, although sometimes referred to in the later documents as if it were the origin of the title of Newfoundland to its territory in Labrador, was in fact only declaratory of an annexation which had already been effected by the commission approved by the Order in Council of March 30 and issued to Capt. Graves; and it is plain that the statement in the Proclamation that the coast of Labrador had been placed "under the care and inspection" of the Governor of Newfoundland was not intended to take anything from the rights conferred upon the Governor by his commission. In the commissions issued to the Governors of Newfoundland who succeeded Capt. Graves, the language of the original commission was retained unaltered.

The annexation to Newfoundland of the southern coast of Labrador bordering on the Gulf of St. Lawrence soon led to difficulties. It had been the policy of the British Government not to encourage planting and settling in Newfoundland or to establish a form of civil government there, but rather to treat the island as a base to which fishing vessels should proceed in each season and which they might use for drying and curing their fish and for other purposes connected with the fishing industry; and, in pursuance of that policy, it had been the practice to appoint as Governor a Naval officer who was also charged, under instructions issued by the Admiralty, with the protection of the free fishing rights of British subjects, such local administration as was required being entrusted to "Admirals of Harbours," who were in fact masters of fishing vessels selected in the order of their arrival in the island harbours. Indeed, the Newfoundland of that day was sometimes spoken of as resembling a great ship provisioned and fitted out by the mother country, and moored off the American continent for the convenience of English fishermen, and its Government as a "floating government." When the Labrador coast was added to Newfoundland, the same policy was applied to that coast: and Hugh Palliser, who in 1764 was appointed to succeed Capt. Graves as Governor of Newfoundland and the coasts of Labrador, applied that policy to the added territory, including the northern shore of the Gulf of St. Lawrence. He forbade all persons from Quebec or any of the Colonies to winter on the coasts of Labrador under his Government; and ultimately, by a regulation dated August 28, 1765, he went so far as to order that no person whatever should resort to Labrador to fish or trade except ship-fishers annually arriving from His Majesty's Dominions in Europe and carrying men engaged to return to those Dominions after the season was over. These restrictions

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led to serious complaints from the "sedentary fishermen," mostly of French nationality, who had long been settled on the north shore of the Gulf of St. Lawrence and had been engaged in the seal and salmon fishery there, and some of whom had received grants of land from the French Government; and early in the year 1766 these settlers and some Quebec traders presented memorials to the Lords of Trade praying to be reinstated in their rights and possessions. These memorials were taken into consideration, and after a considerable correspondence with Governor Palliser (against whom some of the complainants brought an action at law in London) the Lords of Trade, by reports dated June 24, 1772, and March 2, 1773, recommended that the part of the coast of Labrador between the River St. John and the Ance des Espagnols or Baie Phillippeaux near the Straits of Belleisle—being the part of Labrador, with which the settlers and traders were concerned—should be taken from the Government of Newfoundland and restored to its dependence on the Government of Quebec. This proposal was apparently approved by The King's advisers, and on April 22, 1773, an Order in Council was passed for the preparation of the instruments necessary for carrying it into effect; but it was ultimately determined that the matter should be dealt with by a provision to be inserted in the Bill for the Quebec Act of 1774, which was then under consideration. In the course of the preparation of that Bill the proposal made by the Lords of Trade was enlarged so as to provide for the transfer to the Province of Quebec not only of the coast of Labrador from the River St. John to the Ance des Espagnols, but of the whole of the territory in Labrador which had been annexed to Newfoundland. The clauses of the Bill relating to Newfoundland were strenuously opposed by Mr. Edmund Burke, Admiral Saunders and others, but were ultimately carried into law. Accordingly, by the British North America (Quebec) Act, 1774 (Imp.), c. 83, after reciting (among other things) that by the arrangement made by the Proclamation of 1763 "certain Parts of the Territory of *Canada*, where sedentary Fisheries had been established and carried on by the Subjects of *France*, Inhabitants of the said Province of *Canada*, under Grants and Concessions from the Government thereof, were annexed to the Government of *Newfoundland*, and thereby subjected to Regulations inconsistent with the Nature of such Fisheries," it was enacted that the territories therein described and also "all such Territories, Islands, and Countries, which have, since the Tenth of February, one thousand seven hundred and sixty-three, been made Part of the Government of *Newfoundland*" be

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"annexed to, and made Part and Parcel of, the Province of *Quebec*, as created and established by the Royal Proclamation of the seventh of *October*, one thousand seven hundred and sixty-three."

Soon after the passing of this Act it became apparent that, in transferring to the Government of Quebec, not only the parts of Labrador where the "sedentary fishery" for seal, sea-cow and salmon had been carried on, but also those parts facing towards the Atlantic where the great cod and whale fisheries had flourished, a serious blunder had been committed. Complaints were made that the Government of Quebec paid no attention whatever to the cod fisheries on the Atlantic coast, and that "in truth there was no government whatsoever on that coast;" and, ultimately, by the Newfoundland Act, 1809 (Imp.), c. 27, s. 14, it was enacted:—"That such Parts of the Coast of *Labrador* from the River *Saint John* to *Hudson's Streights*, and the said Island of *Anticosti*, and all other smaller Islands so annexed to the Government of *Newfoundland* by the said Proclamation of the Seventh Day of *October* One thousand seven hundred and sixty-three, (except the said Islands of *Madelaine*), shall be separated from the said Government of *Lower Canada*, and be again re-annexed to the Government of *Newfoundland;* any Thing in the said Act passed in the Thirty-first Year of His present Majesty's Reign, or any other Act, to the contrary notwithstanding."

It would seem that, in so restoring to Newfoundland the whole of the coast of Labrador originally annexed to that Government, Parliament omitted to have regard to the position of the sedentary fishermen in the gulf of St. Lawrence which had given rise to so many complaints before the passing of the Act of 1774; and, as might have been expected, these complaints were soon renewed, with the result that in the year 1825 effect was at last given to the counsel tendered by the Lords of Trade in 1773. By the British North America (Seignorial Rights) Act, 1825 (Imp.), c. 59, s. 9, after reciting that under and by virtue of the Acts of 1774 and 1809 "the coast of Labrador, from the river Saint John to Hudson's Streights, and the Islands" above referred to were "annexed to and form part of the government of Newfoundland," and that it was expedient that "certain parts of the said coast of Labrador should be re-annexed to and form part of (the province of) Lower Canada," it was enacted:—"That so much of the said coast as lies to the westward of a line to be drawn due north and south from the Bay or Harbour of Ance Sablon, inclusive, as far as the fifty-second degree of north latitude, with the Island of Anti-

costi, and all other islands adjacent to such part as last aforesaid, of the coast of Labrador, shall be and are re-annexed to and made a part of the said province of Lower Canada, and shall henceforward be subject to the laws of the said province, and to none other . . . . " The Bay or Harbour of Ance Sablon referred to in this section lies a little to the east of the Ance des Espagnols or Phillippeaux Bay.

The statute of 1825 is the last of the documents directly affecting the annexation to Newfoundland of a part of Labrador; but it may be here mentioned that by the Act of Union passed by 1840 (Imp.), c. 35, the Provinces of Upper and Lower Canada, into which Quebec had been divided in the year 1791, were united to form one Province of Canada; that in the year 1854 Newfoundland, in which a representative Government had been established in 1832, became a responsible self-governing Colony; that by the British North America Act, 1867 (Imp.), c. 3, the Dominion of Canada was set up, Lower Canada becoming the Province of Quebec; and that by an Order in Council made in 1880 it was ordered and declared that:—"From and after the first day of September 1880, all British territories and possessions in North America not already included within the Dominion of Canada, and all islands adjacent to any of such territories or possessions, shall (with the exception of the Colony of Newfoundland and its dependencies) become and be annexed to and form part of the said Dominion of Canada, and become and be subject to the laws for the time being in force in the said Dominion in so far as such laws may be applicable thereto."

Thus either by the statute already cited or by the last-mentioned Order in Council, the Dominion of Canada, and particularly its Province of Quebec, has become the next neighbour to the dependencies in Labrador of the Colony of Newfoundland, and the question of boundary falls to be determined as between the Dominion and the Colony.

At this point it is desirable to set out the contentions of the two parties. The contention of the Dominion is that the "coast" which by the commission and Proclamation of 1763, as modified by the subsequent statutes, was annexed to Newfoundland, is "a strip of maritime territory, extending from Cape Chidley at the entrance to Hudson Strait, to the eastern headland of the bay or harbour of Blanc Sablon on the Strait of Bellisle, and comprising, in its depth inland, only so much of the land immediately abutting on the sea, above low-water mark, as was accessible and useful to the British fishermen annually resorting to that coast in the ordinary conduct of their fishing opera-

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tions, for the purposes of 'the open and free fishery' extended to that coast by the Royal Proclamation and carried on there and for those purposes only;" but, recognizing that it may be found impracticable to lay down such a line upon the land, Canada suggests "that the boundary be located as a line to be drawn from the eastern headland of the bay or harbour of Blanc Sablon on the south to Cape Chidley on the north at a distance from high-water mark on the seacoast of the peninsula of Labrador of one mile."

On the other hand, the contention of the Colony of Newfoundland is that the boundary should be "a line drawn due north from Ance Sablon as far as the fifty-second degree of North latitude, and should be traced from thence northwards to Cape Chidley along the crest of the watershed of the rivers flowing into the Atlantic Ocean."

In order to make the matter clear, a sketch-map illustrating the two claims is annexed. On this map the territory proposed by the Dominion as the land to be allotted to Newfoundland is indicated by a thick black line following the line of the seashore, while the boundary claimed by the Colony is marked by a broken line with a hatching over it.

It may be added that the Colony contends that, in the event of the Dominion establishing its main contention, the littoral strip of land which would then represent the territory annexed to Newfoundland should not cross the mouth of the great Hamilton Inlet as shown on the sketch-map, but should be carried along the northern shore of that inlet and round the head of Goose Bay and so back along the southern shore of the inlet to the sea-coast.

Before examining these claims in detail, their Lordships think it desirable to formulate two propositions which appear to be common to both sides, and which indeed are beyond dispute.

First, the word "coast" or "coasts" (for both are used in the documents) is a word of undefined meaning; and while it is usually to be understood in the sense which is given to it in Dr. Johnson's and other dictionaries, that is to say, as meaning "the edge or margin of the land next the sea" or "the shore," there are many examples of its being used to denote a considerable tract of land bounded by and looking towards the sea. In 2 Murray's Oxford Dictionary, 1891, p. 555, "Coast," II e., it is stated that the term "is familiarly applied in different regions to specific littoral districts. in India esp. to the Coromandel coast . . . . " and in 6 Enc. Brit., 11th ed., p. 599, that:—"The word is sometimes applied to the bank of a river or lake, and sometimes to a region (cf. Gold Coast,

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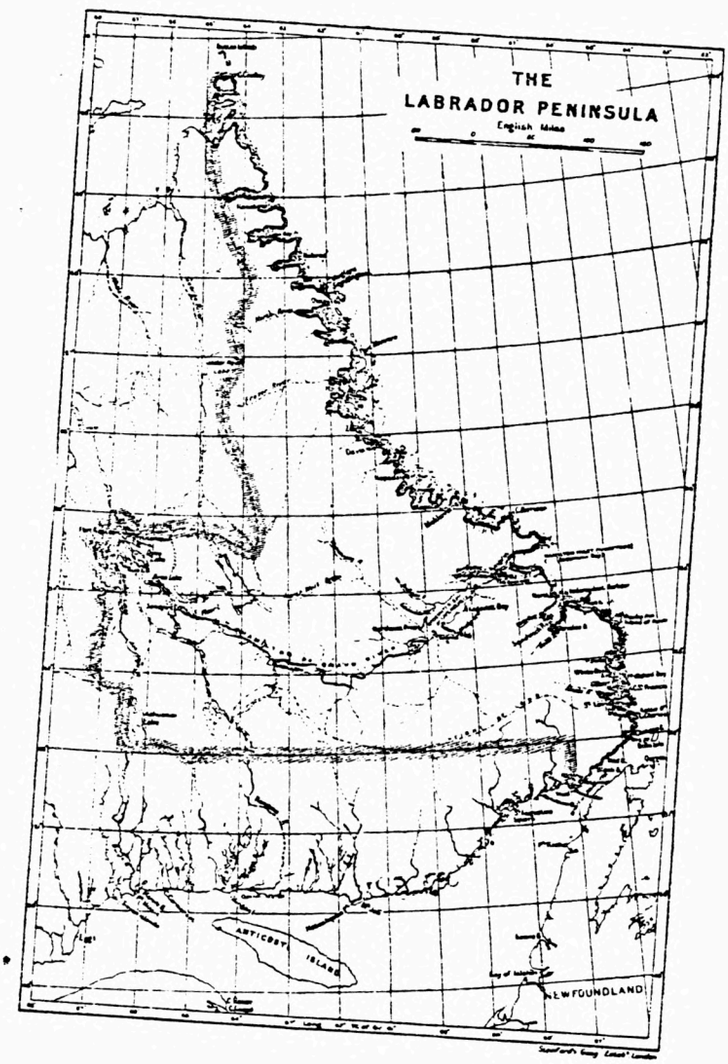

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Coromandel Coast), which may include the hinterland." In the appendix of documents used in this inquiry a number of extracts are given from the Old and New Testaments and from well-known authors, in which the word "coast" is used as signifying a whole country, sometimes extending from the sea to the sources of the rivers running into it; and it is plain that the word is susceptible of more constructions than one, and that its precise meaning must depend on the subject and context.

The second proposition which appears to be beyond dispute in this case, is that the effect of the Orders in Council, Proclamation and statutes which have to be construed, was to give to the Government of Newfoundland, not mere rights of inspection and regulation exercisable upon a line of shore, but territory which became as much a part of the Colony as the Island of Newfoundland itself, and which was capable of being defined by metes and bounds. This is evident from the form of the commissions issued to Capt. Graves and his successors, by which they were appointed Governors of the Island of Newfoundland and of the coast of Labrador in identical terms, and, indeed, in one and the same sentence, and in which reference is again and again made to the "territory" of Labrador comprised in the commission. If there remained any doubt upon this point, it would be set at rest by the language of the statutes of 1774, 1809 and 1825, which refer to the territory in Labrador as being "annexed" first to the Government of Newfoundland and then to the Government of Quebec, and afterwards as being "re-annexed" to Newfoundland and partly "re-annexed" to Lower Canada. Stress was laid by counsel for Canada on the declaration in the Proclamation of 1763 that the Labrador coast had been put under the "care and inspection" of the Government of Newfoundland; but this ambiguous expression cannot affect the plain inference to be drawn from the other documents cited that what was added to Newfoundland was a tract of land, having a boundary which can be located and defined. Indeed, this is assumed by the terms of reference to this Board, to which the parties have agreed.

In these circumstances the question to be determined is, not whether Newfoundland possesses territory upon the peninsula of Labrador, but what is the inland boundary of that territory. Is it to be defined by a line following the sinuosities of the shore at a distance of one mile or thereabouts from high-water mark, or is it to be found at the watershed of the rivers falling into the sea on that shore? No third alternative has been suggested by any person.

When the material documents are considered from this point of view, it is evident that they contain much which supports the contention that the word "coast" is to be construed as including a considerable area of land. The commissions issued to Capt. Graves and his successors until 1774 refer to the "territories" of Labrador and to the planters or inhabitants resident there; and they authorize the Governor to appoint Judges and Justices of the Peace for keeping the peace of the coasts and for holding quarter sessions at places convenient to the inhabitants. The instructions issued during the same period direct the Governor to erect upon the "coast" Court Houses for the trial of offenders and prisons for their detention; and it is plain that a criminal jurisdiction limited to a narrow coastal strip, so that offences committed beyond that limit would not be justiciable and offenders escaping from it could not be apprehended, would be very difficult to exercise. Further, the same instructions require the Governor to report, not only as to the protection of the fishery, but also as to the security of the country and the establishing and carrying on of commerce with the Indians inhabiting the coasts of Labrador: and the directions for protecting the timber from waste and for reporting as to the number of the inhabitants and of the furs taken by them and the improvement of the land, which apply to Labrador as well as to the Island, are appropriate to a Government extending into the interior.

With regard to the limit in depth of the country which may be described as "coast," where that term is used in the wider sense, it is argued that the natural limit is to be found (in the absence of special circumstances) in the watershed which is the source of the rivers falling into the sea at that place; and there is much to be said in favour of that view. It is consistent with the doctrine of international law by which the occupation of a sea-coast carries with it a right to the whole territory drained by the rivers which empty their water into its line (see Hall's International Law, 7th ed., pp. 107-8; Westlake's International Law, 1904, Part 1, pp. 112-3; and Lawrence's Principles of International Law, 7th ed., p. 153); and it is certainly difficult, in the absence of any specified boundary or of any special feature (such as a political frontier), which could be taken as a boundary, to suggest any point between the seashore and the watershed at which a line could be drawn.

Further, the use of the watershed or "height of land" as a boundary was undoubtedly familiar in British North America at the period in question, and it is shown as a boundary in many of the maps of that time. Thus, in some of the pre-an-

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nexation maps of French Canada which have been produced (Sanson 1656, Coronelli 1689, and Mortier 1693), the watershed running westward from Cape Charles is shown as the boundary between Labrador (or Nouvelle Bretagne) and Nouvelle France. In Bowen's map of 1763 the southern boundary of Labrador appears to run along the fifty-second north parallel of latitude, roughly corresponding with the same line of watershed; and the same feature is reproduced in Roeque's map of about the same date. In Bellin's map of 1755 the "hauteur des terres" is indicated as the boundary between the possessions of the Hudson's Bay Co. and the territory (then in French ownership) of Labrador or Nouvelle Bretagne; and the same observation applies to Gibson's map of 1763. In the Proclamation of 1763 the Province of Quebec thereby constituted was defined as bounded on the south by "the highlands which divide the rivers that empty themselves into the said River St. Lawrence from those which flow into the sea." It may well be, therefore, that in allotting to Newfoundland the "coast" of Labrador the framers of the documents of 1763 had in mind as a boundary the "height of land" from which the rivers ran down to that shore—though without any accurate conception of the distance of that boundary from the sea.

The contention that the territory annexed to Newfoundland was intended to run back to the watershed is supported by the fact that in the Proclamation of 1763 the Province of Quebec is described as bounded on the north by a line drawn from the head of the River St. John to the westward—a description which leads to the inference that the land on the east or left bank of the River St. John from its head to the sea had been already allotted to the Government of Newfoundland. It has been ascertained by recent surveys that the River St. John here mentioned does not in fact rise near the watershed, but at some point between the height of land and the sea; but it is plain from contemporary maps that the sources of the River Romaine, which rises at the watershed and runs parallel with the St. John, had been taken for the sources of the latter river, and that the eastern boundary of the new Province of Quebec at this point was intended to follow the course of the River Romaine from the watershed to the sea.

A further argument for the adoption of the watershed as the boundary of Newfoundland-Labrador is based on the position at that time of the Hudson's Bay Co. That company had always claimed to be entitled under its charter to the land reaching to the watersheds from which the rivers ran into Ungava Bay, James Bay and Hudson's Bay, and this claim was ulti-

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mately conceded by the British Government. Upon this footing the line of the watershed running from Cape Chidley southward was for a considerable distance the eastern boundary of the Hudson's Bay territory, and so that watershed might for that distance form a political as well as a natural boundary for the "coast" of Labrador.

But perhaps the strongest argument in favour of an extended construction of the grant to Newfoundland is to be found in the terms of the Act of 1825 above quoted. By that statute, after a recital that it was expedient that "certain parts of the said coast of Labrador should be re-annexed to and form part of Lower Canada," it was enacted that "so much of the said coast as lies to the westward of a line to be drawn due north and south from the Bay or Harbour of Anee Sablon, inclusive, as far as the fifty-second degree of north latitude," should be re-annexed to and made part of that Province. Now a line drawn due north and south from the Bay of Ance Sablon to the fifty-second degree of north latitude would penetrate the interior of the country for a distance of about 40 miles, and the land to the westward of such a line would in some of its parts cover a distance of over 100 miles from the sea; and this being so, it would seem that the language of this enactment, construed in its plain and natural meaning, points directly to the inference that the expression "coasts of Labrador" as used in 1763 and 1809 was understood by Parliament in 1825 to have comprised the interior of the country back to those limits. It is suggested in the case for the Dominion that the line to be drawn north and south as far as the fifty-second degree was merely the draftsman's device for effecting the division of the coastal strip of one mile at Anee Sablon, and was probably intended to serve as a "boundary monument, as it were," for that purpose; but, having regard to the terms of the statute, their Lordships find great difficulty in accepting that construction.

While these arguments make a formidable case in favour of the contention of Newfoundland, it is obvious that the Canadian claim presents great difficulties. A grant of "so much of the land immediately abutting on the sea above low-water mark as was accessible and useful to the British fishermen annually resorting to the coast," even if expressly made in those terms, would have been so vague and indefinite as to be hardly capable of taking effect without some further and clearer definition. Under a grant in those or similar terms, would regard be had only to the needs of the fishermen resorting to the coast at the date of the grant, or would it be necessary to take into account

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the possibly greater needs of future generations of fishermen? And in case of doubt, upon whom would the duty fall of determining what extent of land was "accessible and useful" to the fishermen? The case for Canada admits that it may be found impracticable to lay down such a line upon the land, and suggests that, in order that neither party may suffer by reason of this difficulty, the boundary should be drawn along the coast at a distance of one mile from high-water mark; but their Lordships cannot think that in adopting such a proposal they would be performing the duty cast upon them by the terms of reference to determine the boundary "under the Statutes, Orders in Council and Proclamations." In any case they could not regard the line proposed as accurately defining the territory accessible and useful for the fishery. Of the ribbon of land along the coast which it is proposed to concede to Newfoundland, a great part lies at the summit of high cliffs not accessible from the sea, and this part of the area proposed would be of no use to fishermen. On the other hand, in places where, owing to the existence of a sea beach or of an inlet, opportunities for landing are available, a limit of one mile would often be found insufficient. Dr. Wilfred T. Grenfell, who has an unequalled knowledge of the country to which he has rendered such devoted service, states that he knows of no building in Labrador which is more than 250 yards above high-water mark, and that all nets are spread and fish dried within that distance from the sea; but his report makes it clear that, for the purpose of obtaining wood for repairs, an allowance of 3 miles on the average or 5 miles as a maximum would not be excessive. This view is confirmed by minutes of the Executive Council of Newfoundland, from which it appears that it has been the practice in leasing the right to cut timber in the island to reserve a margin of 3 (or sometimes 5) miles from the sea in the interest of the fishermen. Further, there are places where a broad peninsula is joined to the mainland by a neck not more than 2 miles in width, and in each of these instances the one-mile strip would meet in the neck of the peninsula and cut off by an interposed barrier of Newfoundland soil all access to the Canadian *enclave* on the broader part of the promontory. These considerations seem to show that on any view of the construction of the grant an allowance of one mile from high-water mark would be inadequate, and that any allowance of that kind which might be made would certainly be arbitrary and would probably be insufficient. Indeed, it may be doubted whether any person, noting upon the sketch-map the configuration of the coast as proposed by Canada to be defined, would conceive that

the Crown can have intended to annex to Newfoundland an area of that shape and character, to refer to it as a "territory," and to establish a form of government there; and if, as the Colony forcibly contends, the shores of the great Hamilton Inlet must be treated as a part of the sea coast, so that the one-mile strip would pass up the northern shore of that inlet and round the head of Goose Bay and would then return along its southern shores, the fantastic character of the boundary proposed would become even more apparent. It is also to be observed that the effect of allotting to Newfoundland a continuous one-mile strip along the shore would be to seal off the hinterland up to the watershed from all contact with the shore, from which access to it would naturally be sought; and it cannot be supposed that the statesmen of 1763 intended, while setting up a new form of government in the interior, to put that government entirely at the mercy as regards customs duties and otherwise of the Government of Newfoundland.

The principal arguments urged on behalf of the Dominion were based on the terms of the Proclamation of 1763, and particularly (1) on the declared purpose for which the government of the coast of Labrador was entrusted to Newfoundland and (2) on the provision made in the Proclamation for the Indians residing in the hinterland. It is true that the actual annexation of part of Labrador to Newfoundland was effected by the commission issued to Graves under the Order in Council of March 30, 1763, which was prior in date to the Proclamation of October 7; but the Proclamation is referred to in some of the statutes as a document of great importance, and no doubt regard must be had to its terms so far as they bear on the construction of the commission of the same year.

As to the purpose of the grant, great stress was laid on the declaration in the Proclamation that "to the end that the open and free fishery of [The King's] subjects might be extended to and be carried on upon the coast of Labrador and the adjacent islands," that coast with the islands has been put under the "care and inspection" of the Governor of Newfoundland. Attention was also called to a number of passages in letters and reports of about the same date, in which the control of the fishermen and the prevention of encroachments by the French were referred to as the principal objects to be attained. Having regard to these expressions, it was said the grant of the "coast" must be held to include only so much of the land as was accessible and useful to the fishermen resorting to that coast in the ordinary conduct of their fishing operations.

There is no doubt that the fisheries supplied the prineipal, if

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not the only, motive for the annexation of the coast of Labrador to Newfoundland. Labrador, like Newfoundland, was to be a base for fishing and a nursery of British seamen. But although this was the principal motive of the annexation, it does not follow that it was the measure of the grant. The free right to fish off the shores of Labrador, and the right of British fishermen to land there for the purpose of curing and drying their fish and repairing their ships and tackle, was already secured by statute or Order in Council; and the instructions regularly given to the Admiral in command of the Fleet provided for the protection of British subjects and the prevention of foreign intruders. What King George III and his advisers desired was that there should be a government on the coast, with power to administer justice, to imprison offenders, to encourage trade, and to erect forts for the purpose of defence; and it was for these purposes, which went beyond the regulation of the fisheries, that the coast of Labrador was subjected to the Government of Newfoundland on the same terms as the Island of Newfoundland itself.

Further, the fishing industry would not have been fully provided for by the grant of jurisdiction over a narrow strip of land near the shore. In addition to the cod and the whale which were caught off the Atlantic coast, and to the seal and sea-cow which were found mainly in the Gulf of St. Lawrence, the salmon and salmon-trout had to be considered. The salmon fisheries are mentioned in the instructions given to Capt. Graves, and the special importance of those fisheries in the Gulf of St. Lawrence, and in the rivers running into the gulf, is apparent from many references in the documents produced in evidence. The salmon fishery could only be fully protected by the grant of jurisdiction over the rivers and inland lakes as well as over the seashore; and from this point of view the reference to the fisheries tends rather to extend than to limit the grant.

But is was pointed out that the Proclamation of 1763 contained a declaration (quoted above) reserving under the sovereignity, protection and dominion of the King for the use of the Indians, the lands and territories not included within the limits of the three new Governments of Quebec, East Florida and West Florida, or within the limits of the territory granted to the Hudson's Bay Co.; and it was argued that this reservation applied to the territory occupied by the Indian tribes who were settled between the Atlantic seaboard of Labrador and the watershed, and was evidence that this territory was not intended to be included in the "coast" granted to Newfoundland.

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The Indians living in this territory consisted of Nascopies who lived north of the Hamilton River, and Montagnais who ranged to the south of that river; and if it were established that those tribes were intended to be included among the Indians in whose favour the reservation was made, the argument would undoubtedly have much force. But it does not appear to their Lordships to be made out that the declaration in question referred to the lands occupied by these two tribes. The reservation is confined to lands occupied by "the said Indians"—that is to say, those who are referred to in the next preceding paragraph of the Proclamation as nations or tribes of Indians with whom The King was connected and who lived under his protection; and it appears from the report of the Lords of Trade, dated June 8, 1763, on which the Proclamation was based, that the Indians so described consisted of those tribes of the Six Nations who were settled round the great lakes or beyond the sources of the rivers which fell into the River St. Lawrence from the north. This description would not include Indians residing beyond the sources of the rivers which flow into the Gulf of St. Lawrence or into the Atlantic. It is true that the exception of lands and territories included in the three new Governments or the Hudson's Bay territory does not apply to lands in the "coast" annexed to Newfoundland; but if the Indians in the "coast" territory were not included in "the said Indians," it was unnecessary to except them. Nor would the lands occupied by these Indians fall within the general description contained in the Proclamation as "lands and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west." Further, the Nascopies and Montagnais, so far as they had taken any part in the Anglo-French conflict, had sided with France, and they were not connected with or under the protection of the King before the cession of the French territory to him. The instructions given to Governor Graves in the earlier part of the same year had required him to report as to the establishing or carrying-on of a commerce with the Indians "inhabiting the coast of Labrador"—a direction which was repeated in the instructions to the Governors appointed immediately after the Proclamation, but which was omitted in those given after 1774 when Labrador was withdrawn from the Government of Newfoundland; and such a direction would have been out of place if the Indians settled in Labrador had been altogether excluded from the Governor's jurisdiction. Upon the whole, their Lordships are of opinion that this argument, although well deserving of consideration, is not well founded.

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It is said that the territory claimed by Newfoundland is of great extent, being about twice the size of Newfoundland itself; and no doubt this is the case. But the territory in question, when compared with the vast regions with which the British Government was dealing at the time, was relatively small in area and infinitesimal in value.

The Colony of Newfoundland claimed to support its case founded on the documents by a reference to evidence showing that the annexation of the "coast" had from the year 1763 onwards been understood and treated by everyone as including the whole area lying between the sea and the watershed or "height of land;" and there is no doubt that, where a document is ambiguous, evidence of a course of conduct which is sufficiently early and continuous may be taken into account as bearing upon the construction of the document. In this case the events of the 60 years next after the year 1763 have a special relevance, as the statute of 1809 (under which the present title of Newfoundland directly arises) and the statute of 1825 may be assumed to have been passed with knowledge of the public events which had occurred before their passing. It may be added that it was a term of the agreement between the two Governments that in the discussion before this Board reference might be made to any evidence which (having regard to the nature of the case and the parties to it) the Board might think material and proper to be considered; and that throughout the discussion, which was conducted in the most friendly spirit, both parties were desirous that no available material which might possibly bear upon the question to be decided should be excluded from consideration.

In this connection the following facts, which were proved, appear to their Lordships to be material and proper to be considered:—

(1) In the year 1765 the Unitas Fratrum, a society of Moravian missionaries, petitioned the Lords of Trade for the allotment to them of four tracts of land on the coast of Labrador containing together about 400,000 acres, with a view to the settlement there of missions to the Eskimos; and with the approval of the Lords of Trade missionaries were sent out by the society and received the support and protection of Governor Palliser. At a meeting of the Privy Council held on May 3, 1769, upon a report of the Lords of Trade recommending that a grant of land should be made to the society, The King in Council authorized certain British subjects as trustees for the Unitas Fratrum to occupy and possess during His Majesty's pleasure 100,000 acres of land in such part of Eskimo Bay on

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the coast of Labrador as they should find most suitable to that purpose, and directed the Governor of Newfoundland to give them all reasonable assistance and support in forming their establishment. This grant was duly made, and early in the year 1774 two other similar grants to or in trust for the society of 100,000 acres each were sanctioned by the Privy Council and committed to the Governor of Newfoundland to be carried out. In the year 1821, after the retransfer of Labrador to Newfoundland, a fourth grant of a like nature was made to the same society. The lands so granted to the Society of Unitas Fratrum penetrated into the country far beyond the suggested limit of one mile from high-water mark, and in the case of the most northerly of them to a distance of about 30 miles from the shore. It would appear that these grants, connected as they were with the Government of Newfoundland, were consistent only with the existence of a Newfoundland jurisdiction extending beyond the littoral strip; and it is hard to believe that when, in the year 1809, Parliament restored to Newfoundland the coast of Labrador, it intended to divide the Moravian settlements then in existence, placing a small fraction of them (one mile in width) under the jurisdiction of the colony, and leaving the remainder to Canada.

(2) In the year 1774, John Agnew and others having petitioned for a grant of mines and minerals to be discovered on the "coast or country of Labrador" between the River St. Lawrence and Hudson's Straits, The King in Council approved of the grant to them of all such mines and minerals "upon such parts of the sea coasts of Labrador as lie within 60 miles of low-water mark of the open sea" between the River St. John and the southern limits of the territories granted to the Hudson's Bay Co. This grant appears to treat the "coasts" as extending far inland from the shore.

(3) The administration of justice in Labrador has throughout been under the direction of the Government of Newfoundland. In the early years after the annexation it was found sufficient, as in the case of Newfoundland itself, to administer justice by the agency of Naval Surrogates exercising their functions on board their vessels or from some place close to the seashore. But by the Act of 1809, s. 15, it was enacted that the Supreme Court of Judicature of Newfoundland might hold sittings for criminal and civil cases in the parts of the coast of Labrador by that Act re-annexed to Newfoundland; and by the Act, 1811 (Imp.), c. 45, s. 2, the institution of Surrogate Courts for that purpose was authorized. By the Act, 1824 (Imp.), c. 67, the Government of Newfoundland was empowered

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to institute a Court of civil jurisdiction on the "coast" itself, and to appoint a Judge of such Court; and Judge Patterson, the Judge so appointed, exercised his functions at various places in the Labrador territory, including Rigolet, Kimmamish and North West Brook, places which would have been far outside his jurisdiction if it had been limited as suggested by the Dominion in this enquiry. In 1838 the Legislature of Newfoundland, which had then been established, abolished the Court in Labrador on the ground of expense; but by an Act of the same Legislature passed by 1863 (Nfld.), c. 2, s. 1, the Governor was empowered to institute "a Court of Civil and Criminal Jurisdiction at the Labrador," to be "presided over by one Judge, to be appointed by the Governor in Council," and (s. 4) with an appeal to the Supreme Court of Newfoundland, and (s. 9) to appoint such Judge to be a collector of revenue on the Labrador. This Court was duly set up and was presided over by Judges Sweetland, Pinsent and McNeil successively: and it continued to function until 1874, when it was discontinued. Each of these Judges, in addition to performing his judicial duties, made reports from time to time to the Governor on a number of questions relating to the territory of Labrador, including roads, schools, churches and the fur trade. Among other incidents may be mentioned a visit of Judge Pinsent in 1873 to the North West River (about 100 miles from the open sea), when a Government official vaccinated a number of Montagnais Indians coming there for trade.

(4) Customs duties have been levied on behalf of the Government of Newfoundland on goods disembarked in Labrador from about the year 1826 until the present time, and the right of the Government to collect such duties has from time to time been affirmed by the Secretary of State. In the year 1864 Mr. Donald Smith (afterwards Lord Strathcona), who was in control of the Hudson's Bay Co.'s trading station at North West River, agreed after some demur to pay the duties on goods landed at that place; and such duties have since been regularly paid.

It may be added that a considerable trade in fur was carried on by traders settled at or near the seashore or on the shores of the Hamilton Inlet with the Indians in the interior, and was fostered by the Governor of Newfoundland; but a trade of this character would easily reach beyond the territory of the traders themselves, and it has little bearing on the question of boundary. A similar observation applies to the trade carried on by the Indians with The King's Posts in the Province of Quebec, on which counsel for Canada relied. No evidence was

given of any exercise of a Canadian jurisdiction in any part of the territory in dispute.

It seems desirable to add some observations on the maps, of which a large number (some of great antiquity and interest) were produced by the parties.* Maps published by private persons must, of course, be received with caution, as such persons depend to a large extent upon information obtained from general and unauthoritative sources; but from a map issued or accepted by a public authority, and especially by an authority connected with one of the Governments concerned, an inference may not improperly be drawn.

The maps issued before 1763 have no direct bearing on this case, although some of them have been already referred to as instances of the use of a watershed or "height of land" as the boundary of a territory; and the later maps down to the year 1842 are of little use, except that they clearly indicate the whole course of the River St. John as the eastern boundary between Quebec and Labrador. Arrowsmith's map of British North America (N 24), published in 1842, is interesting as showing a line drawn from Ance Sablon northward to the fifty-second degree of north latitude and then along that parallel to the head of the St. John River as being at that point the boundary between Lower Canada and Labrador, thus indicating that the construction of s. 9 of the Act of 1825 now put forward by Newfoundland was then adopted by the cartographer. The same indication of boundary appears, with greater authority, in the map (N 25) prepared in 1855 by T. C. Keeper, C.E., on the instructions of the Government of Canada for the use of the Canadian Commissioners at the Paris Exhibition. Arrowsmith's map of 1857 (N 26) has some authority as having been ordered to be printed by the House of Commons for the purposes of the Hudson's Bay Committee of that year, and as having been selected as an exhibit in the Alaska Boundary case: and that map not only has a similar indication as to the southern boundary of Labrador, but assigns to that territory the exact boundaries now claimed for it on behalf of Newfoundland. The same observation applies to a map (N 31) prepared in 1871 by two Canadian officials (Russell and Mare) on the order of the Canadian Minister of Agriculture, and to a map (N 32a) compiled by Desbarats in 1873 and sent by Lord Dufferin as Governor-General of Canada to the British Ambassador in Washington as showing "the exact boundary on the coast and

*The maps contained in the collection put in by the Dominion are referred to by their numbers following a C, and those contained in the atlas put in by Newfoundland by their numbers following an N.

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the assumed boundary in the interior." The despatch of the Governor-General transmitting this map enclosed a copy of the report of a Committee of the Privy Council approved by the Governor-General in Council on November 12, 1874, which was in the following terms:—

"In a despatch dated 20th June, 1874, from Sir Edward Thornton to Your Excellency, inclosing a communication from the Hon. Hamilton Fish, Secretary of State at Washington, desiring to be informed whether any part of Labrador is separated from the jurisdiction of either the Dominion of Canada or that of Newfoundland.

"The Honourable the Secretary of State to whom this despatch, with enclosures, has been referred, reports that the boundary-line between the Dominion of Canada and Labrador is a line drawn due north and south from the Bay or Harbor of Ance au Blanc Sablon, near the Straits of Belle Isle, as far as the 52nd degree of north latitude; that Labrador extends eastward and northward from that point to Hudson's Straits.

"That the division-line in the interior separating Labrador from the Dominion of Canada has only been defined as far north as the 52nd degree of north latitude, but it has been assumed that the boundary-line in the interior would have taken the direction laid down on the accompanying map, which follows the height of land.

"That Labrador, with the islands adjacent thereto, is annexed to Newfoundland, and under the Government of that Island.

"Attached to the Report of the Secretary of State are extracts from the Imperial Statute bearing on the question, and a map showing the exact boundary on the coast and the assumed boundary in the interior.

"The Committee recommend that a copy of this Minute with map and extracts from the Imperial Statute, above alluded to, be transmitted to Sir Edward Thornton for the information of the United States Government."

The terms of this report appear to their Lordships to be significant.

The maps subsequent to 1874 are not less interesting. The boundary now claimed by Newfoundland is assigned to Labrador by a map (N 35) prepared by Johnston in 1878, signed by the Surveyor-General of Canada and published by order of the Ministry of the Interior; in a map (C 36 and N 36) prepared by Johnston and Edmunds in 1882 and issued by the Canadian Department of Railways; and in a map (N 38) compiled by two French Canadians (Tache and Genest) and issued

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by the Department of Railways of Quebec in 1883. In a map (C 37 and N 39) prepared by J. Johnston by authority of the Minister of the Interior and issued by the Department of the Interior at Ottawa in July, 1890, the height of land now claimed by Newfoundland as a boundary is shown by a red line; and though it is not clear on that map whether it is intended to be taken as the boundary between Canada and the Dependency of Newfoundland, no other boundary is indicated. This observation does not apply to a map (N 41) issued by the Department of Railways and Canals of Canada in 1891 and signed by the Chief Engineer of Government Railways, for in that map Labrador is clearly shown as bounded by the height of land; nor to a map (N 43) published by the Map and School Supply Co. of Canada, and registered with the Department of Agriculture, in which "Labrador (Dependency of Newfoundland)" is depicted in bold colours as containing (subject to a slight difference to be mentioned hereafter) the precise area for which Newfoundland is contending. In the important map (N 42) prepared by A. P. Low, an official of the Canadian Geographical Survey, as the result of a careful survey of the country and issued by that Department in 1896, the approximate height of land is shown, though not as a boundary; but the line drawn due north from Ance Sablon to the fifty-second parallel is shown and marked "boundary line." No other boundary of Labrador is indicated in that map. It is not until the year 1900 that the boundary now claimed by Canada is found upon any map; but it then appears upon a map (C 39) issued by the Department of the Interior, where a dotted line is drawn along the line of the shore and is marked "boundary undefined." It is also found in later maps; but as these were published after the dispute had arisen, no importance attaches to them.

The maps here referred to, even when issued or accepted by departments of the Canadian Government, cannot be treated as admissions binding on that Government; for even if such an admission could be effectively made, the departments concerned are not shown to have had any authority to make it. But the fact that throughout a long series of years, and until the present dispute arose, all the maps issued in Canada either supported or were consistent with the claim now put forward by Newfoundland, is of some value as showing the construction put upon the Orders in Council and statutes by persons of authority and by the general public in the Dominion.

Upon the whole, their Lordships, having considered the facts and arguments put before them with the care which is neces-

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sary in a matter of such grave importance, have come to the conclusion that the claim of the Colony of Newfoundland is in substance made out; but there are two points of detail to be mentioned.

First, in many of the maps issued after the year 1882, and particularly in the official maps above mentioned and numbered N 38, 41 and 43, and in maps issued by W. and A. K. Johnston (N 37) and by Stanford (N 40), the southern boundary of Labrador is shown as running, not from the point where the north and south line drawn from Ance Sablon meets the fifty-second parallel, and in a straight line along that parallel, but from a point where that north and south line would reach the watershed north of the fifty-second parallel and along that watershed as far as the head of the Romaine river. A boundary so drawn along the watershed would no doubt be more convenient than one which follows the arbitrary line of the fifty-second parallel, and would have the advantage of throwing into Canada the whole course of the rivers which run into the gulf of St. Lawrence. But their Lordships would not feel justified in adopting a boundary which, however convenient in itself, is not warranted by the terms of the statute of 1825; and they are of opinion that the line must be drawn along the parallel as far as the supposed River of St. Johns, namely, the Romaine River. According to the claim of the Colony as illustrated by the sketch-map, the line would be continued westward across the river until it met the height of land; but there is no warrant in the statute of 1825 for such a continuation of the line. the effect of which would be to give to Newfoundland a part of the original Province of Quebec as constituted under the Proclamation of 1763. The line should follow the parallel only until it meets the river, and should then turn north to the watershed.

Secondly, a small island called Woody Island, lying opposite to the Bay of Ance Sablon, is claimed both by Canada and by Newfoundland. In their Lordships' opinion the transfer to Canada by the Act of 1825 of so much of the coast as lies to the westward of a line drawn due north and south from the bay or harbour of Ance Sablon "inclusive," with the islands adjacent to that part of the coast, carries with it Woody Island, which accordingly belongs to the Dominion.

For the above reasons their Lordships are of opinion that, according to the true construction of the statutes, Orders in Council and Proclamations referred to in the Order of Reference, the boundary between Canada and Newfoundland in the Labrador Peninsula is a line drawn due north from the eastern

boundary of the Bay or Harbour of Ance Sablon as far as the fifty-second degree of north latitude, and from thence westward along that parallel until it reaches the Romaine River, and then northward along the left or east bank of that river and its head waters to their source and from thence due north to the crest of the watershed or height of land there, and from thence westward and northward along the crest of the watershed of the rivers flowing into the Atlantic Ocean until it reaches Cape Chidley; and they will humbly advise His Majesty accordingly.

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DICKSON v. CHAMBERLAND.

Alberta Supreme Court, Appellate Division, Harvey, C.J.A., Beck, Hyndman and Mitchell, JJ.A., and Ford, J. March 5, 1927.

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Gifts I—Delivery of discharge of mortgage to third person—No trust—No assignment of debt—No gift.

Where the facts disclose that a mortgagee left a discharge of the mortgage with the duplicate mortgage with a third person who handed them to the mortgagor after the death of the mortgagee and do not disclose that such third person held the discharge for the use of the mortgagor nor that there was an equitable or legal assignment of the debt, it cannot be found that there was a valid gift either *inter vivos* or *mortis causa* of the mortgage debt from the mortgagee to the mortgagor.

APPEAL by the defendant from the judgment of Walsh, J., in favour of the plaintiff. Affirmed.

L. S. Fraser, for appellant; *C. H. Grant*, K.C., for respondent.

HARVEY, C.J.A.:—One Clement, a brother of the defendant, died on April 5, 1925, having made a will about a month previously under which he appointed his nephew, a son of the defendant, his executor, leaving the defendant a legacy of $3,000. The residuary legatees under the will were infant children of a brother of deceased, who had no children of his own.

The executor applied for probate but the succession duties branch of the Provincial Government, being dissatisfied with the disclosure and valuation of the deceased's property had a commissioner appointed who took evidence under oath, in July, 1925. Thereafter an arrangement was made whereby J. Chamberland renounced and letters with the will annexed were granted to the plaintiff, who is a Government official and the Official Guardian.

In December the plaintiff entered an action against Chamberland for a declaration that a note for $2500 payable to the deceased and endorsed to Chamberland was the property of the estate and on the same day began this action against the

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HIS MAJESTY THE KING.....PLAINTIFF;

AND

LADY ELLA V. McMASTER ET AL.....DEFENDANTS.

Crown—Indian lands—Lease by Indians—Royal Proclamation, 1763—Tenant-at-will

Held, that as by the Royal Proclamation of 1763, which has the force of a statute, and the several Indian Acts since passed, lands forming part of Indian Reserves could not be alienated or otherwise dealt with by the Indians, a contract of lease made in 1817 by certain chiefs of the Indian tribe then in occupancy thereof, of a certain island (part of the St. Regis Indian Reserve) for 99 years with right of renewal, was null and void. That the Indians never had such an interest in lands reserved for their occupancy that they could alienate by lease or sale. That the Crown could not itself lease or ratify a lease made by the Indians of such land at any time save upon a surrender of the same by the Indians to the Crown.

2. That the right of the Crown to recover possession of the lands in question, improperly in possession of the defendants, is one incident to the control and management of such lands, given it by the British North America Act, and is not to be confused with a claim on the part of the Crown asserting title thereto either in right of the Dominion or of a province. (*Mowat, Attorney General v. Casgrain, Attorney General* (1897) Q.O.R. 6 Q.B. 12 referred to.

3. That the lease being void, the tenancy acquired by the defendant, from those charged with the control and management of Indian lands, under the Indian Act, was that of a tenancy-at-will, or that of a yearly tenant, which could be terminated by notice to quit and to deliver up possession.

INFORMATION by the Attorney General of Canada to recover possession of certain lands now in the occupancy of defendants, part of an Indian Reserve.

Ottawa, October 15 and November 6, 1925.

Action now tried before the Honourable the President.

W. C. McCarthy and *A. S. Williams* for plaintiff.

George A. Campbell, K.C., for the defendant.

The facts are stated in the reasons for judgment.

MACLEAN J., now this 17th March, 1926, delivered judgment.

This is an action brought by His Majesty the King, on the information of the Attorney General of Canada, wherein the plaintiff claims possession of certain lands, now in possession of the defendants, and being a portion of the St. Regis Indian Reserve located in the eastern part of the province of Ontario.

Certain historical and constitutional facts in connection with the cession of Canada to Great Britain by France,

and George Walker, promised and assured divers members of the legislature of the said state then duly and legally sitting in general assembly of the said state, that if the said members would assent to and vote for the passing of the act of the said general assembly, entitled as aforesaid, the same then being before the said general assembly in the form of a bill, and if the said bill should pass into a law, that such members should have a share of, and be interested in, all the lands, which they the said Gunn, M'Allister and Walker, and their associates, should purchase of the said state by virtue of and under authority of the same law: and that divers of the said members to whom the said promise and assurance was so made as aforesaid, were unduly influenced thereby, and under such influence did then and there vote for the passing the said bill into a law; by reason whereof the said law was a nullity, and from the time of passing the same as aforesaid was, ever since has been, and now is, absolutely void and of no effect whatever; *and that the title which the said state of Georgia had* in the aforegranted premises at any time whatever *was never legally conveyed to the said Peck, by force of the conveyances aforesaid.*"

A *grant* is a *contract* executed.

A law, annulling conveyances, is unconstitutional, because it is a law impairing the obligation of contracts, within the meaning of the constitution of the United States.

The proclamation of the King of Great Britain in 1763 did not alter the boundaries of Georgia.

The nature of the Indian title is not such as to be absolutely repugnant to seisure in fee on the part of the state.

The *third* count, after repeating all the averments and recitals contained in the *second*, further averred, that after the passing of the said act, and of the execution of the patent aforesaid, the general assembly of the state of Georgia, being a legislature of that state subsequent to that which passed the said act, at a session thereof, duly and legally holden at Augusta, in the said state, did, on the 13th of February, 1796, because of the undue influence used as aforesaid, in procuring the said act to be passed, and for other causes, pass another certain act in the words following, that is to say, "An act declaring null and void a certain usurped act passed by the last legislature of this state at Augusta, the 7th day of January, 1795, under the pretended title of 'An act supplementary to an act entitled an act for appropriating a part of the unloca-

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which they shall deem necessary and proper for the good of the state which shall not be repugnant to this constitution. The plea then avers, that until and at the ratification and confirmation aforesaid of the said constitution, the people of the said state were seised, among other large parcels of land, and tracts of country, of all the tenements described by the said Fletcher in his said first count, and of the soil thereof in absolute sovereignty, and in fee-simple; (subject only to the extinguishment of the Indian title to part thereon;) and that upon the confirmation and ratification of the said constitution, and by force thereof, the said State of Georgia became seised in absolute sovereignty, and in fee-simple, of all the tenements aforesaid, with the soil thereof, subject as aforesaid; the same being within the territory and jurisdiction of the said state, and the same state continued so seised in fee-simple, until the said tenements and soil were conveyed by letters patent under the great seal of the said state, and under the signature of George Matthews, Esq. governor thereof, in the manner and form mentioned by the said Fletcher in his said first count. And the said Peck further saith, that on the 7th of January, 1795, at a session of the general assembly of the said state duly holden at Augusta within the same, according to the provisions of the said constitution, the said general assembly, then and there possessing all the powers vested in the legislature of the said state by virtue of the said constitution, passed the act above mentioned by the said Fletcher in the assignment of the breach aforesaid, which act is in the words following, that is to say, "An act supplementary," &c.

Here was recited the whole act, which, after a long preamble, declares the jurisdictional and territorial rights, and the fee-simple to be in the state, and then enacts, that certain portions of the vacant lands should be sold to four distinct associations of individuals, calling themselves respectively, "The Georgia Company," "The Georgia Mississippi Company," "The Upper Mississippi Company," and "The Tennessee Company."

The tract ordered to be sold to James Gunn and

others, (the Georgia Company,) was described as follows: "All that tract or parcel of land, including islands, situate, lying and being within the following boundaries; that is to say, beginning on the Mobile bay where the latitude 31 deg. north of the equator, intersects the same, running thence up the said bay to the mouth of lake *Tensaw;* thence up the said lake Tensaw to the Alabama river, including Curry's, and all other islands therein; thence up the said Alabama river to the junction of the Coosa and Oakfushee rivers; thence up the Coosa river above the big shoals to where it intersects the latitude of thirty-four degrees north of the equator; thence a due west course to the Mississippi river; thence down the middle of the said river to the latitude 32 deg. 40 min.; thence, a due east course to the Don or Tombigby river; thence down the middle of the said river to its junction with the Alabama river; thence down the middle of the said river to Mobile bay; thence down the Mobile bay to the place of beginning.

Upon payment of 50,000 dollars, the governor was required to issue and sign a grant for the same, taking a mortgage to secure the balance, being 200,000 dollars, payable on the first of November, 1795.

The plea then avers, that all the tenements described in the first count are included in, and parcel of, the lands in the said act to be sold to the said Gunn, M'Allister, and Walker and their associates, as in the act is mentioned.

And that by force and virtue of the said act, and of the constitution aforesaid, of the said state, the said *Matthews*, governor of the said state, was fully and legally empowered to sell and convey the tenements aforesaid, and the soil thereof, subject as aforesaid, in fee-simple by the said patent under the seal of the said state, and under his signature, according to the terms, limitations, and conditions in the said act mentioned. And all this he is ready to verify; wherefore, &c.

To this plea there was a general demurrer and joinder.

2d plea. To the second count the defendant, "protesting that the said Gunn, M'Allister, and Walker did not make the promises and assurances to divers members of the legislature of the said state of Georgia, supposed by the said Fletcher in his second count, for plea saith, that until after the purchase by the said Greenleaf, as is mentioned in the said second count, neither he the said defendant, nor the said Prime, nor the said Greenleaf, nor the said Phelps, nor the said Hichborn, nor either of them, had any notice nor knowledge that any such promises and assurances were made by the said Gunn, M'Allister and Walker, or either of them, to any of the members of the legislature of the said State of Georgia, as is supposed by the said Fletcher in his said second count, and this he is ready to verify," &c.

To this plea also there was a general demurrer and joinder.

3d plea to the third count was the same as the second plea, with the addition of an averment that Greenleaf, Prince, Phelps, Hichborn and the defendant were, until and after the purchase by Greenleaf, on the 22d of August, 1795, and ever since have been, citizens of some of the United States other than the State of Georgia.

To this plea also there was a general demurrer and joinder.

4th Plea. To the fourth count, the defendant pleaded that at the time of passing the act of the 7th of January, 1795, the State of Georgia was seised in fee-simple of all the tenements and territories aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title to part thereof, and of this he puts himself *on the country*, and the plaintiff likewise.

Upon the issue joined upon the fourth plea, the jury found the following special verdict, viz.

That his late majesty, Charles the second, King of Great Britain, by his letters patent under the great seal of Great Britain, bearing date the thirtieth day of June, in the seventeenth year of his reign, did grant unto Edward Earl of Clarendon, George Duke of Albemarle, William Earl of Craven, John Lord Berkeley, Antony Lord Ashby, Sir George Carteret, Sir John Colleton, and Sir William Berkeley, therein called lords proprietors, and their heirs and assigns, all that province, territory, or tract of ground, situate, lying and being in North America, and described as follows: extending north and eastward as far as the north end of Carahtuke river or gullet, upon a straight westerly line to Wyonoahe creek, which lies within or about the degrees of thirty-six and thirty minutes of northern latitude, and so west in a direct line as far as the South Seas, and south and westward as far as the degrees of twenty-nine inclusive, northern latitude, and so west in a direct line as far as the South Seas, (which territory was called Carolina,) together with all ports, harbours, bays, rivers, soil, land, fields, woods, lakes, and other rights and privileges therein named; that the said lords proprietors, grantees aforesaid, afterwards, by force of said grant, entered upon and took possession of said territory, and established within the same many settlements, and erected therein fortifications and posts of defence.

And the jury further find, that the northern part of the said tract of land, granted as aforesaid to the said lords proprietors, was afterwards created a colony by the King of Great Britain, under the name of North Carolina, and that the most northern part of the thirty-fifth degree of north latitude was then and ever afterwards the boundary and line between North Carolina and South Carolina, and that the land, described in the plaintiff's declaration, is situate in that part of said tract, formerly called Carolina, which was afterwards a colony called South Carolina, as aforesaid; that afterwards, on the twenty-sixth day of July, in the

third year of the reign of his late majesty George the second, King of Great Britain, and in the year of our Lord one thousand, seven hundred and twenty-nine, the heirs or legal representatives of all the said grantees, except those of Sir George Carteret, by deed of indenture, made between authorized agents of the said King George the second, and the heirs and representatives of the said grantees, in conformity to an act of the parliament of said kingdom of Great Britain, entitled, "An act for establishing an agreement with seven of the lords proprietors of Carolina for the surrender of their title and interest in that province to his majesty," for and in consideration of the sum of twenty-two thousand five hundred pounds of the money of Great Britain, paid to the said heirs and representatives of the said seven of the lords proprietors, by the said agent of the said king, sold and surrendered to his said majesty, King George the second, all their right of soil, and other privileges to the said granted territory; which deed of indenture was duly executed and was enrolled in the chancery of Great Britain, and there remains in the chapel of the rolls. That afterwards, on the ninth day of December, one thousand, seven hundred and twenty-nine, his said majesty, George the second, appointed Robert Johnson, Esq. to be governor of the province of South Carolina, by a commission under the great seal of the said kingdom of Great Britain; in which commission the said Governor Johnson is authorized to grant lands within the said province, but no particular limits of the said province is therein defined.

And the jury further find, that the said Governor of South Carolina did exercise jurisdiction in and over the said colony of South Carolina under the commission aforesaid, claiming to have jurisdiction by force thereof as far southward and westward as the southern and western bounds of the aforementioned grant of Carolina, by King Charles the second, to the said lords proprietors, but that he was often interrupted therein and prevented therefrom in the southern and western parts of said grants by the public enemies of the King of Great Britain, who at divers times

had actual possession of the southern and western parts aforesaid. That afterwards the right honourable Lord Viscount Percival, the honourable Edward Digby, the honourable George Carpenter, James Oglethorpe, Esq. with others, petitioned the lords of the committee of his said majesty's privy council for a grant of lands in South Carolina, for the charitable purpose of transporting necessitous persons and families from London to that province, to procure there a livelihood by their industry, and to be incorporated for that purpose; that the lords of the said privy council referred the said petition to the board of trade, so called, in Great Britain, who, on the seventeenth day of December, in the year of our Lord one thousand seven hundred and thirty, made report thereon, and therein recommended that his said majesty would be pleased to incorporate the said petitioners as a charitable society, by the name of "The Corporation for the purpose of establishing charitable colonies in America, with perpetual succession." And the said report further recommended, that his said majesty be pleased "to grant to the said petitioners and their successors for ever, all that tract of land in his province of South Carolina, lying between the rivers Savannah and Alatamaha, to be bounded by the most navigable and largest branches of the Savannah, and the most southerly branch of the Alatamaha." And that they should be separated from the province of South Carolina, and be made a colony independent thereof, save only in the command of their militia. That afterwards, on the twenty-second day of December, one thousand seven hundred and thirty-one, the said board of trade reported further to the said lords of the privy council, and recommended that the western boundary of the new charter of the colony, to be established in South Carolina, should extend as far as that described in the ancient patents granted by King Charles the second to the late lords proprietors of Carolina, whereby that province was to extend westward in a direct line as far as the South Seas. That afterwards, on the ninth day of June, in the year of our Lord one thousand seven hundred and thirty-two, his said majesty, George the

second, by his letters patent, or royal charter, under the great seal of the said kingdom of Great Britain, did incorporate the said Lord Viscount Percival and others, the petitioners aforesaid, into a body politic and corporate, by the name of "The trustees for establishing the colony of Georgia, in America, with perpetual succession;" and did, by the same letters patent, give and grant in free and common socage, and not *in capite*, to the said corporation and their successors, seven undivided parts (the whole into eight equal parts to be divided) of all those lands, countries and territories, situate, lying and being in that part of South Carolina in America, which lies from a northern stream of a river there commonly called the Savannah, all along the sea-coast to the southward unto the most southern branch of a certain other great water or river, called the Alatamaha, and westward from the heads of the said rivers respectively in direct lines to the South Seas, and all the lands lying within said boundaries, with the islands in the sea, lying opposite to the eastern coast of the same, together with all the soils, grounds, havens, bays, mines, minerals, woods, rivers, waters, fishings, jurisdictions, franchises, privileges, and pre-eminences within the said territories. That afterwards, in the same year, the right honourable John Lord Carteret, Baron of Hawnes, in the county of Bedford, then Earl Granville, and heir of the late Sir George Carteret, one of the grantees and lords proprietors aforesaid, by deed of indenture between him and the said trustees for establishing the colony of Georgia in America, for valuable consideration therein mentioned, did give, grant, bargain and sell unto the said trustees for establishing the colony of Georgia aforesaid, and their successors, all his one undivided eighth part of or belonging to the said John Lord Carteret (the whole into eight equal parts to be divided) of, in, and to the aforesaid territory, seven undivided eight parts of which had been before granted by his said majesty to said trustees.

And the jury further find, that one eighth part of the said territory, granted to the said lords proprietors, and called Carolina as aforesaid, which eighth part be-

longed to Sir George Carteret, and was not surrendered as aforesaid, was afterwards divided and set off in severalty to the heirs of the said Sir George Carteret in that part of said territory which was afterwards made a colony by the name of North Carolina. That afterwards, in the same year, the said James Oglethorpe, Esq. one of the said corporation, for and in the name of and as agent to the said corporation, with a large number of other persons under his authority and control, took possession of said territory, granted as aforesaid to the said corporation, *made a treaty with some of the native Indians within said territory*, in which, for and in behalf of said corporation, he made *purchases of said Indians of their native rights to parts of said territory*, and erected forts in several places to keep up marks of possession. That afterwards, on the sixth day of September, in the year last mentioned, on the application of said corporation to the said board of trade, they the said board of trade, in the name of his said majesty, sent instructions to said Robert Johnson, then Governor of South Carolina, thereby willing and requiring him to give all due countenance and encouragement for the settling of the said colony of Georgia, by being aiding and assisting to any settlers therein: and further requiring him to cause to be registered the aforesaid charter of the colony of Georgia, within the said province of South Carolina, and the same to be entered of record by the proper officer of the said province of South Carolina.

And the jury further find, that the Governor of South Carolina, after the granting the said charter of the colony of Georgia, did exercise jurisdiction south of the southern limits of said colony of Georgia, claiming the same to be within the limits of his government; and particularly that he had the superintendency and control of a military post there, and did make divers grants of land there, which lands have ever since been holden under his said grants. That afterwards, in the year of our Lord one thousand seven hundred and fifty-two, by deed of indenture made between his said majesty, George the second, of the one part, and the said trustees for establishing the

colony in America of the other part, they the said trustees, for divers valuable considerations therein expressed, did, for themselves and their successors, grant, surrender, and yield up to his said majesty, George the second, his heirs and successors, their said letters patent, and their charter of corporation, and all right, title and authority, to be or continue a corporate body, and all their powers of government, and all other powers, jurisdictions, franchises, pre-eminences and privileges therein, or thereby granted or conveyed to them; and did also grant and convey to his said majesty, George the second, his heirs and successors, all the said lands, countries, territories and premises, as well the said one eighth part thereof granted by the said John Lord Carteret to them as aforesaid, as also the said seven eighth parts thereof, granted as aforesaid by his said majesty's letters patent or charter as aforesaid, together with all the soils, grounds, havens, ports, bays, mines, woods, rivers, waters, fishings, jurisdictions, franchises, privileges and pre-eminences, within said territories, with all their right, title, interest, claim or demand whatsoever in and to the premises; and which grant and surrender aforesaid, was then accepted by his said majesty for himself and his successors; and said indenture was duly executed on the part of said trustees, with the privity and by the direction of the common council of the said corporation by affixing the common seal of said corporation thereunto, and on the part of his said majesty by causing the great seal of Great Britain to be thereunto affixed. That afterwards, on the sixth day of August, one thousand seven hundred and fifty-four, his said majesty, George the second, by his royal commission of that date under the great seal of Great Britain, constituted and appointed John Reynolds, Esq. to be captain-general and commander in chief in and over said colony of Georgia in America, with the following boundaries, viz. lying from the most northerly stream of a river, there commonly called Savannah, all along the sea coast to the southward unto the most southern stream of a certain other great water or river called the Alatahama, and westward from the heads of the said rivers respectively, in straight lines to the South Seas, and all the space, circuit and precinct of

land lying within the said boundaries, with the islands in the sea lying opposite to the eastern coast of said lands within twenty leagues of the same. That afterwards, on the tenth day of February, in the year of our Lord one thousand seven hundred and sixty-three, a definitive treaty of peace was concluded at Paris, between his catholic majesty, the King of Spain, and his majesty, George the third, King of Great Britain; by the twentieth article of which treaty, his said catholic majesty did cede and guaranty, in full right to his Britannic majesty, Florida, with fort St. Augustin, and the bay of Pensacola, as well as all that Spain possessed on the continent of North America, to the east or to the south east of the river Mississippi, and in general all that depended on the said countries and island, with the sovereignty, property, possession, and all rights acquired by treaties or otherwise, which the catholic king and the crown of Spain had till then over the said countries, lands, places, and their inhabitants; so that the catholic king did cede and make over the whole to the said king and the said crown of Great Britain, and that in the most ample manner and form.

That afterwards, on the seventh day of October, in the year of our Lord one thousand seven hundred and sixty-three, his said majesty, George the third, King of Great Britain, by and with the advice of his privy council, did issue his royal proclamation, therein publishing and declaring, that he, the said King of Great Britain, had, with the advice of his said privy council, granted his letters patent, under the great seal of Great Britain, to erect within the countries and islands ceded and confirmed to him by the said treaty, four distinct and separate governments, styled and called by the names of Quebec, East Florida, West Florida and Grenada; in which proclamation the said government of West Florida is described as follows, viz. Bounded to the southward by the gulf of Mexico, including all islands within six leagues of the coast from the river Apalachicola to lake Pontchartrain, to the westward by the said lake, the lake Maurepas, and the river Mississippi; to the northward by

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a line drawn due east from that part of the river Mississippi which lies in thirty one-degrees of north latitude, to the river Apalachicola or Catahouchee; and to the eastward by the said river. And in the same proclamation the said government of East Florida is described as follows, viz. bounded to the westward by the gulf of Mexico and the Apalachicola river; to the northward by a line drawn from that part of the said river where the Catahouchee and Flint rivers meet, to the source of St. Mary's river, and by the course of the said river to the Atlantic Ocean; and to the east and south by the Atlantic Ocean and the gulf of Florida, including all islands within six leagues of the sea coast. And in and by the same proclamation, all lands lying between the rivers Alatamaha and St. Mary's were declared to be annexed to the said province of Georgia; and that in and by the same proclamation, it was further declared by the said king as follows, viz. "That it is our royal will and pleasure *for the present*, as aforesaid, to reserve under our sovereignty, protection and dominion for the use of the said Indians all the land and territories not included within the limits of our said three new governments, or within the limits of the territory granted to the Hudson's Bay Company, *as also all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west as aforesaid;* and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained."

And the jury find, that the land described in the plaintiff's declaration *did lay to the westward of the sources of the rivers which fall into the sea from the west and north-west as aforesaid.* That afterwards, on the twenty-first day of November, in the year of our Lord one thousand seven hundred and sixty-three, and in the fourth year of the reign of said King George the third, he the said king, by his royal commission under the great seal of Great Britain, did constitute and ap-

point George Johnstone, Esq. captain-general and governor in chief over the said province of West Florida in America; in which commission the said province was described in the same words of limitation and extent, as in said proclamation is before set down. That afterwards, on the twentieth day of January, in the year of our Lord one thousand seven hundred and sixty-four, the said King of Great Britain, by his commission under the great seal of Great Britain, did constitute and appoint James Wright, Esq. to be the captain-general and governor in chief in and over the colony of Georgia, by the following bounds, viz. *bounded on the north by the most northern stream of a river there commonly called Savannah, as far as the heads of the said river; and from thence westward as far as our territories extend; on the east, by the sea coast, from the said river Savannah to the most southern stream of a certain other river, called St. Mary;* (including all islands within twenty leagues of the coast lying between the said river Savannah and St. Mary, as far as the head thereof;) *and from thence westward as far as our territories extend by the north boundary line of our provinces of East and West Florida.*

That afterwards, from the year one thousand seven hundred and seventy-five, to the year one thousand seven hundred and eighty-three, an open war existed between the colonies of New-Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, called the United States, on the one part, and his said majesty, George the third, King of Great Britain, on the other part. And on the third day of September, in the year of our Lord one thousand seven hundred and eighty-three, a definitive treaty of peace was signed and concluded at Paris, by and between certain authorized commissioners on the part of the said belligerent powers, which was afterwards duly ratified and confirmed by the said two respective powers; by the first article of which treaty, the said King George the third, by the name of his Britannic majesty, acknowledged the aforesaid United

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States to be free, sovereign and independent states; that he treated with them as such, and for himself, his heirs and successors, relinquishes all claim to the government, propriety and territorial rights of the same, and every part thereof; and by the second article of said treaty, the western boundary of the United States is a line drawn along the middle of the river Mississippi, until it shall intersect the northernmost part of the thirty-first degree of north latitude; and the southern boundary is a line drawn due east from the determination of the said line, in the latitude of thirty-one degrees north of the equator, to the middle of the river Apalachicola or Catahouchee; thence along the middle thereof to its junction with the Flint river; thence straight to the head of St. Mary's river; and thence down along the middle of St. Mary's river to the Atlantic Ocean.

And the jury further find, that in the year of our Lord one thousand seven hundred and eighty-two, the Congress of the United States did instruct the said commissioners, authorized on the part of the United States to negotiate and conclude the treaty aforesaid, that they should claim in this negotiation, respecting the boundaries of the United States, that the most northern part of the thirty-first degree of north latitude should be agreed to be the southern boundary of the United States, on the ground that that was the southern boundary of the colony of Georgia; and that the river Mississippi should be agreed to be the western boundary of the United States, on the ground that the colony of Georgia and other colonies, now states of the United States, were bounded westward by that river; and that the commissioners on the part of the United States did, in said negotiation, claim the same accordingly, and that on those grounds the said southern and western boundaries of the United States were agreed to by the commissioners on the part of the King of Great Britain. That afterwards, in the same year, the legislature of the state of Georgia passed an act, declaring her right, and proclaiming her title to all the lands lying within her boundaries to the river Mississippi. And in the year of our Lord, one thousand seven hundred

and eighty-five, the legislature of the said state of Georgia established a county, by the name of Bourbon, on the Mississippi, and appointed civil officers for said county, which lies within the boundaries now denominated the Mississippi territory; that thereupon a dispute arose between the state of South Carolina and the state of Georgia, concerning their respective boundaries, the said states separately claiming the same territory; and the said state of South Carolina, on the first day of June, in the year of our lord one thousand seven hundred and eighty-five, petitioned the congress of the United States for a hearing and determination of the differences and disputes subsisting between them and the state of Georgia, agreeably to the ninth article of the then confederation and perpetual union between the United States of America; that the said congress of the United States did thereupon on the same day resolve, that the second Monday in May then next following should be assigned for the appearance of the said states of South Carolina and Georgia, by their lawful agents, and did then and there give notice thereof to the said state of Georgia, by serving the legislature of said state with an attested copy of said petition of the state of South Carolina, and said resolve of congress. That afterwards, on the eighth day of May, in the year of our lord one thousand seven hundred and eighty-six, by the joint consent of the agents of said states of South Carolina and Georgia, the congress resolved that further day be given for the said hearing, and assigned the fifteenth day of the same month for that purpose. That afterwards, on the eighteenth day of May aforesaid, the said congress resolved, that further day be given for the said hearing, and appointed the first Monday in September, then next ensuing, for that purpose. That afterwards, on the first day of September then next ensuing, authorized agents from the states of Carolina and Georgia attended in pursuance of the order of congress aforesaid, and produced their credentials, which were read in congress, and there recorded, together with the acts of their respective legislatures; which acts and credentials authorized the said agents to settle and compromise all the differences

and disputes aforesaid, as well as to appear and represent the said states respectively before any tribunal that might be created by congress for that purpose, agreeably to the said ninth article of the confederation. And in conformity to the powers aforesaid, the said commissioners of both the said states of South Carolina and Georgia, afterwards, on the 28th day of April, in the year of our Lord one thousand seven hundred and eighty-seven, met at Beaufort, in the state of South Carolina, and then and there entered into, signed, and concluded a convention between the states of South Carolina and Georgia aforesaid. By the first article of which convention it was mutually agreed between the said states, that the most northern branch or stream of the river Savannah from the sea or mouth of such stream to the fork or confluence of the rivers then called Tugaloo and Keowee; and from thence the most northern branch or stream of said river Tugaloo, till it intersects the northern boundary line of South Carolina, if the said branch or stream of Tugaloo extends so far north, reserving all the islands in the said rivers Savannah and Tugaloo, to Georgia; but if the head, spring, or source of any branch or stream of the said river Tugaloo does not extend to the north boundary line of South Carolina, then a west course to the Mississippi, to be drawn from the head, spring, or source of the said branch or stream of Tugaloo river, which extends to the highest northern latitude, shall for ever thereafter form the separation, limit, and boundary between the states of South Carolina and Georgia. And by the third article of the convention aforesaid, it was agreed by the said states of South Carolina and Georgia, that the said state of South Carolina should not thereafter claim any lands to the eastward, southward, south-eastward, or west of the said boundary above established; and that the said state of South Carolina did relinquish and cede to the said state of Georgia all the right, title, and claim which the said state of South Carolina had to the government, sovereignty, and jurisdiction in and over the same, and also the right and pre-emption of soil from the native Indians, and all the estate, property, and claim which the said state of South Carolina had in or to the said lands.

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And the jury further find, that the land described in the plaintiff's declaration is situate south-west of the boundary line last aforesaid; and that the same land lies within the limits of the territory granted to the said lords proprietors of Carolina, by King Charles the second, as aforesaid, and within the bounds of the territory agreed to belong and ceded to the King of Great Britain, by the said treaty of peace made in seventeen hundred and sixty-three, as aforesaid; and within the bounds of the United States, as agreed and settled by the treaty of peace in seventeen hundred and eighty-three, as aforesaid; and north of a line drawn due east from the mouth of the said river Yazoos, where it unites with the Mississippi aforesaid. That afterwards, on the ninth day of August, in the year of our lord one thousand seven hundred and eighty-seven, the delegates of said state of South Carolina in congress moved, that the said convention, made as aforesaid, be ratified and confirmed, and that the lines and limits therein specified be thereafter taken and received as the boundaries between the said states of South Carolina and Georgia; which motion was by the unanimous vote of congress committed, and the same convention was thereupon entered of record on the journals of congress; and on the same day John Kean and Daniel Huger, by virtue of authority given to them by the legislature of said state of South Carolina, did execute a deed of cession on the part of said state of South Carolina, by which they ceded and conveyed to the United States, in congress assembled, for the benefit of all the said states, all their right and title to that territory and tract of land included within the river Mississippi, and a line beginning at that part of the said river which is intersected by the southern boundary line of the state of North Carolina; and continuing along the said boundary line, until it intersects the ridge or chain of mountains which divides the eastern from the western waters; then to be continued along the top of the said ridge of mountains, until it intersects a line to be drawn due west from the head of the southern branch of the Tugaloo river to the said mountains, and thence to run a due west course to the river Mississippi; which deed of cession was

thereupon received and entered on the journals of congress, and accepted by them.

The jury further find, that the congress of the United States did, on the sixth day of September, in the year of our lord one thousand, seven hundred and eighty, recommend to the several states in the union having claims to western territory, to make a liberal cession to the United States of a portion of their respective claims for the common benefit of the union. That afterwards, on the ninth day of August, in the year of our lord one thousand seven hundred and eighty-six, the said congress resolved, that whereas the states of Massachusetts, New-York, Connecticut, and Virginia had, in consequence of the recommendation of congress on the sixth day of September aforesaid, made cessions of their claims to western territory to the United States in congress assembled, for the use of the United States, the said subject be again presented to the view of the states of N. Carolina, S. Carolina and Georgia, who had not complied with so reasonable a proposition; and that they be once more solicited to consider with candour and liberality the expectations of their sister states, and the earnest and repeated applications made to them by congress on this subject. That afterwards, on the twentieth day of October, one thousand seven hundred and eighty-seven, the congress of the United States passed the following resolve, viz. that it be and hereby is represented to the states of North-Carolina and Georgia, that the lands, which have been ceded by the other states in compliance with the recommendation of this body, are now selling in large quantities for public securities; that the deeds of cession from the different states have been made without annexing an express condition, that they should not operate till the other states, under like circumstances, made similar cessions; and that congress have such faith in the justice and magnanimity of the states of North Carolina and Georgia, that they only think it necessary to call their attention to these circumstances, not doubting but, upon consideration of the subject, they will feel those obligations which will induce similar cessions, and justify that confidence which has been

placed in them. That afterwards, on the first day of February, one thousand seven hundred and eighty-eight, the legislature of said state of Georgia, then duly convened, passed an act for ceding part of the territorial claims of said state to the United States; by which act the state of Georgia authorized her delegates in congress to convey to the United States the territorial claims of said state of Georgia to a certain tract of country bounded as follows, to wit: beginning at the middle of the river Catahouchee or Apalachicola, where it is intersected by the thirty-first degree of north latitude, and from thence due north one hundred and forty miles, thence due west to the river Mississippi; thence down the middle of the said river to where it intersects the thirty-first degree of north latitude, and along the said degree to the place of beginning; annexing the provisions and conditions following, to wit: That the United States in congress assembled, shall guaranty to the citizens of said territory a republican form of government, subject only to such changes as may take place in the federal constitution of the United States; secondly, that the navigation of all the waters included in the said cession shall be equally free to all the citizens of the United States; nor shall any tonnage on vessels, or any duties whatever, be laid on any goods, wares, or merchandises that pass up or down the said waters, unless for the use and benefit of the United States. Thirdly, that the sum of one hundred and and seventy-one thousand and twenty-eight dollars, forty-five cents, which has been expended in quieting the minds of the Indians, and resisting their hostilities, shall be allowed as a charge against the United States, and be admitted in payment of the specie requisition of that state's quotas that have been or may be required by the United States. Fourthly, that in all cases where the state may require defence, the expenses arising thereon shall be allowed as a charge against the United States, agreeably to the articles of confederation. Fifthly, that congress shall guaranty and secure all the remaining territorial rights of the state, as pointed out and expressed by the definitive treaty of peace between the United States and Great Britain, the convention between the said

state and the state of South Carolina, entered into the twenty-eighth day of April, in the year of our lord one thousand seven hundred and eighty-seven, and the clause of an act of the said state of Georgia, describing the boundaries thereof, passed the seventeenth day of February, in the year one thousand seven hundred and eighty-three, which act of the said state of Georgia, with said conditions annexed, was by the delegates of said state in congress presented to the said congress, and the same was, after being read, committed to a committee of congress; who, on the fifteenth day of July, in the said year one thousand seven hundred and eighty-eight, made report thereon to congress, as follows, to wit: "The committee, having fully considered the subject referred to them, are of opinion, that the cession offered by the state of Georgia cannot be accepted on the terms proposed; first, because it appears highly probable that on running the boundary line between that state and the adjoining state or states, a claim to a large tract of country extending to the Mississippi, and lying between the tract proposed to be ceded, and that lately ceded by South Carolina, will be retained by the said state of Georgia; and therefore the land which the state now offers to cede must be too far removed from the other lands hitherto ceded to the union to be of any immediate advantages to it. Secondly, because there appears to be due from the state of Georgia, on specie requisitions, but a small part of the sum mentioned in the third proviso or condition before recited; and it is improper in this case to allow a charge against the specie requisitions of congress which may hereafter be made, especially as the said state stands charged to the United States for very considerable sums of money loaned. And, thirdly, because the fifth proviso or condition before recited contains a special guaranty of territorial rights, and such a guaranty has not been made by congress to any state, and which, considering the spirit and meaning of the confederation, must be unnecessary and improper. But the committee are of opinion, that the first, second, and fourth provisions, before recited, and also the third, with some variations, may be admitted; and that, should the said state extend the bounds of her cession,

and vary the terms thereof as herein after mentioned, congress may accept the same. Whereupon they submit the following resolutions: That the cession of claims to western territory, offered by the state of Georgia, cannot be accepted on the terms contained in her act passed the first of February last. That in case the said state shall authorize her delegates in congress to make a cession of all her territorial claims to lands west of the river Apalachicola, or west of a meridian line running through or near the point where that river intersects the thirty-first degree of north latitude, and shall omit the last proviso in her said act, and shall so far vary the proviso respecting the sum of one hundred and seventy-one thousand four hundred and twenty-eight dollars, and forty-five cents, expended in quieting and resisting the Indians, as that the said state shall have credit in the specie requisitions of congress, to the amount of her specie quotas on the past requisitions, and for the residue, in her account with the United States for moneys loaned, congress will accept the cession." Which report being read, congress resolved, that congress agree to the said report.

The jury further find, that in the year of our lord one thousand seven hundred and ninety-three, Thomas Jefferson, Esq. then secretary of state for the United States, made a report to the then President of the United States, which was intended to serve as a basis of instructions to the commissioners of the United States for settling the points which were then in dispute between the King of Spain and the government of the United States; one of which points in dispute was, the just boundaries between West Florida and the southern line of the United States. On this point, the said secretary of state, in his report aforesaid, expresses himself as follows, to wit: "As to boundary, that between Georgia and West Florida is the only one which needs any explanation. It (that is, the court of Spain) sets up a claim to possessions within the state of Georgia, founded on her (Spain) having rescued them by force from the British during the late war. The following view of that subject seems to admit of no reply. The several states now composing the Uni-

ted States of America were, from their first establishment, separate and distinct societies, dependent on no other society of men whatever. They continued at the head of their respective governments the executive magistrate who presided over the one they had left, and thereby secured in effect a constant amity with the nation. In this stage of their government their several boundaries were fixed, and particularly the southern boundary of Georgia, the only one now in question, was established at the thirty-first degree of latitude, from the Apalachicola westwardly. The southern limits of Georgia depend chiefly on, first, the charter of South Carolina, &c. Secondly, on the proclamation of the British king, in one thousand seven hundred and sixty-three, establishing the boundary between Georgia and Florida, to begin on the Mississippi, in thirty-one degrees of north latitude, and running eastwardly to the Apalachicola, &c. That afterwards, on the seventh day of December, of the same year, the commissioners of the United States for settling the aforesaid disputes, in their communications with those of the King of Spain, express themselves as follows, to wit: 'In this stage of their (meaning the United States) government, the several boundaries were fixed, and particularly the southern boundary of Georgia, the one now brought into question by Spain. This boundary was fixed by the proclamation of the King of Great Britain, their chief magistrate, in the year one thousand seven hundred and sixty-three, at a time when no other power pretended any claim whatever to any part of the country through which it run. The boundary of Georgia was thus established: to begin in the Missisippi, in latitude thirty-one north, and running eastward to the Apalachicola,' &c. From what has been said, it results, first, that the boundary of Georgia, now forming the southern limits of the United States, was lawfully established in the year seventeen hundred and sixty-three. Secondly, that it has been confirmed by the only power that could at any time have pretensions to contest it."

That afterwards, on the tenth day of August, in the year 1795, Thomas Pinckney, Esq. minister plenipo-

tentiary of the United States at the court of Spain, in a communication to the prince of peace, prime minister of Spain, agreeably to his instructions from the President of the United States on the subject of said boundaries, expresses himself as follows, to wit: "Thirty-two years have elapsed since all the country on the left or eastern bank of the Mississippi, being under the legitimate jurisdiction of the King of England, that sovereign thought proper to regulate with precision the limits of Georgia and the two Floridas, which was done by his solemn proclamation, published in the usual form; by which he established between them precisely the same limits that, near twenty years after, he declared to be the southern limits of the United States, by the treaty which the same King of England concluded with them in the month of November, seventeen hundred and eighty two."

That afterwards, on the 27th day of October, in the year seventeen hundred and ninety-five, a treaty of friendship, limits and navigation was concluded between the United States and his catholic majesty the King of Spain; in the second article of which treaty it is agreed, that the southern boundary of the United States, which divides their territory from the Spanish colonies of East and West Florida, shall be designated by a line beginning on the river Mississippi, at the northernmost part of the thirty-first degree of north latitude, which from thence shall be drawn due east to the middle of the river Apalachicola or Catahouchee, thence along the middle thereof to its junction with the Flint, thence straight to the head of St. Mary's river, and thence down the middle thereof to the Atlantic ocean."

But whether, upon the whole matter, the state of Georgia, at the time of passing the act aforesaid, entitled as aforesaid, as mentioned by the plaintiff, in his assignment of the breach in the fourth count of his declaration, was seised in fee-simple of all the territories and tenements aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title

to part thereof, the jury are ignorant, and pray the advisement of the court thereon; and if the court are of opinion, that the said state of Georgia was so seised at the time aforesaid, then the jury find, that the said state of Georgia, at the time of passing the act aforesaid, entitled as aforesaid, as mentioned by the said Fletcher, in his assignment of the breach in the fourth coun. of his declaration, was seised in fee-simple of all the territories and tenements aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title to part thereof, and the jury thereupon find, that the said Peck his covenant aforesaid, the breach whereof is assigned in the plaintiff's fourth count mentioned, hath not broken, but hath kept the same.

But if the court are of opinion that the said state of Georgia was not so seised at the time aforesaid, then the jury find, that the said state of Georgia, at the time of passing the act aforesaid, entitled as aforesaid, as mentioned by the said Fletcher, in his assignment of the breach in the fourth count of his declaration, was not seised of all the territories and tenements aforesaid, and of all the soil thereof, subject only to the extinguishment of the Indian title to part thereof; and the jury thereupon find, that the said Peck his covenant aforesaid, the breach whereof is assigned in the plaintiff's fourth count mentioned, hath not kept, but broken the same; and assess damages for the plaintiff, for the breach thereof, in the sum of three thousand dollars, and costs of suit.

Whereupon it was considered and adjudged by the court below, that on the issues on the three first counts, the several pleas are good and sufficient, and that the demurrer thereto be overruled; and on the last issue, on which there is a special verdict, that the state of Georgia was seised, as alleged by the defendant, and that the defendant recover his costs.

The plaintiff sued out his writ of error, and the case was twice argued, first by *Martin*, for the plaintiff in error, and by *J. Q. Adams*, and *R. G. Harper*, for the

defendant, at February term, 1809, and again at this term by *Martin*, for the plaintiff, and by *Harper* and *Story*, for the defendant.

Martin, for the plaintiff in error.

The first plea is no answer to the first count. The breach of the covenant complained of is, that "the *legislature had no authority to sell and dispose of*" the land, but the plea is, that "*the said Matthews, governor of the said state*, was fully and legally empowered to *sell and convey*" the land. Although the *governor* had authority to sell, *non constat* that the *legislature* had.

The same objection applies to the second plea; it is an answer to the inducement, not to the point of the plea. The breach assigned in the second count is, "that the title which the state of Georgia at any time had in the premises was never legally conveyed to the said Peck by force of the conveyances aforesaid."

The improper influence upon the members of the legislature was only inducement.

The plea is, the defendant had no notice nor knowledge of the improper means used. It is no answer to the breach assigned.

The same objection applies also to the third plea.

It appears upon the special verdict that the state of Georgia never was seised in fee of the lands. They belonged to the crown of Great Britain, and at the revolution devolved upon the United States, and not upon the state of Georgia.

When the colonies of North Carolina and South Carolina were royal colonies, the king limited the boundaries, and disannexed these lands from Georgia.

Argument for the defendant in error.

The first fault of pleading is in the declaration.

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The breach of the covenant is not well assigned in the first count. The covenant is, that the legislature had good *right* to sell. The breach assigned is, that the legislature had no *authority* to sell. Authority and right, are words of a different signification. Right implies an interest: authority is a mere naked power.

But if the breach be well assigned, the plea is a substantial answer to it, for if the governor derived full power and authority from the legislature to sell, the legislature must have had that power to give. The plea shows the title to be in the state of Georgia.

The objection is only to the form of the plea, which cannot prevail upon a general demurrer.

Two questions arise upon the issue joined upon the 4th plea.

1st. Whether the title was in the state of Georgia; and, 2d. Whether it was in the United States.

At the beginning of the revolution the lands were within the bounds of Georgia. These bounds were confirmed by the treaty of peace in 1783, and recognised in the treaty with Spain in 1795, and by the cession to the United States in 1802.

The United States can have no title but what is derived from Georgia.

The title of Georgia depends upon the facts found in the special verdict.

The second charter granted by George the 2d in 1732, includes these lands, the bounds of that grant being from the Savannah to the Alatamaha, and from the heads of those rivers respectively, in direct lines, to the South Sea.

It is not admitted that the king had a right to enlarge or diminish the boundaries even of royal provinces.

The exercise of that right, even by parliament itself, was one of the violations of right upon which the revolution was founded; as appears by the declaration of independence, the address to the people of Quebec, and other public documents of the time.

This right, claimed by the king, was denied by Virginia and North Carolina in their constitutions. See the article of the *constitution of Virginia* respecting the limits of that state, and the *25th section of the declaration of rights of North Carolina.* 1 *Belsham's Hist. of Geo.* 3*d.* *The Quebec Act*, and the *Collection of State Constitutions, p.* 180.

The right was denied by the commissioners on the part of the United States, who formed the treaty, and was given up by Great Britain when the present line was established.

But the proclamation of 1763 did not profess or intend to disannex the western lands from the province of Georgia. The king only declares that it is his royal will and pleasure *for the present*, "*as aforesaid*," to reserve under his sovereignty, *protection and dominion*, *for the use* of the Indians, all the lands and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west; and he thereby forbids his subjects from making purchases or settlements, or taking possession of the same.

This clause of the proclamation cannot well be understood without the preceding section to which it refers, by the words "*as aforesaid.*"

The preceding clause is, "that no governor or commander in chief of our other colonies or plantations in America, *i. e.* (other than the colonies of Quebec, East Florida and West Florida,) do presume for the present *and until our further pleasure be known*, to grant warrants of surveys, or pass patents for any lands beyond the heads or sources of any of the rivers, which fall into the Atlantic ocean from the west or north-west; or upon any lands whatever which, not having been

ceded to, or purchased by us, as aforesaid, are reserved to the said Indians, or any of them."

Then comes the clause in question, which is supposed to have disannexed these lands from Georgia, as follows: "And we do further declare it to be our royal will and pleasure for the present as aforesaid, to reserve under our sovereignty, protection and dominion, for the use of the said Indians, all the land and territories lying to the westward of the sources of the rivers which fall into the sea from the west and north-west as aforesaid," &c.

It was a prohibition to *all* the governors of *all* the colonies, and a reservation of *all* the western lands attached to *all* the colonies. But it was only a temporary reservation for the use of the Indians.

If this proclamation disannexed these lands from Georgia, it also disannexed all the western lands from all the other colonies. But if they were disannexed by the proclamation, they were reannexed three months afterwards by the commission to Governor Wright, on the 20th of January, 1764.

It appears by the report of the attorney-general, as well as by Mr. Chalmers's observations, that it never was the opinion of the British government that these lands were disannexed by the proclamation.

If they were not reannexed before, they certainly were by the treaty of peace.

At the commencement of the revolution, the lands then belonged to and formed a part of the province of Georgia.

By the declaration of independence the several states were declared to be free, sovereign and independent states; and the sovereignty of *each*, not of the whole, was the principle of the revolution; there was no connection between them, but that of necessity and self defence, and in what manner each should contribute to the

common cause, was a matter left to the discretion of each of the states. By the second article of the confederation the sovereignty of each state is confirmed, and all the rights of sovereignty are declared to be retained which are not by that instrument expressly delegated to the United States in congress assembled. It provides also that no state shall be deprived of territory for the benefit of the United States.

On the 25th of February, 1783, the legislature of Georgia passed an act declaring her boundaries, before the definitive treaty of peace. This declaration of Georgia was not contradicted by the United States in any public act.

In 1785, Georgia passed an act erecting the county of Bourbon in that territory; this produced a dispute with South Carolina, which ended in the acknowledgment of the right of Georgia to these lands. (See the third article of the convention between South Carolina and Georgia.)

The same boundaries are acknowledged by the United States in their instructions, given by the secretary of state, Mr. Jefferson, in 1793, to the commissioners appointed to settle the dispute with Spain respecting boundaries.

The United States certainly had no claim at the commencement of the revolution, nor at the declaration of independence, nor under the articles of confederation.

During the progress of the revolution a demand was made by two or three of the states, that crown lands should be appropriated for the common defence. But congress never asserted such a right. They only recommended that *cessions* of territory should be made by the states for that purpose.

The journals of congress are crowded with proofs of this fact. See journals of congress, 16*th September*, 1776, *vol.* 2. *p.* 336. 30*th of October*, 1776. 15*th*

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October, 1777, *vol.* 3. *p.* 345. 27*th October*, 1777, *vol.* 3. *p.* 363. 22*d June*, 1778, *vol.* 4. *p.* 262. 23*d and* 25*th June*, 1778. *p*, 269. 1779, *vol.* 5. *p.* 49. 21*st May*, 1779, *vol.* 5. *p.* 158. 1*st March*, 1781. *Resolution of* 1780, *vol.* 6. *p.* 123. 12*th February*, 1781, *vol.* 7. *p.* 26. 1*st March*, 1781. 29th *October*, 1782, *vol.* 8. *p.* —.

At the treaty of peace, there was no idea of a cession of land to the United States, by Great Britain. The bounds of the United States were fixed as the bounds of the several states had been before fixed. The United States did not claim land for the United States as a nation; they claimed only in right of the individual states. Great Britain yielded the principle of the royal right to disannex lands from the colonies, and acquiesced in the principle contended for by the United States, which was the old boundary of the several states. See Chief Justice Jay's opinion in the case of *Chisholm* v. *The State of Georgia*, reported in a pamphlet published in 1793.

The United States then had no title by the treaty of peace. She has since (viz. in 1788) declined accepting a cession of the territory from Georgia, not because the United States had already a title, but because the lands were too remote, &c.

There is nothing in the constitution of the United States, which can give her a title. By the third section of the fourth article the claims of particular states are saved.

The public acts since the adoption of the new constitution are the instructions to the commissioners in 1793, to settle the boundaries with Spain. The treaty with Spain, 27th October, 1795. The act of congress of 7th April, 1798, vol. 4. p. 90. The act of 10th of May, 1800. The remonstrance of Georgia, in December, 1800. And the cession by Georgia to the United States in 1802. All these public acts recognised the title to be in Georgia.

If then Georgia had good title on the 7th of January, 1795, the next question is, had the legislature of that state a right to sell?

By the revolution, all the right and royal prerogatives devolved upon the people of the several states, to be exercised in such manner as they should prescribe, and by such governments as they should erect. The right of disposing of the lands belonging to the state naturally devolved upon the legislative body; who were to enact such laws as should authorize the sale and conveyance of them. The sale itself was not a legislative act. It was not an act of sovereignty, but a mere conveyance of title. 2 *Tucker's Bl. Com.* 53. 57. *Montesquieu, b.* 26. *c.* 15. 2 *Dal.* 320. 4 *Dal.* 14. *Cooper* v. *Telfaire.* Constitution of Georgia, Art. 1. § 16. Digest of Georgia Laws of 7th June, 1777, 1780, 1784, 1785, 1788, 1789, and 1790. These show the universal practice of Georgia in this respect.

A doubt has been suggested whether this power extends to lands to which the Indian title has not been extinguished.

What is the Indian title? It is a mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited. It is not a true and legal possession. *Vattel, b.* 1. § 81. *p.* 37. and § 209. *b.* 2. § 97. *Montesquieu, b.* 18. *c.* 12. *Smith's Wealth of Nations, b.* 5. *c.* 1. It is a right not to be *transferred* but *extinguished.* It a right regulated by treaties, not by deeds of conveyance. It depends upon the law of nations, not upon municipal right.

Although the power to extinguish this right by treaty, is vested in congress, yet Georgia had a right to sell subject to the Indian claim. The point has never been decided in the courts of the United States, because it has never before been questioned.

The right has been exercised and recognised by all the states.

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There was no objection to the sale arising from the constitution of Georgia. With regard to *state* constitutions, it is not necessary that the powers should be *expressly* granted, however it may be with the constitution of the United States. But it is not constitutional doctrine even as it applies to the legislature of the United States.

The old articles of confederation limited the powers of congress to those *expressly* granted. But in the constitution of the United States, the word *expressly* was purposely rejected. *See the Federalist, and Journals of House of Rep. 21st August*, 1789. *Journal of Senate, 7th September*, 1789.

But if the legislature of Georgia could only exercise powers *expressly* given, they had no power to abrogate the contract.

A question has been suggested from the bench whether the right which Georgia had before the extinguishment of the Indian title, is such a right as is susceptible of conveyance, and whether it can be said to be a title in fee-simple?

The Europeans found the territory in possession of a rude and uncivilized people, consisting of separate and independent nations. They had no idea of property in the soil but a right of occupation. A right not individual but national. This is the right gained by conquest. The Europeans always claimed and exercised the right of conquest over the soil. They allowed the former occupants a part, and took to themselves what was not wanted by the natives. Even *Penn* claimed under the right of conquest. He took under a charter from the King of England, whose right was the right of conquest. Hence the feudal tenures in this country. All the treaties with the Indians were the effect of conquest. All the extensive grants have been forced from them by successful war. The conquerors permitted the conquered tribes to occupy part of the land until it should be wanted for the use of the conquerors. Hence the acts of legislation

fixing the lines and bounds of the Indian claims; hence the prohibition of individual purchasers, &c.

The rights of governments are allodial. The crown of Great Britain granted lands to individuals, even while the Indian claim existed, and there has never been a question respecting the validity of such grants. When that claim was extinguished, the grantee was always admitted to have acquired a complete title. The Indian title is a mere privilege which does not affect the allodial right.

The legislature of Georgia could not revoke a grant once executed. It had no right to declare the law void; that is the exercise of a judicial, not a legislative function. It is the province of the judiciary to say what the law *is*, or what it *was*. The legislature can only say what it *shall be*.

The legislature was forbidden by the constitution of the United States to pass any law impairing the obligation of contract. A grant is a contract executed, and it creates also an implied *executory* contract, which is, that the grantee shall continue to enjoy the thing granted according to the terms of the grant.

The validity of a law cannot be questioned because undue influence may have been used in obtaining it. However improper it may be, and however severely the offenders may be punished, if guilty of bribery, yet the grossest corruption will not authorize a judicial tribunal in disregarding the law.

This would open a source of litigation which could never be closed. The law would be differently decided by different juries; innumerable perjuries would be committed, and inconceivable confusion would ensue.

But the parties now before the court are innocent of the fraud, if any has been practised. They were *bona fide* purchasers, for a valuable consideration, without notice of fraud. They cannot be affected by it.

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Martin, in reply.

All the western lands of the royal governments were wholly disannexed from the colonies, and reserved for the use of the Indians. Georgia never had title in those lands. It is true that Great Britain did undertake to extend the bounds of the royal provinces. The right was not denied, but the *purpose* for which it was executed.

By the proclamation, if offenders should escape into those territories, they are to be arrested by the military force and sent *into the colony* for trial.

In Governor Wright's commission the western boundary of the colony is not defined. The jury has not found whether the lands were within Governor Wright's commission.

As to the Indian title.

The royal provinces were not bodies politic for the purpose of holding lands. The title of the lands was in the crown. There is no law authorizing the several states to transfer their right subject to the Indian title. It was only a right of pre-emption which the crown had. This right was not by the treaty ceded to Georgia, but to the United States. The land when purchased of the Indians is to be purchased for the benefit of the United States. There was only a possibility that the United States would purchase for the benefit of Georgia. But a mere possibility cannot be sold or granted.

The declarations and claims of Georgia could not affect the rights of the United States.

An attempt was made in congress to establish the principle that the land belonged to the United States; but the advocates of that doctrine were overruled by a majority. This, however, did not decide the question of right.

The states which advocated that principle did not think proper to refuse to join the confederacy because it was not inserted among the articles of confederation, but they protested against their assent to the union being taken as evidence of their abandonment of the principle.

Nor is the assent of congress to the commission for settling the bounds between South Carolina and Georgia, evidence of an acknowledgment, on the part of the United States, that either of those states was entitled to those lands.

March 11, 1809.

MARSHALL, Ch. J. delivered the opinion of the court upon the pleadings, as follows:

'In this cause there are demurrers to three pleas filed in the circuit court, and a special verdict found on an issue joined on the 4th plea. The pleas were all sustained, and judgment was rendered for the defendant.

To support this judgment, this court must concur in overruling all the demurrers; for, if the plea to any one of the counts be bad, the plaintiff below is entitled to damages on that count.

The covenant, on which the breach in the first count is assigned, is in these words; "that the legislature of the said state, (Georgia,) at the time of the passing of the act of sale aforesaid, had good right to sell and dispose of the same, in manner pointed out by the said act."

The breach of this covenant is assigned in these words; "now the said Fletcher saith that, at the time when the said act of the legislature of Georgia, entitled an act, &c. was passed, the said legislature had no authority to sell and dispose of the tenements aforesaid, or of any part thereof, in the manner pointed out in the said act."

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The plea sets forth the constitution of the state of Georgia, and avers that the lands lay within that state. It then sets forth the act of the legislature, and avers that the lands, described in the declaration, are included within those to be sold by the said act; and that the *governor* was legally empowered to sell and convey the premises.

To this plea the plaintiff demurred; and the defendant joined in the demurrer.

If it be admitted that sufficient matter is shown, in this plea, to have justified the defendant in denying the breach alleged in the count, it must also be admitted that he has not denied it. The breach alleged is, that the legislature had not authority to sell. The bar set up is, that the governor had authority to convey. Certainly an allegation, that the principal has no right to give a power, is not denied by alleging that he has given a proper power to the agent.

It is argued that the plea shows, although it does not, in terms, aver, that the legislature had authority to convey. The court does not mean to controvert this position, but its admission would not help the case. The matter set forth in the plea, as matter of inducement, may be argumentatively good, may warrant an averment which negatives the averment in the declaration, but does not itself constitute that negative.

Had the plaintiff tendered an issue in fact upon this plea, that the governor was legally empowered to sell and convey the premises, it would have been a departure from his declaration; for the count to which this plea is intended as a bar alleges no want of authority in the governor. He was therefore under the necessity of demurring.

But it is contended that although the plea be substantially bad, the judgment, overruling the demurrer, is correct, because the declaration is defective.

The defect alleged in the declaration is, that the

breach is not assigned in the words of the covenant. The covenant is, that the legislature had a *right* to convey, and the breach is, that the legislature had no *authority* to convey.

It is not necessary that a breach should be assigned in the very words of the covenant. It is enough that the words of the assignment show, unequivocally, a substantial breach. The assignment under consideration does show such a breach. If the legislature had no *authority* to convey, it had no *right* to convey.

It is, therefore, the opinion of this court, that the circuit court erred in overruling the demurrer to the first plea by the defendant pleaded, and that their judgment ought therefore to be reversed, and that judgment on that plea be rendered for the plaintiff.

After the opinion of the court was delivered, the parties agreed to amend the pleadings, and the cause was continued for further consideration.

The cause having been again argued at this term,

March 16, 1810,

MARSHALL, Ch. J. delivered the opinion of the court as follows:

The pleadings being now amended, this cause comes on again to be heard on sundry demurrers, and on a special verdict.

The suit was instituted on several covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Gunn and others, in the year 1795, from the state of Georgia, the contract for which was made in the form of a bill passed by the legislature of that state.

The first count in the declaration set forth a breach

in the second covenant contained in the deed. The covenant is, "that the legislature of the state of Georgia, at the time of passing the act of sale aforesaid, had good right to sell and dispose of the same in manner pointed out by the said act." The breach assigned is, that the legislature had no power to sell.

The plea in bar sets forth the constitution of the state of Georgia, and avers that the lands sold by the defendant to the plaintiff, were within that state. It then sets forth the granting act, and avers the power of the legislature to sell and dispose of the premises as pointed out by the act.

To this plea the plaintiff below demurred, and the defendant joined in demurrer.

That the legislature of Georgia, unless restrained by its own constitution, possesses the power of disposing of the unappropriated lands within its own limits, in such manner as its own judgment shall dictate, is a proposition not to be controverted. The only question, then, presented by this demurrer, for the consideration of the court, is this, did the then constitution of the state of Georgia prohibit the legislature to dispose of the lands, which were the subject of this contract, in the manner stipulated by the contract?

The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

In this case the court can perceive no such opposition. In the constitution of Georgia, adopted in the

year 1789, the court can perceive no restriction on the legislative power, which inhibits the passage of the act of 1795. The court cannot say that, in passing that act, the legislature has transcended its powers, and violated the constitution.

In overruling the demurrer, therefore, to the first plea, the circuit court committed no error.

The 3d covenant is, that all the title which the state of Georgia ever had in the premises had been legally conveyed to John Peck, the grantor.

The 2d count assigns, in substance, as a breach of this covenant, that the original grantees from the state of Georgia promised and assured divers members of the legislature, then sitting in general assembly, that if the said members would assent to, and vote for, the passing of the act, and if the said bill should pass, such members should have a share of, and be interested in, all the lands purchased from the said state by virtue of such law. And that divers of the said members, to whom the said promises were made, were unduly influenced thereby, and, under such influence, did vote for the passing of the said bill; by reason whereof the said law was a nullity, &c. and so the title of the state of Georgia did not pass to the said Peck, &c.

The plea to this count, after protesting that the promises it alleges were not made, avers, that until after the purchase made from the original grantees by James Greenleaf, under whom the said Peck claims, neither the said James Greenleaf, nor the said Peck, nor any of the mesne vendors between the said Greenleaf and Peck, had any notice or knowledge that any such promises or assurances were made by the said original grantees, or either of them, to any of the members of the legislature of the state of Georgia.

To this plea the plaintiff demurred generally, and the defendant joined in the demurrer.

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That corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would, in any case, be competent, on proceedings instituted by the state itself, to vacate a contract thus formed, and to annul rights acquired, under that contract, by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

If the majority of the legislature be corrupted, it may well be doubted, whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned.

Whatever difficulties this subject might present, when viewed under aspects of which it may be susceptible, this court can perceive none in the particular pleadings now under consideration.

This is not a bill brought by the state of Georgia, to annul the contract, nor does it appear to the court, by

this count, that the state of Georgia is dissatisfied with the sale that has been made. The case, as made out in the pleadings, is simply this. One individual who holds lands in the state of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns, as a breach, that some of the members of the legislature were induced to vote in favour of the law, which constituted the contract, by being promised an interest in it, and that therefore the act is a mere nullity.

This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent, in the extreme, upon a private contract, between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another, founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.

The circuit court, therefore, did right in overruling this demurrer.

The 4th covenant in the deed is, that the title to the premises has been, in no way, constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature of the state of Georgia.

The third count recites the undue means practised on certain members of the legislature, as stated in the second count, and then alleges that, in consequence of these practices, and of other causes, a subsequent legislature passed an act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void, and asserting the title of the state to the lands it contained. The

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count proceeds to recite at large, this rescinding act, and concludes with averring that, by reason of this act, the title of the said Peck in the premises was constitutionally and legally impaired, and rendered null and void.

After protesting, as before, that no such promises were made as stated in this count, the defendant again pleads that himself and the first purchaser under the original grantees, and all intermediate holders of the property, were purchasers without notice.

To this plea there is a demurrer and joinder.

The importance and the difficulty of the questions, presented by these pleadings, are deeply felt by the court.

The lands in controversy vested absolutely in James Gunn and others, the original grantees, by the conveyance of the governor, made in pursuance of an act of assembly to which the legislature was fully competent. Being thus in full possession of the legal estate, they, for a valuable consideration, conveyed portions of the land to those who were willing to purchase. If the original transaction was infected with fraud, these purchasers did not participate in it, and had no notice of it. They were innocent. Yet the legislature of Georgia has involved them in the fate of the first parties to the transaction, and, if the act be valid, has annihilated their rights also.

The legislature of Georgia was a party to this transaction; aud for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power which must find its vindication in a train of reasoning not often heard in courts of justice.

But the real party, it is said, are the people, and when their agents are unfaithful, the acts of those agents cease to be obligatory.

It is, however, to be recollected that the people can

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under the Treaty of Paris, 1763, and the issuance of the Royal Proclamation of October 7, 1763, are of importance here, but as the same are to be found comprehensively outlined in *St. Catherine Milling and Lumber Company* v. *The Queen* (1). I need hardly repeat them here. In the case just mentioned, there had been a surrender by treaty to the Crown, by the Indians, of the lands involved in that litigation, whereas in this case there has never been any such surrender, and the Crown is not I understand, asserting ownership or title to the lands here in question in the right of the Dominion, and these are the particular facts distinguishing the cases.

The property in question, known under several names, but generally as Thompson's Island, was in Indian occupation from the date of the proclamation of 1763, and doubtless prior to that date, until 1817, when the same was leased in writing, to one David Thompson, by certain chiefs of the Indian tribe then in occupancy of the same, and which constituted a part of what was known as the St. Regis Indian Reserve. The lease was for a period of 99 years and contained a covenant for renewal in the following terms:—

> For themselves and their heirs, executors, administrators, assigns, and successors, do hereby covenant, grant and agree to and with the said David Thompson his heirs and assigns under the penalty of five thousand pounds sterling, that they the said party of the first part their heirs or successors at the expiration of the said term of ninety-nine years shall and will renew, make, sign, seal and deliver to the said David Thompson his heirs, executors, administrators or assigns a legal or lawful lease for a further period or term of ninety-nine years under the same terms and yielding the same rents as is hereby covenanted and agreed by the said David Thompson to be given and paid for the premises hereby demised and leased to him as aforesaid or intended so to be. And it is hereby further covenanted, granted and agreed by and between the parties aforesaid their and each of their heirs, executors, administrators, assigns or successors that if no owner or proprietor shall be forthcoming or can be found to give a further lease of the said premises for a further period of ninety-nine years, then and in such case that these presents and the term of years hereby granted and leased shall be and continue in force for and during and unto the full end and term of nine hundred and ninety-nine years thence next ensuing and it is hereby declared and agreed that in such case the said David Thompson his heirs, assigns or successors shall and may occupy, possess and enjoy all and singular the said premises hereby leased with the appurtenances for and during and unto the full end and term of nine hundred and ninety-nine years thence next ensuing as aforesaid, without the let trouble, hindrance, molestation, interruption, eviction or denial of any person or persons whatever.

(1) [1889] 14 A.C. 46; 13 S.C.R. 577; 13 O.A.R. 148.

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Any rights acquired under this lease in the subsequent years, passed down from one party to another, and in 1862, the title to the lease stood in the name of one Donald McDonald or his heirs. From 1817 down to 1862 the annual rental stipulated in the lease was apparently paid, and to some person or persons acting on behalf of the Indians or in their interests. When the defendant Sir Donald McMaster desired to acquire the lease, or the property covered by the lease, the same was being administered or controlled by the Department of Indian Affairs of the Government of Canada, on behalf of the Indians, and as by statute authorized. With that department this defendant commenced, in 1872, negotiations for the recognition of the lease which he proposed to acquire, and the negotiations extended over a number of years. At this time there was an arrearage of rentals due under the lease, covering a period of about 23 years, and altogether amounting to the sum of $237.50. In the end, this sum was paid to the Department of Indian Affairs in January, 1884, by the defendant Sir Donald McMaster, and he entered upon the property in question under the lease. It might be convenient, however, to mention in greater detail some of the facts disclosed during the negotiations between the Department of Indian Affairs and this defendant. When, hereafter, I refer to the defendant, I shall mean the original defendant Sir Donald McMaster.

As already stated in 1862 Thompson's Island was in the possession of one Donald McDonald or his heirs, the lease having been acquired by McDonald by assignment. At this date, however, and prior thereto the defendant's father occupied the island apparently under an agreement of sale and purchase of the lease, made with McDonald, but it appears he never procured in his lifetime a formal assignment of the lease. In June, 1872, the defendant, then being desirous of obtaining an assignment of the lease from the heirs of McDonald, commenced making inquiries of the Department of Indian Affairs as to the validity of the lease granted by the Indians in 1817 of Thompson's Island, and he was advised that though in previous years, Indians had made leases of land reserved for their benefit, the same was done without adequate authority. Fearing some infirmity in the title under the lease, the defendant inquired if the

department would recognize the title to the lease if the same were assigned by the heirs of McDonald, to him, if he the defendant would pay the past due rentals which had been accumulating since 1862. In this correspondence the defendant refers to the land in question as part of an Indian Reserve. The correspondence was protracted, but in 1881 the defendant was advised by the Deputy Superintendent General of Indian Affairs, that the old lease had become void through non-fulfilment of its conditions, but that the department would endeavour to lease it again on conditions advantageous to the Indians, and in that year the defendant was advised by the same official that if he could get an assignment from the representatives of McDonald deceased, in whom such title as the original lessee had seemed to be vested, and would pay the rental arrearages, his title under the lease would be recognized as far as it could legally be done. This did not appear quite satisfactory to the defendant, as he did not care for a lease that was liable to attack, and he replied that if the department would give him a lease for the original term of 99 years, with covenants for renewals, he would willingly arrange with the McDonald heirs and pay the rental arrearages, but he was insisting upon a recognition of the validity of the tenure of the McDonald heirs under the lease before carrying out such terms. On July 11, 1882, he was informed that if he could establish a legal assignment from the representatives of McDonald to himself, his title as assignee would be recognized. He was informed, however, in the same letter, that he could not obtain a new title in his own name because the Island never having been surrendered by the Indians to the Crown it could not be sold or leased, but as the original lease had long been recognized, the department would recognize him as assignee upon payment of the past due rentals. To this he replied that recognition of the existing lease would satisfy him. On November 3, 1883, the defendant was definitely advised that upon the payment of the arrears of rent his tenancy would be recognized. In the end the unpaid rentals amounting to $237.50, was remitted by the defendant on December 22, 1883, to the Department of Indian Affairs. In a letter from the department dated January 9, 1884, acknowledging receipt of this amount, there appears a review of the title from the

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original lessee down to the assignment to Donald McDonald, and the defendant was therein informed that admitting the right of the Indian Chiefs to lease the Island, the law of Ontario would give him title by possession as against any one but the Crown, and that if McDonald's possession and that of his legal representatives were established since 1844, the department stated, it would be justified in recognizing the defendant as assignee of the lease. On May 20, 1884, the department wrote the defendant that the various documents referring to the title to the lease had been referred to the Department of Justice for an opinion as to whether they were sufficient to admit of the lease of the Island being renewed in his favour, and on June 5, he was advised by the department that he had shewn sufficient title to be considered as the holder of the lease originally granted to Thompson, and that his possessory title as against anyone but the Crown was admitted.

In 1887 the Indians commenced to assert right of occupancy to the Island and threatened to take possession of it, but nothing came of this largely through the intervention of officers of the Department of Indian Affairs, who induced the Indians to abandon such intentions. On August 5, 1915, the defendant made formal application to the department for a renewal of the lease, as the first 99-year period was expiring the following year. He was advised on September 7 following that no assurance had been given him as to a renewal of the lease, but only that his rights under the lease would be recognized as far as the same could be done legally. He was later advised that favourable consideration could not be given to his request for a renewal, and the department disclaimed liability for payment of the penalty provided in the original lease for non-renewal of the same. To this view the department adhered and the defendant never received a renewal, and in due course he was given notice to quit the property, and later the present action was commenced against the defendant.

The proclamation of 1763, as has been held, has the force of a statute, and so far therein as the rights of the Indians are concerned, it has never been repealed. The proclamation enacted that no private person shall make any purchase from the Indians of lands reserved to them,

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and that all purchases must be on behalf of the Crown, etc. Throughout the subsequent years all legislation in the form of Indian Acts continued the letter and spirit of the proclamation in respect of the inalienability of Indian reserves by the Indians. As was said by Lord Watson in the *St. Catherine Milling and Lumber Company* case, since the date of the proclamation Indian affairs had been administered successively by the Crown, by the provincial governments, and since the passing of the British North America Act, 1867, by the Government of the Dominion. The policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract duly ratified in a meeting of their chiefs or head men convened for the purpose. Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty, and as determined in the *St. Catherine Milling and Lumber Company case*. There can be no doubt but that the property in question was part of an Indian Reserve covered by the proclamation. For these reasons I am clearly of the opinion that the lease to Thompson in 1817 was void, and that the Indians never had such an interest in the lands reserved for their occupancy, that they could alienate the same by lease or sale. The Crown could not itself lease, or ratify any lease, made by the Indians of such lands at any time since the proclamation, save upon a surrender of the same by the Indians to the Crown. If the lease was void anything that the Department of Indian Affairs or any other authorized body or person administering Indian affairs did, or could do in the way of adoption or ratification of the same, would be contrary to the enactment of the proclamation and of the subsequent statutes relating to Indian affairs, and which in this respect were declaratory of the provisions of the proclamation and not binding on the Crown. I am unable also to concur in the defendant's contention that the Quebec Act, which enlarged the limits of the province of Quebec, destroyed the rights of the In-

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dians in the lands reserved under the proclamation. This I think has been authoritatively settled.

The defendants also rely on title acquired by prescription. This contention is I think wholly without force. Rental was apparently paid during the whole period since the date of the lease, although for a time it remained unpaid as I have already explained. Even if this were not clearly proven in respect of the whole period of 99 years, still, admittedly, the defendant paid to the appropriate authority the annual rental mentioned in the lease during his occupancy, and for more than twenty years prior thereto when the rentals became in arrears by his predecessors in occupancy under the lease. A title by prescription cannot be asserted concurrently with such an acknowledgment of title in another or others.

One of the defendant's most formidable contentions is, that if the legal title to the property in question is in the Crown, it must be in the Crown in the right of the province of Ontario, and that the Crown in the right of the Dominion has no status to claim the land as owner, and they rely upon the authorities of *St. Catherines Milling & Lumber Company* v. *The Queen* (1), and *Attorney General for Quebec* v. *Attorney General for Canada* (2). I do not think this position is tenable. In the two authorities cited the lands had been surrendered by the Indians to the Crown, and the substantial point in issue in both cases was whether in virtue of secs. 109 and 117 of the British North America Act such lands had passed to the Crown in the right of the province interested. Here there has been no surrender, and the legal title is in the Crown where it always was, subject to what was termed in the St. Catherine Milling & Lumber Company case, the burden of the Indian title. What is asserted or claimed in this action, it seems to me is that the right to repossess is in the Crown, not that the title to the property is in the Crown in the right of the Dominion. The fact that the Attorney General for Canada prosecutes for the Crown does not show that a Dominion title is necessarily claimed. *The Attorney General* v. *Harris* (3). The Parliament of Canada, in virtue of sec. 91 (24) B.N.A. Act has exclusive legislative authority over

(1) [1889] 14 A.C. 46. (2) [1921] 1 A.C. 401 at p. 407.
(3) [1872] 33 U.C.Q.B.R. 94.

"Indians and lands reserved for Indians," and there never having been any surrender of the lands in question to the Crown, and the control, direction and management of lands reserved for Indians being in the Dominion, I think the Crown is entitled to seek possession of the property in question from the defendants for the benefit of the Indians. The power of the Crown to manage and legislate in respect of Indian lands, surely implies the right to bring action to recover or protect any interest of the Indians in such lands. The Indian Act, chap. 81, R.S.C., 1906, sec. 4, states that the Minister of the Interior shall be Superintendent General of Indian Affairs and shall have the control and management of the land and property of the Indians in Canada. The corresponding legislation, in force at the time the defendant went into possession of Thompson's Island, contained a similar provision. To seek recovery of possession of the lands in question, believed to be improperly in the defendants, is incident to the control and management of such lands, and is not I think to be confused with a claim on the part of the Crown asserting title to such lands either in the right of the Dominion or of a province. *Mowatt, Attorney General* v. *Casgrain, Attorney General* (1).

The plaintiff's statement of claim is a bare claim for the possession of the lands in question. It is not pleaded that the lands are a portion of any tract or tracts of land, set apart by treaty or otherwise, for the use or benefit of the Indians, or that the same is under the control and management of the Minister of the Interior representing the Crown. On the other hand it is not claimed that the title to the said land is in the Crown in the right of the Dominion. The cause was tried upon the footing that the lands in question were Indian lands, and that the control and management of the same was in the person designated by the Indian Act, and who is a Minister of the Crown, and that in virtue of such duty and power so vested in him this action was brought. I shall consider the pleadings as amended so as to properly set forth the nature and quality of the interest of the plaintiff in the lands here in question.

(1) [1897] Q.O.R. 6 Q.B. 12.

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If the lease was always void, it remains to be considered what was the nature of the tenancy acquired by the defendant from those charged with the control and management of Indian lands, under the Indian Act, in accepting annual rentals from the defendant during the period of his occupancy. As contended by plaintiff's counsel, I am of the opinion that his highest position was that of a yearly tenant, and that the tenancy was terminated by the notice to quit and deliver up possession. If the view I take that the lease is and always was void, and that the same has not and could not since have been ratified by the Crown, then the defendant could not be more than a tenant-at-will, or a yearly tenant, and which here it matters not.

The defendants claim that in the event of the plaintiff succeeding in this action for the recovery of possession of the lands covered by the lease, they are entitled to compensation for improvements and expenditures made upon the property by the defendant Sir Donald McMaster in reliance upon the security of his rights under the lease, and particularly his right of renewal of the same at the end of the 99-year period. No evidence was given at the trial as to the liability of the plaintiff for compensation, or the amount if any, and accordingly I reserve the right to hear counsel and evidence, or to direct a reference upon this point when and if necessary. This, I understand, to be agreed upon by counsel. If the view I take of the case ultimately prevails, I should hope that this might be amicably arranged between the parties.

I am therefore of the opinion that the plaintiff is entitled to judgment, and a declaration that he is entitled to the possession of the lands described in the statement of claim. No evidence was given by the plaintiff as to the claim for issues and profits, and accordingly I need say nothing as to this part of the plaintiff's claim. The circumstances of the case warrant me in directing that there be no order as to costs.

Judgment accordingly.

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ERROR to the circuit court for the district of Massachusetts, in an action of covenant brought by Flecher against Peck.

The *first* count of the declaration states that Peck, by his deed of bargain and sale dated the 14th of May, 1803, in consideration of 3,000 dollars, sold and conveyed to Fletcher, 15,000 acres of land lying in common and undivided in a tract described as follows: beginning on the river Mississippi, where the latitude 32 deg. 40 min. north of the equator intersects the same, running thence along the same parallel of latitude a due east course to the Tombigby river, thence up the said Tombigby river to where the latitude of 32 deg. 43 min. 52 sec. intersects the same, thence along the same parallel of latitude a due west course to the Mississippi; thence down the said river, to the place of beginning; the said described tract containing 500,000 acres, and is the same which was conveyed by Nathaniel Prime to Oliver Phelps, by deed dated the 27th of February, 1796, and of which the said Phelps conveyed four fifths to Benjamin Hichborn, and the said Peck by deed dated the 8th of December, 1800; the said tract of 500,000 acres, being part of a tract which James Greenleaf conveyed to the said N. Prime, by deed dated the 23d of September, 1795, and is parcel of that tract which James Gunn, Mathew M'Allister, George Walker, Zachariah Cox, Jacob Walburger, William Longstreet and Wade Hampton, by deed dated 22d of August, 1795, conveyed to the said James Greenleaf; the same being part of that tract which was granted by letters patent under the great seal of the state of Georgia, and the signature of George Matthews, Esq. governor of that state, dated the 13th of January, 1795, to the said James Gunn and others, under the name of James Gunn, Mathew M'Allister, and George

If the breach of covenant assigned be, that the *state* had no authority to sell and dispose of the land, it is not a good plea in bar to say that the *governor* was legally empowered to sell and convey the premises, although the facts stated in the plea as inducement, are sufficient to justify a direct negative of the breach assigned.

It is not necessary that a breach of covenant be assigned in the very words of the covenant. It is sufficient if it show a substantial breach.

The court will not declare a law to be unconstitutional, unless the opposition between the constitution and the law be clear and plain.

The legislature of Georgia, in 1795, had the power of disposing of the unappropriated lands within its own limits.

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In a contest between two individuals, claiming under an act of a legislature, the court cannot inquire into the motives which actuated the members of that legislature. If the legislature might constitutionally pass such an act; if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit between individuals founded on the allegation that the act is a nullity in consequence of the impure motives which influenced certain members of the legislature which passed the law.

When a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights.

A party to a contract cannot pronounce its own deed invalid, although that party be a sovereign state.

Walker and their associates, and their heirs and assigns in fee-simple, under the name of the Georgia company; which patent was issued by virtue of an act of the legislature of Georgia, passed the 7th of January, 1795, entitled "An act supplementary to an act for appropriating part of the unlocated territory of this state for the payment of the late state troops, and for other purposes therein mentioned, and declaring the right of this state to the unappropriated territory thereof, for the protection and support of the frontiers of this state, and for other purposes."

That Peck, in his deed to Fletcher, covenanted "that the state of Georgia aforesaid was, at the time of the passing of the act of the legislature thereof, (entitled as aforesaid,) legally seised in fee of the soil thereof, subject only to the extinguishment of part of the Indian title thereon. And that the legislature of the said state at the time of passing the act of sale aforesaid, had good *right* to sell and dispose of the same in manner pointed out by the said act. And that the governor of the said state had lawful authority to issue his grant aforesaid, by virtue of the said act. And further, that all the title which the said state of Georgia ever had in the aforegranted premises has been legally conveyed to the said John Peck by force of the conveyances aforesaid. And further, that the title to the premises so conveyed by the state of Georgia, and finally vested in the said Peck, has been in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature of the said state of Georgia."

The breach assigned in the first count was, that at the time the said act of 7th of January, 1795, was passed, "the said legislature had no *authority* to sell and dispose of the tenements aforesaid, or of any part thereof, in the manner pointed out in the said act."

The 2d count, after stating the covenants in the deed as stated in the first count, averred, that at *Augusta*, in the said state of Georgia, on the 7th day of January, 1795, the said James Gunn, Mathew M'Allister

act only by these agents, and that, while within the powers conferred on them, their acts must be considered as the acts of the people. If the agents be corrupt, others may be chosen, and, if their contracts be examinable, the common sentiment, as well as common usage of mankind, points out a mode by which this examination may be made, and their validity determined.

If the legislature of Georgia was not bound to submit its pretensions to those tribunals which are established for the security of property, and to decide on human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded.

If the legislature be its own judge in its own case, it would seem equitable that its decision should be regulated by those rules which would have regulated the decision of a judicial tribunal. The question was, in its nature, a question of title, and the tribunal which decided it was either acting in the character of a court of justice, and performing a duty usually assigned to a court, or it was exerting a mere act of power in which it was controlled only by its own will.

If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles, which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law, he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the inter-

course between man and man would be very seriously obstructed, if this principle be overturned.

A court of chancery, therefore, had a bill been brought to set aside the conveyance made to James Gunn and others, as being obtained by improper practices with the legislature, whatever might have been its decision as respected the original grantees, would have been bound, by its own rules, and by the clearest principles of equity, to leave unmolested those who were purchasers, without notice, for a valuable consideration.

If the legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its power alone, and the same power may devest any other individual of his lands, if it shall be the will of the legislature so to exert it.

It is not intended to speak with disrespect of the legislature of Georgia, or of its acts. Far from it. The question is a general question, and is treated as one. For although such powerful objections to a legislative grant, as are alleged against this, may not again exist, yet the principle, on which alone this rescinding act is to be supported, may be applied to every case to which it shall be the will of any legislature to apply it. The principle is this; that a legislature may, by its own act, devest the vested estate of any man whatever, for reasons which shall, by itself, be deemed sufficient.

In this case the legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, and which would have justified its abrogation so far as respected those to whom crime was imputable. But the grant, when issued, conveyed an estate in fee-simple to the grantee, clothed with all the solemnities which law can bestow. This estate was transferrable; and those who purchased parts of it were not stained by that

guilt which infected the original transaction. Their case is not distinguishable from the ordinary case of purchasers of a legal estate without knowledge of any secret fraud which might have led to the emanation of the original grant. According to the well known course of equity, their rights could not be affected by such fraud. Their situation was the same, their title was the same, with that of every other member of the community who holds land by regular conveyances from the original patentee.

Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held?

The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.

When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation.

To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.

It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.

The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire; she is a member of the American union; and that union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass. The constitution of the United States declares that no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

Does the case now under consideration come within this prohibitory section of the constitution?

In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract?

A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object

of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected.

If, under a fair construction of the constitution, grants are comprehended under the term contracts, is a grant from the state excluded from the operation of the provision? Is the clause to be considered as inhibiting the state from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the state are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some appre-

hension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state.

No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.

In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favour of the right to impair the obligation of those contracts into which the state may enter?

The state legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased.

This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?

The argument in favour of presuming an intention to except a case, not excepted by the words of the constitution, is susceptible of some illustration from a principle originally ingrafted in that instrument, though no longer a part of it. The constitution, as passed, gave the courts of the United States jurisdiction in suits brought against individual states. A state, then, which violated its own contract was suable in the courts of the United States for that violation. Would it have been a defence in such a suit to say that the state had passed a law absolving itself from the contract? It is scarcely to be conceived that such a defence could be set up. And yet, if a state is neither restrained by the general principles of our political institutions, nor by the words of the constitution, from impairing the obligation of its own contracts, such a defence would be a valid one. This feature is no longer found in the constitution; but it aids in the construction of those clauses with which it was originally associated.

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

In overruling the demurrer to the 3d plea, therefore, there is no error.

The first covenant in the deed is, that the state of Georgia, at the time of the act of the legislature thereof, entitled as aforesaid, was legally seised in fee of the soil thereof subject only to the extinguishment of part of the Indian title thereon.

The 4th count assigns, as a breach of this covenant, that the right to the soil was in the United States, and not in Georgia.

To this count the defendant pleads, that the state of Georgia *was seised;* and tenders an issue on the fact in which the plaintiff joins. On this issue a special verdict is found.

The jury find the grant of Carolina by Charles second to the Earl of Clarendon and others, comprehending the whole country from 36 deg. 30 min. north lat. to 29 deg. north lat., and from the Atlantic to the South Sea.

They find that the northern part of this territory was afterwards erected into a separate colony, and that the most northern part of the 35 deg. of north lat. was the boundary line between North and South Carolina.

That seven of the eight proprietors of the Carolinas surrendered to George 2d in the year 1729, who appointed a Governor of South Carolina.

That, in 1732, George the 2d granted, to the Lord Viscount Percival and others, seven eighths of the territory between the Savannah and the Alatamaha, and extending west to the South Sea, and that the remaining eighth part, which was still the property of the heir of Lord Carteret, one of the original grantees of Carolina, was afterwards conveyed to them. This territory was constituted a colony and called Georgia.

That the Governor of South Carolina continued to exercise jurisdiction south of Georgia.

That, in 1752, the grantees surrendered to the crown.

That, in 1754, a governor was appointed by the crown, with a commission describing the boundaries of the colony.

That a treaty of peace was concluded between Great

Britain and Spain, in 1763, in which the latter ceded to the former Florida, with Fort St. Augustin and the bay of Pensacola.

That, in October, 1763, the King of Great Britain issued a proclamation, creating four new colonies, Quebec, East Florida, West Florida, and Grenada; and prescribing the bounds of each, and further declaring that all the lands between the Alatamaha, and St. Mary's should be annexed to Georgia. The same proclamation contained a clause reserving, under the dominion and protection of the crown, for the use of the Indians, all the lands on the western waters, and forbidding a settlement on them, or a purchase of them from the Indians. The lands conveyed to the plaintiff lie on the western waters.

That, in November, 1763, a commission was issued to the Governor of Georgia, in which the boundaries of that province are described, as extending westward to the Mississippi. A commission, describing boundaries of the same extent, was afterwards granted in 1764.

That a war broke out between Great Britain and her colonies, which terminated in a treaty of peace acknowledging them as sovereign and independent states.

That in April, 1787, a convention was entered into between the states of South Carolina and Georgia settling the boundary line between them.

The jury afterwards describe the situation of the lands mentioned in the plaintiff's declaration, in such manner that their lying within the limits of Georgia, as defined in the proclamation of 1763, in the treaty of peace, and in the convention between that state and South Carolina, has not been questioned.

The counsel for the plaintiff rest their argument on a single proposition. They contend that the reservation for the use of the Indians, contained in the pro-

clamation of 1763, excepts the lands on the western waters from the colonies within whose bounds they would otherwise have been, and that they were acquired by the revolutionary war. All acquisitions during the war, it is contended, were made by the joint arms, for the joint benefit of the United States, and not for the benefit of any particular state.

The court does not understand the proclamation as it is understood by the counsel for the plaintiff. The reservation for the use of the Indians appears to be a temporary arrangement suspending, for a time, the settlement of the country reserved, and the powers of the royal governor within the territory reserved, but is not conceived to amount to an alteration of the boundaries of the colony. If the language of the proclamation be, in itself, doubtful, the commissions subsequent thereto, which were given to the governors of Georgia, entirely remove the doubt.

The question, whether the vacant lands within the United States became a joint property, or belonged to the separate states, was a momentous question which, at one time, threatened to shake the American confederacy to its foundation. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed.

It is the opinion of the court, that the particular land stated in the declaration appears, from this special verdict, to lie within the state of Georgia, and that the state of Georgia had power to grant it.

Some difficulty was produced by the language of the covenant, and of the pleadings. It was doubted whether a state can be seised in fee of lands, subject to the Indian title, and whether a decision that they were seised in fee, might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title.

The majority of the court is of opinion that the nature of the Indian title, which is certainly to be re-

spected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.

Judgment affirmed with costs.

JOHNSON, J. In this case I entertain, on two points, an opinion different from that which has been delivered by the court.

I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity.

A contrary opinion can only be maintained upon the ground that no existing legislature can abridge the powers of those which will succeed it. To a certain extent this is certainly correct; but the distinction lies between power and interest, the right of jurisdiction and the right of soil.

The right of jurisdiction is essentially connected to, or rather identified with, the national sovereignty. To part with it is to commit a species of political suicide. In fact, a power to produce its own annihilation is an absurdity in terms. It is a power as utterly incommunicable to a political as to a natural person. But it is not so with the interests or property of a nation. Its possessions nationally are in nowise necessary to its political existence; they are entirely accidental, and may be parted with in every respect similarly to those of the individuals who compose the community. When the legislature have once conveyed their interest or property in any subject to the individual, they have lost all control over it; have nothing to act upon; it has passed from them; is vested in the individual; becomes intimately blended with his existence, as essentially so as the blood that circulates through his system. The government may indeed demand of him the one or the other, not because they are not his, but because whatever is his is his country's.

As to the idea, that the grants of a legislature may be void because the legislature are corrupt, it appears to me to be subject to insuperable difficulties. The acts of the supreme power of a country must be considered pure for the same reason that all sovereign acts must be considered just; because there is no power that can declare them otherwise. The absurdity in this case would have been strikingly perceived, could the party who passed the act of cession have got again into power, and declared themselves pure, and the intermediate legislature corrupt.

The security of a people against the misconduct of their rulers, must lie in the frequent recurrence to first principles, and the imposition of adequate constitutional restrictions. Nor would it be difficult, with the same view, for laws to be framed which would bring the conduct of individuals under the review of adequate tribunals, and make them suffer under the consequences of their own immoral conduct.

I have thrown out these ideas that I may have it distinctly understood that my opinion on this point is not founded on the provision in the constitution of the United States, relative to laws impairing the obligation of contracts. It is much to be regretted that words of less equivocal signification, had not been adopted in that article of the constitution. There is reason to believe, from the letters of Publius, which are well known to be entitled to the highest respect, that the object of the convention was to afford a general protection to individual rights against the acts of the state legislatures. Whether the words, "acts impairing the obligation of contracts," can be construed to have the same force as must have been given to the words "obligation and *effect* of contracts," is the difficulty in my mind.

There can be no solid objection to adopting the technical definition of the word "contract," given by Blackstone. The etymology, the classical signification, and the civil law idea of the word, will all support it. But the difficulty arises on the word "obligation,"

which certainly imports an existing moral or physical necessity. Now a grant or conveyance by no means necessarily implies the continuance of an obligation beyond the moment of executing it. It is most generally but the consummation of a contract, is *functus officio* the moment it is executed, and continues afterwards to be nothing more than the evidence that a certain act was done.

I enter with great hesitation upon this question, because it involves a subject of the greatest delicacy and much difficulty. The states and the United States are continually legislating on the subject of contracts, prescribing the mode of authentication, the time within which suits shall be prosecuted for them, in many cases affecting existing contracts by the laws which they pass, and declaring them to cease or lose their effect for want of compliance, in the parties, with such statutory provisions. All these acts appear to be within the most correct limits of legislative powers, and most beneficially exercised, and certainly could not have been intended to be affected by this constitutional provision; yet where to draw the liue, or how to define or limit the words, "obligation of contracts," will be found a subject of extreme difficulty.

To give it the general effect of a restriction of the state powers in favour of private rights, is certainly going very far beyond the obvious and necessary import of the words, and would operate to restrict the states in the exercise of that right which every community must exercise, of possessing itself of the property of the individual, when necessary for public uses; a right which a magnanimous and just government will never exercise without amply indemnifying the individual, and which perhaps amounts to nothing more than a power to oblige him to sell and convey, when the public necessities require it.

The other point on which I dissent from the opinion of the court, is relative to the judgment which ought to be given on the first count. Upon that count we are

called upon substantially to decide, "that the state of Georgia, at the time of passing the act of cession, was legally seised in fee of the soil, (then ceded,) subject only to the extinguishment of part of the Indian title." That is, that the state of Georgia was seised of an estate in fee-simple in the lands in question, subject to another estate, we know not what, nor whether it may not swallow up the whole estate decided to exist in Georgia. It would seem that the mere vagueness and uncertainty of this covenant would be a sufficient objection to deciding in favour of it, but to me it appears that the facts in the case are sufficient to support the opinion that the state of Georgia had not a *fee-simple* in the land in question.

This is a question of much delicacy, and more fitted for a diplomatic or legislative than a judicial inquiry. But I am called upon to make a decision, and I must make it upon technical principles.

The question is, whether it can be correctly predicated of the interest or estate which the state of Georgia had in these lands, "that the state was seised thereof, in fee-simple."

To me it appears that the interest of Georgia in that land amounted to nothing more than a mere possibility, and that her conveyance thereof could operate legally only as a covenant to convey or to stand seised to a use.

The correctness of this opinion will depend upon a just view of the state of the Indian nations. This will be found to be very various. Some have totally extinguished their national fire, and submitted themselves to the laws of the states: others have, by treaty, acknowledged that they hold their national existence at the will of the state within which they reside: others retain a limited sovereignty, and the absolute proprietorship of their soil. The latter is the case of the tribes to the west of Georgia. We legislate upon the conduct of strangers or citizens within their limits, but innumerable treaties formed with them

acknowledge them to be an independent people, and the uniform practice of acknowledging their right of soil, by purchasing from them, and restraining all persons from encroaching upon their territory, makes it unnecessary to insist upon their right of soil. Can, then, one nation be said to be seised of a fee-simple in lands, the right of soil of which is in another nation? It is awkward to apply the technical idea of a fee-simple to the interests of a nation, but I must consider an absolute right of soil as an estate to them and their heirs. A fee-simple estate may be held in reversion, but our law will not admit the idea of its being limited after a fee-simple. In fact, if the Indian nations be the absolute proprietors of their soil, no other nation can be said to have the same interest in it. What, then, practically, is the interest of the states in the soil of the Indians within their boundaries? Unaffected by particular treaties, it is nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors within certain defined limits. All the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves. If the interest in Georgia was nothing more than a pre-emptive right, how could that be called a fee-simple, which was nothing more than a power to acquire a fee-simple by purchase, when the proprietors should be pleased to sell? And if this ever was any thing more than a mere possibility, it certainly was reduced to that state when the state of Georgia ceded, to the United States, by the constitution, both the power of pre-emption and of conquest, retaining for itself only a resulting right dependent on a purchase or conquest to be made by the United States.

I have been very unwilling to proceed to the decision of this cause at all. It appears to me to bear strong evidence, upon the face of it, of being a mere feigned case. It is our duty to decide on the rights, but not on the speculations of parties. My confi-

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dence, however, in the respectable gentlemen who have been engaged for the parties, has induced me to abandon my scruples, in the belief that they would never consent to impose a mere feigned case upon this court.

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The practice in Kentucky to call a jury to ascertain the facts in chancery causes is incorrect.

A suit in chancery by one who has the prior equity against him who has the eldest patent is in its nature local, and if it be a mere question of title, must be tried in the district where the land lies.

But if it be a case of *contract, or trust,* or *fraud,* it is to be tried in the district where the defendant may be found.

If, by any reasonable construction of an entry, it can be supported, the court will support it.

When a

THIS was an appeal from the decree of the circuit court of the United States, for the district of Kentucky, in a suit in equity brought by Watts, a citizen of *Virginia*, against Massie, a citizen of *Kentucky*, to compel the latter to convey to the former 1,000 acres of land in the state of *Ohio*, the defendant having obtained the legal title with notice of the plaintiff's equitable title.

The bill stated that the defendant Massie (the appellant) had contracted with a certain *Ferdinand Oneal*, to locate and survey for him a military warrant for 4,000 acres in his name, (which the plaintiff afterwards purchased for a valuable consideration,) and to receive for his services in locating and surveying the same, the sum of 50*l.* which the plaintiff paid him. That the defendant located the said warrant with the proper surveyor, and being himself a surveyor, he fraudulently made a survey purporting to be a survey of part of the entry, but variant from the same, and contrary to law, whereby the survey was entirely removed from the land *entered* with the surveyor, for the fraudulent purpose of giving way to a claim of the defendant's which he surveyed on the land entered for the plaintiff, whereby the plaintiff lost the land, and the defendant obtained the legal title. That the land adjoins the town of Chillicothe, and is worth fifteen dollars an acre. The bill prays that the defendant may be compelled to convey the

is nothing, in our opinion, in the Maryland statute of 1780 (ch. 10), to change this construction of the law.

The other ground is also unmaintainable. A discharge of a party under a writ of *habeas corpus* from the process under which he is imprisoned, discharges him from any further confinement under the process, but not under any other process which may be issued against him under the same indictment.

For these reasons we are of opinion that the party is rightfully in custody under the bench warrant of the Circuit Court, and therefore that the petition for the writ of *habeas corpus* ought to be denied.

The rule, therefore, to show cause is discharged, and the motion for the habeas corpus is overruled.

Cited—14 Pet., 623, 625, 626, 628; 14 How., 119; 1 Wall., 253; 4 Cranch C. C., 554; 1 Wood. & M., 69; 3 Wood. & M., 436.

711*] *COLIN MITCHEL, ROBERT MITCHEL, in his own right, and as assignee of the estate and effects of the mercantile house heretofore trading under the firm of CARNOCHAN & MITCHEL, and as trustee of the creditors of said firm, and also of RICHARD CARNOCHAN, WILLIAM CALDER, BENJAMIN MARSHALL, BENJAMIN W. ROGERS, JOHN P. WILLIAMSON, the heirs and legal representatives of JOHN M'NISH, deceased, and JAMES INNERARITY, *Appellants*

v.

THE UNITED STATES.

Land titles in Florida—construction of the treaty of cession and of acts of Congress—law of nations—property rights of individuals in ceded territory Indian titles—grant from Indians—no new evidence to be considered in appellate courts.

A claim to lands in East Florida, the title to which was derived from grants by the Creek and Seminole Indians, ratified by the local authorities of Spain before the cession of Florida by Spain to the United States; confirmed.

It was objected to the title claimed in this case, which had been presented to the Superior Court of Middle Florida, under the provisions of the acts of Congress for the settlement of land claims in Florida, that the grantees did not acquire, under the Indian grants, a legal title to the land. Held, that the acts of Congress submit these claims to the adjudication of this court as a court of equity; and those acts, as often and uniformly construed in its repeated decision, confer the same jurisdiction over imperfect, inchoate and incentive titles, as legal and perfect ones, and require the court to decide by the same rules on all claims submitted to it, whether legal or equitable.

By the law of nations, the inhabitants, citizens, or subjects of a conquered or ceded country, territory, or province, retain all the rights of property which have not been taken from them by the orders of the conqueror; and this is the rule by which we must test its efficacy according to the act of Congress, which we must consider as of binding authority.

A treaty of cession is a deed or grant by one sovereign to another, which transferred nothing to which he had no right of property, and only such right as he owned, and could convey to the grantee. By the treaty with Spain the United States acquired no lands in Florida to which any person had lawfully obtained such a right, by a perfect or inchoate title, that this court could consider it as property under the second article, or which had, according to the stipulations of the eighth article of the treaty, been granted by the lawful authorities of the king: which words, "grants" or "concessions," were to be construed in their broadest sense, so as to comprehend all lawful acts which operated to transfer a right of property, perfect or imperfect.

The effect of the clauses of the confirmation of grants made was, that they confirmed them presently on the ratification of the treaty, to those in possession of the lands; which was declared to be that legal seisin and possession which follows title is co-extensive with the right and continues till it is ousted by an actual adverse possession, as contradistinguished from residence and occupation.

*The United States, by accepting the cession [*712 under the terms of the eighth article, and the ratification by the king, with an exception of the three annulled grants to Alleyon, Punon Rostro, and Vargas, can make no other exceptions of grants made by the lawful authorities of the king.

The meaning of the words "lawful authorities" in the eighth article, or "competent authorities" in the ratification, must be taken to be "by those persons who exercised the granting power by the authority of the crown." The eighth article expressly recognizes the existence of these lawful authorities in the ceded territories, designating the governor or intendant, as the case might be, as invested with such authority; which is to be deemed competent till the contrary is made to appear.

By "the laws of Spain" is to be understood the will of the king expressed in his orders, or by his authority, evidenced by the acts themselves; or by such usage and customs in the province as may be presumed to have emanated from the king, or to have been sanctioned by him as existing authorized local laws.

In addition to the established principles heretofore laid down by this court as the legal effect of an usage or custom, there is one which is peculiarly appropriate to this case. The act of Congress giving jurisdiction to this court to adjudicate on these causes, contains this clause in reference to grants, &c., "which was protected and secured by the treaty, and which might have been perfected into a complete title, under and in conformity to the laws, usages and customs of the government under which the same originated." This is an express recognition of any known and established usage or custom in the Spanish provinces, in relation to the grants of land, and the title thereto, which brings them within a well-established rule of law—that a custom or usage saved and preserved by a statute has the force of an express statute, and shall control all affirmative statutes in opposition, though it must yield to the authority of negative ones, which forbid an act authorized by a custom or usage thus saved and protected; and this is the rule by which its efficacy must be tested, according to the act of Congress, which must be considered of binding authority.

In the case of The United States v. Arredondo (6 Peters, 691), the lands granted had been in the possession and occupation of the Allachua Indians, and the centre of the tract was an Indian town of that name. But the land had been abandoned, and before any grant was made by the intendant, a report was made by the attorney and surveyor-general on a reference to them, finding the fact of abandonment; on which it was decreed that the lands had reverted to and become annexed to the royal domain.

By the common law, the king has no right of entry on lands which is not common to his subjects; the king is put to his inquest of office, or information of intrusion, in all cases where a subject is put to his action; their right is the same, though the king has more convenient remedies in enforcing his. If the king has no original right of possession to lands, he cannot acquire it without office, joined so as to annex it to his domain.

The United States have acted on the same principle in the various laws which Congress have passed in relation to private claims to lands in the

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NOTE.—*As to Indians', title of, to lands within the United States*, see note to Worcester v. Georgia, 6 Pet., 515.

Citizens of a conquered or ceded territory retain all the rights of property which have not been taken from them by the orders of the conqueror. See note to Delassus v. United States, *ante*, 117.

Floridas; they have not undertaken to decide for themselves on the validity of such claims, without the previous action of some tribunal, special or judicial. They have not authorized an entry to be made on the possession of any person in possession, by color of a Spanish grant or title, nor the sale of 713] *any lands as part of the national domain, with any intention to impair private rights. The laws which give jurisdiction to the district courts of the territories to decide in the first instance, and to this on appeal, prescribe the mode by which lands which have been possessed or claimed to have been granted pursuant to the laws of Spain, shall become a part of the national domain; which, as declared in the seventh section of the Act of 1824, is a "final decision against any claimant pursuant to any of the provisions of the law."

One uniform rule seems to have prevailed in the British provinces in America by which Indian lands were held and sold, from their first settlement, as appears by their laws—that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property, from generation to generation, not as the right of the individuals located on particular spots. Subject to this right of possession, the ultimate fee was in the crown and its grantees, which could be granted by the crown or colonial legislatures while the lands remained in possession of the Indians; though possession could not be taken without their consent.

Individuals could not purchase Indian lands without permission or license from the crown, colonial governors, or according to the rules prescribed by colonial laws; but such purchases were valid with such license, or in conformity with the local laws; and by this union of the perpetual right of occupancy with the ultimate fee, which passed from the crown by the license, the title of the purchaser became complete.

Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites, and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals. In either case their rights became extinct, the lands could be granted disencumbered of the right of occupancy, or enjoyed in full dominion by the purchases from the Indians. Such was the tenure of Indian lands by the laws of Massachusetts, Connecticut, Rhode Island, New Hampshire, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

Grants made by the Indians at public councils, since the treaty at Fort Stanwix, have been made directly to the purchasers or to the State in which the land lies, in trust for them, or with directions to convey to them; of which there are many instances of large tracts so sold and held, especially in New York.

It was an universal rule that purchases made at Indian treaties, in the presence and with the approbation of the officer under whose direction they were held by the authority of the crown, gave a valid title to the lands. It prevailed under the laws of the States after the Revolution, and yet continues in those where the right to the ultimate fee is owned by the States or their grantees. It has been adopted by the United States, and purchases made at treaties held by their authority have been always held good by the ratification of the treaty, without any patent to the purchasers from the United States. This rule in the colonies was founded on a settled rule of the law of England, that by this prerogative the king was the 714*] universal occupant of *all vacant lands in his dominions, and had the right to grant them at his pleasure, or by his authorized officers.

When the United States acquired and took possession of the Floridas, the treaties which had been made with the Indian tribes before the acquisition of the territory by Spain and Great Britain, remained in force over all the ceded territory as the laws which regulated the relations with all the Indians who were parties to them, and were binding on the United States by the obligation they had assumed by the Louisiana Treaty, as a supreme law of the land, which was inviolable by the power of Congress. They were also binding as a fundamental law of Indian rights, acknowledged by royal orders and municipal regulations of the province, as the laws and ordinances of Spain in the ceded provinces, which were declared to continue in force by the proclamation of the governor in taking possession of the provinces; and by the acts of Congress, which assured all the inhabitants of protection in their property. It would be an unwarranted construction of these treaties, laws, ordinances and municipal regulations to decide that the Indians were not to be maintained in the enjoyment of all the rights which they could have enjoyed under either, had the provinces remained under the dominion of Spain. It would be rather a perversion of their spirit, meaning and terms, contrary to the injunction of the law under which the court acts, which makes the stipulations of any treaty, the laws and ordinances of Spain, and these acts of Congress, so far as either apply to this case, the standard rules for its decision.

The treaties with Spain and England before the acquisition of Florida by the United States, which guaranteed to the Seminole Indians their lands according to the right of property with which they possessed them, were adopted by the United States; who thus became the protectors of all the rights they had previously enjoyed, or could of right enjoy under great Britain or Spain, as individuals or nations, by any treaty to which the United States thus became parties in 1803.

The Indian right to the lands as property was not merely of possession, that of alienation was concomitant; both were equally secured, protected and guaranteed by Great Britain and Spain, subject only to ratification and confirmation by the license, charter or deed from the governor representing the king. Such purchases enabled the Indians to pay their debts, compensate for their depredations on the traders resident among them to provide for their wants; while they were available to the purchasers as payment of the considerations which at their expense had been received by the Indians. It would have been a violation of the faith of the government to both, to encourage traders to settle in the province, to put themselves and property into the power of the Indians, to suffer the latter to contract debts, and when willing to pay them by the only means in their power, a cession of their lands, withhold an assent to the purchase, which by their laws or municipal regulations was necessary to vest a title. Such a course was never adopted by Great Britain in any of her colonies, nor by Spain in Louisiana or Florida.

The laws made it necessary, when the Indians sold their lands, to have the deeds presented to the governor for conformation. The sales by the Indians transferred the kind of right which they possessed; the ratification of the sale by the governor must be regarded as a relinquishment of the title of *the crown to the purchaser, and [*715 no instance is known where permission to sell has been "refused, or the rejection of an Indian sale."

In the present case the Indian sale has been confirmed with more than usual solemnity and publicity; it has been done at a public council and convention of the Indians conformably to treaties, to which the king was a party, and which the United States adopted; and the grant was known to both parties to the treaty of cession. The United States were not deceived by the purchase, which they knew was subject to the claim of the petitioner, or those from whom he purchased; and they made no stipulation which should put it to a severer test than any other; and it was made to a house which, in consideration of its great and continued services to the king and his predecessor, had deservedly given them high claims as well on his justice as his faith. But if there could be a doubt that the evidence in the record did not establish the fact of a royal license or assent to this purchase as a matter of specific and judicial belief, it would be presumed as a matter of law arising from the facts and circumstances of the case, which are admitted or unquestioned.

As heretofore decided by this court, the law presumes the existence in the provinces of an officer authorized to make valid grants: *a fortiori*, to give license to purchase and to confirm; and the treaty designates the Governor of West Florida as the proper officer to make grants of Indian lands by confirmation as plainly as it does the Governor of East Florida to make original grants, or the Intendant of West Florida to grant royal lands. A direct grant from the crown of lands in a royal haven may be presumed on an uninterrupted possession of sixty years, or a prescriptive possession of crown lands for forty years.

The length of time which brings a given case within the legal presumption of a grant, charter, or license, to validate a right long enjoyed, is not definite, depending on its peculiar circumstances.

After the case had been fully heard in the Superior Court of Middle Florida, the judge of that court, in examining the evidence in the case with a view to its decision, considered that he had discovered in the date of the water-mark in the paper on which one of the original Spanish documents had been written, a circumstance which brought into doubt the genuineness of the instrument. No objection of this kind had been made during the argument of the cause; and after the supposed discovery, no opportunity was permitted by the Court of Florida to the claimants to explain or account for the same. After the appeal had been docketed in this court, the appellants asked permission to send a commission to procure testimony which it was alleged would fully explain the circumstance, and offered to read *ex-parte* depositions to the same purpose.

BY THE COURT: This is refused, because in an appellate court, no new evidence can be taken or received without violating the best-established rules of evidence. Under such circumstances, it would be dealing to the petitioner a measure of justice incompatible with every principle of equity, to visit upon his title an objection which the claimant was not bound to anticipate in the court below, which he could not meet there, and which this court were compelled to refuse him the means of removing by evidence. We will not say what course would have been taken if his title had depended on the date of the paper alluded to; as the case is, it is only one of numerous undisputed 716*] documents tending *to establish the grant, the validity of which is but little if it could be in any degree affected by the date of the permission.

APPEAL from the Superior Court of Middle Florida.

The appellants, on the 18th day of October, 1828, presented to the Superior Court of Middle Florida, their petition under the authority of the sixth section of the Act of Congress passed on the 23d of May, 1828, entitled "An Act supplementary to the several acts providing for the settlement and confirmation of the private land claims in the territory of Florida; and of the Act of 1824, referred to in the said act, authorizing claimants in Missouri to institute proceedings to try the validity of their titles.

The appellants claimed title to a tract of land containing one million two hundred thousand acres in the territory of Florida, the greater part of which was situated between the rivers Appalachicola and the St. Mark's, comprehending all the intervening sea-coast and the islands adjacent.

The title was asserted to be held under deeds from the Creek and Seminole Indians to Panton, Leslie & Co., to John Forbes & Co., and to John Forbes, and confirmed by the authority of Spain.

These lands, the petitioners alleged, were granted by the Indian tribes, as an indemnity from the Spanish government and from those Indians, for losses sustained by them in prosecuting a trade with the Indians, under the special and exclusive license of Spain.

The Indian grants were dated on the 25th May and the 22d August, 1804, and the 2d August, 1806, and were alleged to have been confirmed by Governor Folch, the governor of the province.

The facts of the case, and all the documents on which the title of the petitioners were claimed to rest, with the evidence in the case, are fully stated in the opinion of the court.

The answer of the district attorney stated, that the commissioners under the Act "for the settlement of private land claims, and for the conformation thereof," were instructed to report, and not to decide upon large claims; that the claim of the petitioners was reported upon by the commissioners, and *their report [*717 laid before Congress—but it was denied that the documents presented to the said commissioners and by them reported, were, by the said report, "admitted to be genuine." The title of the appellant is invalid. Congress did not confirm or adopt the report of the commissioners upon this claim, but referred all claims not annulled by the Treaty of Cession, nor by the decree of the King of Spain ratifying the same, nor reported by the commissioners as antedated or forged, to the decision of the judiciary.

The cause was heard in the Superior Court of Middle Florida, on the evidence adduced by the petitioners and the United States and on public documents, all of which were sent up with the record; and was finally disposed of by a decree of the judge of that court, entered on the 2d of November, 1830, dismissing the petition.

The petitioners appealed to this court. The appeal was entered in January Term, 1831.

At former terms of this court, on the motions of the counsel for the United States, the case was postponed to enable the government of the United States to procure papers from Madrid and from Havana, which were considered important and necessary in the cause. These motions were always resisted by the counsel for the appellants.

At January Term, 1834, the case was continued, under an order of the court that it should not be argued before the 2d of February, 1835.

On the 9th of January, Mr. Butler, Attorney-General of the United States, moved the court to postpone the hearing of the case until later in the term than the day fixed for the same; alleging that the documents which had been expected from Havana had not arrived, and that the government had despatched a special messenger for them, whose return was expected before the 25th of February, during the term. The court refused to hear the motion until the case should be called, on or after the 2d of February. Afterwards, on the 9th of February, the motion was renewed on the part of the United States by the Attorney-General, and was overruled; the court not thinking it necessary to hear the counsel for the appellants against it.

*The cause then came on, and was [*718 argued by *Mr. White* and *Mr. Berrien* for the appellants, and by the Attorney-General and *Mr. Call* for the United States.

For the appellants, the following points were submitted to the court:

1. That the Indian sales of 1804 and 1811, and the several acts in confirmation thereof, by the Governor of West Florida, vest in the grantees a full and complete title to the land in controversy.

2. That the King of Spain was bound, in good faith, to indemnify the house of Forbes & Co. for the losses sustained by them in their traffic with the Indian tribes; that the satisfaction of the claims of that house, which was effected by these sales, and the consequent re-

lease of the obligation of the King of Spain to indemnify them, constituted a sufficient consideration to the Spanish crown for any right of pre-emption or otherwise which it might have had in these lands.

3. That these sales, having been made with the knowledge, assent and previous approbation of the authorities of Louisiana and West Florida; having been subsequently ratified and confirmed by the civil and military governor of the latter province; having been notified to the Captain-General of Cuba, and by him to the king, and not having been disapproved by either, that these several acts and omissions amount to an acquiescence on the part of the King of Spain and his legitimate authorities, which, according to the laws and usages of that kingdom, would vest a valid title in the grantees.

4. That the decision of the Captain-General of Cuba, on the petition of John Forbes, setting forth his title to these lands and praying leave to sell the same, is a judicial decision upon the validity of that title by the highest legitimate authority of that captain generalcy, to which West Florida was an appendage, and cannot be drawn into question in any other tribunal.

5. That the grantees, and those claiming under them, have had legal possession, in good faith, by just title, since the date of the respective grants, which constitute a title by prescription under the laws of Spain.

6. That the title thus subsisting in the grantees, by the aforesaid sales and acts of confirma-719*]tion, by the acquiesceuce, *after notice, of the King of Spain and his legitimate authorities, by the judicial decision of the Captain-General of Cuba, and by the right of prescription, at the date of the delivery of the Floridas to the United States, was a valid and legal title, which was recognized and confirmed by the treaty of cession.

For the United States, it was contended by *Mr. Butler* and *Mr. Call:*

I. Admitting it to be true, for the sake of argument,

1. That the house of Forbes & Co. had rendered important services to the Spanish government, and had well-founded claims on its bounty.

2. That the King of Spain was bound, in good faith, to indemnify the house, for the losses sustained by them in their traffic with the Indians.

3. That the government of the United States had knowlege of the existence of that house, of its claims on Spain, and of the title on which the present suit is founded.

4. That the vacant and ungranted lands in the Floridas, even if the present claim be confirmed, will yet be more than the government of the United States, at the time of the cession, expected to receive; and,

5. That other equitable circumstances exist, which entitle the claim to a favorable regard.

Still, it is contended, on the part of the United States, that no valid reason can be found, in either or all of these circumstances, for reversing the decree of the court below.

That decree must be affirmed, unless it can be shown that the claimants, at the time of the cession, had a legal right to the lands in question; acquired either,

1. By virtue of a grant or concession, made before the 24th of January, 1818, by His Catholic Majesty, or by his lawful authorities; or,

2. By virtue of some other valid title, known to, and recognized by the laws of Florida.

II. The most important of the suggestions above referred to, viz., the alleged liability of the King of Spain to indemnify Forbes & Co. for their losses, &c., is not correct in point of fact. Neither the law of nations nor any special promise nor any existing treaty, inposed on him any such obligation. *Besides, if [*720 such obligation existed, the duty of auditing and settling the accounts belonged alone to the intendency of the province; and the Spanish government could not be bound for the payment of any particular demand, on the mere admission of the Indians.

III. The claim, in the present case, though of land within the territorial limits of the Floridas, does not profess to be founded on any original substantive grant made by the King of Spain or his officers, but on cessions made by Indian tribes, and on alleged ratifications and confirmations thereof, and acquiescence thereiu, by the Spanish authorities. In this respect, the present case differs from all the cases hitherto submitted to this court.

IV. The Indian deeds to Panton, Leslie & Co. did not, either in themselves or with the confirmation thereof by Governor Folch, convey to the grantees therein named, any legal right to the lands in question.

1. According to the laws of Spain in force in the Floridas, the absolute title in the soil, in all the lands described in the deeds, was, at the execution thereof, exclusively vested in the crown of Spain. The Indians, by those laws, were regarded as having no title whatever, except in and to such tracts as were left in their possession by the Spanish authorities, in conformity to the laws of the Indies; and no part of the premises in question were so allotted.

2. If the title of the Spanish crown was qualified, in respect to lands in the Floridas, by any Indian right of occupancy, that right existed only in favor of such Indian tribes, if any, as actually inhabited the lands, and as had not previously surrendered it; and the Spanish crown possessed the absolute and exclusive right to extinguish it.

3. The lands in question were, in fact, at the time of the cessions, vacant and uninhabited, and therefore no Indian right of occupancy could exist therein.

4. The original Indian right of occupancy, if any ever existed, from the shores of the gulf, as far as the flowing of the tide up the bays, rivers and inlets, in the premises in question, was extinguished by solemn compact between the government of Great Britain and the Indians in the year 1765; and by the Treaty of 1783, Spain succeeded to all the rights of soil and *sovereignty, previously possessed [*721 by the British crown. As to the greater part of the lands decribed in them, the Indian deeds were therefore invalid.

5. The deeds were executed by Indians, residing, with a trivial exception, within the territorial limits of the United States. The cessions were not the act of the Seminole nation, every town and village of which was interested in the Indian right of possession.

6. The Indians could not sell to the subjects of Great Britain, land within the jurisdiction of Spain, on which was erected the fortress of St. Mark's, then occupied and garrisoned by the troops of Spain, and since ceded and delivered by the Spanish government to the United States.

7. William Panton and John Leslie, of the house of Panton, Leslie & Co., were both dead, and no such firm existed in Florida as that of Panton, Leslie & Co., at the time of executing the several deeds, and at the time of their confirmation by Governor Folch.

8. Panton, Leslie & Co. were foreigners. They had not taken the oath of allegiance to the crown of Spain, without which they could receive no grant of land in Florida, from the subordinate officers of the government.

9. There is no proof that the governors-general of Louisiana authorized or approved the purchases in question.

10. The original acts of confirmation of the Indian sales by Governor Folch to the house of Panton, Leslie & Co., and to the house of John Forbes & Co., have not been produced by the petitioners, nor their absence satisfactorily accounted for. There is no evidence, then, that any formal titles were given by Governor Folch to the grantees for the land in question.

11. Governor Folch had no power to ratify and confirm the Indian cessions in question.

(1.) Because the power to ratify such cessions was not within the scope of his general authority, nor had he any special authority to ratify the same.

(2.) Because the lands, with a small exception, were situated within the Province of East Florida, and out of his jurisdiction.

(3.) Because the royal order of 1798 vested in the intendants the exclusive power of granting **722***] and conceding all kinds *of land; and at the date of the supposed grants, Juan Ventura Morales was Inteudani of West Florida.

V. If the titles executed by Governor Folch could be considered as original substantive grants (which is by no means admitted), they would still be invalid by reason of their repugnancy to the laws, ordinances, usages and regulations of the Spanish government. As to the lands in East Florida, they must certainly be invalid.

VI. The facts and circumstances attending this case, and relied on by the appellants, do not amount to any such acquiescence on the part of the King of Spain and his lawful authorities as would, according to the laws and usages of that kingdom, vest a valid title in the grantees. And all presumption of such acquiescence is conclusively rebutted by the subsequent grants actually made by the King himself.

VII. No title by prescription exists in this case.

VIII. The permission granted by the Captain-General of the Island of Cuba to the house of John Forbes & Co. to sell the lands in controversy to Colin Mitchell, related only to the lands described in the cession of 1804, and was not a judicial decision on the validity of the title. It created no estate either in the grantees or those claiming under them.

IX. The Captain-General of the Island of Cuba had no jurisdiction over the lands in Florida. The royal domain of Florida was under the exclusive control and superintendence of the intendancy.

X. The various circumstances and arguments relied on by the appellants being, for the reasons above stated, each of them insufficient in itself to sustain the present claim, they must, from the peculiar nature of this case, be equally insufficient in the aggregate.

XI. The United States have a clear title to the fortress of St. Mark's and its appurtenances, which, even if the claim be allowed in other respects, must be excepted by definite bounds therefrom, and should have been so excepted in the petition.

On the 14th of March, the case having been argued, and the opinion of the court being about to be delivered by Mr. Justice Baldwin, Mr. Butler and Mr. Call, for the United States, moved to postpone the final disposition of the case until next term.

*The Attorney-General stated that [**723** the messenger who had been dispatched to Havana had on the day preceding returned to the city of Washington, and had brought with him documents of great importance to the just decision of the case; and that information had been received by the Department of State that other documents, showing the action of the government of Spain in relation to titles to lands in Florida, were preparing in Havana by the consul of the United States there, who had been specially commissioned for the purpose, which would be received before the next session of the court. These documents were represented by the agent at Havana to be very important in the cause. The motion was opposed by Mr. White, Mr. Ogden, Mr. Berrien, and Mr. Webster, of counsel for the appellants; and supported by Mr. Call and Mr. Butler. The motion was held under advisement until the 17th of March, when,

Mr. Chief Justice MARSHALL said:

The court has taken into its serious and anxious consideration, the motion made on the part of the government to continue the cause of *Mitchel* v. *The United States* to the next term.

Though the hope of deciding causes to the mutual satisfaction of parties would be chimerical, that of convincing them that the case has been fully and fairly considered, and that due attention has been given to the arguments of counsel, and that the best judgment of the court has been exercised on the case, may be sometimes indulged. Even this is not always attainable. In the excitement produced by ardent controversy, gentlemen view the same object through such different *media* that minds not unfrequently receive therefrom precisely opposite impressions. The court, however, must see with its own eyes, and exercise its own judgment, guided by its own reason.

The motion is founded on the expectation that by the next term admissible evidence may be obtained which will shed much light on this cause, and change essentially its present character. This motion is opposed on the ground that the delays have already been excessive; that a farther continuance for twelve months would affect one of the parties most injuriously, *and that no rational foundation [**724** is laid for the opinion that new and important

additions will or can be made to the information the record at present contains.

The cause was docketed on the 2d of February, 1831. On the 26th of the same month a motion was made on the part of the United States to bring on the case for argument at that term. This motion was opposed and was overruled. The reasons of the court are not recollected; but the motion was in opposition to a positive rule, and must for that cause alone have been rejected.

In March, 1832, the parties were willing to bring on the cause, but the court thought it too late in the term to take it up, and it was continued.

In 1833 and in 1834 the cause was continued, on the motion of the attorney for the United States, supported by the same arguments which are now urged.

This cause was commenced in the District Court of the United States for the territory of Florida, in October, 1828. The degree of intelligence which has been employed in preparing the record for a final decision, gives the most absolute assurance that from the commencement of the controversy, it must have been perceived that the case depended essentially on the sanction given by the authorities of Spain to the grants made by the Indians. It was perceived, and great efforts were made in the District Court by both parties for the establishment of this fact. A vast mass of evidence has been collected on it, and is to be found in the record. An inspection of that evidence goes far to establish the opinion that it cannot be materially varied.

The government has unquestionably made great exertions—we believe all that could be made—to obtain any additional documents which the case may furnish. No difficulty has been opposed by the Spanish government to the inquiries of the American agents. On the contrary, every facility has been given to them. We cannot doubt that the most important documents would be the most immediately forwarded. Those which have arrived have been inspected. They are not believed to vary the case; many of them are undoubtedly important, but they were already in the record, and have been considered. The transfer of all sales of 725*] crown lands from the *political to the Treasury Department, from the governor to the intendant, and the ordinance by which this change was effected, were already in possession of the court, and had been maturely considered. The documents referred to were chiefly in the record.

We are not satisfied, from the communications of the agent of the United States, that the additional papers to which he alludes, and which he hopes to obtain, can materially affect the merits of the case. With this strong impression on our minds, we should not be justified in granting a still farther continuance. The opinion of the court will be delivered.

Mr. Justice BALDWIN delivered the opinion of the court:

The land in controversy is claimed by the United States in virtue of the Treaty of Cession by Spain, by which the territory and sovereignty of the two Floridas were acquired, in consideration of $5,000,000, paid in extinguishment of certain claims of the citizens of the United States on the government of Spain. Colin Mitchel claims, by deeds from various tribes of Indians belonging to the great Creek Confederacy, to Panton, Leslie & Co., to John Forbes & Co., and to John Forbes, confirmed by the local authorities of Spain, whose right has become vested in him by sundry mesne conveyances, to which it is unnecessary to refer, as the regular deraignment of whatever title was vested in the original grantees to the present claimants is not questioned. (Record, 362.) The lands are in four separate tracts, extending from the mouth of the River St. Mark's, outside of the islands along the sea-coast, to the west end of St. Vincent's Island, west of the mouth of the River Appalachicola; thence to that river about five miles from its mouth, up the same for many miles; thence by a back line to a point on the western bank of the St. Mark's above the old fort of that name, and down the said river to the sea. It is unnecessary to refer to the bounduries of the separate tracts, or the particular designation of the lines and points of the whole body of lands, as they are not a subject of controversy in this case; the quantity, as estimated by the claimant, is one million two hundred and fifty thousand acres (Record, 5); and by the Spanish officers, one million three hundred and ninety-one thousand arpents. (Record, 224.) The history of the claim is this:

*The commercial house of Panton, [*726 Leslie & Co. had long been established at St. Augustine, in East Florida; it had extensive connections and great credit in England, and its operations were very great. After Spain had taken possession of the Floridas, in virtue of the Treaty of Peace in 1783, the king, by a royal order, gave them license to carry on and continue their commercial operations in those provinces and Louisiana. (Record, 164–167, 236–281, 157–160.) As they were an English house, an oath of allegiance was required, which was taken by Mr. Panton (Record, 127, 128) and by Mr. Leslie, for himself and the other members of the firm who were not in the province (Record, 275, 281, 282) in 1786, with which the Spanish government was satisfied, as a compliance with the royal orders of the same year. (Record, 160–164).

This house conducted its affairs to the entire satisfaction of the successive governors-general of Louisiana (Record, 120–129) and the local authorities of the Floridas; rendered important services to the crown; met with many and great losses, amounting, by the estimate of the Marquis of Casa Calvo, then Governor-General of Louisiana, in 1800, to $400,000. (Record, 125, 136, 147, 148.) Five of his predecessors had recommended the awarding some indemnity to the house; they had made repeated claims upon the crown, the justice of which had been acknowledged by all the local authorities during all the changes of administration (Record, 121, 122, 132, 133, 134), in their numerous dispatches to the miuistry, which had been submitted to the king. (Record, 130, 374.) They concurred in representing to the king the great importance and services of the house as a political instrument of the government; that they had a right to indemnity from the king; that the situation of the house was such, that they

must sink under their losses if it was not afforded; and that it must be sustained and preserved as indispensable to retain any control over the Indians, and secure the possession of the provinces intrusted to their care. (Record, 130, 139, 143–152, 151, 252–257, 302, 580.)

In consequence of the repeated solicitations of the house to the king for compensation, a royal order was directed to the Captain-General of Cuba on the subject of the indemnities proper to be given them; in reply to which, among other propositions made by the Governor-
727*] General of Louisiana, was a grant *of twenty leagues square of royal lands west of the Mississippi, or a loan of $400,000 without security. (Record, 144, 145.) This shows the sense of that high officer of the value of the services of the house, the extent of their losses in their exertions in favor of the government, with the measure of remuneration which he considered to be due of right in 1800. (Record, 144, 147.)

Among the losses sustained by the house, was a large amount due by the Seminole Indians prior to 1800, and for robberies of their stores in 1792 and 1800 by members of that tribe, headed by the celebrated adventurer Bowles, exceeding in all $60,000 (Record, 22–28); of which they were unable to procure any payment from the Indians, but who had expressed a willingness to make compensation by a grant of their lands.

Early in 1799 the house made an application to the Governor-General of Louisiana for leave to purchase from the Indians as much land as would satisfy the above claims, which was favorably received by both him and his successor. (Record, 54, 56.) Negotiations with the Indians was followed by a deed of cession from them, in [illegible] of the large tract containing one million two hundred thousand arpents. (Record, 554.)

This deed was confirmed at a general council of the nation and its chiefs held at Pensacola in 1806, in the presence of Folch, Governor of West Florida (Record, 568, 584, 590, 614), in all the form and solemnity which Indians could give it. This governor had previously given leave to make the purchase on a petition presented to him by the house in January, 1804, setting forth the circumstances of the case; which was granted on only one condition—that they should not dispose of the lands without notice to and knowledge of the government; and in December, 1806, gave his full confirmation to the grant of the Indians made to Panton, Leslie & Co. (Record, 58, 84.) Another application was made to the same governor in 1807 for his permission to make an additional purchase from the same Indians, which was granted in December, 1810, on condition that the house should cede the whole or part of the lands to the king, if he should want them, at the price at which they acquired them, and not dispose of them without notice to the government. (Record, 273, 274, 275.) In the following
728*] *year the Indians granted the other tracts between the rivers Wakulla and St. Mark's, including the fort, which was also confirmed by the governor (Record, 606) at a great public council of the Indians at Pensacola; this tract contained by estimation ninety-seven thousand arpents. At the same time another tract on the sea-coast, including some islands at and west of the mouth of the Appalachicola, was in like manner granted by the Indians and confirmed by the governor to John Forbes & Co., the successors of Panton, Leslie & Co. (Record, 106), containing sixty-five thousand arpents. At the same time and place there was granted and confirmed to John Forbes an island in the Appalachicola containing six thousand eight hundred arpents, for which no consideration was paid; the grant being a gratuity by the Indians to Forbes, in consideration of his services and friendship rendered and shown to them for years before. (Record, 217–224.) It is not deemed necessary to recite more specially the various original deeds from the Indians, or those made in councils after the lines had been marked which designated the boundaries of the respective grants, nor the grants of the Governor of West Florida, confirming them by titles in form delivered to the parties; they are in form and substance alike (Record, 28–106, 430, 447), and no question has arisen on their terms.

Those of the Indians recite the considerations which led to the grants, convey the lands with a warranty of their title by ascertained boundaries (Record, 39, 40, 49, 91, 95, 86, 98, 69, 82–84, 29–36, 59, 63, 95–108, 562); those of the governor ratify and confirm the grants in full and direct dominion (Record, 37, 49, 91, 95, 111) and in full property, put the grantees in possession, and promise to defend and maintain it (Record, 106, 137, 145), all of which he declares is done by using the powers vested in him. (Record, 75–91, 30–37, 99, 233, 234.) They are drawn up in great form; contain a perfect recognition of the Indian grants, and give to them all the validity which he could impart to them. (Record, 106, 131, 175, 191, 193.) They are made in the name of the king, executed and attested in all due formality, and their authenticity proved as public documents, and by the testimony of witnesses to the official signatures. (Record, 562, 579, 615, 620, 623, 646, 611, 612, 613–626.) The claims of the house upon the Indians *for debts due since [*729
1789 and depredations committed, were notorious to the government and inhabitants of Pensacola (Record, 273, 274, 536, 590), as were the purchases; and their confirmation by the Indians, at which two thousand are computed to have attended in 1811 (Record, 592, 601), is proved as a fact by witnesses present in the different councils; so is the fact of the ratification by the governor. (Record, 579, 614, 615, 620, 623, 646.) The original deeds, and the demarcation of lines and boundaries were made (Record, 42, 43, 100, &c.) in the presence of the commandant at St. Mark's (Record, 73, 97, 104, 108), exercising the offices of lieutenant-governor and sub-delegate of the intendancy, or were approved by him; every act done in relation to the cessions and their ratification, from the first application to the governor-general in 1799 to their consummation in 1811, was public and notorious to both Indians and whites. (Record, 590.) Governor Folch reported all his proceedings to the Captain-General of Cuba, by whom they were approved, who declared that the king would confirm them, and, as some of the witnesses say, declared that he had confirmed them. (Record, 228, 229, 232, 568,

572, 584, 594.) From the time of the first cession in 1804, the Indians acknowledged the validity of the grants, were satisfied with them, called the land the white land, or the land of the whites (Record, 606); asked permission from the house to hunt upon them, and with the exception of some occasional depredations, respected their possessions and property. (Record, 619–621, 623.) Their title, too, was equally respected by the local government, and all the officers of the king (Record, 234, 574, 624, 625); nor from him to the lowest does there appear to have been expressed any dissatisfaction at any of the acts of Governor Folch, or the least doubt of the perfect validity of the title; though the claim of the house to the whole land conveyed was perfectly known and evidenced by a partial actual possession, taken at an early period and continued till the cession of the provinces. (Record, 620, 624, 625.) There is no evidence in the record that either the Indians, the governor, or intendant ever made a cession, grant, order of survey, or gave permission to settle within the boundaries of any of the grants. It is also a circumstance of no small consideration that, notwithstanding the long and inveterate controversy be-[*730 tween *the governor and intendant about their powers to grant lands even in small tracts, there was none in relation to these. Yet the intendant had full notice of them, spoke of them, but made no objection (Record, 571) or perferred any complaint to the captain-general or the king, although the quantity of land thus granted to this house was nearly double to the whole amount of the grants of royal lands made by the government of West Florida. (Record, 421, 469.) It was also proved that in the opinion of those who know the land, as well as the officers of government, it was not worth, at the time, the amount of the just claims of the house on the Indians; that the grants were taken as the only means of their indemnification, and that the purchase was much less advantageous to them than to the king, who thereby became absolved from a claim not only too just to deny, but too large to satisfy with convenience. (Record, 570–574, 579, 556, 572, 625.) It is also proved that the Indians who made the cessions occupied the lands for hunting-grounds; were deemed the owners of them as Indian lands, and had three settlements upon them previously (Record, 559, 565, 576, 585), and that the country was claimed by the Seminoles. (Record, 12, 52, 607.) The lines were marked by persons appointed by the governor in presence of the Indians, who consented to them (Record, 621–623, 632), and the governor gave formal possession to the house (Record, 625) according to the plats of the several grants exhibited to him, which the witnesses declare to have corresponded with the lines marked upon the ground, and those recited in the deeds and petitions. (Record, 623.)

In opposition to this mass of documentary and parol testimony, in support of the allegations of the petitioners that the grants were in fact made and confirmed in the manner and for the reasons and considerations set forth, no direct evidence appears in the record. Some of the witnesses were examined as to the supposed influence of the house with Governor Folch, but the imputation was negatived, and the proceedings throughout declared to have been in good faith. (Record, 554–583.)

So far, then, as the merits of the case depend on the genuineness of the deeds and documents, the facts of the grants and confirmations by the Indians and governor, the marking the lines and possession of the land, the good faith of the whole *transaction, the absence of [*731 fraud, the authority of the Indian chiefs, as representatives of their respective tribes, we entirely concur in opinion with the court below. That the grants were made *bona fide*, for a valuable consideration, of the adequacy of which the Indians were competent judges, if they had any right in the lands which they could convey; that the ratification of the governor was fairly and fully made, and for good and sufficient reasons, of which he was the judge, if he had competent authority to give effect and validity to Indian cessions of the land in controversy. The view which the learned judge took of these questions, after a thorough, searching examination of the documents and evidence, is so entirely satisfactory, that we have only to express our assent to the conclusions at which he arrived. (Record, 662–669.)

There is, however, one subject which was considered by him, into which we do not feel at liberty to inquire, which is the water-mark in the paper on which the governor's permission of the 7th of January, 1804, was written, noticed and commented on at large by the judge. (Record, 706.) This objection was not made in the court below, at the hearing, or in the argument, so that no opportunity was afforded to the petitioner to produce any evidence on the subject, or to his counsel to answer the objection. This court also refused to grant him a commission to take testimony to explain and account for the water-mark, or permit him to read the *ex parte* evidence offered to explain it; because in an appellate court no new evidence could be taken or received without violating the best established rules of evidence and law. Under such circumstances, it would be dealing to the petitioner a measure of justice incompatible with every principle of equity, to visit upon his title an objection which he was not bound to anticipate in the court below, which he could not meet there, and which this court were compelled to refuse him the means of removing by evidence. We will not say what course would have been taken if his title had depended on the date of the paper alluded to; as the case is, it is only one of numerous undisputed documents tending to establish the grant, the validity of which is but little, if it could be in any degree affected by the date of the permission.

It is objected by the counsel of the United States that the *original acts of con-[*732 firmation of the Indian sales by Governor Folch are not produced, and that the copies in evidence are not legal proof of such acts. This objection seem to us not to be well founded in fact or law. The original Indian deeds were procured by the agent of the United States from the public archives in Havana (Record, 529, &c.), and are now before us. The deeds of confirmation were made according to the rules of the civil law adopted by Spain, and in force in Florida and Cuba; the original is a

record, and preserved in the office, which cannot be taken out; a *testimonio* or copy is delivered to the party, which is deemed to be and is certified as an original paper, having all the effect of one in all countries governed by the civil law. Such is proved to be the law of those colonies, as a fact, by Mr. White (Record, 628); such is the form of the certificates in this case, varying in phraseology somewhat, but agreeing in substance and affect (Record, 19, 38, 45, 50, 58, 91, 106, 111), in perfect accordance with the civil law adopted in Louisiana, and recognized by this court in the case of *Owings* v. *Hull*, decided at the present term. We therefore consider those now produced as original deeds of confirmation by the governor, duly certified and proved.

It is objected that the deeds of 1804 and 1806, to Panton, Leslie & Co., were inoperative to pass the lands, they having died previously.

It is in proof as a fact that Forbes & Co. were the successors in business and interest to Panton & Co. This change of the name and partners of the house after the death of Mr. Panton was known to the officers of the local government and the king, who, by a royal order in 1805 (Record, 262), and another in 1807 (Record, 270), directed that it should have no effect on their privileges. To the king it mattered not whether the lands were conveyed to the house as a firm, or to the partners *nominatim*; they, it seems, preferred considering the lands as a part of the general effects of the partnership, and received the deeds accordingly; as it concerned only them, and as there has been produced no law of Spain invalidating such a grant, the objection cannot be sustained.

Another objection, on account of an oath of [*733] allegiance not *having been taken by the grantees, is removed by the evidence already referred to, and need be no farther considered.

It is objected that the grant of 1811 is invalid, because it comprehends the fort of St. Mark's, then actually occupied by the troops of the king. It is in full proof that the site of St Mark's and the adjacent country was within the territory claimed by the Seminole Indians. (Record, 12, 131, 603—607, 618.) It is not certain, from the evidence, whether it was purchased from the Indians, or merely occupied by their permission; there seems to be no written evidence of the purchase, but no witness asserts that possession was taken adversely to the Indian claim, and it is clearly proved to have been amicably done. (Record, 232, 306, 581.) Whether the Indians had a right to grant this particular spot then or not, cannot affect the validity of the deeds to the residue of the lands conveyed in 1811. The grant is good, so far as it interfered with no prior right of the crown, according to the principles settled by this court in numerous cases arising on grants by North Carolina and Georgia, extending partly over the Indian boundary, which have uniformly been held good, as to whatever land was within the line established between the State and the Indian Territory. (*Wear* v. *Danforth*, 9 Wheat., 675; *Patterson* v. *Jenks*, 2 Peters's Rep., 216; and *Wear* v. *Patterson*, decided by the Supreme Court of the United States, January, 1835, *ante*, 663.) As to the land covered by the fort and appurtenances, to some distance around it, it becomes unnecessary to inquire into the effect of the deeds, as the counsel of the petitioners have in open court disclaimed any pretensions to it.

Another objection is of a more general nature, that the grantees did not acquire a legal title to the lands in question. But it must be remembered that the acts of Congress submit these claims to our adjudication as a court of equity; and, as often and uniformly construed in its repeated decisions, confer the same jurisdiction over imperfect, inchoate and inceptive titles as legal and perfect ones, and require us to decide by the same rules on all claims submitted to us, whether legal or equitable.

Whether, therefore, the title in the present case partakes of the one character or the other, it remains only for us to inquire whether that of the petitioner is such in our opinion that he *has, either by the law of nations, the [*734 stipulations of any treaty, the laws, usages, and customs of Spain, or the province in which the land is situated, the acts of Congress or proceedings under them, or a treaty, acquired a right which would have been valid if the territory had remained under the dominion and in possession of Spain.

In doing so, we shall not take a detailed review of the leading cases on Spanish grants already decided by this court, in relation to those lands which formed a part of the royal domain, in contradistinction to those which may be considered as Indian lands claimed by Indians, by their title, whatever it may be. Those comprehended within the claim of the petitioners being of the latter description, as they contend and thereupon rest their title, it will suffice to state some general results of former adjudications which are applicable to this case, are definitively settled, so far as the power of this court can do it, and must be taken to be the rules of its judgment. They are these:

That by the law of nations, the inhabitants, citizens, or subjects of a conquered or ceded country, territory, or province, retain all the rights of property which have not been taken from them by the orders of the conqueror, or the laws of the sovereign who acquires it by cession, and remain under their former laws until they shall be changed.

That a treaty of cession was a deed or grant by one sovereign to another, which transferred nothing to which he had no right of property, and only such right as he owned and could convey to the grantee. That by the treaty with Spain the United States acquired no lands in Florida to which any person had lawfully obtained such a right by a perfect or inchoate title, that this court could consider it as properly under the second article, or which had, according to the stipulations of the eighth, been granted by the lawful authorities of the king; which words, "grants" or "concessions," were to be construed in their broadest sense, so as to comprehend all lawful acts which operated to transfer a right of property, perfect or imperfect. (6 Peters, 710; 7 Peters, 86, 88; 8 Peters, 445, 449, 450, 486.)

That the effect of the clauses of confirmation of grants made was that they confirm them presently on the ratification of the treaty, to those in possession of the lands, which was declared

735*] *to be that legal seisin and possession which follows a title, is coextensive with the right, and continues till it is ousted by an actual adverse possession, as contradistinguished from residence and occupation. (6 Peters, 743; 8 Cranch, 229, 230; 4 Wheat., 213, 233; 4 Peters, 480, 504, 506; 5 Peters, 354, 355.)

That the United States by accepting the cession under the terms of the eighth article, and the ratification by the king, with an exception of the three annulled grants to Allegon, Punon Rostro, and Vargas, can make no other exceptions of grants, made by the lawful authorities of the king. (8 Peters, 463, 464.)

That the meaning of the words lawful authorities in the eighth article, or competent authorities in the ratification, must be taken to be "by those persons who exercised the granting power by the authority of the crown." That the eighth article expressly recognizes the existence of these lawful authorities in the ceded territories, designating the governor or intendant, as the case might be, as invested with such authority, which is to be deemed competent till the contrary is made to appear. (8 Peters, 449 to 453.)

That "by the laws of Spain" is to be understood the will of the king expressed in his orders, or by his authority, evidenced by the acts themselves, or by such usages and customs in the province as may be presumed to have emanated from the king, or to have been sanctioned by him, as existing authorized local laws. (6 Peters, 714 to 716.)

In addition to the established principles heretofore laid down by this court as to the legal effect of an usage or custom, there is one which is peculiarly appropriate to this case. The act of Congress giving jurisdiction to this court to adjudicate on these causes, contains this clause in reference to grants, &c., "which was protected and secured by the treaty, and which might have been perfected into a complete title, under and in conformity to the laws, usages and customs of the government under which the same originated." (6 Peters, 708, 709; 3 Story's Laws U. S., 1959, 1960.)

This is an express recognition of any known and established usage or custom in the Spanish provinces, in relation to the grants of land and the title thereto, which brings them within a well-established rule of law. That a custom 736*] or usage saved *and preserved by a statute has the force of an express statute, and shall control all affirmative statutes in opposition, though it must yield to the authority of negative ones, which forbid an act authorized by a custom or usage thus saved and protected (4 Co. Inst., 86, 298); and this is the rule by which we must test its efficacy according to the act of Congress, which we must consider as of binding authority.

In taking possession of Florida pursuant to the treaty, and in establishing a government in and over it, Congress have acted on the same principles as those which were adopted by this court in the former cases. In the Act of 1821, for carrying the treaty into execution, Congress authorizes the vesting the whole power of government in such person as the president may direct for the maintaining the inhabitants in the free enjoyment of their property. (Pamphlet Laws, 47.)

The governor thus appointed, by his proclamation in the same year, announces to the inhabitants that he has been invested with all the powers, and charged with all the duties heretofor held and exercised by the Captain-General and of the Intendant of the Island of Cuba over the Floridas; and the governor thereof recites the foregoing act of Congress, declares that they shall be maintained and protected in the free enjoyment of their property, &c., and that all laws and municipal regulations which were in existence at the cessation of the late government remain in full force. (Pamphlet of 1822, 113.)

The tenth section of the Act of 1822 contains the same pledge for the protection of property, and the thirteenth continued in force the existing laws, till altered by the local legislature then organized. (Pamphlet, 15.)

The formal act of the surrender of the Floridas by Spain to the United States was made by the commandants of both of the provinces, by the authority of the Captain General of Cuba under a royal order. (Phamplet, 110.)

These are most solemn acts of both governments, which, as the proceedings under the treaty of cession, are made a rule for our guide in deciding on the validity of the title to lands in the provinces, they have all been ratified and approved by the king and Congress, affording the highest possible evidence of the true meaning of both the high contracting parties to the treaty. They point directly to the kind of government *which existed [*737 before the cession as being vested in the Captain-General and Intendant of Cuba, and the governors of the provinces, as the supreme legislative, executive, and judicial power, subordinate to the king only. And as it became afterwards in the hands of the governor alone by act of Congress subordinate only thereto, while under both, the government was administered in conformity to the local laws and municipal regulations. It cannot therefore be doubted that among the other powers of the former government, that of granting lands was invested in some of its officers, nor that such officers were the governor, the intendant, or captain-general, as the case might be: thus exhibiting a union of opinion between the King of Spain as well as the legislative and judicial departments of this government, as to the meaning of the treaty, which cannot be without its influence on its true construction and bearing on the rights of parties now before this court, sitting in an appellate court of equity, directed to decide "in conformity to the principles of justice" and the laws and ordinances of the government under which the claim of the petitioner originated, they must be our guide.

Colin Mitchel claims the land in controversy as a purchaser from Panton, Leslie & Co., John Forbes & Co., and John Forbes, who were purchasers from the Seminole or Tallapoosa Indians, *bona fide*, for a valuable consideration paid by one party and received by the other by force or contract, accompanied with the legal seisin and possession of the whole, and actual *pedis possessio* of a part, under a claim of right and title to the whole by grant. The equity of the parties from whom Mitchel purchased commenced in 1789, 1790, 1792, when the depredations were first committed and the debts contracted which formed the

consideration of the Indian deeds, the debts increasing till 1800, and the depredations then renewed. A claim early made on the Indians for compensation and on the government of Spain for indemnity, continued till an agreement for the cession of lands by the former was made in 1800, and carried into effect in 1804 and 1806; when it was carried into grant, ratified and confirmed by the Indians, the Governor of West Florida, and Captain-General of Cuba, without an interfering claim till the cession to the United States in 1820, 1821. On the other hand, the United States claim the 738*] land *by purchase from the King of Spain, made *bona fide*, for a valuable consideration fully paid, but with full and direct notice of the equity of Forbes & Co., and the purchase in the name of Panton, Leslie & Co., of which Forbes was a partner, which notice was as early as 1804. (Record, 283, 286, 290, 291, 568.) The earliest equity claimed by the United States was in January, 1818, when the cession was first proposed; the first agreement to convey by Spain was in 1819, the date of the treaty; and the final grant was made in 1820, the date of the ratification; and possession first taken in 1821, pursuant to the conveyance of the treaty.

Thus viewing the contending parties, we proceed as a court of equity to inquire whether, at the time the cession by the treaty took effect in favor of the United States, there was a right of property in Colin Mitchel to the lands included in his grants, or whether they had been previously granted by the lawful authorities of the king. That they were granted in fact is incontestable; and they were private property, if there was a grant competent by law to vest a title.

It is contended by the United States that the acts of Governor Folch, in the permissions to purchase from the Indians, and the ratifying of and confirming their deeds, are void, as the lands were not in West Florida, over which province alone he had any jurisdiction.

There seems no doubt that under the British government the River Appalachicola remains the boundary between East and West Florida, as it was so established by the proclamation of the king in 1763 (1 Laws U. S., 444), but it does not appear that Spain had adopted it in administering the government of those provinces by any royal order, or that such was a common opinion of the inhabitants (Record, 602, to 604); on the contrary, it appears that so early as 1785, Don Galvez, then Governor-General of Louisiana, considered the district of St. Mark's de Appalachy as a dependency of his government, and in 1686 placed it under care of the government of West Florida, and ordered the establishment of a post there by a detachment from the garrison of Pensacola, which acts were approved by a royal order in March, 1787. (Record, 306, 197.) These orders were acquiesced in by the Governor of East Florida, who appears to have exercised no jurisdiction 739*] within that *territory, or to the west of it, after 1786. (Record, 260). There is abundant evidence in the record that that post, the circumjacent territory, with what lies between it and the Appalachicola, was a dependency on and subject to both the civil and military jurisdiction of the Governor of West Florida, and was so considered by all the officers of the government, the captain-general and the king, as appears from many documents. (Record, 163, 165, 167, 168, 189, 190, 201, 202, 203, 209, 227, 228, 234, 236, 266, 267, 297, 298, 304.) The fact of the exercise of jurisdiction over that territory by the Governor of West Florida is also established by the concurring testimony of many witnesses (Record, 582, 600, 601, 602, 604), as is also the fact of its surrender by him to the United States as a part of the territory under his command. (Record, 602: Laws of 1832, pamphlet, 112.)

But evidence of the fact still more conclusive, and its most solemn recognition by both governments, is to be found in the formal act of surrendering the sovereignty and possession of the province by Spain to the United States. The Governor of West Florida "placed the commissioner of the United States in possession of the country, territories and dependencies of West Florida, including the fortress of St. Mark's, with the adjacent islands, dependent on said province." (White, 198; Pamphlet Laws, 112.) So it was accepted and is yet held by the United States, and so we must consider it is as understood by Congress in the various laws passed since the cession, and the proceedings therein authorized under the treaty in reference to East and West Florida. The boundary between them must be taken to be that which existed under Spain from 1785 till 1821, as incontestably proved, and most solemnly admitted by the United States, up to which the powers of the Governor of West Florida, whatever they might be, could be exercised in their plenitude, both as a government *de facto* and a government *de jure*.

It becomes needless to inquire whether, after these solemn acts, it is competent for the United States to now contest the existence of such boundary: it suffices for this case, that it is abundantly established by all the evidence, which is uncontradicted, and that the lands in controversy are situate within West Florida, according to the boundaries recognized by both *governments. This objection cannot [*740 therefore be allowed to prevail. It is next contended that the power to grant lands in West Florida was not vested in the governor, but was confided exclusively to the intendant; this is clearly proved to be the settled law of that province as to royal lands, which were the property of the crown, and is admitted by the counsel of the petitioner.

But the reverse is, we think, equally apparent as to Indian lands, until their right had been abandoned, and the land become annexed to the royal domain by a process in the nature of an office at common law. (White, 25, 40, 42, 79, 43, 47, 215.) The relations between the Indians and the government of Spain were considered as matters of the deepest political concern, in nowise connected with its fiscal operations; the commerce with the Indians was, as a political instrument, intrusted exclusively to the governors, as clearly appears by their correspondence with each other, the Captain-General of Cuba, and the ministry in the mother country, and regulated by royal orders (Record, 113-153), with which the intendancy had nothing to do. (Record, 151, 571, 579, 586, 587, 590; White, 32.)

It was a part of the governor's oath, as prescribed by the laws of the Indies, "that you shall take care of the welfare, increase and protection of the Indians." (Record, 237.) He was their protector, whose duty it was to examine whether claims upon them were well founded, and if so, contribute by all possible means to their being paid (Record, 557), but not to lend his sanction, or allow the smallest injury to be done to them. (Record, 571, 232.) The fact of the supervision of Indian sales of their land by the governors of provinces and commandants of posts, in acts of confirmation and putting the purchasers in possession, is very clearly established by the report of the land commissioners of the United States in Louisiana. (Record, 325–335.) It was exercised by Don Galvez, Governor-General of Louisiana, as early at least as 1777, in confirming an Indian sale of the great Houma tract on the Mississippi (1 Laws U. S., 551, 552, 554); and there is no evidence that this power was ever intrusted to or conferred on any other officer, nor that it was ever exercised by any other.

It was an authority expressly delegated to them by the laws (White, 232–234), and so reported [*741] by the commissioners (Record, *329); proved also as a fact by the former secretary of the province (Record, 572) and Governor Folch. (Record, 231–234.) It cannot, indeed, be well questioned that the governors and commandants of posts were the appropriate officers for these purposes, in the absence of any evidence of confirmations by intendants, with positive evidence of their approbation by the Captain-General of Cuba, in making (Record, 12) formal acts of confirmation without objection by the Intendant-General of Cuba, or by local intendants. When to these considerations is added another, arising from the circumstance of there being no instance of the rejection or disaffirmance of a deed confirming an Indian sale by any of the superior authorities in the provinces, or by the king, as is clearly established (Record, 336, 627, 628, and admitted in the argument, we cannot feel authorized to declare that Governor Folch usurped any powers vested in the intendant, in any of his acts relating to these lands.

The confirmation of similar grants made by acts of Congress, or by boards of commissioners acting under their authority, are also powerful evidence of the lawful exercise of the authority of these officers; and being proceedings under the treaty and laws, they are made a rule by which among others we may adjudicate on the claims of the present parties, in doing which we cannot sustain this objection without overlooking such a concurrence of evidence of various descriptions, as leaves no reasonable cause of a doubt of the authority of Governor Folch; especially when we connect with his first permission to make the purchase of 1804 the condition attached to it that the lands should not be disposed of without the giving notice to and knowledge of the government; and to that of 1811, that it should be conveyed to the king, if required, at the price at which it was purchased, and the mode in which that condition was performed and released.

Pursuant to these conditions, John Forbes applied to the Captain-General of Cuba in 1817 for permission to sell the land to the petitioner, which being referred to the assessor-general for his advice, he reported that the lands had been transmitted actually and lawfully in full property to Mr. Forbes, with a conditional title, or *título ouroso*, for which acquisition competent permission was given by Governor Folch, who *delivered titles of confirmation subsequently; whereupon a formal permission was [*742 given by the Captain-General to make the sale, which was a direct approbation of all the proceedings authorized by that governor, as well as that he was the officer designated for such purpose. (Record, 12, 52, 53.) Such a confirmation by an officer subordinate only to the king, performed so long after the acts done by the governor of a province who was under the control of the captain-general, must be referred to his legitimate authority competent for the purpose. It was done also on the deliberate advice of an officer responsible to the crown, which makes the presumption very strong, if not irresistible, that everything preceding it had been lawfully and rightfully done. (White, 25, 40, 43, 47, 49.) This proceeding is in the nature of an inquest of office, in analogy to the writ of *ad quod damnum*, which by the common law precedes the grant of any charter, license, or patent of the king, of anything which may be injurious to his or the rights of others, on which an inquest is taken, on whose report the king acts, on the advice of the proper officer or tribunal, makes the grant or withholds it, as advised. (3 Bla. Com., 259; 17 Vin. Abr., 171, 176; 7 Day's Com. Dig., 80.)

The report of the assessor-general seems to have been acted on as an inquisition at common law, finding that there was no obstacle to the making use of the powers intrusted to the captain-general. We should feel it to be an assumption of much responsibility to declare that on the evidence in this record, and the law arising upon it, that either of the officers referred to usurped powers not vested in them, or exercised them against or without the authority of the king.

The counsel of the United States pressed in argument the decision of this court in the case of *Arredondo*, as an affirmance of the right of the intendant of the province, or of Cuba, to grant Indian lands. In that case the lands granted had been in the possession and occupation of the Allachua Indians, and the centre of the tract was an Indian town of that name. But the land had been abandoned, and before any grant was made by the intendant a report was made by the attorney and surveyor-general on a reference to them, finding the fact of abandonment, on which it was decreed that the land had reverted to and become annexed to the royal domain.

*Considering this so be a judicial act [*743 in the nature of an inquest of office, and the decree of the intendant as making the fact a *res adjudicata*, we did not feel at liberty to look behind it for evidence on which it was founded; the consequence of which was, that by the judgment of a competent tribunal, the land was part of the royal domain, subject to the disposition of the intendant. There is no pretense of a similar proceeding having been had in relation to these lands, nor could there well

be an opposition to the evidence in the record, especially the report of the assessor-general in 1817, that they were the lands of the Semitoles at the time of the cession by them and the confirmation by Governor Foich. By the common law the king has no right of entry on lands which is not common to his subjects; the king is put to his inquest of office, or information of intrusion, in all cases where a subject is put to his action; their right is the same, though the king has more convenient remedies in enforcing his. If the king has no original right of possession to lands, he cannot acquire it without office, found so as to annex it to his domain. (2 Co. Inst., 46; Saville, 8, 9, pl. 20; Hob., 347; Hardress, 460; 7 Day's Com. Dig., 77; Gilbert's Ex., 109; 3 Bla. Com., 257; Fitz. N. B., 90 *b*.; 4 Co., 58 *b*.; 16 Vin., 552; 3 Co., 10, 11; 9 Co., 96, 95, 98; Hardress, 51, 52; Plow., 236, 486; 1 Co., 42; 5 Co., 52 *b*; Plow., 229, 230.) Such, too, seems to be the law of Spain in the Floridas and Cuba, as appeared in the case of *Arredondo*, and as it must have been understood by the Spanish authorities, when they acknowledged the Indian right to lands in the harbor of Pensacola to be an existing one in 1816. Nor is there any evidence in the record that their right ceased to be respected, or that lands which had been in their possession became annexed to the royal domain, till some official proceeding, founded on the law of Spain, in the nature of an office by the common law, had taken place under the proper authority. (White, 25, 40, 37.)

The United States have acted on the same principle in the various laws which Congress have passed in relation to private claims to lands in the Floridas; they have not undertaken to decide for themselves on the validity of such claims without the previous action of some tribunal, special or judicial. They have not authorized an entry to be made on the pos- [*744] session of *any person in possession, by color of a Spanish grant or title, nor the sale of any lands as part of the national domain, with any intention to impair private rights. The laws which give jurisdiction to the district courts of the territories to decide in the first instance, and to this on appeal, prescribe the mode by which lands which have been possessed or claimed to have been granted pursuant to the laws of Spain, shall become a part of the national domain, which, as declared in the seventh section of the Act of 1824, is a "final decision against any claimant pursuant to any of the provisions of the law."

Another objection is made to the title of the petitioner, on the allegation that by the Treaty of Picolata between Great Britain and the Creeks in 1765, the Indians had ceded all the lands in controversy between the sea and flow of the tide, in virtue of which they became the property of the crown and passed to Spain by the Treaty of 1783.

The fifth article of the Treaty of Picolata, made to prevent encroachments on the lands or hunting-grounds of the Creeks, stipulates that the boundary of the province of East Florida "shall be all the sea coast as far as the tide flows, in the manner settled with the great Tomachiches by the English," with all the country particularly described therein, which they grant and confirm to the king.

As this refers to a treaty or compact made with this chief, its meaning must be sought in it, and unless something can be found there which will make the expression more definite than the general terms "all the sea coast as far as the tide flows," it will require great latitude of construction, as to an Indian cession, to extend it from the St. Mary's around the peninsula of Florida to the mouth of the Appalachicola. The tract of country ceded lies on the sea-coast, east of a point formed by a line run from the source of St. John's, which is its southern boundary; the western boundary is a line run from the junction of the Ocklawa with the St. John's northwardly to the St. Mary's, nearly parallel to the sea coast, at an average distance of about thirty miles west. It would be stretching the meaning of this treaty very far to embrace within it an extent of sea-coast and contiguous land within the flow of the tide to its whole extent, when the extent of the lands ceded west of a line from the mouth of the Ocklawa to *the sea was so small. Be- [*745] fore we could do it, it must appear to have been so previously settled between the English and Tomachiches, as is referred to in the Treaty of Picolata. From the account given in M'Call's History of Georgia, the treaty with Tomachiches was held in 1733, and the cession of the sea-coast was only between the Altamaha and Savannah, extending west to the extremity of the tide-water. (1 M'Call's Hist., 37.)

As this is the act referred to, it must be taken in connection with the subsequent treaty to make it certain by the reference (6 Peters, 739), which entirely removes the objection, and shows the cessions of the sea-coast to be confined to that part which is between the St. Mary's and St. John's rivers.

The report of the surveyor-general in 1817, is very full on the subject of the boundaries between the British government and the Indians in East and West Florida. (Record, 184–194.) He says, "with regard to East Florida, I have never been able to discover that there has ever been any treaty or agreement with the natives of that province concerning the limits of their possession, nor in that of the Spanish authority." As the surveyor-general had referred to the Treaty of Picolata in his report, it is clear that it was construed by the Spanish government as it now is by this court.

We now come to consider the nature and extent of the Indian title to these lands.

As Florida was for twenty years under the dominion of Great Britain, the laws of that country were in force as the rule by which lands were held and sold; it will be necessary to examine what they were as applicable to the British provinces before the acquisition of the Floridas by the Treaty of Peace in 1763. One uniform rule seems to have prevailed from their first settlement, as appears by their laws; that friendly Indians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them as their common property from generation to generation, not as the right of the individuals located on particular spots.

Subject to this right of possession, the ultimate fee was in the crown and its grantees,

746*] which could be granted by the *crown or colonial legislatures while the lands remained in possession of the Indians, though possession could not be taken without their consent.

Individuals could not purchase Indian lands without permission or license from the crown, colonial governors, or according to the rules prescribed by colonial laws; but such purchases were valid with such license, or in conformity with the local laws; and by this union of the perpetual right of occupancy with the ultimate fee, which passed from the crown by the license, the title of the purchaser became complete.

Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abondoned them, made a cession to the government, or an authorized sale to individuals. In either case their right became extinct, the lands could be granted disencumbered of the right of occupancy, or enjoyed in full dominion by the purchasers from the Indians. Such was the tenure of Indian lands by the laws of Massachusetts (Indian Laws, 9, 10, 15, 16, 17, 18, 19, 21), in Connecticut (40, 41, 42), Rhode Island (52, 55), New Hampshire (60), New York (62, 64, 71, 85, 102), New Jersey (133), Pennsylvania (138), Maryland (141, 143, 144, 145), Virginia (147, 148, 150, 153, 154), North Carolina (163, 164, 58), South Carolina (178, 179), Georgia (186, 187), by Congress (Appendix, 16); by their respective laws, and the decisions of courts in their construction. (See cases collected in 2 Johnson's Dig., 15, tit. Indians; and Wharton's Dig., tit. Land, &c., 488.) Such, too, was the view taken by this court of Indian rights in the case of *Johnson* v. *M'Intosh* (8 Wheat., 571, 604), which has received universal assent.

The merits of this case do not make it necessary to inquire whether the Indians within the United States had any other rights of soil or jurisdiction: it is enough to consider it as a settled principle that their right of occupancy is considered as sacred as the fee-simple of the whites. (5 Peters, 48.) The principles which had been established in the colonies were adopted by the king in the proclamation of October, 1763, and applied to the provinces ac-747*] quired by the Treaty of Peace and *the crown lands in the royal provinces, now composing the United States, as the law which should govern the enjoyment and transmission of Indian and vacant lands. After providing for the government of the acquired provinces (1 Laws U. S., 443–444) it authorizes the governor of Quebec, East and West Florida, to make grants of such lands as the king had power to dispose of, upon such terms as have been usual in other colonies, and such other conditions as the crown might deem necessary and expedient, without any other restriction. It also authorized warrants to be issued by the governors for military and naval services rendered in the then late war. It reserved to the Indians the possession of their lands and hunting-grounds; and prohibited the granting any warrant of survey, or patent for any lands west of the heads of the Atlantic waters, or which, not having been ceded or purchased by the crown, were reserved to the Indians, and prohibited all purchases from them without its special license. The warrants issued pursuant to this proclamation for lands then within the Indian boundary, before the Treaty of Fort Stanwix in 1768, have been held to pass the title to the lands surveyed on them, in opposition to a Pennsylvania patent afterwards issued. (*Sims* v. *Irvine*, 3 Dallas, 427–456.) And all titles held under the charter or license of the crown to purchase from the Indians have been held good, and such power has never been denied; the right of the crown to grant being complete, this proclamation had the effect of a law in relation to such purchases; so it has been considered by this court. (8 Wheat., 595–604.) Settlements made by permission of the commanding officers of posts on lands not ceded by the Indians, have been held to give a pre-emption to lands in a proprietary government, and warrants and patents for such lands have been uniformly held good, when knowingly made by the proprietary or his officers as lands not purchased from the Indians. (See Wharton's Dig., tit. Lands, 488.) This proclamation also directed that purchases from Indians should be made at a public council or assembly, in the presence of the governor or commander-in-chief of the colony, and be purchased for the king and in his name. (1 Laws U. S., 447.)

The Indian deeds made at the treaty of Fort Stanwix were to the king in trust for the grantees. (Colony Titles, 82–98.)

*Grants made by the Indians at public [*748 councils have since been made directly to the purchasers or to the State in which the land lies, in trust for them, or with directions to convey to them, of which there are many instances of large tracts so sold, and held, especially in New York. (Indian Treaties, 13–38.)

It was an universal rule that purchases made at Indian treaties, in the presence and with the approbation of the officer under whose direction they were held by the authority of the crown, gave a valid title to the lands; it prevailed under the laws of the States after the revolution, and yet continues in those where the right to the ultimate fee is owned by the States or their grantees. It has been adopted by the United States, and purchases made at treaties held by their authority have been always held good by the ratification of the treaty, without any patent to the purchasers from the United States. This rule in the colonies was founded on a settled rule of the law of England that by his prerogative the king was the universal occupant of all vacant land in his dominions, and had the right to grant it at his pleasure, or by his authorized officers. (Hob., 322; Co. Litt., 1, 41, *b*; 4 Bac. Abr., Prerog., 153; 7 Day's Com. Dig., 76.)

The authority of the proclamation is in the right of the king to legislate over a conquered country, which, as Lord Mansfield says, was never denied in Westminster Hall, or questioned in Parliament. If a king comes to a country by conquest, he may alter its laws; but if he comes to it by title and descent, it must be with consent of Parliament. He is entrusted with making the treaty of peace; he may yield up the conquest or retain it on what terms he pleases. These powers no man ever

disputed; neither has it hitherto been controverted that the king might change part or the whole of the law or political form of government of a conquered dominion. He comes in place of the king of Spain, the former sovereign (Cowper 204, 213), in a case arising under this proclamation. The proclamation of October, 1763, then, must be taken to be the law of the Floridas till their cession by Great Britain to Spain in 1783, superseding during that period the laws of Spain which had been before in force in those provinces, so far as they were repugnant; and according to the es-

749*] tablished principles of the *laws of nations, the laws of a conquered or ceded country remain in force till altered by the new sovereign. The inhabitants thereof also retain all rights not taken from them by him in right of conquest, cession, or by new laws. It is clear, then, that the Indians of Florida had a right to the enjoyment of the lands and hunting grounds reserved and secured to them by this proclamation, and by such tenure and on such conditions as to alienation as it prescribed, or such as the king might afterwards direct or authorize. The Indians had also a right to the full enjoyment of such rights of property as the king might choose to impart to them by any regulation, by treaty or promise made to them by his authority.

By the treaty of Mobile in 1765 the boundary of the lands or hunting grounds reserved and claimed by the Chickasaw and Choctaw Indians was settled, a cession was made to the king, reserving to themselves full right and property in all the lands northward of such boundary. (Record, 309.)

The treaty of Pensacola in the same year established the boundary with the upper and lower Creeks, who made a cession of lands, which they granted and confirmed to the king (Record, 310, 311), and a similar treaty was made with the Creeks at Picolata, in East Florida, in the same year. (Record, 312.)

By thus holding treaties with these Indians, accepting of cessions from them with reservations, and establishing boundaries with them, the king waived all rights accruing by conquest or cession, and thus most solemnly acknowledged that the Indians had rights of property which they could cede or reserve, and that the boundaries of his territorial and proprietary rights should be such, and such only as were stipulated by these treaties.

This brings into practical operation another principle of law settled and declared in the case of *Campbell* v. *Hall*, that the proclamation of 1763, which was the law of the provinces ceded by the treaty of 1763, was binding on the king himself, and that a right or exemption once granted by one proclamation could not be annulled by a subsequent. (Cowp., 213.) It cannot be necessary to inquire whether rights secured by a treaty approved by the king are less than sacred under his voluntary proclamation.

750*] *By the treaty of Augusta in 1773, a cession was made to the king of certain lands for a specified consideration, which was to be paid to persons to whom the Cherokees and Creeks were indebted, and to defray the expenses of the treaty. This cession was made under an asserted claim of a right of property by the Creeks to the ceded lands, and a boundary was established between their remaining lands and those of the king in Georgia. (Record, 313-317.) By a subsequent treaty at Augusta in 1783, and at Shoulderborne in 1786, the obligation of the Indians to pay their debts is mutually recognized. (Record, 317.) By the Treaty of Fort Schuyler in 1788, the obligation of the Indians to make compensation for injuries committed by them is also admitted, as is also the case in treaties with the United States. (1 Laws U. S., 371, 407, 409, 410.) It may then be considered as a principle established by the king that the Indians were competent judges of the consideration on which they granted their lands; that they might be granted for the payment of debts, and that this principle has been fully recognized by the United States. It can hardly be contended that while such cessions by the Creeks were valid in Georgia on one side of a then imaginary line, they would be void on the other side in Florida, as to lands held under the same law, and by the same tenure. Whether the grants were made to the king directly, and the debts or injuries which formed their consideration be paid by him to the persons to whom they were due, or compensation made through him, or directly to the parties by a grant to them, must be a matter purely in the discretion of the king, or the officer whom he had authorized to accept or confirm the cessions by his license. Such were the relations between the Indians and Great Britain as established by the proclamation of 1763, and confirmed by subsequent treaties between them from 1765 to 1779 (Record, 186, 188), during the period of her dominion over the Floridas. This liberality and kindness to them, with respect for their rights of property in their lands or hunting grounds, would seem to have arisen more from a sense of justice than motives of mere policy, when we consider the position of Great Britain between the treaty of 1763 and the commencement of the Revolution. The undisputed sovereign of the whole territory from the Gulf of Mexico to that *of St. Lawrence, she had little to fear [*751 from the rival or hostile policy of Spain, the only neighbor to her colonies, and who had been humbled during the preceding war, and weakened to such a degree that she was no longer formidable in Louisiana. It was far different with Spain. On taking possession of the Floridas, after the independence of the United States had been established, with such a formidable, and rival, if not hostile neighbor along the whole line of a narrow and weak province, the friendship of the Indians was a most important consideration. It would have been lost by adopting towards them a less liberal, just, or kind policy than had been pursued by Great Britain, or acting according to the laws of the Indies in force in Mexico and Peru. It was soon found necessary not only to respect their rights, as they had been enjoyed for twenty years before, but to place them on the permanent foundation of treaties and direct guaranties by the king. The most solemn assurances of both were given. (Record, 232.)

A treaty was accordingly held in Pensacola in 1784 with the Tallapoosas or Seminoles, the object of which was declared to be to make the

subjects of the king enjoy the fruits of peace, by which the Indians acknowledge themselves his subjects, promising to obey the laws in those points which were compatible with their character and circumstances, conforming themselves to the usages and municipal customs which are established (Record, 329), observing their contracts with the traders in good faith (Record, 323), and promising to observe "those orders exacted by reason, equity and justice, the principal basis of this Congress." By the thirteenth article, the officers of the crown promised in the royal name, the security and guaranty of the lands which the Indians hold, according to the right of property with which they possessed them, on the sole condition that they are comprehended within the limits of the king as the sovereign. (Record, 324, 404, 405, 364.)

In 1793 another treaty was held at the Walnut Hills with the same Indians (among others); it was declared to be a treaty of friendship and warranty between them and the king, who was declared their immediate protector and mediator between them and the American States, in order to regulate their boundaries with them, and preserve the Indians in the possession of their lands. They were referred to the Governor of West Florida, "as repre- [*752] senting *the king in it," by the fifth article, with a stipulation in the fifteenth, that the points negotiated would be determined on by the commissaries of the king, with the approbation of the governor of that province, with the same force as if expressed in the treaty. By the nineteenth article, the Spanish and Indian nations approved and ratified all which was contained in it, and mutually promised and swore a mutual guaranty, the Indians declaring themselves under the protection of the king, he assuring them of his protection in all cases where they wanted it. (Record, 240–245.) This treaty also ratified all former treaties made from 1784. (Record, 241.) They were also approved by the king (Record, 117, 118), and thereafter considered by the highest officers of the government in Florida, Louisiana and Cuba, as solemn guaranties to the Indians of all the rights they held under Great Britain. (Record, 139, 140, 168, 174, 181–189, 228, 229, 232–247, 257, 258, 295, 570, 583.) This right was occupancy and perpetual possession, either by cultivation, or as hunting-grounds, which was held sacred by the crown, the colonies, the States and the United States; while the unauthorized settlement of the whites on royal or proprietary lands gave them not even the right of preemption, unless by special laws, or custom and usage, sanctioned by proprietary officers. (See Wharton's Dig., *ut supra.*)

But Spain did not consider the Indian right to be that of mere occupancy and perpetual possession, but a right of property in the lands they held under the guaranty of treaties, which were so highly respected, that in the establishment of a military post by a royal order, the site thereof was either purchased from the Indians or occupied with their permission, as that of St. Mark's. The evidence of Governor Folch, given in 1827, on the nature of the Indian title, is very strong and full (Record, 231–235), and the high respect paid to it by all the local authorities so late as 1816, is strikingly illustrated in a report of the surveyor-general of West Florida. It seems that in that year an application was made for permission to buy lands on the other side of the Bay of Pensacola, to which the reply of the governor and sub intendant was, if the lands are situated on the side from Yellow Water hitherward. "I am persuaded they belong to the Indians, even our own careening *ground which is in [*753 front of this town" (Record, 172); which, according to another report from the surveyor-general, belonged, by the treaties with England, to the Indians (Record, 175); and who refers to the limited space of province left to the government, and the necessity of recurring to negotiations with the Indians to obtain some of the lands; which are the best in the vicinity of Pensacola. (Record, 176.)

When their right is thus regarded as to their lands in the immediate vicinity of the seat of government of the province at so late a period, it cannot be doubted that it was considered by the officers of the king as at least equally valid in a far distant part, remote from any habitation of the whites, save those connected with the house of Panton or Forbes. Although it may be conceded as a principle of national law that when Spain took possession of these provinces the king could establish whatever form of government or system of laws he pleased; consider by the law of power, though not of right, the Indians as his subjects or as mere savages, with whom there should be no relations but those of peace and trade, and who held no rights otherwise than at the pleasure of the government, or according to the laws in force in other provinces; yet, it was his orders to his officers to continue and confirm those relations which had previously existed, to consider, treat and protect the Indians as his subjects, and to give them new and most solemn pledges of his protection in all their rights, as individuals; and as nations or tribes, competent parties to treaties of mutual guaranty, for his, as well as their protection in those provinces, which had not before been done in any of his dominions.

This was not done for slight reasons, but for such as would seem in the opinion of all the great officers of the provinces to have led to these treaties, and strong stipulations, as indispensable to secure their possession. But their obligation on the king did not depend on the motives which led to their adoption; they bound his faith, and when approved by him became the law of the provinces, by the authority of royal orders, which were supreme, and bound both king and Indians as contracting parties, in this respect as nations on a footing of equality of right and power. The consequence was that when once received into his protection as individuals, they *became [*754 entitled by the law of nations and of the provinces, on the same footing as the other inhabitants thereof, to the benefits of the law and government, which, in every dominion, equally affect and protect all persons and all property within its limits, as the rule of decision, for all questions which arise there (Cowper, 208), as in this case it must be as to the right of property in the Indians. This situation of the Florida Indians was well known to the United States, as is most clearly indicated in the fifth article of the treaty with Spain in 1795—"so

that Spain will not suffer her Indians to attack the citizens of the United States, nor the Indians inhabiting their territory." As thus considered by the United States and Spain, they were called "her Indians," while those in the United States were considered as the mere inhabitants of their territory, as the practical result of the respective treaties which were recognized as subsisting ones between the then contracting parties and the Indians; of the stipulations of which and their effect, the United States could not have been otherwise than well informed at that time, as to the right of property in Indian lands in the Floridas. When they acquired these provinces by the treaty of cession, it was not stipulated that any treaty with the Indians should be annulled, or its obligation be held less sacred than it was under Spain; nor is there the least reference to any intended change in the relations of the Indians towards the United States. They came in the place of the former sovereign by compact, on stipulated terms, which bound them to respect all the existing rights of the inhabitants, of whatever description, whom the king had recognized as being under his protection. They could assume no right of conquest which may at any time have been vested in Great Britain or Spain, for they had been solemnly renounced, and new relations established between them by solemn treaties; nor did they take possession on any such assumption of right: on the contrary, it was done under the guaranty of Congress to the inhabitants, without distinction, of their rights of property, and with the continued assurance of protection. They might, as the new sovereign, adopt any system of government or laws for the territory consistent with the treaty and the Constitution; but instead of doing so, all former laws and municipal regulations which were in existence at the cession, were continued **735***] *in force. It was not necessary for the United States, in the treaty of cession, to enter into any new stipulation to protect and maintain the Indians as inhabitants of Florida, in the free enjoyment of their property, or as nations, contracting parties to the treaties of Pensacola and Walnut Hills with Spain in 1784 and 1793: for by the sixth article of the Louisiana Treaty between France and the United States, they had promised "to execute such articles and treaties as may have been agreed on between Spain and the nations or tribes of Indians, until by mutual consent, other suitable articles shall have been agreed upon." (1 Laws, 137.) These were the treaties which guarantied to the Seminole Indians their lands according to the right of property with which they possessed them, and which were adopted by the United States, who thus became the protectors of all the rights they had previously enjoyed, or could of right enjoy under Great Britain or Spain, as individuals or nations, by any treaty to which the United States thus became parties in 1803.

When they acquired and took possession of the Floridas, these treaties remained in force over all the ceded territory by the orders of the king, as the law which regulated the relations between him and all the Indians, who were parties to them, and were binding on the United States, by the obligation they had assumed by the Louisiana Treaty, as a supreme law of the land which was inviolable by the power of Congress. They were also binding as the fundamental law of Indian rights, acknowledged by royal orders and municipal regulations of the province, as the laws and ordinances of Spain in the ceded provinces, which were declared to continue in force by the proclamation of the governor in taking possession of the provinces, and by the acts of Congress, which assured all the inhabitants of protection in their property. It would be an unwarranted construction of these treaties, laws, ordinances and municipal regulations, were we to decide that the Indians were not to be maintained in the enjoyment of all the rights which they could have enjoyed under either, had the provinces remained under the dominion of Spain. It would be rather a perversion of their spirit, meaning and terms, contrary to the injunction of the law under which we act, which makes the stipulations of any treaty, the laws and ordinances of Spain, *and these acts of [***756** Congress, so far as either apply to this case, the standard rules for our decision.

On these considerations, we are clearly of opinion that the Indians who claimed the lands in question had, under the government of Great Britain and Spain, a right of property in them which could not be impaired without a violation of the laws of both, and the sanctity of repeated treaties; that these rights continued till the time of the cession, are guarantied by the treaty and acts of Congress in relation to the Floridas, in perfect conformity with its stipulations and faith, unless the Indians had previously made a binding transfer to the parties under whom the petitioner claims them.

The remaining question is, whether he has become invested with the right of the Indians, either in virtue of their deeds, or by the grant of the lawful authorities of the king, pursuant to the laws, usages and customs of the Spanish government of the province. The proclamation of 1763 was undoubtedly the law of the province till 1783; it gave direct authority to the governors of Florida to grant crown lands subject only to such conditions and restrictions as they or the king might prescribe. These lands were of two descriptions: such as had been ceded to the king by the Indians, in which he had full property and dominion, and passed in full property to the grantee; and those reserved and secured to the Indians, in which their right was perpetual possession, and his the ultimate reversion in fee, which passed by the grant subject to the possessory right. The proclamation also authorized the union of these rights by a purchase from the Indians, and taking possession with the leave and license of the crown in favor of an individual, or by the governor at an Indian council, for and in the name of the king. This proclamation was also the law of all the North American colonies in relation to crown lands. The grants of the governors were universally considered as made by the king through his authorized representatives, and when his authority to grant those lands of the crown, the right to which was perfect by the union of the rights of possession with the reversion, it is scarcely possible that their authority would be more limited as to those in which the king had only a remote ultimate fee. As a matter of policy, it was for the benefit of

the king and colony to substitute the possession, settlement and cultivation [*757] of the whites for the mere occupancy of the Indians in the pursuit of game; and it cannot be imagined, without clear proof, that the autograph of the king or his order in council, should be indispensable for a license or permission to purchase, when a patent was valid without either. There is no evidence in the record or in the history of the colonies that such a distinction existed in law or usage, but is in direct collision with all the colonial laws relating to purchases from the Indians, as well as the course pursued at treaties, when deeds were made to purchasers with the consent of the governor, or to the king, State, or United States, for their use, or in trust to convey to them. There is no evidence or reason to induce the belief that Spain acted in any other manner in the confirmation of Indian deeds: the usage of her local governors and commandants of posts in such confirmation, is in precise conformity to that of the other colonial officers under Great Britain, and was also in conformity to the existing laws of Spain. (Record, 329.) From the confirmation of the Houma grant in 1777 by the Governor-General of Louisiana to that of the Captain-General of Cuba of this, in 1811, during forty years, no instance appears of a direct confirmation by the king, or of his ever having required any other act than the approbation of the local governor to give perfect validity to the purchase.

Independently of these considerations there is another, founded on the treaty at the Walnut Hills, with the Creek and Tallapoosa Indians, held by the then Governor of West Florida, under the authority of the Governor-General of Louisiana. The governor of that province is in the fifth article declared to be "as representing the king in it." Such a stipulation in a treaty of friendship and warranty would bind the king in good faith not to disavow his acts declared to be done in the royal name and authority. It would be an imputation on his faith to his acknowledged subjects, plighted by repeated guaranties, to suppose that he intended by the treaty of cession to exclude from confirmation those lands which his white subjects had purchased from the Indians under the sanction of treaties, with the approbation and formal confirmation of his highest officers; and to confirm only those grants of the royal domain, which had been made at the mere will of his governors, for such consideration only as they might prescribe. If there could be any [*758] foundation for such an imputation in any case, the history, terms and consideration for the present grants would at once repel it: and when we consider that the United States accepted of the cession with a knowledge that they had been made, as well as the circumstances under which they were made, connected with the quantity of land embraced within them, without excepting them from confirmation, we can have little doubt that it was the meaning and intention of both contracting parties to the treaty to place them on the same footing as the grants of land belonging to the royal domain.

There is nothing in the treaty which authorizes a distinction between such grants, which operate by their own force as a transfer of the full property in royal lands, held by the crown under cessions from the Indians; or deeds of confirmation, which give validity to grants conveying the Indian right, in confirming the transfer by the license of the king in the person of his representative.

The governor was equally the lawful authority of the king for the one purpose as the other; though he had, by his royal order, transferred the power to grant royal lands from the governor to the intendant, he had not affected the authority of the former to confirm grants made by the Indians in such form as to validate the title conveyed. Whether this act of the governor operated by way of confirmation or grant is immaterial; it gave such effect to the purchase that the lands became the property of the purchaser, so that they could not revert to the crown by the abandonment of the Indians, or any judicial process known to the law of England or Spain, which in substance and effect were the same. When we look, too, to the very remote contingent interest which the king could have to these lands, consistently with his guaranty to the Indians, there can be no reason perceived why deeds or grants, operating to confirm in full property to the purchasers from the Indians, lands thus guarantied to them, should not be held in a court of equity as valid as original grants of the royal domain.

The Indian right to the lands as property was not merely of possession, that of alienation was concomitant: both were equally secured, protected, and guarantied by Great Britain and Spain, subject only to ratification and confirmation by the license, charter, or deed from the governor representing the king. Such [*759] purchases enabled the Indians to pay their debts, compensate for their depredations on the traders resident among them, to provide for their wants; while they were available to the purchasers as payment of the considerations which at their expense had been received by the Indians. It would have been a violation of the faith of the government to both, to encourage traders to settle in the province, to put themselves and property in the power of the Indians, to suffer the latter to contract debts, and when willing to pay them by the only means in their power, a cession of their lands, withhold an assent to the purchase, which by their laws or municipal regulations was necessary to vest a title. Such a course was never adopted by Great Britain in any of her colonies, nor by Spain in Louisiana or Florida: of this fact there is abundant proof in the record, by public documents, and the testimony of the highest officers of the local government, the laws, usages and customs of which were well known to the United States before the treaty. The report of the commissioners on Opelousas claims was submitted to the Secretary of the Treasury in 1815; acted on and approved by Congress in 1816; in which report the commissioners state that "the right of the Indians to sell their land was always recognized by the Spanish government. (Record, 328.) The laws made it necessary when the Indians sold their lands to have the deeds presented to the governor for confirmation. (Record, 329.) The sales by the Indians transferred the kind of right which they possessed; the ratification of the sale by the governor must be regarded as a

relinquishment of the title of the crown to the purchaser (Record, 333), and no instance is known where permission to sell has been "refused (Record, 330), or the rejection of an Indian sale." (Record, 336.)

In the present case the Indian sale has been confirmed with more than usual solemnity and publicity; it has been done at a public council and convention of the Indians conformably to treaties, to which the king was a party, and which the United States adopted, and the grant was known to both parties to the Treaty of Cession. The United States were not deceived by the purchase, which they knew was subject to the claim of the petitioner, or those from whom he purchased, and made no stipulation which should put it to a severer test than **760***] *any other; and it was made to a house which, in consideration of its great and continued services to the king and his predecessor, had deservedly given them high claims as well on his justice as his faith. But if there could be a doubt that the evidence in the record did not establish the fact of a royal license or assent to this purchase as a matter of specific and judicial belief, it would be presumed as a matter of law arising from the facts and circumstances of the case, which are admitted or unquestioned.

As heretofore decided by this court, the law presumes the existence in the provinces of an officer authorized to make valid grants (6 Peters, 728; 8 Peters, 459); *a fortiori*, to give license to purchase and to confirm; and the treaty designates the Governor of West Florida as the proper officer to make grants of Indian lands by confirmation as plainly as it does the Governor of East Florida to make original grants (8 Peters, 452), or the Intendant of West Florida to grant royal lands. A direct grant from the crown of lands in a royal haven may be presumed on an uninterrupted possession of sixty years (2 Anst., 614; 1 Dow. Par. Ca., 322, 323); or a prescriptive possession of crown lands for forty years. (3 Dow. Par. Ca., 112.) An encroachment on a royal forest by a continued possession of twenty years will be presumed to have been by the license of the crown or by a grant, if no act of Parliament prohibits it. (11 East, 57, 284, 488, 495.) On the same principle, after a long possession of Indian lands the law would presume that it was founded on an Indian deed duly confirmed, or any title consistent with the facts and the circumstances in evidence. (1 Paine, 469, 470.) Anything which would make the ancient appropriation good (Cowper, 110), if it could have had a lawful foundation, for whatever may commence by grant is good by prescription. (1 Roll. Abr., 512; 4 Mod., 55; 1 Saund., 345.) The length of time which brings a given case within the legal presumption of a grant, charter, or license, to validate a right long enjoyed, is not definite, depending on its peculiar circumstances; in this case we think it might be presumed in less time than when the party rested his claim on prescriptive possession alone. There is every evidence, short of the sign-manual or order of the king, approving and confirming this grant, and if that were **761***] wanting to secure *a right of property to lands which have been held as these have been, the law would presume that it once existed, but was lost in the lapse of time and change of governments. The more especially as by the laws of Spain prescription for the period of ten years has the same effect as twenty by the principles of the common law.

For these reasons we think the title of the petitioner is valid by all the rules prescribed by the acts of Congress which give us jurisdiction of the case.

This cause came on to be heard on the transcript of the record from the Superior Court for the Middle District of Florida, and was argued by counsel; on full consideration whereof, this court is unanimously of opinion that the title of the petitioner to so much of the lands in controversy as is embraced within the lines and boundaries of the tract granted by the deeds, grants and acts of confirmation to Panton, Leslie & Co. in 1804 and 1806; also to the island in the River Appalachicola, ceded, granted and confirmed to John Forbes in 1811; also to the lands and islands at and west of the mouth of said river, which were ceded, granted and confirmed to John Forbes & Co. in 1811, is valid by the law of nations; the treaty between the United States and Spain, by which the territory of the Floridas was ceded to the former; the laws and ordinances of Spain, under whose government the title originated; the proceedings under said treaty, and the acts of Congress relating thereto: and do finally order, decree, determine and adjudge accordingly. And this court doth in like manner order, adjudge, determine and decree, that the title of the petitioner to so much of the tract of land which lies east of the first-mentioned tract, between the rivers Wakulla and St. Mark's, which was conveyed to John Forbes & Co. in 1811, as shall not be included in the exception hereinafter made, is valid by the laws, treaty and proceedings as aforesaid; with the exception of so much of the last-mentioned tract as includes the fortress of St. Marks and the territory directly and immediately adjacent and appurtenant thereto, which are hereby reserved for the use of the United States. And it is further ordered and decreed that the territory thus described shall be *that which was [***762** ceded by the Indian proprietors to the crown of Spain for the purpose of erecting the said fort, provided the boundaries of the said cession can be ascertained. If the boundaries of the said cession cannot now be ascertained, then the adjacent lands which were considered and held by the Spanish government or the commandant of the post as annexed to the fortress for military purposes, shall be still considered as annexed to it, and reserved with it for the use of the United States. If no evidence can now be obtained to designate the extent of the adjacent lands, which were considered as annexed to St. Mark's as aforesaid, then so much land shall be comprehended in this exception as, according to the military usage, was generally attached to forts in Florida or the adjacent colonies. If no such military usage can be proved, then it is ordered and decreed that a line shall be extended from the point of junction between the rivers St. Mark's and Wakulla to the middle of the River St. Mark's, below the junction; thence extending up the middle of each river three miles in a direct line, with-

out computing the courses thereof; and that the territory comprehended within a direct line, to be run so as to connect the points of termination on each river, at the end of the said three miles up each river, and the two lines to be run as aforesaid, shall be, and the same is hereby declared to be, the territory reserved as adjacent and appurtenant to the fortress of St. Mark's, and as such reserved for the use of the United States. To which the claim of the petitioner is rejected; and as to which this court decree that the same is a part of the public lands of the United States.

The decree of the court below is therefore reversed and annulled in all matters and things therein contained, with the exception aforesaid; and this court, proceeding to render such decree as the said court ought to have rendered, do order, adjudge and decree that the claim of the petitioner is valid and ought to be confirmed, and is and remains confirmed by the treaty, laws and proceedings aforesaid, to all the lands embraced therein, except such part as is hereinabove excepted. And this court does further order, adjudge and decree, that the clerk of this court certify the same to the Surveyor General of Florida, pursuant to law, with directions to survey and lay off the lands described in the petition of the claimant, ac-

763* cording *to the lines, boundaries and description thereof in the several deeds of cession, grant and confirmation by the Indians or Governor of West Florida filed as exhibits in this cause, or referred to in the record thereof, excepting, nevertheless, such part of the tract granted in 1811, lying east of the tract granted in 1804 and 1806 as is hereby declared to be the territory of the United States, pursuant to the exception hereinbefore mentioned, and to make return thereof according to law as to all the lands comprehended in the three first herein mentioned tracts. And as to the tract last herein mentioned, to survey and in like manner to lay off the same, so soon as the extent of the land herein excepted and reserved for the use of the United States shall be ascertained in the manner hereinbefore directed.

And this court doth further order, adjudge and direct, that the extent and boundaries of the land thus excepted and reserved shall be ascertained and determined by the Superior Court of the Middle District of Florida in such manner and by such process as is prescribed by the acts of Congress relating to the claims of lands in Florida, and to render thereupon such judgment or decree as to law shall appertain.

Aff'd—S. C., 15 Pet., 52, 80.
Cited—10 Pet., 208, 305, 614; 11 Pet., 335; 12 Pet., 436, 437, 438, 440, 457, 495, 733, 737, 749; 14 Pet., 308; 15 Pet., 80, 84, 88; 6 How., 40; 9 How., 445; 20 How., 63, 178; 17 Wall., 244, 247; 20 Wall., 284, 286; McAll., 273; 5 Dill., 409.

[SUPREME COURT OF NORTHERN TERRITORY]

MILIRRPUM AND OTHERS *v.* NABALCO PTY. LTD. AND THE COMMONWEALTH OF AUSTRALIA

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1970, DARWIN, *May* 25-29; *June* 1-5, 8-10; CANBERRA, *Sept.* 7-10, 14-18, 21-25, 28; *Oct.* 1, 27-30; *Nov.* 2-6, 9-13, 16-20, 23-25;

1971, ALICE SPRINGS, *April* 27.

Blackburn J.

Aboriginals—Tribal lands—Colonial settlement—Title of Crown—Effect on particular areas used by aboriginal natives—Relation of native clans to particular areas—Necessity for continuity of relationship—Doctrine of communal native title—General principles—Whether doctrine part of law of any part of Australia—Whether applicable in settled colony except by statutory recognition—Extinguishment by statute—Whether enactment must be explicit—Aboriginal social rules and customs—Whether recognizable as system of law—Relationship under system of native clans to land—Whether recognizable as right of property—Lands Acquisition Act 1955-1966, *s.* 5 (1) "*Interest*".

Constitutional Law—Acquisition of colonial territory—General principles—Colonial policies relating to native lands—Establishment of Province of South Australia—By Letters Patent of 1836 (*Imp.*)*—Effect of proviso reserving rights of aboriginal natives to occupation and enjoyment of land—Whether applicable to after-acquired territory—Whether constitutional guarantee of aboriginal rights—Whether mere affirmation of principle of benevolence—Effect of subsequent Imperial legislation granting succession of legislative powers over territory—Surrender of Northern Territory to Commonwealth—Application of Lands Acquisition Act to Northern Territory—Whether exclusive code for control of acquisition of land in Northern Territory—Effect of subsequent legislation of Northern Territory—Northern Territory (Administration) Act* 1910-1919, *s.* 9*—Lands Acquisition Act* 1906-1916*—Minerals (Acquisition) Ordinance* 1953 (*N.T.*).

Mines and Minerals—Mineral leases—By Crown over private land—Effect of validating legislation—Provision that lease have effect according to terms—Mining (Gove Peninsula Nabalco Agreement) Ordinance 1968 (*N.T.*), *s.* 6 (2).

Evidence—Hearsay—Reputation evidence—Statements by deceased ancestors—About matters of public and general rights—Testimony of aboriginal natives of ancestors' statements—About clan rights to particular areas of land—About system relating to such rights—Expert opinion—Anthropological testimony—Whether hearsay—Whether founded on non-apparent facts—Testimony in terms of concepts—Admissibility.

Aboriginal natives of Australia representing native clans sued a mining company and the Commonwealth claiming relief in relation to the possession and enjoyment of areas of Arnhem Land in the Gove Peninsula

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over which mineral leases had been granted by the Commonwealth to the company, which mined for bauxite in the area.

The areas consisted of a number of tracts of land, each linked to a native clan, the total of which exhausted the areas in question. The boundaries between the tracts were not precise but were sufficient for native purposes. The natives asserted on behalf of the native clans they represented that those clans and no others had in their several ways occupied the areas from time immemorial as of right. The natives contended, as " the doctrine of communal native title ", that at common law the rights under native law or custom of native communities to land within territory acquired by the Crown, provided that those rights were intelligible and capable of recognition by the common law, were rights which persisted and must be respected by the Crown itself and by its colonizing subjects unless and until they were validly terminated.

The natives further contended, as part of that doctrine, that those rights could be terminated only by the Crown (a) by consent of the native people or by forfeiture after insurrection or, perhaps, (b) by explicit legislation or by an act of State, and that the rights of the native people to use and enjoy the land in the manner in which their own law or custom entitled them to do was a right of property.

The natives contended further that the *Minerals (Acquisition) Ordinance* 1953 (N.T.) was invalid, that the bauxite ores and the land in which they existed had never ceased to belong to the natives, that the *Mining (Gove Peninsula Nabalco Agreement) Ordinance* 1968 (N.T.) and leases granted in that behalf by the Commonwealth were invalid and, accordingly, that the company's operations were unlawful.

Held: (1) Testimony by aboriginal natives of statements made by deceased ancestors about the rights of various clans to particular areas of land and about the system of which those rights formed part, was admissible under the exception to the hearsay rule relating to declarations of deceased persons about matters of public and general rights (commonly known as reputation evidence). The special body of law known as the law of " traditional evidence " by which native law and custom may be established before a tribunal responsible for the administration of such law and custom does not form part of the common law as it is understood in Australia.

(2) Evidence from an anthropologist in the form of a proposition of anthropology—a conclusion having significance in that field of discourse—was not inadmissible (a) as hearsay, by the circumstance that the evidence was founded partly on statements made to the expert by the aboriginals, (b) as opinion founded on facts which were not apparent, since the facts were ascertained by the methods and described in terms appropriate to the expert's field of knowledge, (c) as conceptual in terms rather than factual, provided that the expert spoke in terms of concepts appropriate both to his field of knowledge and the court's understanding.

(3) In the circumstances of the case, the natives had not established that, on the balance of probabilities, their predecessors had, at the time of the acquisition of their territory by the Crown as part of the colony of New South Wales, the same links to the same areas of land as those claimed by the natives.

Customs, beliefs and social organization of the aboriginal natives of Australia in general, and of the areas claimed in particular, considered.

The doctrine of communal native title contended for by the natives did not form, and never had formed, part of the law of any part of Australia. Such a doctrine has no place in a settled colony except under express statutory provisions. Throughout the history of the settlement of Australia any consciousness of a native land problem inspired a policy of protection and preservation, without provision for the recognition of any communal title to land.

Principles applicable to the acquisition of colonial territory (both settled or occupied and conquered or ceded) and colonial policies relating to native lands, considered in detail, and in relation thereto the following matters considered: the application of English law in the overseas possessions of the Crown; colonial policy with regard to native lands in North America; the common law before and after 1788; American cases since the revolution; Canadian cases; Indian cases; African cases; the law in New Zealand; the Australian authorities; the Australian historical material.

(4) In the circumstances of the case, the natives had established a subtle and elaborate system of social rules and customs which was highly adapted to the country in which the people lived and which provided a stable order of society remarkably free from the vagaries of personal whim or influence. The system was recognized as obligatory by a definable community of aboriginals which made ritual and economic use of the areas claimed. Accordingly, the system established was recognizable as a system of law.

However, the relationship of the native clans to the land under that system was not recognizable as a right of property and was not a "right, power or privilege over, or in connexion with, the land" within the meaning of the definition of "interest" in land contained in s. 5 (1) of the *Lands Acquisition Act* 1955-1966, relating to the acquisition of land on just terms.

The natives had established a recognizable system of law which did not provide for any proprietary interest in the clans in any part of the areas claimed.

(5) The Letters Patent of 1836 by which the Province of South Australia was established and its boundaries defined, by its proviso that nothing therein contained should affect or be construed to affect "the rights of any Aboriginal Natives of the said Province to the actual occupation or enjoyment in their own persons or in the persons of their descendants of any Land therein now actually occupied or enjoyed by such Natives", (a) did not extend to territory which became part of South Australia thereafter, (b) did not operate as a constitutional guarantee of aboriginal rights, but (c) was no more than the affirmation of a principle of benevolence inserted in the Letters Patent to bestow upon it a suitably dignified status. Moreover, later Imperial legislation, granting a succession of legislative powers effective over the areas claimed, necessarily implied the repeal of any constitutional limitation on legislative power contained in the proviso to the Letters Patent.

(6) Section 9 of the *Northern Territory (Administration) Act* 1910-1949, which provides that the provisions of the *Lands Acquisition Act* 1906-1916 shall apply to the acquisition by the Commonwealth, for any public purpose, of any lands owned in the Territory by any person, did not provide an exclusive code for the control of acquisition of land in the

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Northern Territory. Section 9 of the *Northern Territory (Administration) Act* was merely an application of the Act to the Northern Territory and did not proscribe the adoption of schemes of acquisition by the exercise of the plenary legislative powers of the Northern Territory Legislature. Moreover, legislation in pursuance of those plenary powers, such as the *Minerals (Acquisition) Ordinance* 1953 (N.T.), providing for acquisition by legislative process, was not in any way inconsistent with the provisions of the *Lands Acquisition Act*, which provided for acquisition by executive process.

Kean v. *The Commonwealth* (1963), 5 F.L.R. 432, followed.

Semble, that " any public purpose " referred to in s. 9 of the *Northern Territory (Administration) Act* included any purpose in relation to the Northern Territory.

(7) If the Commonwealth had no interest, and thus could not pass to the company any interest, in the land and in the bauxite ores in the areas claimed, nevertheless the mineral leases which the Commonwealth had purported to grant to the company, being validated by the provisions of the *Mining (Gove Peninsula Nabalco Agreement) Ordinance* 1968 (N.T.) which provided, by s. 6 (2), that any such lease had effect according to its terms, were effective to make the company's actions lawful or perhaps to create proprietary interests in the company.

There is no principle of law that communal native title can only be extinguished by legislation by express enactment: extinguishment may be implied.

Wade v. *N.S.W. Rutile Mining Co. Pty. Ltd.* (1969), 43 A.L.J.R. 247, applied.

ACTION.

Aboriginal natives of Australia, suing on behalf of several native clans which made ritual and economic use of certain areas of Arnhem Land in the Gove Peninsula, sued Nabalco Pty. Ltd., a company conducting mining operations for bauxite ore in the areas in pursuance of mineral leases granted by the Commonwealth, and the Commonwealth for relief relating to the occupation and enjoyment of the areas by the several clans. The action was reconstituted and came to trial upon a fresh statement of claim delivered pursuant to leave granted on 16th May, 1969, in *Mathaman* v. *Nabalco Pty. Ltd.* (1969), 14 F.L.R. 10.

A. E. Woodward Q.C., *J. E. Fogarty* and *J. D. Little*, for the plaintiffs.

L. J. Priestly, for Nabalco Pty. Ltd., the first defendant.

R. J. Ellicott Q.C., Solicitor-General for the Commonwealth, *W. O. Harris Q.C.* and *M. H. McLelland*, for the Commonwealth, the second defendant.

Cur. adv. vult.

On 27th April, 1971, judgment was delivered.

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APRIL 27.

The following judgment was delivered :

BLACKBURN J. This action is brought by a number of Australian aboriginals who claim that their interests in certain land in the Northern Territory have been unlawfully invaded by the defendants. The plaintiff Milirrpum is a member of the Rirratjingu clan, and sues both in his personal capacity and as a representative of the other members of his clan. The meaning of the word " clan ", arbitrarily used here, will appear later ; at this stage it is enough to say that the clan is an indeterminate group in the sense that births and deaths, occurring from the indefinite past to, and after, the commencement of the action, are assumed not to affect the identity of the clan. The fact that the plaintiffs are thus members of a class which is subject to continual changes of membership was the basis of some argument relating to the substantive issues in the case, but no point was taken as to its procedural implications.

The plaintiff Munggurrawuy similarly sues for himself and for the Gumatj clan. The plaintiff Daymbalipu sues for himself, for the Djapu clan to which he belongs, and for all members of the other clans named in the title of the action. The claims of this third class of plaintiffs are different from those of the first two classes. All the plaintiffs alleged that part of the land subject of the action was Rirratjingu land, and part was Gumatj land, and that, apart from some small exceptions, none was land of any other clan. It was alleged that the plaintiffs of the third class used and enjoyed the Rirratjingu and Gumatj land with the consent of the Rirratjingu and Gumatj and in accordance with the law or custom applicable to all the plaintiffs. In this brief introductory summary much is taken for granted ; the meaning of such a phrase as " Rirratjingu land " is one of the deepest questions in the case ; and the accuracy and certainty with which such land was described in the evidence were in serious dispute.

A short account and history of the subject land.

The land the subject of the action (which hereafter I call " the subject land ") is at the north-eastern corner of Arnhem Land, in the Northern Territory of Australia. If a line is drawn from a point in Melville Bay at latitude 12 degrees 15 minutes south, longitude 136 degrees 37 minutes east, to a point in Port Bradshaw at latitude 12 degrees 30 minutes south, longitude 136 degrees 45 minutes east, it will be about seventeen statute miles long. The subject land can be described with sufficient precision as that part of the Australian continent, together with some offshore islands, lying north-east of that line. It has an area of something of the order of 200 square miles and is commonly called the Gove Peninsula. Reference was of course made in the evidence to other land outside, but near to, the subject land.

The plaintiffs say that from an indefinite time in the past—a period which for them began with the deeds of the great spirits who, they believe, were their ancestors—their predecessors have continuously used the subject land in the manner in which they themselves claim still to be entitled to do without interference. History has little indeed to say of the subject land until very recently. Tasman sailed round its shores in 1644 and apparently charted its outline with such accuracy as was then possible. Islanders from Macassar made frequent, perhaps regular, visits to the north coast of Australia, including presumably the subject land, and had some commerce with the aboriginals. Lieutenant James Cook R.N. at Possession Island on 22nd August, 1770, purported to take possession of " the whole Eastern coast " from latitude 38 degrees south " down to this place "; a description which cannot be said to include the subject land. On 26th January, 1788, at Sydney Cove, Captain Arthur Phillip R.N., Governor and Commander-in-Chief of New South Wales, formally hoisted the flag, in the name of the King, in a territory which was described in his commissions as extending westward as far as 135 degrees of east longitude and northward as far as Cape York—thus clearly including the subject land. Thereupon the subject land became part of New South Wales. In February 1803 Commander Matthew Flinders R.N., commanding H.M.S. *Investigator* charted the coast of the subject land in the course of a voyage along a considerable part of the coast of North Australia. The *Investigator* lay in Caledon Bay, a few miles to the south of the subject land, for several days, and there Flinders made contact with some aboriginals; a few days later he went ashore on the subject land in Melville Bay, where he saw no aboriginals, but suspected that they saw him. Shortly afterwards he met and had some conversation with some Macassans. No attempt was made to settle in any part of the subject land while it was part of New South Wales. Notwithstanding that three settlements were at various times established and abandoned on the north coast of Australia, three or four hundred miles to the westward, the subject land can have been seldom even visited by white men during that time.

On 6th July, 1863, by Letters Patent under the *Australian Colonies Act*, 1861, the whole of what is now the Northern Territory was annexed to the Colony of South Australia, including of course the subject land.

The first alienation by the Crown of any estate or interest in any part of the subject land occurred in 1886, when John Arthur Macartney became the lessee of a large area which included the whole of the subject land under a pastoral lease for the term of twenty-five years from 1st October, 1881. Thereafter for over thirty years various persons held and surrendered, or suffered the determination of, large pastoral leases which included the subject

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land. Evidence of the actual visitation or occupation of the subject land during this period, by white men or by livestock, is very slight; it is improbable that either were there in any significant numbers. On 1st January, 1911, the Northern Territory became a Territory of the Commonwealth of Australia and has so remained. All existing proprietary rights were preserved. The last of the pastoral leases over the subject land was determined on 10th January, 1913. On 14th April, 1931, the Arnhem Land Reserve, which included the whole of the subject land, was created under a Northern Territory Ordinance as a reserve " for the use and benefit of the aboriginal native inhabitants of the Northern Territory ". Various changes, not material here, have been made in this Reserve; for a period the subject land was mostly excluded from it. Later the subject land was restored to the Reserve, and now apparently remains part of it, notwithstanding the granting of certain leases. In November 1935 or thereabouts, the Reverend Wilbur Chaseling and others came ashore at Yirrkala, on the subject land (in about latitude 12 degrees 15 minutes south, longitude 136 degrees 53 minutes east) and founded the Mission which has existed there ever since. They were probably the first white men to establish permanent habitations on the subject land. The Methodist Missionary Society of Australia Trust Association had a lease of almost the whole of the subject land, together with other land, for a term of twenty-one years from 1st July, 1938.

Up to this time no exploitation or development of any part of the subject land by white men had occurred except in the most insignificant degree. But during the Second World War the Royal Australian Air Force established an airfield inland, and also a flying-boat base at Drimmie Head in Melville Bay, both on the subject land. Flying operations were conducted from both establishments. Necessarily, some roads were made in the vicinity, and buildings were erected. At the end of the war the R.A.A.F. activities ceased, but the airfield has been used for civil aviation since 1950.

In 1953 the *Minerals (Acquisition) Ordinance* of the Northern Territory became law. In the subject land are large quantities of bauxite, a valuable mineral. The purported effect of the Ordinance was to vest the bauxite in the Crown if it was not already the Crown's property.

On 17th November, 1958, began the first of a number of mineral leases on the subject land, which are not material to this case, and were surrendered or otherwise determined. Various test-drilling, sampling, survey and construction work for mining purposes was carried out, both by government agencies and by private persons with government authority, between 1955 and 1966. Between 1964 and 1967 an elaborate group of scientific and administrative buildings was set up on the subject land by the Commonwealth Government. This establishment occupied about

two square miles. It was staffed by scientific and administrative personnel and, until after the commencement of this action, was used by the European Launcher Development Organization.

On 22nd February, 1968, the two defendants, the Commonwealth and Nabalco Pty. Ltd. (which I shall call "Nabalco") entered into an agreement whereby the Commonwealth promised to grant a special mineral lease to Nabalco, for a term of forty-two years, of land included in the subject land. The purpose of the agreement was to enable Nabalco to mine the bauxite. The Commonwealth also promised to grant special purposes leases to Nabalco for the establishment of a township and for other purposes ancillary to Nabalco's mining operations. The agreement was expressed to come into effect upon the coming into effect of an Ordinance approving it. Such an Ordinance, the *Mining (Gove Peninsula Nabalco Agreement) Ordinance* 1968, was duly passed and came into effect on 16th May, 1968. Leases were duly granted, Nabalco commenced operations accordingly, and the writ in this action was issued on 13th December, 1968.

The nature of the proceedings.

It is important to make clear that the case for the plaintiffs was not simply that they were aboriginals who had been dispossessed of their ancestral lands by the advent of the white man, culminating in the mining activities of the defendant Nabalco. There are great and difficult moral issues involved in the colonization by a more advanced people of a country inhabited by a less advanced people. These issues, though they were rightly dealt with as relevant to the matters before me, were not treated as at the foundation of the plaintiffs' case. Had they been so treated, the case would have involved an examination, not merely of some aspects of the dealings of some European people with some aboriginal races over the last four hundred years (as it did), but of much of the history of mankind. The foundation of the plaintiffs' argument was a proposition of law that political sovereignty over, and " the ultimate or radical title to ", the subject land became vested in the Crown by reason of what Governor Phillip did in pursuance of his commissions at Sydney in 1788 and thus that from that time the common law applied to all subjects of the Crown in New South Wales, including the predecessors of the plaintiffs, and so, in the events which have occurred, to the parties to this action. The plaintiffs' central contention was that at common law the rights, under native law or custom, of native communities to land within territory acquired by the Crown, provided that these rights were intelligible and capable of recognition by the common law, were rights which persisted, and must be respected by the Crown itself and by its colonizing subjects, unless and until they were validly terminated. Such rights could be terminated only by the Crown and only by

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the consent of the native people, or perhaps by explicit legislation. Until terminated, the rights of the native people to use and enjoy the land, in the manner in which their own law or custom entitled them to do, was a right of property.

Here again, it is important to make clear what it is that the plaintiffs are asserting. It is not that the immemorial presence of aboriginals on the subject land gives the plaintiffs, as aboriginals, a right to exclude the defendant Nabalco. It is that the plaintiff clans, and no others, have in their several ways occupied the subject land from time immemorial as of right; that the rights of the plaintiff clans are proprietary rights; that these rights are still in existence; and that Nabalco's activities are unlawful in that they are an invasion of such proprietary rights.

Counsel for the plaintiffs made no attempt to conceal the novelty, in Australian courts, of these contentions.

The defendant Nabalco justifies its presence, and its activities, in the subject land by the leases granted in accordance with the *Mining (Gove Peninsula Nabalco Agreement) Ordinance* 1968. The defendant Commonwealth resists the plaintiffs' claim on the ground that the *Minerals (Acquisition) Ordinance* 1953-1954 was valid and that the *Mining (Gove Peninsula Nabalco Agreement) Ordinance* 1968 was valid and effective, and thus that the leases were also. The plaintiffs therefore, as a necessary element in their case, say that the *Minerals (Acquisition) Ordinance* was invalid in so far as it purported to terminate their communal interest in the bauxite. Their principal argument to this end was that the Ordinance was ultra vires the Legislative Council of the Northern Territory by reason of the provisions of the *Lands Acquisition Act* of the Commonwealth Parliament.

One form of relief for which the plaintiffs prayed was damages, but no evidence has yet been adduced of any damage or loss suffered. Each defendant admitted, in its defence, that it had acted in such a way as to deny, and did in fact deny, that the plaintiffs had any legal title to, or proprietary interest in, the subject land, and thus the principal relief sought by the plaintiffs at this stage of the proceedings is by way of declaration. Injunctions are also sought, and to this I will refer later. The declarations which the plaintiffs seek are :

(a) A declaration that the plaintiffs are entitled to the occupation and enjoyment of the subject land free from interference.

(b) A declaration that the *Minerals (Acquisition) Ordinance* 1953 is ultra vires and void in so far as it purports to have compulsorily acquired for the Crown in right of the Commonwealth bauxite ores and other minerals, as defined in that Ordinance, existing in their natural condition in the Northern Territory.

(c) A declaration that the Commonwealth had no interest in the subject land enabling it effectively to grant any leases or other rights over it.

As pleaded, the plaintiffs' case included a contention that they had acquired rights by adverse possession against the Crown, and also a contention that they had acquired rights by the inclusion of the subject land in reserves created under Northern Territory legislation. These contentions were both formally abandoned.

The case may thus be resolved into several questions, or groups of questions. There is a question of fact—what, in the plaintiffs' own eyes, is their relationship to the subject land ? To answer this requires the answer to a question in the law of evidence—how may such matters be proved ? There is what might be called the central question, namely does there exist at common law a doctrine of native title such as the plaintiffs' counsel propounded, or any such doctrine ? If so, is the nature of the plaintiffs' relationship with their land, as proved, such as to require the application of the doctrine ? Then, and certainly not least, there are questions of law as to the effect of various events and legislative provisions since 1788.

Some, at least, of the possible answers to these questions are such as to provide a sufficient ground for deciding the case without reference to any other ground. But counsel asked me to deal with all the major questions, and I propose to do so.

The admissibility of the plaintiffs' evidence.

I have now to deal with what is logically the first of these questions —that of how the plaintiffs may prove their case. The defendants objected to the admission of much of the plaintiffs' evidence, but consented to my receiving it subject to my later decision on its admissibility.

The matters which the plaintiffs have to prove are set out in pars. 4, 5 and 6 of the statement of claim, as follows :

" 4. Pursuant to the laws and customs of the aboriginal native inhabitants of the Northern Territory, each clan holds certain communal lands. The interest of each member of the clan in such communal lands is a proprietary interest and is a joint interest with each other member of the clan. Each such individual interest arises at birth and continues until death.

5. Pursuant to the said laws and customs, the interest of each clan in the land which it holds is inalienable and its incidents include—

(a) The right to occupy and move freely about the said lands ;

(b) the right to exclude others from the said lands ;

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(c) the right to live off the waters and the plant and animal life of the said lands;

(d) the right to dig for and use the flints, clays and other useful minerals in the said lands; and

(e) The right to dispose of any products in or of the land by trade or ritual exchange.

6. Pursuant to the said laws and customs, the Rirratjingu and the Gumatj clans hold and exercise the said rights over, and have from time immemorial held and exercised the said rights over, all that land comprising a peninsula generally north of Port Bradshaw and east of Melville Bay in the Northern Territory and commonly referred to as the Gove Peninsula. The whole of the land referred to is hereinafter called " the said land ". Further particulars in the form of a map showing the approximate boundaries of the areas held by the said clans respectively will be supplied before the hearing of this action."

On certain issues there was a formal agreement between the parties, which requires explanation.

It was plain from the evidence, and not disputed by the defendants, that the existence of the Yirrkala Mission since 1935 has greatly affected the way of life of the aboriginals living on the subject land. The nature of the changes can be shortly described. Most, if not all, of the aboriginals in the subject land now, some thirty-five years after the establishment of the Mission, have more or less fixed habitations which are in and about the Mission. That is not to say that they never move about the land or " live off the land " in the manner in which it appears that their predecessors did. They do so, but for shorter periods, by way of change or recreation, rather than permanently. Their livelihood does not now, as formerly it did, entirely depend on gaining sustenance from the animal and plant life of the land. They insist, however, that this choice of a different régime in no way affects their right to assert their system of native title against the defendants. It was not contended by the defendants that if the plaintiffs had any such right, they had lost it by electing to make permanent or semi-permanent habitations in the vicinity of the Yirrkala Mission. The purport of the evidence for the plaintiffs was to establish what were the laws, customs and manner of living of the aboriginals on the subject land in the days before the Mission, and for a period going back into the indefinite past. In the statement of claim the phrase " from time immemorial " is used, but perhaps somewhat unhappily; at any rate, the technical connotations of that phrase in English law had no relevance. It was an essential part of the plaintiffs' case that there had existed, from a time in the indefinite past and in particular from 1788, not merely the same *system* of clan membership and organization and the same *system* of land

ownership, but also the ownership by the Rirratjingu and the Gumatj of the very land to which they now respectively lay claim. The plaintiffs thus set themselves the task of proving on the balance of probabilities that the land now claimed by them to be Rirratjingu land was Rirratjingu land in 1788; and so for Gumatj land.

The agreement to which I have referred was in effect that if, notwithstanding the defendants' contentions that much of the evidence was inadmissible, the Court made findings of fact about the clan system and about the land-holding system in the period immediately before the establishment of the Mission, the defendants would admit that the *systems* of clan organization and of land holding had existed in 1788 and continuously thereafter, but this did not involve any admission that any particular clan had held any particular area of land since that time.

The evidence therefore was directed to the establishment of the plaintiffs' social organization, way of life and land holding rules, particularly as regards the subject land, as they were in the pre-Mission period. The plaintiffs sought to prove these matters by the oral evidence of two kinds of witnesses, namely aboriginals (each of whom was a member of one of the plaintiff clans) and expert witnesses, i.e., the two anthropologists, Professors Stanner and Berndt. The defendants objected on various grounds to much of this evidence.

No difficulty arose in the reception of the oral testimony of the aboriginals as to their religious beliefs, their manner of life, their relationship to other aboriginals, their clan organization and so forth, provided, first, that the witness spoke from his own recollection and experience, and secondly, that he did not touch on the question of the clan relationship to particular land or the rules relating thereto. No question of hearsay is at this stage involved; what is in question is only the personal experience and recollection of individuals. The substance of this evidence had to be proved, in some manner, as an indispensable preliminary to the exposition and understanding of the system of "native title" asserted by the plaintiffs. It would be impossible even to begin to understand what the plaintiffs claim to be the relationship, in their law, of a clan to a particular piece of land, without first attempting to understand what is meant by the clan. In due course I shall set out my findings on these matters.

The Solicitor-General insisted that proof of all the facts asserted by the plaintiffs must be by evidence admissible at common law, and that no power lay in the Court to override or extend the ordinary rules of evidence, either because of the novelty of the matters in issue, or because of the difficulty of communicating with the aboriginal witnesses and understanding their evidence. So stated.

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the proposition must be correct, but the Solicitor-General developed it broadly to a point at which substantive and adjective law coalesced. If, he said, the application of the ordinary rules of evidence produced the result that material which the plaintiffs wished to prove was impossible of proof. that was not surprising or unacceptable. It was merely another demonstration of the lack of substance in the plaintiffs' case.

In my opinion the proper approach of the Court to the difficult problems of evidence which the case poses is upon the following lines. Neither the novelty of the substantive issues, nor the unusual difficulties associated with the proof of matters of aboriginal law and custom, is any ground for departing from the rules of the law of evidence which the Court is bound to apply. On the other hand, the rules of evidence are to be applied rationally, not mechanically. The application of a rule of evidence to the proof of novel facts, in the context of novel issues of substantive law, must be in accordance with the true rationale of the rule, not merely in accordance with its past application to analogous facts. The proposition " there is no substantive right " (*or* " there is no precedent for this fact-situation "), " *therefore* there is no appropriate rule of evidence, *therefore* the evidence is inadmissible " is unacceptable.

I take as a simple example, for the purpose of applying these principles, a piece of evidence which, in slightly varying forms, the aboriginal witnesses gave several times and which the defendants contended to be inadmissible. " My father (who is now dead) said to me ' this [referring to a particular piece of land] is land of the Rirratjingu '." At this stage I need not go into the various forms in which the statement was put. The argument for the defendants was that this was inadmissible on the ground that it was hearsay and not admissible under any of the recognized exceptions to the hearsay rule. A well-known exception had of course to be considered. It is described by Phipson, *Law of Evidence*, 11th ed. (1970), par. 972, in these words: " Declarations made by deceased persons of competent knowledge . . . are admissible in proof of ancient rights of a public or general nature. Evidence of this description is frequently included under the general term *reputation*.... The grounds of admission are (1) *death* ; (2) *necessity*, ancient facts being generally incapable of direct proof ; and (3) the guarantee of truth afforded by the *public nature of the rights*, which tends to preclude individual bias and lessen the danger of mis-statements by exposing them to constant contradiction ", and again, at par. 1277 : " General reputation is admissible to prove the existence of the facts mentioned below, partly by reason of the difficulty of obtaining better evidence in such cases, and partly because ' the concurrence of many voices ' among those most favourably situated for knowing, raises a reasonable presumption that the facts concurred in are true. *Public rights*. General reputation

is admissible to prove public rights under the same limitations as hearsay on this subject." To this last sentence there is a footnote giving a reference to par. 972.

The same matter is dealt with much more elaborately in Wigmore, *A Treatise on Evidence*, vol. 5, ss. 1582-1593, though these sections purport to deal only with the application of the reputation principle to the subject of " land-boundaries and land-customs ".

The Solicitor-General strenuously contended that the rules derived from the decided cases, and set out in these authoritative works, had no application to the matters which the plaintiffs sought to prove in this case. In the first place he contended broadly that the ancient rights which at common law were provable by so-called reputation evidence, were all of a kind capable of enforcement under English law. Customary rights, manorial rights, rights of fishery, boundaries of land held under the ordinary law of real property—matters of this kind had for centuries been known to, and capable of determination and enforcement by, the common law. In this case, however, the common law had no knowledge of, and could not recognize, rights of the kind which the plaintiffs are seeking to enforce, and the reputation principle therefore had no application. This seems to me, with respect to the Solicitor-General, to be reasoning of a kind which I have just described as unacceptable. Here the plaintiffs are trying to show, rightly or wrongly, that their system is recognized at common law. It is not the function of law of evidence to operate by way of anticipating the decision of substantive law upon the facts which the evidence in question seeks to prove. In my opinion it is mechanical, not rational, application of the law, to apply the hearsay rule so as to exclude this evidence, solely on the ground that the reputation principle can apply to the proof of rights only of a kind which the law has already recognized.

Secondly, the Solicitor-General contended that the evidence to which he was objecting (in the form of the typical evidence quoted above) was not evidence of a reputation at all, but rather a statement of fact or opinion, or even a statement of religious belief. The point is explained thus by Wigmore in s. 1584 :

" What is offered must be in effect a *reputation*, not the mere *assertion of an individual*. . . . But reputation includes and is often learned through the assertion of individuals ; it is therefore constantly necessary to distinguish between (*a*) assertions involving mere individual credit and (*b*) assertions involving a community-reputation. The common form of question put to a reputation-witness was : ' What have you heard old men, now deceased, say as to the reputation on this subject ? '

" The judges constantly speak of ' reputation from deceased persons '. Thus, though in form the information may be merely what the deceased persons have been heard to say about a custom, yet in effect it comes or ought to come from them as a statement

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of the reputation. . . . The deceased individual declarant is merely the mouthpiece of the reputation. Whenever, therefore, individual declarations are offered, they must appear to be, in the words of Baron Wood, ' the result of a received reputation ' (*Moseley* v. *Davies* (1))."

The Solicitor-General pointed out that in no case did any aboriginal say, " My father told me that the reputation among the old men of the tribe was that the land was Rirratjingu land ". In my opinion it is clear that what is vital is the sense of the declaration, and not the precise words in which it is framed. Thus in *Moseley* v. *Davies* itself, the statement in question was that the witness had heard old persons, long since dead, say that it had always been the custom to make certain payments. The Court had no difficulty in holding that this meant, though it did not say, that there was a reputation that such payments were enforceable as a custom. In the light of the evidence I have heard in this case, even apart from that which was contended to be inadmissible, and taking judicial notice of the notorious fact that Australian aboriginals have no writing and that therefore all matters of tribal custom and organization must be discussed and communicated orally, I have no difficulty in concluding that a statement in the form " My father told me that this was Rirratjingu land " is in substance a statement as to reputation.

The Solicitor-General further contended that the rights described in such a statement were, within the meaning of the established rules as to reputation evidence, private and not public or general rights. The argument was ingenious but in the last resort unconvincing. The distinction is certainly a well-recognized one: *Lord Dunraven* v. *Llewellyn* (2); Phipson, *The Law of Evidence*, 11th ed. (1970), par. 972. At first sight one might say that a statement that a given piece of land is the property of a particular clan obviously relates to public and not private rights. The Solicitor-General's ingenious argument, however, was that in this case the rights claimed were not claimed as the rights of a substantial section of the community against the whole of the rest of the community, but rather as rights of one clan (the Rirratjingu) against another clan (the Gumatj). Each clan was thus reduced to the status of an individual. Even taking into account the plaintiffs' assertion that other clans had the right to use or enjoy the given land with permission of the clan to which it belonged, such rights were essentially rights as between a few individuals (the clans) and not rights exercisable by a substantial, definable section of a large community, as distinct from the other members of the community.

In my opinion this argument loses sight of the rationale of the distinction between public and general rights, and private rights.

(1) (1822) 11 Price 162, at p. 180; 147 E.R. 434, at p. 440.

(2) (1850) 15 Q.B. 791; 117 E.R. 657.

The real importance of the distinction is surely that rights affecting a large number of people are those which are likely to be truly stated, because large numbers of people are likely to know the truth, and error is thus "sifted" as Wigmore says (s. 1583). To quote Wigmore again: "The matter is one which in its nature affects the common interest of a number of persons in the same locality, and thus necessarily becomes the subject of active, general and intelligent discussion." This requirement is plainly satisfied in the example quoted. It is not displaced by arguments based on the peculiar status of the clans vis-à-vis each other, in this particular case.

The Solicitor-General's most weighty argument was akin to the last one. He put it that there must be an identity between the community of people in which the reputation is alleged to be held and the community of people which enjoys the right which the reputation seeks to establish. The common law, he said, took the view that only if there was such an identity was the reputation likely to be trustworthy, since if all enjoyed the right, each person was likely to have the same means of information. His criticism was that in the plaintiffs' case the community to which the alleged law applied was never shown; even if it could be taken to be the community of clans of aboriginals being all those who are plaintiffs and who enjoyed rights of some kind over the subject land, still the evidence given was not evidence which related to a reputation in that community. It was merely the evidence of a member of the Rirratjingu clan saying in effect "this is Rirratjingu land". It was not possible, he contended, to add up a number of such assertions by members of different clans, and thereby arrive at a reputation held by all members of a defined community, relating to rights enjoyed by them all.

After much consideration I have come to the conclusion that this argument is not sound. I go back to the broad context in which these rules of evidence are being applied. We are not dealing here with the case of a group of people all claiming an identical right, within the framework of a larger community, governed by a fully developed system of law which recognizes the right provided that its reputed existence can be proved. We are dealing with a situation which is at once more simple and more complicated. The group or community is the group consisting of all the people of all the clans who are plaintiffs. The custom or law which they seek to assert is not merely one right, or the same right existing in each of a number of people to do the same simple or single thing, but the totality of aboriginal law which says "this land is Rirratjingu land and there the Rirratjingu may do certain things in certain circumstances, and this land is Gumatj land and there the Gumatj and the other clans may do other things in other circumstances" and so forth. Once the rights asserted are seen as a complex of

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different but consistent rights, applicable to a whole community, being the group of clans who are the plaintiffs in the action, the apparent difficulty disappears. There is an identity between the community of people in which the reputation is alleged to be held, and the community of people which enjoys the right which the reputation seeks to establish, to use the Solicitor-General's words again. If it were practically possible for each witness to describe the total system applicable to all the people in the group, in one speech without interruption, the matter would be easier to see in its true light. Why should it make any difference that the reputation has to be established bit by bit, that is to say by each witness saying at one time " this is Rirratjingu land " and later " this (another piece) is Gumatj land "? As the Solicitor-General himself said, there is apparently no English or American case like this, where the matter of public right sought to be proved is a complex totality of rights rather than a single right. But in my opinion the proper conclusion from that is not that there is no authority for the admission of reputation evidence in such circumstances, but that the situation is a new one and that the true rationale of the reputation principle allows, indeed requires, that it be applied.

I need hardly say that the fact that there were inconsistencies in the evidence actually given by the various claimants of the rights is nothing to the point. The question at present is the question whether the evidence is admissible ; it is not the question whether the rights asserted have been satisfactorily proved.

I reject, therefore, the defendants' objections to the admission of statements by the aboriginal witnesses as to what their deceased ancestors had said about the rights of the various clans to particular pieces of land, and the system of which these rights form part. In my opinion, such evidence is admissible under the exception to the hearsay rule relating to the declarations of deceased persons as to matters of public and general rights (commonly known as reputation evidence).

The Solicitor-General greatly assisted me with an explanation and discussion of a number of African cases, decided both by the courts in Africa and by the Judicial Committee on appeal, where what is commonly called " traditional evidence " relating to African native law and custom has been admitted, though it did not fall within the ordinary rules of evidence. I need not examine these cases in detail. It is clear that there is (or perhaps one should say there was) an accepted body of law in the British colonies in Africa, whereby native law and custom could be proved in the courts by assertions of native tradition, often, though not always, by persons who were in effect native experts in native law or tradition. Thus in *Angu* v. *Atta* (3) the Judicial Committee said : " As is

(3) (1916) Gold Coast Privy Council Judgments (1874-1928) 43.

the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof in the Court, become so notorious that the courts will take judicial notice of them." The matter is fully explained in a learned article by A. N. Allott, " The Judicial Ascertainment of Customary Law in British Africa ", (1957) 20 *Modern Law Review* 244. In my opinion this is a special field of the law of evidence, not part of the common law as it is understood in Australia ; it is adapted to deal with a situation quite different from that which is before me in this case. The question before me is whether Australian law recognizes the native title which is asserted. On the other hand, the purpose of the rule in *Angu* v. *Atta*, and of the highly developed system of rules of which it forms a part, is to enable proof of the detailed matters of native law and custom to be given in courts which have the responsibility of applying such law and custom in suits between subjects, or between a subject and the Crown, on the assumption that the native law and custom is applicable to the matter before the court. Indeed, in many colonial possessions special statutory provision was made not only for the application of the native law and custom, but for its proof. I was referred to a number of such provisions, in the laws of the Gold Coast, Papua, New Guinea and New Zealand, but I need not refer to them here. In my opinion the special body of law known as the law of " traditional evidence" has no application to this case.

The expert evidence.

Evidence for the plaintiffs was given by two anthropologists, Professor W. E. H. Stanner and Professor R. M. Berndt. Both are acknowledged experts who have given many years of study to Australian aboriginal culture. Counsel for the defendants objected to the admission of most of their evidence.

In only one respect was any attack made on the qualifications of these two expert witnesses. Professor Stanner, who is Professor of Anthropology in the Research School of Pacific Studies at the Australian National University, gave evidence of his extensive experience of Australian aboriginal culture both in field work and in academic study. This experience included more than eight years of field work in and about the Northern Territory. His special fields of interest were religion, ritual and symbolism, and territorial matters (by which I understood him to mean the systems by which particular groups of aboriginals were related to particular areas of land). The region in which most of his work had been done was the area between the Daly and Fitzmaurice Rivers, centring on Port Keats—about six hundred miles from the subject land. He had studied the published work of other anthropologists relating to the Arnhem Land aboriginals. His personal knowledge

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of the subject land and its people was based on two visits—one of three days in 1968, which was in connexion with official duty; and one of eight days, which he spent at Yirrkala Mission in "more or less continuous discussion" with aboriginals. The purpose of this visit can be put in Professor Stanner's own words: "... in order to see as far as I could, by brief tests, to what extent I could say ... that knowledge gained in other parts of Australia would have some relevance to my opinions about the state of community life, the kind of customs they are following, the extent to which they follow those customs, in Arnhem Land. I don't pretend it was more than a brief visit, I don't pretend it was more than merely superficial. I went there to satisfy myself that I was not simply talking on an abstract plane."

The Solicitor-General did not dispute Professor Stanner's general qualifications as an anthropologist, but contended that because of his limited experience with the aboriginals of the subject land he was not qualified to give expert evidence in this case. In such a matter, it seems to me, there can be no precise rules. The court is expected to rule on the qualifications of an expert witness, relying partly on what the expert himself explains, and partly on what is assumed, though seldom expressed, namely that there exists a general framework of discourse in which it is possible for the court, the expert and all men according to their degrees of education, to understand each other. Ex hypothesi this does not extend to the interior scope of the subject which the expert professes. But it is assumed that the judge can sufficiently grasp the nature of the expert's field of knowledge, relate it to his own general knowledge, and thus decide whether the expert has sufficient experience of a particular matter to make his evidence admissible. The process involves an exercise of personal judgment on the part of the judge, for which authority provides little help. I accept with respect what Menzies J. said in *Clark* v. *Ryan* (4), that it "is very much a question of fact" but it seems to me a question of fact of a peculiar kind, not unlike the question whether a judge may take judicial notice of some matter. In this case I do not hesitate to rule that Professor Stanner's general anthropological experience, combined with his special study of aboriginals of other parts of Australia and his short periods of study in the subject land, qualify him to give admissible evidence on the matters in issue in this case. The shortness of his experience in the subject land may be relevant to the weight of his evidence.

No such point was taken about the qualifications of Professor R. M. Berndt, who is Professor of Anthropology in the University of Western Australia. Included in his extensive field work in the study of Australian aboriginals was a period of about one year

(4) (1960) 103 C.L.R. 486, at p. 503.

in 1946 and 1947, when he worked in the Gove Peninsula. On each of three later occasions he has spent three or four weeks there. I need not detail the rest of his great experience.

Counsel for the defendants made a weighty attack on the admissibility of so much of the experts' evidence as purported to give an account of the social organization or " laws " of the aboriginals. One such ground of attack was the hearsay rule. It was contended that the anthropologists' sources of knowledge of the facts upon which they based their opinions included what they had been told by the aboriginals.

I do not think it is correct to apply the hearsay rule so as to exclude evidence from an anthropologist in the form of a proposition of anthropology—a conclusion which has significance in that field of discourse. It could not be contended—and was not—that the anthropologists could be allowed to give evidence in the form : " Munggurrawuy told me that this was Gumatj land." But in my opinion it is permissible for an anthropologist to give evidence in the form : " I have studied the social organization of these aboriginals. This study includes observing their behaviour ; talking to them ; reading the published work of other experts ; applying principles of analysis and verification which are accepted as valid in the general field of anthropology. I express the opinion as an expert that proposition X is true of their social organization." In my opinion such evidence is not rendered inadmissible by the fact that it is based partly on statements made to the expert by the aboriginals.

My ruling is based on accepting that there is a valid field of study and knowledge called anthropology which deals with the social organization of primitive peoples (the definition will serve well enough for the purpose in hand). The process of investigation in the field of anthropology manifestly includes communicating with human beings and considering what they say. The anthropologist should be able to give his opinion, based on his investigation by processes normal to his field of study, just as any other expert does. To rule out any conclusion based to any extent upon hearsay—the statements of other persons—would be to make a distinction, for the purposes of the law of evidence, between a field of knowledge not involving the behaviour of human beings (say chemistry) and a field of knowledge directly concerned with the behaviour of human beings, such as anthropology. A chemist can give an account of the behaviour of inanimate substances in reaction, but an anthropologist must limit his evidence to that based upon what he has seen the aboriginals doing, and not upon what they have said to him.

I do not believe that the law of evidence requires me to put chemistry into one category and anthropology into another. The matter can be tested, it seems to me, by applying the analogy of

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medical evidence, with which courts are so familiar. This is a field in which the " facts " include both what the expert observes and what he hears from other persons—his patients. A medical expert gives evidence in this form : " I have studied the subject of coronary heart disease. This study includes observing the anatomical and physiological facts ; talking to patients and considering what they say ; studying the literature, etc. I express the opinion as an expert that proposition X is true of coronary heart disease." There is no doubt a considerable difference in degree between the extent to which statements made by other persons form the basis of conclusions in clinical medicine and in anthropology ; but in my opinion it is not a difference in kind. (The example I have given by way of analogy has, of course, nothing to do with the rule that a medical witness may repeat what a patient said to him for the purpose of establishing the foundation for his opinion of that particular patient's condition.)

Coupled with the objection based on the hearsay rule was the objection, sometimes taken, that the facts upon which the experts based their opinions were not apparent. It was insisted that expert evidence is evidence of opinion, and that every opinion must be shown to be based either on proved facts or on stated assumptions. This principle I accept as correct. The question is how it is to be applied. The proposition that all expert evidence is evidence of opinion requires analysis. In the typical case a medical witness first gives an account of what he found on examination of a patient —this much may be described as " fact " and then gives his conclusion about the patient's state of health—this much may be called " opinion ". Yet it would be ridiculous to suggest that the examination, and the account of it, could be just as well conducted and given, by an unqualified person. The expert is an expert observer, and his special skill enables him to select, and state, the " facts " which are relevant and significant, and reject, and omit to mention, those which are not. The process of selection involves the application of unexpressed opinion. Moreover, he states the " facts " in specialized terms which imply generalizations accepted as valid within his field of knowledge. These generalizations may in former times have been, and may even now be, matters of disputed opinion. In this broad sense, everything that an expert says within his own field of expert knowledge is a matter of opinion, including his account of the " facts ". To apply the analogy to the case before me, the aboriginals of the subject land correspond to the patient. The frame of reference in which the evidence is being given—their social organization—corresponds to the patient's state of health. The " facts " are those selected and deemed significant by the expert in the exercise of his special skill.

It seems to me that the question is one of the weight, rather

than of the admissibility, of the evidence, and that the court must be astute to inquire how far any conclusion proffered by an expert is indeed based on facts and to weigh it accordingly; but the "facts" include those ascertained by the methods, and described in the terms, appropriate to his field of knowledge. The ascertainment and description of such facts, and the extent to which they support the conclusions proffered, can of course be the subject of cross examination.

A particular matter upon which the defendants pressed their objection to the admission of expert evidence, was the question whether a relationship between a given clan and a given piece of land existed at a time before any evidence based on personal experience could be given of it, particularly in 1788, when the subject land became part of New South Wales. The objection was that the experts were not shown to have any qualification for expressing an opinion about the antiquity or permanence of such a relationship; the opinions so expressed were merely speculation. I do not uphold this. In my opinion both the experts were qualified by their experience in anthropology, and in particular their knowledge of the Australian aboriginal, to express an opinion on the permanence of a social group and of its relationship to a particular piece of land, and therefore on the likelihood that such a relationship existed in 1788. On this question I think I should attach more weight to Professor Berndt's opinion than to Professor Stanner's because of his more detailed knowledge of the aboriginals of the subject land. But neither opinion was, in my judgment, inadmissible.

Counsel were able to refer me to only one case in which the expert evidence of an anthropologist was judicially discussed; that was the Canadian case of *Reg.* v. *Discon and Baker* (5). There, the accused were charged with an offence against a provision forbidding the hunting of game in the close season. Their defence was that they were Indians entitled to hunt on ancient tribal territory without restriction and that the statutory provision did not apply to them. I am not here concerned with any question of substantive law, but only with the admissibility of expert evidence called on behalf of the accused. The witness was a professor of anthropology, who testified that before the arrival of Captain Cook on Vancouver Island in 1778 (he being the first white man to arrive there) the tribe of Indians to which the accused belonged was entitled to hunt for food in that particular land as tribal territory. He admitted in cross examination that his knowledge of the tribe was derived solely from his studies of books and material written since 1900, and that his evidence involved "a small degree of conjecture". Schultz Co. Ct. J. of the Vancouver County Court, in the course of his judgment, said this (at pp. 624-625): "The

(5) (1968) 67 D.L.R. (2d) 619.

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'opinion' of Professor Duff as to the aboriginal right of the Squamish Indians to hunt in Squamish Valley as tribal territory is not based upon *any fact personally* known to the witness. It is obvious that Professor Duff, like Discon and Baker, could not have any *personal* knowledge of the condition of affairs in the Squamish Valley at any time before 1778. Similarly, the 'opinion' of Professor Duff as to this aboriginal right does not emanate from a hypothetical question predicated upon *any fact adduced in evidence* which the expert witness is asked to assume to be true. The weight of the evidence is to be determined by the tribunal of fact which, in this appeal, is the trial judge. I conclude that the 'opinion' of Professor Duff is 'really a matter of conjecture'." It is to be noted that the evidence was in fact admitted without objection, and that his Honour's comment related to its weight. It is also to be noted that, at any rate so far as appears from the report, the expert did not profess to base his opinion upon his general anthropological knowledge, nor express it as an opinion upon the permanency or antiquity of an anthropological fact found to be existing within living memory. The case does not, in short, disturb my conclusion that in principle the evidence in question in this case is properly admissible.

What is in question at present is merely the admissibility of the evidence. Whether I should make a finding in accordance with the evidence so admitted is a totally different question.

A further objection to the evidence of the expert witnesses was that they tended to apply unwarranted concepts of their own to the actual facts of aboriginal behaviour and to talk in terms of such concepts, even to the extent of expressing themselves in terms which anticipated the findings of the Court on the issues before it. It was maintained, for example, that questions and answers expressing the idea of the " rights " of clans of aboriginals to particular land were objectionable. I do not accuse counsel of over-simplifying the matter; the objection was not merely that the Court should not allow an expert to decide a question which it was for the Court to decide. The contention was really that the experts tended to " conceptualize ", to use the Solicitor-General's word, rather than to state facts objectively. This argument is closely related to the attempted distinction between the facts of aboriginal behaviour, as observed, and the formulation of propositions about their social organization, based on such observations. In my opinion it is fallacious to require the expert altogether to avoid the use of words expressing concepts; to do so would be to deny his utility as a channel for the communication to the Court of the science he professes. It seems to me to be a function of an expert witness to talk in terms of concepts which are appropriate both to his field of knowledge and to the Court's understanding. A problem for the Court in this case is to decide, with the experts' assistance,

as a matter of fact, what the aboriginals' " rights " are, in the eyes of the aboriginals. To reach, and to express, any conclusions on this matter it is convenient to use words like " right ", " claim " and " law ". The Solicitor-General himself went to the heart of the matter, when, in reference to the use of the word " ownership " by Professor Berndt, he commented : " I think he is trying to use an English word to describe it but it is the only one he can find." An alternative course might be to use aboriginal words ; but from my experience in this case I venture to doubt whether such words exist ; at any rate there would be tremendous difficulties of translation. Another alternative in theory would be to invent arbitrary words. In my opinion it is acceptable, and indeed far preferable, to allow the expert to answer questions in terms of " rights ", " claims ", etc., provided that the Court at all times remembers that there are two questions which are solely for it to decide. The first is that already mentioned : whether the conclusion of the expert, be it expressed in terms of " rights ", etc., or not, is one to which the Court should come. This is a question of fact. In deciding it, the Court must be alert to the danger of allowing its conclusions to be unjustifiably affected by the use of words which are only tentatively appropriate. The matter might in practice be difficult, though it would not in principle be impossible, to explain to a jury. The second is whether what is tentatively called the " right " can be subsumed under some category which enables it to be recognized at common law, for example whether it can be properly characterized as a right of property. This is a matter of law. In other words, if the expert talks about " the land-owning or land-possessing group " the court can accept this without prejudice to its task of deciding whether such is in fact a proper jurisprudential analysis of the relationship. Bearing all this in mind, I do not reject as inadmissible, nor do I necessarily set aside as of no weight, that expert evidence which was expressed in conceptual terms.

I thus overrule all the general objections to the admissibility of the expert evidence.

The aboriginals' social organization.

I turn now to matters of fact. What follows will be an account of my findings, upon the evidence, as to the customs, beliefs and social organization of the aboriginals of the subject land. The account is primarily true of conditions just before the foundation of the Yirrkala Mission. It must be remembered that, since the 1930s, considerable changes have taken place, to which I have already referred. The time before the foundation of the Mission is of course well within the memory of many living persons. Where no reference is made to any particular period, it can be taken that my findings refer to both the pre-Mission period and the present.

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I do not, for the moment, deal with the question whether the facts of the pre-Mission period were also true at earlier times, and in particular in 1788. I make a special finding as to that later.

In the aboriginal belief, all things in the physical and spiritual universes (and the difference between them seems not to be important) belong to one or the other of two classes called " moieties ". The names of the moieties are Dua and Yiritja. It is in the unchangeable natural order of things that every human being, every clan, every animal and plant species, and every inanimate thing, belongs to one or other of the moieties.

The people themselves believe that they are descendants of certain great spirit ancestors whose names and deeds are well known ; they arrived at identified places and they moved about the land doing various things at various places. Whether or not they were the creators of the physical world, they were certainly the ordainers of the system of life which the aboriginals accept. Foremost in this system is the principle of the clan. There are aspects of the clan system which were a matter of some dispute, and indeed I think there are some aspects which are in the realm of yet unexplained mystery, but at this point I give an account only of such aspects as are not in dispute in this case. The clan is essentially a patrilineal descent group. Every human being has his clan membership determined at the moment of his birth, and it is that of his father. Each clan, and therefore each member of it, belongs to either the Dua or Yiritja moiety. Each clan is strictly exogamous. This has two aspects : not only can a person marry only one of another clan, but also only one of a clan of the opposite moiety. This results in there often being a special relationship between some particular pairs of clans, brought about by the fact that so many marriages have taken place between persons from each clan of the pair. Polygamy is normal. Upon marriage, a woman does not cease to belong to her own clan, though of course her children belong to the clan of her husband.

The relationship of language to clan membership is an only partly explained mystery. I deal later with the disputed question of the true nature of the group which is identified with particular areas of land, and the part which language plays in the determination of such group. There is apparently a language peculiar to every one, or almost every one, of the clans named in the title of this action. The languages seem to have varying degrees of resemblance to each other, with words in common, but their distinctness from each other is not in doubt. The aboriginals themselves seem not to be in difficulty about understanding and speaking several of the languages. Professor Stanner said that their linguistic powers are " really quite astonishingly good "; that quadrilingual aboriginals are very common, and bilingual aboriginals so common as to be not noticeable. Children of tender years spend most of

their time with their mothers, and later apparently without effort or difficulty use their father's language (which may be quite different) as their normal speech, and possibly speak other languages also. Notwithstanding this, the languages apparently remain distinct, and Professor Stanner suggested that it is customary to take pride in the preservation of linguistic differences.

I turn to the question of the land. As I understand it, the fundamental truth about the aboriginals' relationship to the land is that whatever else it is, it is a religious relationship. This was not in dispute. It is a particular instance of the generalization upon which I ventured before, that the physical and spiritual universes are not felt as distinct. There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole. For the moment, I make no reference to the much disputed questions of the identity, extent and correct delineation of the land of each clan. It is not in dispute that each clan regards itself as a spiritual entity having a spiritual relationship to particular places or areas, and having a duty to care for and tend that land by means of ritual observances. Certain sacred objects, called rangga, are at once symbols of the continuity of the clan, and tangible indications of the relationship between the clan and certain land. These sacred objects are closely guarded and shown only to those who may properly see them, and then only with due solemnity. Counsel and I were privileged, at specially conducted views, to have some of these objects shown to us by their custodians.

The clan, then, had a religious basis, it had a connexion with land, and the principle of its existence was patrilineal descent. But its relationships with other social phenomena were far from simple. It may be a convenient beginning to the explanation of this aspect of the matter to say that the ordinary connotation of the word " tribe ", suggesting a group of people with an internal organization of its own, ruled directly or indirectly by a " chieftain ", and being in a direct economic relationship with, and in control over, a definable " territory ", has no resemblance to the facts of this case. The evidence shows something far more subtle. The clan had no internal organization of its own, or any rate none relevant to this case. No chieftain ruled over it ; rather, apparently, decisions affecting the whole clan may have been made by a consensus of the older men. The clan had little significance in the economic sense ; indeed, it was a matter of dispute whether it had any such significance. The economic relationship between the aboriginals and the land is not easy to describe. It seems that at any given time there would be various groups of aboriginals in various places about the land, each group living in a particular area, hunting animals, obtaining vegetable food,

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getting materials for clothing and ritual observances and moving about from area to area as the economic exigencies required. Each group consisted of a number of adult men, some with their wives and children and some unmarried. The composition of any given group at a given time could not be predicted, and did not, for any fixed or recognized time, remain constant; indeed, one group might not be recognizable as such over a period of one year or even less, or might persist for a longer period. Changes in the personnel of the group would occur not only by reason of births, deaths and marriages, but for purely economic reasons such as sufficiency of food supplies, and also because of ritual requirements at special sacred places at particular times. To refer to such a group, both the anthropologist witnesses used the technical word " band ". The " band " was the land-exploiting group.

I have not yet explained the word " clan " in depth, but I have attempted to explain the nature of the band. My explanations are obviously inadequate, but as far as they go, I believe they would be undisputed. I now have to turn to matters which were in dispute. I will deal first with the composition of the band in terms of clan membership, and secondly with the question whether the composition of the band, in that sense, determined, or partly determined, the land over which the band conducted its operations.

Counsel for the plaintiffs contended that the normal composition of each band was a nucleus, usually a numerical majority, of persons being male members of one clan together with the wives and children of those of them who were married. Thus, ignoring for the moment the married women, a band would be recognizably associated with a particular clan, in the sense that *most* of its members would be members of that clan. That *all* the male members of a band were of the same clan was not suggested as normal; commonly, some members of other clans would be found also.

The clearest evidence for this view was given by Professor Berndt, who said: " I think the normal composition of the . . . band . . . would be made up of a core of members of a particular patrilineal descent unit." Professor Stanner, whose detailed knowledge of the clans on the subject land was of course less than Professor Berndt's, said that " the fairly high predictability is that in any one band you will find a core of constant membership and these will be the people who at that point of time are linked most closely with the territory area ", but this answer was not in itself very clear, and was not elsewhere explained. It was given in cross examination, and in its context meant, I think, no more than that the band was not a group which coalesced and disintegrated daily and by chance, but one which maintained a degree of stability despite its liability to constant change. A close examination of the aboriginal evidence has led me to the conclusion that it does not support the proposition that the band normally

contained a " core ", or significant majority, of persons of the same clan. All the aboriginal witnesses were asked about this matter and all told essentially the same tale : that the groups in which they moved about the country were composed of members of several clans ; some named almost all the clans mentioned in the case. I do not think I need refer to this evidence in detail : I might take as an example Milirrpum who said that for several years before the establishment of the Mission, he lived at Bremer Island. This island is about five miles long and two miles wide. He said that at that time there were Rirratjingu, Gumatj, Galpu, Djambarrpuyngu and sometimes Lamamirri in the group in which he lived (transcript pp. 356-357). Similarly Birrikitji, a member of the Dhalwangu clan, is an old man who was an adult before the Mission was established. In describing his life before the time of the Mission, he said that people of every clan mentioned in the title to the action were " with " his people when they moved about the country (transcript pp. 619, 620). It is possible to interpret some of these passages from the aboriginals' evidence as meaning only that people of any clan could *possibly* be found in a band and as consistent with the proposition that a band would normally have a majority of people of one clan. What impresses me most on this question, however, is that not one of the ten aboriginal witnesses who were from eight different clans, said anything which indicated that the band normally had a core from one clan, or that they thought of the band in terms of their own clan, and all of them indicated that within the band it was normal to have a mixture of people of different clans. I cannot help feeling that the absence of such an indication from the evidence of no less than ten witnesses must have considerable weight. Had the composition of the band for which Mr. Woodward contended been the normal one, I find it difficult to believe that ten aboriginal witnesses would gi[ve] no evidence of it.

Another possible interpretation might be that a numerical preponderance of men of one clan was not significant in itself ; a band might have men, perhaps old men, of one clan as its effective leaders, though in a minority, in such a way that it would be recognized as having a link with that clan rather than with any other. Of this, however, there was no suggestion in the evidence.

I am therefore in the position of having to weigh Professor Berndt's opinion against the impression that I get from the total of the aboriginal evidence.

A related and equally difficult question was whether a particular band normally stayed mainly upon land to which any particular clan laid claim. Mr. Woodward's contention was that, upon the evidence, it was normal for the members of each clan to spend most of their time, in their several bands, on their clan territory. I am now talking about normal food-gathering activities, and

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not about religious ceremonies which (it was not disputed) were conducted at particular places by members of particular clans—sometimes by more than one clan at a time at the same place. Professor Stanner, who gave his opinion with the warning that he lacked a detailed knowledge of the particularities of the subject land, expressed the opinion that the band would not normally confine itself to the land of a particular clan (transcript p. 70). He did say, it is true, that "members of the clan may in fact spend a lot of their time on their own territory" (p. 1009), but that of course is not inconsistent with the former opinion, since no doubt much time was spent on religious ceremonies. Professor Berndt said much the same thing (transcript pp. 1057-1058): "I would say an appreciable amount of time throughout the year is spent within one's own mata-mala territory." (The meaning of "mata-mala" will appear later.) He went on to say that when food is not very plentiful people move further afield and then said: "I would repeat that they spend quite a good deal of time in their territory for it is necessary to come back for reasons of their spiritual heritage in looking after their particular site."

Professor Berndt expressed agreement with a passage on this topic in a book called *Black Civilization* by Professor Lloyd Warner. The book itself was often mentioned in the evidence, and Professor Berndt described it as "a basic and also a classic text book", and added," there are no other basic and classic text books regarding north-east Arnhem Land". The passage in question was: "The clan's so-called 'ownership' of the land has little of the economic about it. Friendly peoples wander over the food areas of others and, if their area happens to be poor in food production, possibly spend more of their lives on the territory of other clans than on their own. Exclusive use of the group's territory by the group is not a part of the Murngin idea of land 'ownership'."

Turning to the aboriginal evidence, none of the witnesses said that in the days before the Mission he lived chiefly in his clan territory and to a less extent in territory of other clans. Once again, I am struck by this absence of express evidence on the part of ten aboriginal witnesses. I consider that I must give considerable weight to this absence. Mr. Woodward, in addressing me on the evidence on this particular point, could put it no higher than that it was a matter of impression; that generally speaking, when they were asked where their time was spent before the days of the Mission, witnesses tended to emphasize the country of their own clan. I do not think that this conclusion is borne out by the evidence. Dadaynga Marika, who was clearly able to read a map, described with the aid of a map where he lived "before the Mission came". The places he mentioned included country which, on the plaintiffs case, is Gumatj country, though he was of the Rirratjingu clan.

Milirrpum, full brother to Dadaynga, when asked where he was living before he lived at the Mission, mentioned various Rirratjingu places. Munggurrawuy, the Gumatj representative, gave no evidence on this point. Larrtjannga, a member of the Ngaymil clan, described his experience of moving over a great deal of country without any particular emphasis on any particular places. Birrikitji of the Dhalwangu clan and Narritjin of the Manggalili clan, each said in general terms that before the Mission came he was living in "my country". Monyu of the Galpu gave no relevant evidence on the point; neither did Daymbalipu of the Djapu, who would have been too young to remember the days before the Mission.

On this point, therefore, I think the evidence does not support Mr. Woodward's contention. I cannot feel satisfied that a band spent a significantly greater portion of its time in the territory of any clan than in that of another, or that a band regarded itself as based in the territory of any particular clan.

I come therefore to the question of the relationship of the band to the clan, and the significance of that relationship. I think it is a fair summary of the contention which Mr. Woodward put to me as a proper conclusion from all the evidence, that the band was an organic part, having a social and economic function, of the clan. The band was an economic arm of the clan. That it had other clansmen, and visited other territory, did not significantly affect the matter; a clan exercised its economic functions through its bands based on its own land.

But upon consideration of all the evidence, my conclusion is against this contention: I consider that the suggested links between the bands and the clans are not proved. I find it more probable that the situation was not as Mr. Woodward contended, but rather that neither the composition nor the territorial ambit of the bands was normally linked to any particular clan. My finding is that the clan system, with its principles of kinship and of spiritual linkage to territory, was one thing, and that the band system which was the principal feature of the daily life of the people and the modus of their social and economic activity, was quite another. To reduce this somewhat high-flown discussion to simple terms, the evidence is that it was of great importance that a group of people performing a religious ceremony at a particular place should be either of the same clan, or of clans which traditionally celebrated the particular rite together. The people of each clan were deeply conscious of their clan kinship and of the *spiritual* significance of particular land to their clan. On the other hand, beyond the fact that a father and his children were necessarily members of the same clan, it was of no importance whether or not the members of a band, a food-gathering and communal living unit, had any clan relationships to each other, or conducted their food-gathering and communal living upon territory linked to any particular clan.

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The clan.

I have said something of the meaning of the word "clan", but a much more elaborate explanation is now required, and was offered in evidence by the plaintiffs. It was not suggested by the defendants that this more elaborate explanation was not open to the plaintiffs upon their pleading.

The explanation was based principally on the evidence of Professor Berndt. Professor Stanner's explanation of the clan was in accordance with what appears to be implied in the statement of claim (transcript p. 41): "A group of people of both sexes, any ages, who think of themselves and are thought of by others as being very closely related in the patrilineal line, and are thought of, and think of themselves and are thought of by others as being particularly closely related to a specified territory, and who as a group act in marriage exogamously." Professor Stanner explained that the word "mala" was commonly used among the aborigines of the subject land to indicate a clan. He also said (transcript p. 46) that in the subject land people tended to use the name of their language as a clan name. The word "mata" is commonly used for "language" and literally it means "tongue" (as Flinders noted in 1803). Professor Stanner had put to him the names of the various clans which are named in the title to this action, and he was asked whether they were mata names or mala names; he replied: "As far as I could determine they all belong to the mata type of designation." He was asked whether, in a typical language group or mata, one would expect to find one mala or more than one mala, and he replied: "I think on the whole there would be more likely to be a congruence of such a kind that the group known as the mata group and the mala group are one and indivisible." Professor Stanner added that a clan did not always or necessarily have a proper name for itself; there being no absolute necessity for a clan to be named.

Professor Berndt, on the other hand, gave an explanation which made a somewhat different impression. He too explained the "mala" classification as referring to a patrilineal descent group with a spiritual linkage to mythological beings. He also explained that the "mata" classification was one of language, and that this latter was a classification of which the aboriginals themselves are highly conscious. Any given aboriginal could be referred to in terms either of his mala or of his mata; but neither classification was, for Professor Berndt, by itself the ultimately significant classification—the classification which linked the aboriginal to his territory. This was, he said, the "mata-mala combination" or "mata-mala pair" or as he sometimes said simply the "mata-mala". Such a group could be defined as those who were of a certain language *and* of a certain patrilineal descent, as distinct from another mata-mala which was of, say, the same language but a

different patrilineal descent. But this did not complete the explanation. There might be the converse case. "Each mata is usually linked with more than one mala, and vice versa. For example, the Wonguri mata is often associated with the Mandjigai mala; but this last is often paired with the Gobubingu mata—which again, has other linked mala, notably the Birgili. Every person in this society inherits, patrilineally, membership in one such mata-mala pair." The passage quoted was strictly speaking not in evidence, being from a published work of Professor Berndt, put only in cross examination to another witness, but Professor Berndt said the same thing himself (transcript pp. 1166, 1167-1168). The group linked to a particular piece of land, Professor Berndt said, was in every case a "mata-mala" in this sense. This was the sense of the word "clan" in which (to use the language of the statement of claim) "each clan holds certain communal lands".

The evidence of the aboriginals was quite consistent with this view, after making allowance for the difficulties of translation and great differences of outlook between whites and aboriginals which constantly attended counsel's, and the Court's, attempts to understand the aboriginals' evidence. In this respect, as in all others, I believe that the aboriginals all gave their evidence with complete honesty and frankness, tempered only by occasional polite reluctance to talk about matters which they regarded as proper to be explained by others. But I could not help noticing from their evidence that even though they might be aware of the "mata-mala" concept, it did not occupy the forefront of their own thinking about their clan organization. This impression of mine was confirmed by Professor Berndt, who said (transcript p. 1138): "Q. . . . they do not normally refer to themselves by reference to both the mata and the mala? A. In ordinary everyday speech the mata term would be more generally used."

An illustration is the evidence of the Rirratjingu. On Professor Berndt's view, the word "Rirratjingu"—which is a "mata" name—ought to be a collective name for more than one "mata-mala". And so, in fact, it could be seen to be—after a very close examination of the evidence of several witnesses, none of whom explicitly said so. Wandjuk, a Rirratjingu, belonged, according to his own evidence, to a mata-mala which might be called "Rirratjingu-Djamundar" though he did not use mata and mala names in direct juxtaposition in this manner, and neither did any aboriginal witness. There had been, he said, another mala associated with the Rirratjingu mata, which had been called "Wurulul" but all the Wurulul men had died out; only the Djamundar were left, and "doesn't matter two different mala but we are all one Rirratjingu" (transcript p. 869), and again, "it doesn't matter about the two, we're one now" (transcript

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p. 864). Curiously, although strictly speaking he was Djamundar, he preferred to call himself Wurulul, apparently in order to keep alive the Wurulul name (transcript p. 869). Milirrpum also gave the same two names for the mala which made up the two Rirratjingu mata-malas, and he claimed to belong to both (transcript p. 363). Wandjuk was emphatic that the sacred rangga belonged to all Rirratjingu people irrespective of their mala (transcript p. 898).

Professor Berndt asserted that there was yet another mala, which made a mata-mala "Rirratjingu-Miliwurrwurr" (transcript p. 1118). This was mentioned (but only in cross examination) by Milirrpum and Wandjuk, both Rirratjingu witnesses, as associated with another name which, at least on one possible interpretation, might be a mata name—"Bararrngu". Whatever is the true solution to this puzzle, it is apparent that the Rirratjingu do not readily think of the Miliwurrwurr mala as forming another mata-mala combination.

Munggurrawuy, the only Gumatj witness, was emphatic that there were two mala in the Gumatj mata (Raiung and Rrakbala) and that he and all Gumatj belonged to them both.

The witness Birrikitji, an old man of the Dhalwangu clan (a mata name), suggested—though far from clearly—that there were two associated mala, making two mata-mala pairs, Dhalwangu-Nargala and Dhalwangu-Nongulula.

Similar evidence, sometimes less clear, was given by other aboriginal witnesses of other clans: I need not recount it all. My finding on this matter is that the mata-mala pair, as Professor Berndt described it, is the land-associated group. If I may venture to say so, this is a piece of anthropological analysis; it is not much emphasized by the aboriginals themselves, who seem to use mata names most naturally, and to think in terms of mata-mala pairs only when they are pressed to do so: they suggest—and some even say—that the mala divisions of the mata groups are unimportant.

I should also add that from Professor Berndt's evidence it is clear that he has a wide knowledge of aboriginal song cycles and sacred rituals, and I do not forget the possibility that the "mata-mala pair" concept may be much more a feature of aboriginal ritual culture than it is of their everyday existence as it appeared in the evidence.

To avoid misunderstanding, I must make clear that even though the "clan" names Rirratjingu, Gumatj, etc., as used in the title of the action, are primarily mata names—i.e., they refer primarily to the languages spoken by the persons who belong to those groups—each one nevertheless also connotes a linkage of patrilineal descent from mythological ancestors, though the genealogy may

not be known beyond two or three generations. Of the ten aboriginal witness, only two, Munggurrawuy and Narritjin, were able to give the names of their ancestors as far back as their great-grandfathers. It is clear that a Rirratjingu man, of whatever mata-mala, is of the Dua moicty, and can marry only a woman of a mata-mala which is of the Yiritja moiety (e.g. Gumatj). A name therefore which has a primary connotation of language has also a secondary connotation of patrilineal kinship.

I should mention that much use was made in the evidence of the word "bapurru". It seemed to be understood by all the aboriginal witnesses of whatever clan, but all the attempts of counsel to elicit a precise and consistent meaning for it, even with the assistance of Professor Berndt, were, I thought, less than successful. Possibly it has different connotations in the different languages; its highest common factor, I thought, was the idea of patrilineal relationship. But in my opinion nothing turns on trying to clarify it further.

Hereafter I will often use the word "clan" for simplicity, and in the hope that its underlying complexity is now sufficiently indicated.

The question now arises, what is the significance of the findings which I have made about the structure of the clans? Mr. Woodward rightly, in my opinion, contended that so far as concerned the association of clans with parts of the subject land, it was not important that the "clan" appeared upon the evidence to be a "mata-mala combination". For the moment I set aside the claim of the clans in the third class, represented by the plaintiff Daymbalipu. The only two clans which are alleged to have direct proprietary claims in any part of the subject land, apart from very small areas claimed by the Galpu and the Dhalwangu, and an area linked to the Lamamirri (a special case mentioned later), are the Rirratjingu and the Gumatj. I deal later with the question, which was strongly disputed, whether the link between each of these two clans with sufficiently defined areas of land had been satisfactorily proved. For the moment I am talking only of the internal consistency of the statement of claim. For the Gumatj, Munggurrawuy said that he belonged to both the mala associated with that mata name, Raiung and Rrakbala. This was apparently true of all Gumatj people. It did not appear from the evidence whether there had been some coalescence of malas, or whether, as Mr. Woodward rather suggested, the Gumatj are an entirely homogeneous group with alternative names, of the same meaning, to refer to their patrilineal descent. As far as the Rirratjingu are concerned, those parts of the subject land affected by the actions of Nabalco which, on the plaintiffs' own case, are Rirratjingu land, are all, according to the evidence, attributed to the Djamundar mala, which is still in existence. The evidence rather suggests

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that the land of the Rirratjingu-Wurulul mata-mala (which is no longer in existence) was on Bremer Island, but Nabalco's leases do not extend there. In short, the land in dispute is said by the plaintiffs to be all either Gumatj land or Rirratjingu-Djamundar land; for the purposes of the statement of claim, the analysis of the "clan" as a "mata-mala pair" to this extent does not matter.

The "mata-mala pair" concept does, however, have considerable significance in a different context, with which I deal later.

The land claimed by each clan.

I now turn to the difficult question of whether the plaintiff clans have proved their relationship to satisfactorily defined areas of the subject land. The problem is one of identification of areas of land from the evidence. Aerial photographs and highly accurate maps, not showing the plaintiffs' claims, were put in evidence, but no attempt was made to provide a view of any of the land. Some of the aboriginal witnesses were quite at home in reading maps, and hardly less so in reading aerial photographs; others had no such ability, and the Court had to do its best to understand their attempts to describe the areas to which they referred. Many aboriginal names were used, but not always with great clarity. I deal later with the question of nomenclature.

None of the aboriginal languages can be written, except by a handful of expert linguists, all white persons or young educated aboriginals, who have applied themselves to the problem in recent years. Apart from the sacred rangga which, I understand, do not purport to convey precise descriptions of land, there is nothing in the aboriginal world which in any way corresponds to title deeds or registers. My findings therefore must be based solely on oral evidence.

The Solicitor-General made a very thorough and strongly adverse criticism of this evidence—not of its truth or honesty—but of what he contended to be its lack of effect. In the first place, he contended that no boundaries had been shown of any satisfactory precision, except in one or two cases where such a feature as a river provides a boundary which is unmistakable. The contention of the plaintiffs, based on the evidence of the aboriginals and the experts, was that for the aboriginals, very seldom, if ever, was there a need to define a boundary with the precision with which it is normally defined in any system of law of European origin, or, for that matter, any system applicable to people who cultivate the soil. A boundary need be only as precise as the users of the land require it for the uses to which they put the land. It was not the habit of the aboriginals to mark, either notionally or actually, by any line on the ground a boundary between the land of one clan and another; there would be agreement that a given area related to one clan,

and that an adjacent area related to another clan, and the question "where exactly does one area end and the other begin" would be a useless or meaningless question.

The plaintiffs' contention was in effect that the evidence could be summarized pictorially in the form of a map in which all the Rirratjingu land would be coloured in one colour and all the Gumatj land in another colour, and in the result no land would be left uncoloured, and the map would bear a legend to the effect that the boundaries, the existence of which the juxtaposition of the two colours on the map would suggest to the reader, were in fact imprecise and indeed immaterial. This was the view of the matter which was expressed in the evidence of Professor Berndt. He did not, as I have already said, attempt to say "this is Rirratjingu land", etc.; rather, his evidence was of the system. He stressed above all the mythological origins of the clans' claims to particular land, and he described the whole of the subject land as "criss-crossed" with mythological links between places and clans.

Professor Stanner did not go into the matter in such detail, but expressed the opinion that aboriginals would generally agree about the correct attribution of any land to a particular clan, though there might be inconsistencies in their answers as to just where the land of one clan ended and that of another began. But there would not usually be a dispute, because they would not generally think the subject worth a dispute.

The defendants, on the other hand, contended that upon the evidence either the boundaries between the areas were so vague as to make it impossible to attribute areas to particular clans, or that the areas claimed by the clans were not really areas at all, they were rather sites or localities, surrounded by tracts which could be described as "no man's land". It was strongly urged by the Solicitor-General that the clans really laid claim not to adjacent territories, but to a series of special places of mythological significance, and that apart from such special places the land was simply open to all, having no relationship to any particular clan.

On this problem, I mention for the first time the evidence of the Reverend Mr. Chaseling, who gave evidence on behalf of the Commonwealth. He was the missionary who founded the Yirrkala Mission in 1935 and served there till 1941. He was in 1935 a very young man, recently ordained as a Methodist minister, who had taken pains, after his appointment to the missionary field and before taking up his post, to receive a special course of instruction from Professor A. P. Elkin, who was then, and is still, recognized as one of the greatest experts in the world in Australian aboriginal studies, and was then head of the Department of Anthropology in the University of Sydney. Mr. Chaseling's account of the discussions was as follows: "Professor Elkin outlined the trained anthropologist's approach to the primitive people, and recommended

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certain books that I might read, and stressed, over and over again, the manner in which evidence was taken and the way in which primitive peoples' habits and customs and beliefs could be studied, and the language and the method of getting their language down on paper." Mr. Chaseling said that he had five or six " sessions " with Professor Elkin, each of an hour or more, and also that he read books recommended to him by Professor Elkin and subscribed to a continuing publication, *Oceania*. He also took care to consult Professor Elkin during his periods of furlough from the mission field.

His primary purpose in being at Yirrkala was of course to be a Methodist minister in a hitherto uncultivated missionary field. He made it clear that—as is not at all difficult to believe—this entailed a life of hard physical exertion in conditions of the most rigorous austerity. But at the same time he had a sincere personal interest in the pursuit of knowledge about aboriginal life and language, and he did his best to reach reliable conclusions and record them. He was a dedicated man of great integrity, whose basic attitude was to respect aboriginal ways of life as the first step towards understanding them. I accept Mr. Chaseling as a witness of unquestionable honesty ; I admit his opinion evidence as that of an expert witness, though I can give it only the weight which his relatively slight qualifications warrant. But, as will be apparent. I am often obliged to reject his testimony as less reliable than that of other witnesses. The fault may have been in the incompleteness of his investigations : an example perhaps is that the name " Dhalwangu " was unknown to him. After all, he was not there primarily to conduct anthropological investigations, though he had conversed on such matters with many aboriginals, including some who gave evidence in this case. In other cases his understanding of what was said to him, or his subsequent recollection, may have been at fault. I have not ruled out the possibility that what he observed more than thirty years ago may have changed since that time ; but generally I think this unlikely. I shall refer to other parts of Mr. Chaseling's evidence later. For the moment I am concerned with his views on boundaries.

His view was that a number of areas, all near the coast, had significance for particular clans : indeed it was a basic principle, I think, of his view of the territorial organization of the aboriginals on the subject land that the coastline and a strip behind it of " four or five miles " in width. at the most, was divided up between the clans, by lines which were fairly definite in the aboriginals' eyes, and which he did his best to record. The hinterland—the country inland from this coastal strip—was simply bush country in which no clan was particularly interested. Occasional food-gathering took place in it when the normal sources of supply were reduced, but in general the sources of food were all in the coastal

strip. The only other significance of the hinterland was that it had recognized tracks across it for the purpose of travel from one part of the coastal strip by the shortest practicable route to another. But beyond that the people were not really interested in it.

I am obliged to reject this view as inconsistent with all the rest of the evidence. Such a picture was presented neither by the aboriginals nor by the other experts. On one occasion, the aboriginal witness Matjidi was asked what his mother had told him about the country where the airfield now is. That was " hinterland " in the sense in which I have used that word in relation to Mr. Chaseling's evidence. Matjidi's reply, as translated by the interpreter, was, " She didn't tell me anything because it was bush country ". The Solicitor-General relied on this as supporting Mr. Chaseling's view, but I cannot find it convincing, primarily because it is an isolated instance and secondly because I do not know what " bush country " may connote. The interpreter at this point was a well-educated young aboriginal.

Counsel for the defendants placed reliance on passages in cross examination which suggested that the life of the aboriginals in pre-Mission days was, in general, movement from one " special place " to another " special place "—the " special places " being places of mythological or ritual significance, or possibly including those of particular importance in food supply. I do not think these passages establish the defendants' contention on this point, because they are not necessarily inconsistent with the idea of *tracts* of land being associated with particular clans. Moreover, I have learned from other experience in this Court not to place too much reliance on cross examination of aboriginal witnesses in which the questions are expressed in terms of anything less than the most extreme precision. The natural courtesy and simplicity of the aboriginal people tends to make them somewhat easily " led " by a leading question, if by any possibility the terms of the question are such as to permit agreement with the answer suggested. I am not in the least suggesting that the Solicitor-General took any deliberate advantage of this fact : he was scrupulously fair ; but I could not always attribute to the answers to his cross examination the weight which I might have done to the same answers out of the mouths of white men.

Upon consideration of all the evidence, I am clearly of opinion that the aboriginals do, as their counsel contended, think of the subject land as consisting of a number of tracts of land each linked to a clan, the total of which exhausts the subject land, though the boundaries between them are not precise in the sense in which boundaries are understood in our law. I reject the view of the defendants, that the true explanation is that upon the land there are many sites or places, each of which is attributable to one or

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more clans, and which are separated by areas of land without any particular clan linkage.

The aboriginal witnesses used a large number of aboriginal names, for many of which there appeared to be no English equivalents. Some such names obviously referred to tracts or areas, and some to more precisely definable places. Even with those which appeared to have a relatively precise significance, there were differences of usage. Counsel for the defendants subjected these differences to strong and detailed criticism. But in my opinion this criticism exposed few, if any, significant discrepancies. For example, a particular aboriginal name might be used by one witness to refer to, say, a swamp, and by another to refer to the creek where it runs into the swamp and by another to a hill beside the swamp—all in the same locality; but this sort of difference seems to me to resemble a similar usage of place names in our own system of nomenclature. If there had been any clear discrepancies of locality, I would have had to view the aboriginal evidence in this regard with great doubt: but in my opinion there was a notably high degree of consistency. The aboriginal place names, in short, seem to be used with that degree of precision for which there is a practical need, and no more. I think the same could be said of many of ours.

I can deal shortly with the criticisms made of the consistency of the plaintiffs' evidence of clan linkage to land. In general, the aboriginal witnesses gave consistent evidence which enables the Court to say—within the limits of accuracy already explained—that any given part of the subject land can be attributed to a particular clan.

In the course of his sustained and weighty attack on the plaintiffs' contention that their clans' relationship to the land was a proprietary relationship, the Solicitor-General made a very detailed analysis—which he presented in the form of a table—showing to which clan each aboriginal witness attributed each area or place which he mentioned. I deal at a later stage in these reasons for judgment with the Solicitor-General's contention as to the effect of his analysis upon the question whether the plaintiffs' claims to the land were proprietary in nature. For the present purpose, what was remarkable about this table was its consistency—in fact, I think that there was no instance of any given place being attributed to one clan by one witness and to another clan by another. Certain places are mythologically significant to more than one clan, but this was explained in the evidence. Strictly speaking, only Rirratjingu and Gumatj places are relevant, but the consistency with which other places were attributed to the respective clans by different witnesses was a fact of some significance.

On this topic, Mr. Chaseling's evidence was in several respects at variance with that of the aboriginals. For instance, he asserted

that in his time there was no claim by the Gumatj to the area about Drimnie Head and Dundas Point, but five aboriginal witnesses claimed this as Gumatj land and none suggested otherwise. For reasons already given, I regard Mr. Chaseling's evidence on this and similar points as less credible than that of the aboriginals.

I have attempted to display my findings on this topic in the form of a map annexed to these reasons for judgment*. This map must be read with the following warnings in mind:

1. It is a summary of evidence given by the aboriginals in this case—it does not represent my findings as to the antiquity or permanence of the attributions which it depicts. The evidence relates to the period before the foundation of the Yirrkala Mission, of which the witnesses could speak for themselves or of what their deceased parents had told them; they claim that the same is true today.

2. The nature of the suggested "boundaries" has already been described.

3. Nothing is implied about the nature of the relationship of the clans to the land—for which I have just used the neutral word "attribution". I deal with this later.

4. The aboriginal names (which are only some of the more important) are to be understood with the explanation already given.

The nature, in law, of the clans' interests in the land might be thought to be the next subject to be dealt with. To do so would have the advantage that this discussion of law would follow immediately upon the findings of fact to which the law is to be applied. I have decided that the loss of this advantage is more than offset by the advantage of dealing with this question of law *after* my examination of the cases on the subject of communal native title.

The permissive use of land.

There are two related, though distinct, aspects of this matter.

The first is the question whether, as a characteristic of the clan's relationship to particular land, it was necessary that any other clan, or a person of any other clan, should have permission before using it or travelling on it. It must be remembered that the aboriginals did not cultivate land or practise animal husbandry; they took what grew naturally. My finding on the relationship of the band to the clan has already been expressed. The evidence shows that bands moved freely about the subject land, and that no permission was required for a band to go anywhere. No evidence was given as to the hypothetical possibility of a band entering land not linked to the clan of any member of such band.

The evidence shows that care was taken that approaches to sacred sites were made only with the knowledge of the clan concerned: and that *participation* in ritual was, or might be, by

*See p. 294.

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invitation of the clan concerned. It also—though less certainly—shows that if an individual went by himself, for a purpose such as hunting, on land related to a clan of another moiety, he would take care that a responsible person of the appropriate clan was informed. Such a case had special relevance for the subject land, which is nearly all linked to one of two clans of opposite moieties—the Rirratjingu and the Gumatj. It is at least doubtful, in my view, whether there was such a custom when a man of one clan entered land of a clan belonging to the same moiety. Moreover, the evidence does not show, in my opinion, that the matter was regarded as one of seeking a permission which might or might not be granted; what it shows, I think, is simply that the custom was not to be alone in the territory of another clan (or possibly moiety) without the knowledge that some responsible member of that other clan or moiety was aware of the fact. Only one specific case of the refusal of permission was, I think, given in evidence. Dadaynga Marika of the Rirratjingu said that "last year" he had asked his uncle Munggurrawuy, representing the Gumatj, whether he could go to Cape Arnhem to get carving wood. The request was refused on the ground that his own people wanted the wood for themselves. (Incidentally, Cape Arnhem is in the Lamamirri country being "looked after" by the Gumatj.) This was an isolated instance, and I am hesitant to generalize from it, since the attitude of the aboriginals living at Yirrkala may have been affected by their contact with the attitudes of white men. As an instance of this, the same witness said that when he went to the airfield, which is on Gumatj land, to catch an aeroplane, he did not ask anyone.

On the land of a man's own clan there were no restrictions of any kind, for there he was a part of the natural order of things in accordance with the provision made by the ancestral spirits. The only exceptions to this related to access to sacred sites by persons not fully initiated.

The second aspect of this matter is that referred to in par. 23 of the statement of claim: the claims of the plaintiffs in the third class, represented by the plaintiff Daymbalipu.

Paragraph 23 is as follows: "The members of the Djapu, Marrakuli, Galpu, Munyuku, Ngaymil, Wangurri, Djambarrpuyngu, Mangalili, Dhalwangu, Warramirri and Madarrpa clans residing on the said land are there with the consent and approval of the Rirratjingu and Gumatj clans respectively and in accordance with the aboriginal laws and customs of the Northern Territory and are sharing and at all material times have shared the use and benefit and possession of the said land with the Rirratjingu and Gumatj clans. This enables the said members of the eleven clans to indulge in the activities referred to in sub-pars. 5 (a), (c), (d) and (e) hereof." The reference to these subparagraphs is to the activities which

the Rirratjingu and the Gumatj were alleged to be entitled to carry on by virtue of their relationship to their land, omitting the alleged right to exclude others.

The evidence in support of these claims was in two categories. First, the evidence as to the composition of the bands and the use of the land by bands. The clans named in this paragraph of the statement of claim were shown to have had members who were members of bands on the subject land. I have already set out my findings on this matter. Secondly, there was evidence of what can be summarized as conscious co-operation between clans, including those named in par. 23, in the access to ritual sites and in the performance of ritual. There were rules about this, doubtless of considerable strictness, but they were not investigated in detail in the evidence, nor was the matter really in dispute. There was no other evidence in support of par. 23. There was no suggestion that the clans named in par. 23 had a status, or rights, relating to land of either the Rirratjingu or the Gumatj which applied to them but not to any other clans. On the contrary, there were several other clans mentioned in evidence, without any suggestion that they were in any different position: for example, the Barrarrngu, the Balamomo, the Liyalanmirri, the Belang, the Golumala, the Datiwuy. It was not clear in every case whether these names were mata names or mala names, but for the present purposes that cannot matter; they referred to groups of aboriginals whose presence on the land was not unexpected or objectionable. If par. 23 means that the list therein is an exhaustive list, there was no evidence to support this allegation. The evidence shows that members of the clans named in the list did use the Rirratjingu and Gumatj land, but the evidence does not show that such use was by clans as such (except perhaps for ritual purposes) but by individuals.

The antiquity of the present links between the clans and the land.

No matter of fact was more difficult or more strenuously disputed than this. The aboriginals believe that their great ancestral spirits arrived at particular places, allotted sites and areas to the two moieties and their various clans, and moved across the land, establishing mythological links which are eternal and unchangeable. As I have already said, the aboriginals have no written records or anything corresponding to them; that the sacred rangga are, among other things, charters to land, is a matter of aboriginal faith; they are not evidence, in our sense, of title. No direct evidence was adduced of what the links were between any clans and any areas of land at any time before that to which the statements of the deceased ancestors of the witnesses related. Matthew Flinders recorded his fleeting impressions of the aboriginals on, or very close to, the subject land, with his usual care and clarity,

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but needless to say his record has no bearing on the present problem, beyond allowing the Court to make, from the fact that there were aboriginals there in 1803 who used the word " mata " for " tongue ", the reasonable inference that there were such aboriginals there also in 1788. The earlier anthropologists had made statements in general terms about land-holding systems, but did not attempt to produce anything resembling a " register of titles ". Professor Lloyd Warner's work was done in the years 1927 to 1929, and his book *Black Civilization*, published in 1937, contained a map purporting to show attributions of land to clans for an area larger than, but including, the subject land. The Reverend T. T. Webb, a missionary, produced in 1934 a map having the same purpose. Both these investigators were based at Milingimbi, on the north coast of Arnhem Land more than a hundred miles west of the subject land. The two maps were put to Professors Stanner and Berndt in cross examination, but neither map was tendered in evidence. The Reverend Mr. Chaseling may well have been the first white man to make a systematic attempt to record clan linkages with particular land, by direct communication, made on the subject land itself, with aboriginals actually living there.

The matter must therefore rest upon inferences drawn by the Court, with assistance from the expert evidence, from the factual evidence about the situation in 1935, or at such earlier time as the declarations of deceased persons related to. Both the experts called on behalf of the plaintiffs expressed their opinions on this matter, and Mr. Woodward relied heavily upon them. It is to be remembered that it was formally agreed between the parties through their counsel that if the Court made any finding as to the *system* of land-holding in the period before the advent of the Yirrkala Mission, it would be admitted by the defendants that that *system* was in force in 1788, but this was as far as the agreement went. The matter in dispute was the antiquity, or more precisely the existence in 1788, of the links between the actual clans and the actual pieces of land which are found to have existed in the period immediately before the advent of the Yirrkala Mission.

Before coming to the evidence of Professors Stanner and Berndt on this subject, it must be said that they both referred to the existence of what was called a " cultural bloc " extending over north-eastern Arnhem Land, an area considerably larger than, but including, the subject land. This meant, I think, a discernible homogeneity in the culture of the aboriginals in this larger area which sometimes justified the making of inferences and significant comparisons when facts were shown to exist outside the subject land but inside the " cultural bloc ".

I propose now to set out Professor Stanner's evidence on this subject, with the explanation that it was immediately preceded by his evidence as to the relative stability of aboriginal social

organization; the formal agreemen' had not at that stage been made. I make this point because, in order to evaluate Professor Stanner's evidence on the antiquity of the actual clan linkage, it is fair to consider it against a background of his opinion as to the relative changelessness of aboriginal life.

Professor Stanner's evidence in chief was this:

"Q. I want you to assume that evidence will be given by others as to the territory presently held by certain clans in the Gove Peninsula. I want you to assume that that evidence will be to the effect that those territories have remained unchanged, within living memory, and that people now alive were told of those territories, of the areas which they covered, and of their approximate boundaries, by people who are now dead. So that there will be evidence of a maintenance of territories by particular clans, maintenance of possession of territories, by particular clans, during living memory, and for some time before living memory. On that assumption, I want to ask you whether you can express any opinion as to the likelihood of that territory holding by particular clans, going back further into antiquity, than living people are able to speak of. . . . Would you say—are you able to say whether it is more probable than not that those boundaries—sorry—those territories were held by those clans in 1788?

A. Again, sir, I would say it is more probable than not, in my opinion" (transcript p. 131).

On this, Professor Stanner was cross-examined in various ways. First, he was asked about the maps which had been published by Professor Lloyd Warner in 1937 and by the Reverend T. T. Webb in 1934. The maps both showed very considerable discrepancies, not only between themselves, but also between each of them and the links to particular tracts of land which were attributed to particular clans by the aboriginal witnesses in this case. Professor Stanner was asked whether this did not throw doubt on his opinion that the same clan linkages probably existed in 1788. His reply was essentially that he could not accept either of the maps, produced as they were by persons who worked from Milingimbi, as a serious challenge to the accuracy of the evidence of aboriginals actually living in the subject land.

The next matter which was put to Professor Stanner in cross examination was a matter of fact which I have not yet mentioned. It was one which emerged clearly and consistently from the aboriginal evidence as well as from the evidence of Professor Berndt. There is an area of land which can be defined fairly accurately, being part of the subject land, between which and the Lamamirri clan there is an established relationship. The Lamamirri clan has now for some years been reduced to two women. For what length of time this has been so is uncertain, but Mr. Chaseling recorded it. The result, of course, is that the clan must inevitably

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become extinct. The Gumatj clan, between which and the Lamamirri there was apparently in the past a close relationship, are now said to be "looking after" the Lamamirri land, and the rangga, on behalf of the Lamamirri clan. It was suggested by the defendants that the result of this situation would be, with the passage of time, that the existence of the Lamamirri clan and its link with the land would be forgotten, and the land would be considered to be Gumatj land, and that a similar process might well have happened in the past, thus casting doubt on the absence of change between 1788 and 1935 in the clan linkages with land.

Professor Stanner thought that such a "dropping out" of a clan linkage from aboriginal memory would take not less than three generations. He also had put to him a passage from Professor Lloyd Warner's book suggesting that a similar situation existed at the time of publication of that book in regard to two other named clans (outside the subject land) each of which had only one male member, and that in a few generations the memory of these clans, and their links with particular land, would probably be lost. Similarly he was asked about the Wurulul mala, forming the Rirratjingu-Wurulul mata-mala, which apparently is now reduced to women only. None of these instances caused him to retract his opinion.

Professor Stanner was then asked about certain passages in published works of the Reverend Mr. Webb and of Professor Berndt which suggest, as an explanation of the fact that groups speaking the same language can be found linked to discrete areas of land, separated by areas linked to people of other languages, that at some time in the past there has been migration or movement from one area to another. He replied that he was unwilling to accept the hypothesis of migration or movement. He described this hypothesis as "a wholly unnecessary assumption to make" (transcript p. 966). Unfortunately, as I think, it was not made clear what it was that in his opinion rendered the assumption unnecessary.

He also had put to him a passage from a book written by Mr. Chaseling, which Professor Stanner regarded as not being a scientific work, in which a statement is made, as an historical fact, that within living memory (at the time when the book was written) violent battles had taken place, first between the Rirratjingu and the Galpu, and secondly between the Galpu and the Djapu, the result in each case being a migration of many miles. The truth of this story Professor Stanner described as a speculative possibility which he could neither accept nor reject. but he did concede that the combined effect of the passage in Mr. Chaseling's book and that in Professor Warner's would cause him to place a reservation on his answer as to the existence of the clan linkages in 1788; a reservation to this effect, that he felt the passages called for

some explanation before he would express the opinion he had formerly expressed as to the lack of change from 1788 to 1935.

He was asked about a passage in an article by another anthropologist, Professor Hiatt, published in 1962. in which it was asserted that in "the north-central area of the Arnhem Land Reserve" (an area about two hundred miles west of the subject land) some patrilineal descent groups, having become depopulated, may have adopted others as joint owners of their territories. Professor Stanner conceded (transcript p. 998) that such a thing could have happened even before European settlement.

He was asked also about something which he himself had written in 1965, referring not particularly to the subject land, but to a phenomenon which he had found in many parts of Australia, that a "totem site" (a sacred place of a particular clan) appeared in the wrong country, that is in country linked to another clan. His own explanation had been that these represented "long-term shifts of estate or range which may have been more common than has been supposed". In the context, I think it was clear that "estate" and "range" meant, to use the terms I have been using in these reasons for judgment, territory of particular clans. Professor Stanner was asked whether he still adhered to this view, and he replied: "I have no reason to change it, except that long-term is long-term" (transcript p. 1003).

I have now, I think, given an account of all that Professor Stanner said on this topic. I find it extraordinarily difficult to assess the total effect of his evidence upon the problem before me. I must, of course, place great reliance upon an expression of opinion by a witness of such eminence upon a subject which is his own and is not mine. Yet he did concede that certain matters put to him in cross examination suggested to him that some reservation should be attached to his originally expressed opinion; I take this to mean that he would, before expressing the opinion again in the terms in which he originally expressed it, wish to make further inquiries about those matters. Such an attitude in an expert witness tends, to my mind, to increase the reliance which I should place upon the totality of his evidence. But even with the suggested reservation, I am left with the clear impression that Professor Stanner's opinion on the subject was in favour of the proposition that the links between clans and land proved to have existed in 1935 were probably the same in 1788. What I cannot say I am entirely clear about is what his reasons were for rejecting or discounting the suggestions which were put to him as tending to throw doubt on that proposition.

I turn now to the evidence of Professor Berndt on this matter. In examination in chief he said:

"Q. Can I ask you specifically whether in your opinion it is more probable or not that the land which is presently claimed

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by the Gumatj and the Rirratjingu respectively was held by them in 1788 ? . . . . .

A. I would say it is highly likely that the situation we find today or that which we found at the point when I carried out my field work in 1946 or 1947 existed for some hundreds of years before then and specifically before whatever date you mentioned " (transcript pp. 1054-1055, 1056).

On this he was extensively cross-examined. He was first asked about a passage in a book written shortly after his first field work in the subject land (1946 to 1947) and published in 1951. There he had written : " Throughout the whole area the territory is divided between a number of clans, some of which have become extinct, while others have had their populations seriously diminished. These clans have allocated to them certain mata (or linguistic groups), which may be inter-changeable between clans belonging to the same patrilineal moiety. There is a pronounced emphasis on the importance of the mata, each of which exists as an almost independent unit. Again, many of these mata, like the mala, have become extinct or been absorbed by more powerful groups." He was asked whether the last sentence of this passage was not to some extent inconsistent with his opinion given in examination in chief. In explanation, he said that the passage referred to an area larger than the area of the subject land, namely an area which extended from Milingimbi, about 120 miles west, to Rose River, about 150 miles south, of the subject land. But, he said, " If one focuses more specifically on the Gove Peninsula area I would say there have been very little fluctuation from what I can gather, and I would add that I know of only one direct example . . . " (transcript p. 1077). This was the well-known example of the Lamamirri, having two females as the surviving members of the clan, and the Gumatj " taking over " (or " looking after ") the Lamamirri land. He then referred also to the dropping out of the Wurulul mala of the Rirratjingu-Wurulul mata-mala, and mentioned the likelihood of the disappearance of a further mala, but he did not mention its name. He then said explicitly that he knew of no other instances of mata-mala pairs becoming extinct in the Gove Peninsula area. He did not proffer at this point, or I think elsewhere, an explanation which might be thought appropriate : some reason why the situation would, between 1788 and 1935, be less likely to change in the Gove Peninsula than in the larger area.

He went on to explain that if a mata-mala pair became extinct one would expect to find references to it in folk-lore. Thus, a name found in folk-lore but not known to refer to any existing mata-mala pair *might* be explained either " because something had happened to the population " *or* because it was a secret, sacred or ritual alternative name—of which there were many.

The latter explanation he thought more likely, though he did not say why. He conceded that there might have been instances of the disappearance of mata-mala pairs of which he had no knowledge, because such a disappearance "is highly likely over a very long period" (transcript pp. 1079-1080).

Mr. Harris then put to him that in some cases clans had been known to have become reduced to a very few males, thus increasing the risk of extinction. Specifically, he was asked about the case of the Djapu clan. This was said to have been reduced to one man, Wongu, who succeeded in reviving his clan by having a number of sons. Mr. Chaseling's evidence was that Wongu had had twenty-five wives and fathered fifty children; but Professor Berndt did not accept that the Djapu males had ever become reduced only to Wongu. He claimed to have other information to the effect that there were other Djapu besides Wongu and his descendants. It should be added here, though it was not put to Professor Berndt, that Birrikitji, whose mother was a member of the Djapu, said in cross examination that at one time the only male Djapu were Wongu and his descendants.

The next matter put to Professor Berndt was that of the Jurwuri, also spelled Yarrawidi or Yerrordi. This group consisted of two males, Jama and Waindjung. Professor Berndt was first asked whether this did not show that mata-mala groups could fall very low in numbers of males, and thus be subject to the risk of extinction, though in fact Jama and Waindjung have had descendants. Professor Berndt's explanation was that this was a special case. The father of Jama and Waindjung, who was of the Gumatj, was, at the time when they were conceived, a member of a band living in Lamamirri country. Believing, as was the custom, that the spirits which animated them came from that country, they took the name Jurwuri, which was an alternative for Lamamirri. This did not, according to Professor Berndt, alter the fact that they were really Gumatj. He was asked whether this episode was not an example of the appearance of a new mata-mala combination, but he insisted that they had adopted the Jurwuri name merely as a "courtesy mala name".

It should be added here, though it was not put to Professor Berndt, that some of the aboriginal witnesses talked of these Jurwuri or Yarrawidi men on the footing that they were of a separate clan. The most interesting reference to them was that of Dadaynga Marika (transcript p. 241). He first had the name Yerrordi put to him, which he apparently failed to recognize. The interpreter could not help because she did not recognize the name either. The Solicitor-General then said: "I mention these two names—Wychung, a man called Wychung . . .", and the witness interrupted, ignoring the interpreter: "Wychung, yes." The subsequent cross examination was as follows:

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" Q. Do you know Wychung ? A. Yes, I know Wychung.

Q. And what clan does he come from ? A. Gumatj. That is the clan of Yarrawidi.

Q. Yarrawidi. That is what we want. Can we have that again ? A. Yarrawidi."

The interpreter then spelled this word from the witness's pronunciation of it. The cross examination proceeded :

" Q. Is there a man called Yarmar ? A. Yarmar, yes.

Q. Is he of the Yarrawidi clan ? A. Yes.

Q. So both Wychung and Yarmar are of the Yarrawidi clan ? A. Yes.

Q. Not Gumatj ? A. No.

Q. Not Gumatj ? A. No."

The witness later said that they had had descendants, one, at least, of whom he knew, Wychung's son.

There was no dispute that " Yarmar " and " Jama ", " Wychung " and " Waindjung ", and " Yerrordi ", "Yarrawidi " and " Jurwuri " are respectively alternative spellings.

Wandjuk said that the Yarrawidi mala was associated with the Lamamirri mata. Milirrpum was asked about the Yarrawidi people, and mentioned Wychung and Yarmar. Mr. Chaseling said that Yarmar had in August 1936 accompanied him in a sea trip from Yirrkala to Caledon Bay, south of the subject land, and had pointed out certain land as " my country ". Mr. Chaseling also mentioned the Yerrordi as one of the clans (he used the word mala) found in north-eastern Arnhem Land. He insisted that the Yerrordi was a separate mala. He said that originally he had put Jama and Wychung on the list of " Kumite " people (as he called the Gumatj) but had afterwards crossed them off that list, being satisfied that that information was incorrect, and that these two had been " checked and rechecked again and again " as Yerrordi (transcript pp. 1304, 1305).

I cannot possibly come to a clear finding on the very confusing evidence about Jama and Waindjung. I do not reject Professor Berndt's explanation, but the total evidence at least suggests a doubt about the immutability of mata-mala combinations.

To return to the evidence of Professor Berndt, he conceded (transcript p. 1086) that, on rare occasions, mata-mala pairs would become very low in male members and in that situation would run a serious risk of extinction.

Next, Professor Berndt had put to him a passage from Professor Lloyd Warner's book (transcript p. 1094) in which two clans were mentioned, each having only one male member at the time the book was written. Professor Warner had written that in the highly likely event of these clans disappearing " the land will continue to belong to the dead clan until in several generations memory of it is lost and new traditions have filled the thought of the natives.

The land and waterholes will then belong to another group which will have been occupying it since the demise of its former owners. The writer recorded statements from some younger men that certain territory belonged to the people now living upon it, while a few old men said this land really belonged to an older group that had died out. Once these old men are dead, it is likely that all memory of the ownership by a former clan will be gone". Professor Berndt did not disagree with this passage, though he suggested that Professor Warner might have misunderstood the statements of the younger men that the land "belonged" to them, when really they were saying that they were holding it in trusteeship for an extinct clan.

Professor Berndt was then asked about a statement which he himself had made in his book *Kunapipi* that many mata-mala pairs had been absorbed by more powerful groups. The answer he gave was that that did not now represent his opinion, at any rate in regard to the Gove Peninsula. He was not clear in his explanation why his opinion had changed, but he did agree that "something of this sort could occasionally have taken place".

He agreed that, although the basic myths—the stories of the deeds of the spirit ancestors, and so forth—were likely to remain unchanged for generations, because they were acted and sung in rituals and song cycles, the existence of a mata-mala pair which had in fact become extinct might be more easily forgotten, because in such a case there was not the same depth of feeling to inspire long memory (transcript p. 1102).

Then, on the question of the number of generations over which memory of the existence of individuals would be likely to remain, his view was that in general, most people would have a recollection of their ancestors of two generations back—i.e. their grandparents. This seems to me to fit in with what the aboriginal witnesses said; most named their fathers and grandfathers, but only two of the ten were able to name their great-grandfathers. He went on to express the opinion, however, that even though the identity of ancestors of more than two earlier generations might well be forgotten, it would take longer for the existence of an extinct mata-mala pair to be forgotten, because of the retention of references in ritual song cycles, and the existence of the rangga.

Professor Berndt then had put to him the passage from a work *The World of the First Australians* of which he was the joint author. The passage read to him contained the following: "... mata-mala territories are very accommodating: isolated sites belonging to one moiety may be found in territory of the opposite moiety. Right in the middle of one mata-mala territory may be a sacred site belonging to another relatively distant mata-mala combination of either the same or opposite moiety. There are various reasons for this. For instance, a large mata may have split up; or it may

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have moved to another part of the region and become incorporated in another territory." Professor Berndt's explanation of this (transcript p. 1107) was: " . . . there must be some historical reason for the movement of people speaking the same language, and my suggestion there was that where one had, perhaps, segmentation taking place through a large number of persons associated with a particular mata-mala, then there may be some sort of movement historically being attached to another mala, this particular mata being attached to another mala." Mr. Harris then asked him, referring to the above explanation: " It does carry with it, does it not, the consequence that at some time in the past a mata has had territory A and then has moved, or part of it has moved, from territory A to territory B?" To which Professor Berndt replied: " This seems to be the case, from the information we have got." He went on to comment that what he had been doing in that passage was seeking or suggesting an explanation for empirically discovered facts. He admitted that he did not understand such a process, but had postulated it as possibly having occurred. He went on to explain that the existence of such " enclaves " often had an explanation in the aboriginal mythology; that a Wongarr, or mythical spirit ancestor, had moved from one point in one territory to another point in another territory, each of these points being spots sacred to a particular mata-mala pair.

I noticed that Professor Berndt, when asked to explain this phenomenon of the separation of two areas related to one mata-mala pair, by an area related to another mata-mala pair, tended to put his explanation on two planes, the mythological and the historical. At p. 1115 of the transcript, for example, having given both explanations successively in regard to the Dhalwangu " enclave ", he was at pains to emphasize that the second, the historical, interpretation " does not invalidate the original interpretation. One has to think in two ways ". I do not suggest the slightest aspersion upon the standing of Professor Berndt as an expert, or upon his academic and scientific integrity. For both I have great respect. But my belief is that on this topic he did what expert witnesses sometimes tend to do, namely make an assumption about what the issues were to which the questions and answers were relevant, the assumption not being entirely correct. The issues in the case are a matter for the Court and counsel, not for the witness. With all respect to Professor Berndt, I was left with the impression that in a sincere effort to explain to the Court, which of course is uninitiated in such matters, a question of difficult, and indeed disputed, analysis of the anthropological facts, he to some extent displayed his belief that the question for the Court was what, for the anthropologist, was the soundest explanation of the phenomenon of an " enclave " or separation

of a mata-mala territory. He tended to stress the mythological explanation and to reduce to relative unimportance, as of more doubtful significance, the purely historical explanation. But in fact, the issues before the Court are such that the mere existence of the possibility of a historical explanation—if such possibility does exist—the possibility of the breaking of a link between a mata-mala pair and a piece of land—is of considerable importance. So to say is not to accuse Professor Berndt of any bias. It is merely to throw light upon what appears in his answers to be an emphasis upon one aspect rather than upon another.

Professor Berndt was then referred to an article which he had written in vol. 57 of *The American Anthropologist*. The article related to the social organization of the aboriginals of eastern Arnhem Land. He was asked to explain the passage: "For various reasons which we shall not discuss here, linguistic groups have, we may assume, grown unwieldy or been driven away from their home territory and have thus settled elsewhere" (transcript p. 1120). To explain this Professor Berndt reminded the Court of the particularly close relations which frequently existed between mata-mala pairs which though distinct, and exogamous, nevertheless felt a special kinship with each other because so many persons from one of them married persons of the other. Professor Berndt thought that the detachment of a mata-mala pair from a particular territory, followed by attachment to a territory with which it had no previous mythological or traditional association, would be impossible, but that a mata-mala pair might become associated with territory of another mata-mala pair with which it had been in the kind of special relationship to which I have just referred. Once again, he said (transcript p. 1126): "It is a kind of social explanation I am offering that is framed in historical terms. I could give empiric examples and I think we are telescoping material to some extent, telescoping an argument one would have to consider in relation to genealogical information. People who belonged to hypothetical Rirratjingu A or hypothetical Rirratjingu B would be related in a specific way . . . only those related in this specific way would have moved in my view, so one would have to add a number of additional comments to this."

Professor Berndt was then asked about another paper he had written, published in *Anthropological Forum*; he was referred to a passage in which he agreed that what he had meant was that at some stage there had been only one territory of the Djambarrpuyngu mata, when it had only one mala, and that subsequently there had been a process of growth and division in which that one territory had been divided up into smaller parcels, for the mata-mala pairs.

Again, Professor Berndt was asked to discuss a passage from an article called "Tribal Organization in the Eastern Arnhem

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Land " in vol. III of the journal *Oceania*, by the Reverend T. T. Webb. Mr. Webb spent many years as a missionary at Milingimbi Mission, and also conducted some anthropological investigations from there. A passage from the article was quoted to Professor Berndt, which suggested that there had been movement of descent groups in relation to the territory to which they were related. Professor Berndt's explanation of this passage was given at some length. I quote what I hope can fairly be described as the core of it :

" Q. The passage I have read is another piece of evidence which goes to build up the picture that there has been movement among the various groups in this block in north-eastern Arnhem Land ? A. I think one has to accept that there has been movement and I do not think anyone has denied it but it depends on the kind of movement involved and at the level of economic unit we have only recognized that this was a part of the living aspect and at the level of the structure of society we have too little information about the taking over of other territories and things of this kind. There is little evidence but there are these suggestions of movement and we have agreed that historically perhaps we can seek an explanation in that dimension, but there is precious little empirical evidence for it.

Q. But do not the indications and so on that you have referred to lead to the conclusion that it is just not possible now to say what the situation was with regard to the clan's territories even one hundred years ago ? A. I would disagree with you on that point . . . I think everything we have been saying has been supporting the statements that I have made of the significance of the structure and organization of this area, even accepting within that, mobility and variation in terms of change which we have recognized as being part of the social living. Even accepting this one has to accept also that there was structure and form within this situation.

Q. But the structure and form of the social organization could go along with the change in the location of the mata-mala groups ? A. We have not much evidence of this, really. When you come to consider this, we are in a way mixing up two kinds of evidence. On the one hand we are seeking historical explanations for the on-the-ground situation which we find today that consists of duplication of mata-mala terms in some areas, and this kind of statement is no more than speculative, but I think we can agree to a certain extent that there must have been some sort of movement to create the situation we find today. What is involved here I do not know, but I imagine it would be considerable. On the other hand I think everything we have been saying points to stability and continuity within a specifically recognized framework of both local group structure and the patterning of movement within it " (transcript pp. 1130-1131).

With respect, this seems to me to be the essence of what Professor Berndt was really saying on this difficult topic, and to be in principle consistent both with the views of Professor Stanner and with the impression that I had from all the aboriginal evidence, namely that the system, the pattern, of aboriginal relationship to land has been an enduring one probably for centuries but that within that system or pattern there have been changes of various kinds: the disappearance of mata-mala pairs; the possible appearance of new mata-mala pairs (which he conceded, though as an improbability); the changes of links between particular territory and particular mata-mala pairs; and an underlying basis of mythology which does not change in broad outline.

Finally, Professor Berndt had put to him the two maps produced respectively by Professor Lloyd Warner and the Reverend Mr. Webb, already mentioned. Professor Berndt said that he did not think that the information on this map should be taken seriously into account in regard to information which it purported to depict, because Professor Warner worked from Milingimbi and did not visit the Gove Peninsula. It was, in Professor Berndt's words, "seen from the perspective of Milingimbi" and Professor Berndt added that it did not tally with the information which he himself had collected when he was at Yirrkala in 1946 and 1947. He was confident that there would have been no basic change in the actual facts during the period from 1927 to 1946-1947. He also added the opinion that Professor Warner had probably not got his information from members of the actual mata-mala pairs concerned.

To the accuracy of Mr. Webb's map, Professor Berndt had similar objections. He found its inaccuracy more difficult to understand, because of his knowledge of the places where Mr. Webb had worked, but he nevertheless rejected the accuracy of the information because it was "complied from the Milingimbi perspective".

It will be seen that Professors Stanner and Berndt were in substantial agreement about Warner's and Webb's maps. Since Professor Berndt worked in the subject land for about a year, my impression was that his evidence was convincing on this point.

Professor Berndt's view, that there now exists a given number of mata-mala pairs, coupled with the possibility of the death of all male members, means that at some time in the historical past there were some mata-mala pairs which do not now exist. He himself conceded this. To that extent, the number of mata-mala pairs has diminished over a period in the past which cannot really be estimated. But he also conceded the possibility that the reverse process had taken place, that there may now be mata-mala pairs which at some period in the past did not exist. Since it is axiomatic that every mata-mala pair must have a land area associated with it, there seems no escape from the inference, to be drawn from Professor Berndt's own evidence, that there must have been, over

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a long period, changes in the linkages between particular areas and particular mata-mala pairs; that the linkages which on the evidence in this case existed in about 1935 may possibly not be the same as the linkages which existed in 1788. The question which it is for the Court to decide is whether, upon all the evidence, on the balance of probabilities those particular linkages were the same in 1788 as in 1935.

What, then, are the changes which might possibly have occurred between 1788 and 1935?

The first possibility is that a particular mata-mala pair may have become extinct. In every case, of course, it would be the death of the last surviving male which either caused, or foreshadowed with certainty, the extinction of a mata-mala pair. But the event could represent one of the following possibilities:

1. The last surviving male was the last representative of a mata as well as the last representative of a mala. On the evidence, it is impossible to say whether the extinction of the Lamamirri clan was an extinction of this kind or of one of the two following kinds.

2. The last surviving male may have been the last surviving member of a mata, there being other members of the mala associated with another mata.

3. The last surviving male may have been the last surviving member of a mala, there being other malas associated with the mata. The disappearance of the Rirratjingu-Wurulul mata-mala pair, and that of the Rirratjingu-Miliwurrwurr pair, appear to have been of this type.

That extinctions of any of these kinds may possibly have taken place is shown by the evidence.

When an extinction occurs, there may be a transference of the land to another group for guardianship, as in the Lamamirri-Gumatj case—with the undoubted possibility that in time the guardianship will be forgotten. Alternatively, there may be a coalescence of land which formerly belonged to two mata-mala pairs, into one territory linked to the surviving mata-mala pair. This seems to be likely to happen to what was once Rirratjingu-Wurulul land, for we have the Rirratjingu witnesses stressing the unimportance of their internal distinctions and the importance of the fact that they are all Rirratjingu. The evidence of Munggurrawuy, the only Gumatj who gave evidence, that there are no subdivisions of his mata, seems possibly to represent a slightly further advanced stage in this process.

There is also the fact, not easy to explain, that separate pieces of territory linked to the same mata, perhaps even to different mata-mala pairs each of the same mata, are to be found in different parts of the area; for example, the small enclave at Banambarrnga (Rainbow Cliff) which the evidence showed to be linked with the Dhalwangu, whose other territory is outside the subject land.

Professor Berndt conceded the possibility of the detachment of a mata-mala pair from land formerly linked to it, as one of the explanations of such a fact.

Again, there is the fact, accepted by Professor Berndt, that at some earlier stage than living memory, a large area of land was linked to the Djambarrpuyngu mata which has now become split up into smaller areas apparently attributable to different mata-mala pairs.

Nothing, I think, was said in evidence which suggested any reason why processes of these kinds were less likely to happen in the subject land than elsewhere in the north-eastern Arnhem Land "cultural bloc". If in fact the subject land was different in this respect, the reason for the difference did not appear.

Granted that changes of the kinds described are possibilities, what is the likelihood that such a change or changes took place in the subject land after 1788 and was not revealed in any evidence in this case? The witnesses, some of them old men (exact ages were never discoverable) said what their deceased parents had told them. Let that be assumed to take the matter back to 1910. Let it be remembered also that a change of the kind postulated might take some time—i.e. it might begin in say 1700 and be complete by 1800. The evidence suggested three generations as the average limit of aboriginal knowledge of genealogy. Professor Berndt also gave evidence that in song cycles and ritual there would be a preservation of the memory of the past. He did not go into details or give examples of this, but said that nothing in his knowledge of such matters suggested to him the former existence of links between mata-mala pairs and areas of land which do not exist now. I accept, of course, this statement of his, but he also said that it was impossible to know in all cases whether an unexplained name used in ritual was an alternative name for an existing mata-mala pair or a name for one which had disappeared.

I am sure that it is also important to see the wood as well as the trees—to bear in mind the overall pattern of aboriginal life, as explained by the experts and demonstrated by the aboriginals, as one of relative stability, to which change must, of course, occur, but not rapidly or by conscious effort. I mention again two specific facts which in my opinion are amply proved to have occurred in the recent past. These are examples; others of a like kind *may* have occurred. Each is a fact which is *capable* of leading to a change of the kind under consideration, but neither unfortunately gives an indication of the time scale likely to be involved. One is the death of all male members of the Lamamirri, with its inevitable consequence. The length of time for which the special relationship of the Gumatj to the Lamamirri land will be remembered is unknown. The other is the disappearance of the

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Rirratjingu-Wurulul mata-mala. But the men of the Rirratjingu-Djamundar—the other mata-mala pair—seem anxious to stress the unity of the Rirratjingu mata. The effect is again inconclusive.

This question of fact has been for me by far the most difficult of all the difficult questions of fact in the case. I can, in the last resort, do no more than express that degree of conviction which all the evidence has left upon my mind, and it is this: that I am not persuaded that the plaintiffs' contention is more probably correct than incorrect. In other words, I am not satisfied, on the balance of probabilities, that the plaintiffs' predecessors had in 1788 the same links to the same areas of land as those which the plaintiffs now claim.

The doctrine of communal native title.

I now come to a question of law which is the central question in the case. The plaintiffs contend that, at common law, communal occupation of land by the aboriginal inhabitants of a territory acquired by the Crown is recognized as a legally enforceable right. It is consistent with the feudal theory that the Crown has the ultimate or radical title to all land over which it has political sovereignty. In order to be so recognized, the aboriginal right or custom must be such as is capable of recognition by the common law. The Court must ascertain what, according to aboriginal law and custom, is the identity of the community claiming the land; what are the limits of the land claimed; whether the interest claimed is proprietary; and the incidents of that interest. Once established, the native title owes its validity to the common law. The native title can be extinguished only by the Crown, and, on one alternative argument, only by purchase or voluntary surrender, or by forfeiture after insurrection; in the other alternative, extinguishment is possible by explicit legislation or by an act of state.

This whole doctrine for which the plaintiffs contended may be given for convenience the name of "the doctrine of communal native title".

To apply the doctrine to this case, the plaintiffs contend that their predecessors laid claim in 1788, when the subject land became part of New South Wales, to those parts of the subject land to which the plaintiff clans now lay claim. No surrender or purchase, they say, has ever taken place, and no valid legislation or act of state has ever extinguished these rights. If, therefore, the claims of the clans are shown to be capable, in the sense described above, of recognition by the common law, they must be recognized now, with the result that the plaintiffs are entitled to the declarations which they seek against the defendants.

The question is therefore whether the doctrine of communal native title exists at common law and applied at the foundation

of New South Wales in 1788. To answer this question has involved a very far-reaching inquiry. In theory, indications of the existence or non-existence of the doctrine may be found in many places. For example, there may be significance in statutes of many kinds; in cases decided in England before or after 1788; in the opinions of counsel and in the published writings of learned authors; in cases decided in colonial courts before the American Revolution; in cases and in the writings of learned authors in the United States after the Revolution—for of course the Courts of most of the States, and the Federal Courts, have always acknowledged the significance of the English common law as an element in their legal history; in cases and authorities decided in British, Dominion, and colonial courts since 1788, and especially in the decisions of the Judicial Committee of the Privy Council; and in cases decided in the High Court of Australia and in State Supreme Courts in Australia. Indications, relevant to the existence or non-existence of the doctrine, may also be found in the practice of governments both before, at the time of, and after the actual settlement or acquisition of colonial territories; indeed, a great deal of the historical material which was put in evidence related to the practice of governments, and was minutely examined by counsel with a view to deriving from it indications which supported their respective contentions.

I have already said that Mr. Woodward conceded that the plaintiffs' contention was a novel one in an Australian court. It was no part of his case to show whether or not, in Australian history, any group of aboriginals had had a similar claim to land anywhere in the continent. There is no evidence before me—or only the slightest evidence—to show what social organization Australian aboriginals had, or what claims they made to land, at any other time or place. Such matters have probably never before been demonstrated to an Australian court in such detail as they have been to this Court. I venture to doubt, on the evidence before me, whether it would have been possible to do so before the work of anthropologists in relatively recent years. That is not to say that many Australians, and many people in Britain, ever since the early days of New South Wales, have not been deeply concerned at what has appeared to be the dispossession of the aboriginals, and its consequences. Whether the explanation of the novelty of the contention now put forward is that these are the only clans which have survived, in proximity to the lands they claim, into a time when their customs can be demonstrated, or whether in fact no other aboriginals have had such customs, is a question which is unanswered; it is also irrelevant. I approach this question of law on the footing that the novelty, in Australian courts, of the doctrine of communal native title is in itself no argument against the existence of the doctrine.

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Principles applied to the acquisition of colonial territory.

There are certain wide principles, not purely of law, which must be set out as a necessary background to a statement of the law applicable to colonial possessions.

The first is a principle which was a philosophical justification for the colonization of the territory of the less civilized peoples; that the whole earth was open to the industry and enterprise of the human race, which had the duty and the right to develop the earth's resources; the more advanced peoples were therefore justified in dispossessing, if necessary, the less advanced. Kent explains this principle shortly (*Commentaries on American Law*, vol. III, p. 387); he mentions its earlier expression by Vattel, but as a philosophical doctrine it no doubt had a longer pedigree. The Puritans of Massachusetts looked upon it as the application of a command given by God at the Creation: Kent's *Commentaries*, vol. III, p. 388, note (a).

Related to this was the doctrine that discovery was a root of title in international law: that the sovereign whose subjects discovered new territory acquired title to such territory by the fact of such discovery. This principle was repeatedly said to have been the basis of the claims by European sovereigns, including of course the British Crown, to land on the American continent: see, for example, Chalmers, *Political Annals of the Present United Colonies* (1780), vol. I, p. 5; *Johnson and Graham's Lessee* v. *M'Intosh* (6), per Marshall C.J.; Kent's *Commentaries*, vol. III, p. 379.

Related again was the principle that subjects of a sovereign have no power to acquire for themselves title to land from aboriginal natives; any such purported acquisition operates as an acquisition by the sovereign. This principle operates whether the actions of the subject amount to a conquest of the aboriginal natives, or the conclusion of a treaty with them, or merely a private bargain. The principle was often shortly described as the sovereign's right of pre-emption. Its existence and age are undoubted. It is stated, for example, in terms implying no doubt, in an opinion of the Law Officers given in 1717: Chalmers, *Opinions of Eminent Lawyers* (1814), p. 41. It was again stated by Marshall C.J. in *Johnson and Graham's Lessee* v. *M'Intosh* (7) as a principle which had been applied by other sovereigns as well as by the Kings of England, and also invariably by the United States. It was again stated by Chapman J. in *Reg.* v. *Symonds* (8), where the origin of the rule was suggested as a development of the previous principle that title rests upon discovery. These two cases last mentioned were, as

(6) (1823) 8 Wheaton 543, at p. 573.
(7) (1823) 8 Wheaton 543.
(8) (1847) N.Z.P.C.C. 387.

will be seen, heavily relied on by the plaintiffs. See also Kent's *Commentaries*, vol. III, p. 385.

This last rule was a highly beneficent one in the interests of the aboriginal natives, since it protected them from being overreached by unscrupulous colonists, and made it far more likely that any bargain would be fair. Another way of expressing the same rule was to say that only the Crown, or the sovereign, had power to extinguish native title. In that form, it comes near to being a statement of the proposition that as against white subjects the natives have rights which cannot be taken away from them. This proposition resembles some of the dicta in cases in the nineteenth century upon which the plaintiffs relied strongly in this case.

The application of English law in the overseas possessions of the Crown.

In my opinion the authorities show that the law relating to the application of English law to the overseas possessions of the Crown was, in principle, well settled by 1788 : indeed, it had been so since *Campbell* v. *Hall* (9) and scarcely less so since the publication of Blackstone's *Commentaries* (1765). The American authorities show, I think, that their courts regarded the law as having been well settled at the time of the Revolution (1776).

Blackstone (*Commentaries* I. 107) stated the doctrine as clearly settled at the time when he wrote. The work was published in 1765. There is a distinction between settled colonies, where the land, being desert and uncultivated, is claimed by right of occupancy, and conquered or ceded colonies. The words " desert and uncultivated " are Blackstone's own ; they have always been taken to include territory in which live uncivilized inhabitants in a primitive state of society. The difference between the laws of the two kinds of colony is that in those of the former kind all the English laws which are applicable to the colony are immediately in force there upon its foundation. In those of the latter kind, the colony already having law of its own, that law remains in force until altered. Blackstone cites several cases, forming a chain of authority which goes back to *Calvin's Case* (10). The whole doctrine was clear, though its application in any given case often caused difficulty, particularly the question whether a particular English law applied in a particular colony. The great case of *Campbell* v. *Hall* (11), where the law of a ceded colony was in question, treats the doctrine as stated by Blackstone as settled beyond doubt, and in my opinion it was settled beyond doubt in 1788 and is so at this day, for settled colonies.

(9) (1774) 20 State Tr. 239 ; 98 E.R. 1045.
(10) (1608) 7 Co. Rep. 1a, at p. 17 ; 77 E.R. 377.
(11) (1774) 20 State Tr. 239 ; 98 E.R. 1045.

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What is perhaps curious is that it does not always seem to have been made plain, or at any rate explicit, to which class each colony belonged. One would have thought that the question depended on matters of plain fact; and that had there been any doubt there would have been an express pronouncement either by the government at home or by the authorities in the colony, making clear what the basis of law in the colony was. But this does not always seem to have happened; indeed, it was sometimes a matter of debate to which class a particular colony belonged. Thus Blackstone, referring to the class of conquered or ceded colonies, says roundly (I. 108): "Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest in driving out the natives (with what natural justice I shall not at present inquire) or by treaties." But in fact those colonies which afterwards became the original States of the American Union (with the exception of New York) were acquired by peaceful occupation by settlers who had found no rivals but the Indians, and against them had rarely had to rely on organized military activity. Blackstone perhaps had in mind the island colonies as well as those of the North American continent; of the latter, Chalmers wrote more accurately: "No conquest was ever attempted over the aboriginal tribes of America: their country was only considered as waste, because it was uncultivated, and therefore open to the occupancy and use of other nations. Upon principles which the enlightened communities of the world deemed wise, and just, and satisfactory, England deemed a great part of America a desert territory of her Empire, because she had first discovered and occupied it . . ." (*Political Annals* (1780), vol. I, p. 28).

Blackstone and Chalmers thus appear to express opposite views on a matter of historical fact. But Chancellor Kent, writing between 1826 and 1830, is aware that what is important is the legal theory, and that for this purpose historical fact may give place to legal fiction. He says that the practice of treating with the Indians for their land ". . . was founded on the pretension of converting the discovery of the country into a conquest; and it is now too late to draw into discussion the validity of that pretension, or the restriction which it imposes. It is established by numerous compacts, treaties, laws and ordinances, and founded on immemorial usage. The country has been colonized and settled, and is now held by that title. It is the law of the land, and no court of justice can permit the right to be disturbed by speculative reasoning on abstract rights" (*Commentaries*, vol. III, p. 381).

The important point for the purposes of this case is not to which class any particular colony belonged, but the fact that the doctrine itself—the distinction between the two classes of colonies and the basis of law applicable to each class—is clearly established law, and that, as Kent suggests, the attribution of a colony to a parti-

cular class is a matter of law, which becomes settled and is not to be questioned upon a reconsideration of the historical facts.

The North American colonies (I refer now to the thirteen states which were the founding states of the Union) originally had governments which fell into one of three classes, also described by Blackstone (I. 108). These classes were provincial establishments, dependent on commissions issued by the Crown to the Governors, with accompanying instructions : proprietary governments, " granted out by the Crown to individuals, in the nature of feudatory principalities " ; and charter governments in the nature of civil corporations. The basis of title to land in all these colonies, whatever their kind of government, was a grant from the Crown. In some there had been an original grant by the Crown to a proprietor ; for example, Maryland. In others, a chartered corporation received the grant. In either case the grantee gave a good title by grants to colonists. In provincial establishments the Governor usually had power by commission to make grants in the name of the Crown. The terms of a number of grants are set out in some of the law officers' opinions, published in Chalmers' *Opinions of Eminent Lawyers* (1814). Apparently no such grant of land contained any exception, reservation or qualification of any kind relating to the title of native inhabitants to any part of the lands granted. In law, the grants were in every respect on the same footing as a grant of land in England. Thus, if any question arose, whether in England or in a colonial court, of title to colonial land, the relevant considerations, so far as appears from any of the authorities cited to me or any of the historical material given in evidence, never included any postulated title in the Indians, nor was the right or claim of the Indians to their tribal lands ever regarded as any encumbrance on the title of those who had interests in them by English law. Once again, this appears clearly from the opinions published in Chalmers ; there are several dealing with questions of title to land in the American colonies. The same thing appears in *Penn* v. *Lord Baltimore* (12). This was a suit in equity in which the title to land in Pennsylvania, or on the borders of Pennsylvania and Maryland, came into question. There is no trace in the argument that the title of either party was in any way impeachable, or encumbered, by reason of the rights of the Indian occupants of the lands ; yet both parties derived title from grants by the Crown. Chalmers, summarizing in 1780 the process whereby the American colonies, then newly independent, had originally received their law from the mother country, wrote : " It instantly became a fundamental principle of colonial jurisprudence, that in order to form a valid title to any portion of the general dominion, it was necessary to show a grant either mediately or directly from English monarchs " (*Political Annals*, vol. I, p. 677).

(12) (1750) 1 Ves. Sen. 444 ; 27 E.R. 1132.

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I am satisfied that 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 title of Indians to tribal land.

Colonial policy with regard to native lands in North America.

Such was the law, but in two respects colonial policy diverged remarkably from it.

There was a widespread, indeed almost universal, practice, which by the time of the American Revolution was of respectable antiquity, of treating with the Indians for the surrender of their lands, notwithstanding that in law the title to the lands either had already been obtained or could be obtained from a person with a good root of title in a Crown grant. "The English government purchased the alliance and dependence of the Indian nations by subsidies, and purchased their lands when they were willing to sell, at a price they were willing to take, but they never coerced a surrender of them" (Kent's *Commentaries*, vol. III, p. 384). This was not merely a practice adopted by colonists for selfish reasons, to ensure good relations with the Indians, but a policy deliberately adopted by home Governments. Express instructions to that effect were given, for example, to the Dutch authorities in what is now New York, in 1629 (Cohen, 32 *Minnesota Law Review* 28, at p. 40). Similar express instructions were given to English colonial Governors in New York, New England and Virginia (Labaree, *Royal Instructions to British Colonial Governors*, vol. I, pp. 465, 467). William Penn's policy of purchase from the Indians in his vast domain was famous: Chalmers, *Political Annals*, vol. I, p. 644.

Chancellor Kent gives a full account of this matter with detailed examples from almost all the North American colonies; indeed, he explains that the practice of the Spanish and French colonists in North America was in principle the same (*Commentaries*, vol. III, pp. 390-396). Kent regarded this practice as striking proof of the justice and moderation which were generally shown by the white races in their dealings with the Indians of North America, though it did not prevent him from being aware of the darker side of the picture, nor from coming to his melancholy conclusion: "Judging from their past history, the Indians of this continent appear to be destined, at no very distant period of time, to disappear with those vast forests which once covered the country, and the existence of which seems essential to their own."

The second respect in which colonial policy appeared to be more favourable to the Indians than a full exploitation of legal right, was shown in the matter of Indian reserves. Express instructions were often given to ensure that the colonists, whatever might be their legal right to occupy land, did not encroach upon specifically defined lands which were occupied by Indians. Labaree quotes

instructions to the Governors of New York and Virginia in 1755 and 1756 respectively, describing in detail the boundaries of a tract of land which had been the subject of an agreement with the Iroquois Indians, instructing the Governors to defend and support the Indians in the quiet possession of their hunting grounds, and proceeding as follows: "And you are not upon any pretence whatsoever to grant lands to any person whatever within the limits described in the said deed, but to use your utmost endeavours to prevent any settlements being made within the same" (*Royal Instructions to British Colonial Governors*, vol. I, pp. 468-469).

In December 1761 instructions were given to the Governors of seven of the North American colonies, forbidding them, upon pain of being removed from office, to pass any grant of any land either within or adjacent to territories possessed or occupied by Indians, and requiring them to order all persons who either wilfully or inadvertently had settled upon Indian land to remove themselves (Labaree, op. cit., pp. 476-478).

The Treaty of Paris (1763), which ended the Seven Years' War, added vast tracts of land to the domains of the Crown in North America. The Crown of France ceased to own any territory there; from the Atlantic seaboard to the Mississippi was the domain of the Crown of Great Britain; beyond the Mississippi was the territory of the Crown of Spain. By Royal Proclamation of 7th October, 1763, which was expressed to be made in consequence of the treaty, certain provisions were made for the government of British territory. These included the setting up of new provinces including Quebec (roughly what was later called Lower Canada), East Florida (where the State of Florida now is) and West Florida (a narrow strip of land along the northern shore of the Gulf of Mexico extending as far west as the Mississippi). For the present purposes, the material clause of the Proclamation was that which made express provision for the maintenance of the Indians in their hunting grounds. Having recited that it was desirable that the Indians should not be disturbed in the possession of ". . . such Parts of our Dominions and Territories as, not having been ceded to or purchased by us, are reserved to them, or any of them, as their Hunting Grounds . . .", the clause went on first to forbid the Governors or Commanders-in-Chief of the new colonies of Quebec, East Florida and West Florida to survey or grant lands beyond the bounds of their respective governments, and then proceeded to forbid the Governors and Commanders-in-Chief in any of the *other* colonies or plantations in America to survey or grant " . . . Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North-West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them".

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The effect was to create an enormous Indian reserve from the watershed of the Alleghany Mountains to the Mississippi, bounded in the south by the northern boundary of West Florida and in the north by the watershed between the Great Lakes and Hudson's Bay. It is clear that all the land referred to and dealt with in this clause of the Proclamation was land of the Crown, as the Judicial Committee pointed out in *St. Catherine's Milling and Lumber Co.* v. *The Queen* (13), a case which will be referred to later. The important point for the moment is that the Proclamation of 1763 was a notable example of the policy of reserving for the use of Indians land which was within the domain of the Crown and therefore capable in law of being granted to colonists. The result was achieved by forbidding the issue of any grants of any such land. Such grants would have been perfectly valid, but by deliberate policy the Crown chose not to make them.

This policy was taken seriously ; in 1765 the Governor of Virginia was expressly instructed to cause persons who had migrated to the westward of the Alleghany Mountains and seated themselves on lands contiguous to the River Ohio, in disobedience to the Proclamation, to evacuate those settlements immediately, and to ensure that such a thing did not occur again. A similar instruction was sent to the proprietary Governor of Pennsylvania on the same date. In all the instructions to the successive Governors of Quebec, East Florida and West Florida, from 1763 until the Revolution, they were ordered to ensure obedience to the provisions of the Proclamation (Labaree, op. cit., pp. 473, 474, 479).

The common law before and after 1788.

I must regard as of some significance the fact that there is no trace of any doctrine of communal native title in Blackstone's *Commentaries*, first published in 1765. I do not think it is sufficient to reply that Blackstone professed to treat only of English law. The title of the fourth section of his Introduction is "Of the countries subject to the Laws of England" and with proper qualifications in each case he deals successively with Wales, Scotland, Berwick upon Tweed, Ireland, the Isle of Man, the Channel Islands, and "our more distant plantations in America, and elsewhere". It is true that he makes only cursory reference to the differences between English law and the laws of these places. But to explain the absence from Blackstone of any mention of a doctrine which is said to be a doctrine of the common law in 1788, it is necessary to say either that the doctrine did not exist in 1765 and yet had become established in 1788, or alternatively to say that Blackstone made a significant error of omission.

A possible line of reasoning from the doctrine that in settled colonies English law applies so far as it is applicable, is as follows.

(13) (1888) 14 App. Cas. 46.

If that is correct, and exhaustive, then the doctrine of communal native title does not apply in any territory *as a doctrine of the common law*. It does not apply in a settled colony because ex hypothesi it is not part of the law of England. It does not apply in a conquered or ceded colony unless it is either part of the existing law which the conqueror is bound to respect, or it is expressly applied by the conqueror as an act of State; in either case it is ex hypothesi not a doctrine of the common law. The conclusion is that if it applies in any territory, it applies otherwise than as a doctrine of the common law. In other words, the only proper question in this case is " whatever may be the law in other jurisdictions, does the doctrine of communal native title form part of the law of the Northern Territory? ".

The plaintiffs' case was from first to last put on a wider footing. Mr. Woodward's argument was that the doctrine, though it had never been made explicit in an Australian judicial decision, could and should now be applied in the Northern Territory as a common-law doctrine. The plaintiffs must, I think—and they did—adopt one or more of the following positions:

1. Blackstone's statement was not exhaustive: he should have mentioned the doctrine in order to give a true picture of the law relating to colonies in 1765. In view of the authorities already mentioned, I cannot accept this view. It would also be surprising if Blackstone allowed such an omission to pass, whether advertently or not.

2. There was a development in the law between 1765 and 1788, by which time the doctrine had become established. I do not think the authorities show this. *Campbell* v. *Hall* (14) is a leading case, decided in the middle of that period and argued very thoroughly with an examination of many authorities. Nothing in it warrants the suggestion that the doctrine was emerging just at that time. It is true that the question in issue was not the same.

3. The doctrine developed after 1788, from principles which existed in 1788, and like many other such doctrines of the common law, became applicable to Australia. In strict theory, it might be an answer to this that it was not in England that the doctrine developed, but in the Crown's overseas possessions (or some of them) and in the United States. In this theory, the common law, applicable to Australia, means the common law as it was before 1788 and as it has later developed in Australia, in England, and in decisions of the Judicial Committee, excluding any developments which have taken place in other jurisdictions.

This reasoning is unacceptable primarily of course because of the old-fashioned rigidity of the concept of the common law as

(14) (1774) 20 State Tr. 239; 98 E.R. 1045.

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something which, having been passed on to a colony at its foundation, thereafter develops only in that colony, in England, and in decisions of the Judicial Committee; on this theory, recourse to decisions in other jurisdictions is a waste of time. In the second place, the application of this theory amounts to saying that the existence of a doctrine of communal native title in Australia is categorically impossible because it could not have existed in England in 1788 or at any time, there being no aboriginals to whom it could apply.

The problem was perceived, and dealt with, by Chapman J. in a passage in his judgment in *Reg.* v. *Symonds* (15). I refer to that judgment later. For the moment I am concerned only with the following remarkable passage in it (at p. 388): "The intercourse of civilized nations, and especially of Great Britain, with the aboriginal natives of America and other countries, during the last two centuries, has gradually led to the adoption and affirmation by the colonial courts of certain established principles of law applicable to such intercourse. Although these principles may at times have been lost sight of, yet 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 the colonial Governments, have concurred to clothe with certainty and precision what would otherwise have remained vague and unsettled. These principles are not the new creation or invention of the 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; and they are in part deduced from those higher principles, from charters made in conformity with them, acquiesced in even down to the charter of our own colony; and from the letter of treaties with native tribes, wherein those principles have been asserted and acted upon."

This was in advance of its time, in its freedom from the rigidity of some nineteenth century ideas of the growth of the common law; it was also a reminder of the more flexible views which prevailed in the eighteenth century, of which the arguments in *Campbell* v. *Hall* (16) are good examples. I do not think that I should in 1971 adopt any less flexible approach, and counsel for the defendants did not seriously suggest that I should. The concept of "the common law" may have lost some sharpness of definition, but it is still not without utility. I need not further apologize for examining cases in jurisdictions outside England and Australia for the light which they may throw on the question of law which

(15) (1847) N.Z.P.C.C. 387.

(16) (1774) 20 State Tr. 239; 98 E.R. 1045.

I have to decide. In doing so I am not suggesting any departure from the rules which lay down what precedents are binding on this Court.

American cases since the Revolution.

I turn now to the cases decided in the United States of America after the Revolution. Less than twelve years elapsed from the beginning of the Revolution (4th July, 1776) to the foundation of New South Wales in January 1788. Before I deal with the United States cases, I mention a matter of historical significance. From its earliest times the Government of the United States continued the policy, which was of such long standing in the colonies, of " purchasing " lands occupied by Indians. After the Revolution these transactions often took the form of treaties to which the parties were the United States of the one part and a tribe or tribes of Indians of the other part. No less than 242 such treaties were made between 1778 and 1842; a list is given in *United States Statutes at Large*, vol. VII, p. iii. There is an enlightening article by F. S. Cohen, (1947) 32 *Minnesota Law Review* 28, in which the learned author surveys the history of the matter and shows that it was the persistent policy of the United States to make bargains, for proper compensation, with the Indian tribes for the cession of land occupied by them. According to him, most of the land of the continental United States (apart from Alaska) was bought from the Indians in this way—a statement which takes into account both pre-Revolutionary and post-Revolutionary history.

The learned author goes on to survey the later developments of United States case law, his general theme being that what began as a matter of practice, as distinct from law, developed into a doctrine of law, that the courts must recognize and enforce Indian communal title, even against the United States or a person deriving title from them. I have followed his argument closely, and with respect and with some diffidence I must say that some of his authorities in my opinion do not support the doctrinal burden which he puts upon them. But what is of more importance is that the United States Supreme Court has, since the publication of that article, denied its principal contention: *Tee-Hit-Ton Indians* v. *United States* (17).

In *Marshall* v. *Clark* (18) the opposing parties each claimed to be entitled to land by virtue of a different Act of the Virginia State Assembly. A case was stated to the State Court of Appeals, in which one of the questions was whether the State of Virginia had extinguished the claim of the Indians to the lands in question, and if not, whether the lands could be considered as " waste and unappropriated " within the meaning of an Act. The Court of Appeals held that the question whether the State had extinguished

(17) (1955) 348 U.S. 272. (18) (1791) 1 Kentucky Reports 77.

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the claims of the Indians was of no consequence in the case. Titles to land in Virginia derived from the State, which was deemed to be the successor to the Crown. The Crown had full power to grant title to any land under its political sovereignty. " The dormant title of the Indian tribes remained to be extinguished by Government, either by purchase or conquest, and when that was done, it inured to the benefit of the citizens who had previously acquired a title from the Crown, and did not authorize a new grant of the lands as waste and unappropriated " (p. 80). In other words, the so-called extinguishment of the Indian " title " was something unconnected with the claim of either party : the latter claims were matters of title in the legal sense.

In *Jackson ex dem. Klock* v. *Hudson* (19), decided by the Supreme Court of the State of New York, the plaintiff sued in ejectment and one of the objections to his title was that at the time of one of the deeds which formed his chain of title, certain Indians were in possession of the land, and had been so for a period of at least thirty years, which included the time when the original patent, dated 1731, had been issued. Kent C.J. said : " The policy or the abstract right of granting lands in the possession of the native Indians without their previous consent, as original lords of the soil, is a political question with which we have at present nothing to do. It cannot arise or be discussed in the contest between two of our own citizens, neither of whom deduces any title from the Indians."

In *Goodell* v. *Jackson* (20) the question in issue was a question relating to the right of an Indian, as an individual, to take land by descent or grant and to make a valid alienation of it. Chancellor Kent held that the Indian could take, but not, in the circumstances of the case, alienate, except in pursuance of various statutes of the State of New York passed for the protection of Indians. The case is principally of interest as giving a long and eloquent review of the measures taken to protect Indians against being over-reached in dealings with white men. It is noteworthy that there is no suggestion that Indian communal title could be set up against title derived from the State.

The next case is *Fletcher* v. *Peck* (21), decided by the Supreme Court of the United States. The question which is material for the present purposes was whether certain land, which had been part of the Indian reserve created by the Royal Proclamation of 1763, between the Alleghany Mountains and the Mississippi River, in the State of Georgia, was vested in that State or the United States. It was suggested by one party that the effect of the Proclamation of 1763 had been to disannex the land from the State of Georgia, and that the United States thereafter acquired

(19) (1808) 3 Am. Dec. 500; 3 Johns. 375.

(20) (1823) 11 Am. Dec. 351; 20 Johns 693.

(21) (1809) 6 Cranch 87.

title to it by virtue of the treaty with Great Britain at the end of the Revolutionary War. The Court rejected this argument and held, just as was held years later by the Judicial Committee in the *St. Catherine's Milling Co.* case (22), that the land of the great Indian reserve was after 1763 none the less land of the Crown. At the end of his judgment Marshall C.J. said this (at p. 142): "It was doubted whether a State can be seised in fee of lands subject to the Indian title, and whether a decision that they were seised in fee might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title. The majority of the Court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the State." The last part of this is of course entirely consistent with what the plaintiffs are saying in the case before me, that the doctrine of communal native title is not inconsistent with the ultimate or radical title being in the Crown. But the language of Marshall C.J. in *Fletcher* v. *Peck* is interesting as showing the tendency to emphasize the status of native occupancy, even to the stage of using the word "title" in relation to the communal occupation of Indian lands, which by custom had to be extinguished by purchase, but which in law had no significance as against a properly constituted title to the land. In a dissenting judgment Johnson J. went even further, and asserted in effect that everything but full ownership was in the Indians, while only a bare residual right was in the sovereign: "If the interest in Georgia was nothing more than a pre-emptive right, how could that be called a fee-simple, which was nothing more than a power to acquire a fee-simple by purchase, when the proprietors should be pleased to sell?" (at p. 147).

Mr. Woodward's contention was that the language used in these early cases represents the birth, or perhaps a sign of the incipient birth, of the doctrine upon which he relied.

Next is the case of *Johnson and Graham's Lessee* v. *M'Intosh* (23). This has been quoted and referred to many times, and the plaintiffs relied strongly on it. An action of ejectment was brought for land in the State of Illinois which had been in the great Indian reserve set up by the Royal Proclamation of 1763. The plaintiffs claimed under a purchase and conveyance from Indians and the defendant under a grant from the United States. The court below gave judgment for the defendant, upon a case stated which set out the facts in very great detail; the whole case is set out in the report. On a writ of error, the Supreme Court affirmed the judgment of the court below.

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(22) (1888) 14 App. Cas. 46.

(23) (1823) 8 Wheaton 543.

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The plaintiffs claimed under two conveyances made in 1773 and 1775 by Indian chiefs on behalf of their tribes. The land was conquered from the British in the Revolutionary War, and in 1784 was duly made over by the State of Virginia to the United States, which in 1818 granted it to the defendant. Marshall C.J. (at p. 572) described the principal question before the Court as the power of Indians to give, and of private individuals to receive, a title which could be sustained in the courts of the United States. He began by setting out first the conquest of land on the American continent by European powers and the principle of title through discovery. He went on (at p. 574): ". . . the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves, and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy."

The Chief Justice proceeded to give a historical account which showed in detail how all the colonizing powers of Europe had adopted these principles in North America. He went on (at p. 579): "Thus has our whole country been granted by the Crown while in the occupation of the Indians. These grants purport to convey the soil as well as the right of dominion to the grantees. . . . It has never been objected to this, or to any other similar grant, that the title as well as possession was in the Indians when it was made, and that it passed nothing on that account." Later (at p. 583) he referred to "the principle, that discovery gave a title to lands still remaining in the possession of the Indians. Whichever title prevailed, it was still a title to lands occupied by the Indians, whose right of occupancy neither controverted, and neither had then extinguished." The word "neither" here refers to England and France; the Chief Justice had been referring to the dispute which resulted in the Seven Years' War and the extinction of French sovereignty over a large part of the American continent. He went on to give an account (at p. 584) of the treaty which ended the War of the American Revolution, pointing out that as a result of it the rights to the soil which had previously been in Great Britain "passed definitively to these States".

At this point he said: "It has never been doubted that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right was vested in that government which might constitutionally exercise it." At p. 588 he said: "All our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy, and recognize the absolute title of the Crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians." He repeatedly used similar words. For example (at p. 588): "The British Government . . . asserted . . . a limited sovereignty over [the Indians] and the exclusive right of extinguishing the title which occupancy gave to them." Again (at p. 592): ". . . the principle which has been supposed to be recognized by all European governments, from the first settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a seisin in fee, than a lease for years, and might as effectually bar an ejectment." Again (at p. 603): "It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right."

In my most respectful opinion, 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. In the first place, the case does not raise that issue; the Indians were not parties to the action and the question was not the validity of the Indian title against the United States or its grantees, but the validity of an alienation by Indians to subjects of the Crown. No doubt, the Chief Justice was deeply concerned to emphasize the practical value to the Indians of the common custom of "extinguishing Indian title". He was concerned to stress the propriety of respecting the Indian occupancy, and he must have been mindful of the existence since 1763 of the great Indian reserve and that, in general, land in it had been acquired by the whites from the Indians by treaty or purchase. He was concerned to uphold the value of Indian occupancy because, I venture to suggest, he was obliged to state its weakness—its incapacity to be alienated save to the sovereign. His judgment, in short, may, in my opinion, be regarded as an eloquent exposition of the soundness of the practice applicable to the relations between

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whites and Indians in respect of Indian land, but not as an encroachment upon the rigour of the law. That law was well settled, and contained no doctrine of communal native title.

It would be an over-simplification to classify these statements of the Chief Justice as obiter dicta, on the ground that the ratio of the case was simply that a title derived from an United States grant was superior to one derived from an Indian grant. What he said may well have been directed at the first argument for the plaintiffs, which is reported at pp. 562-563. This was that the Indians were the owners of the land in dispute at the time of executing the deed of 1775, and had power to sell, and that the United States had purchased the same lands of the same Indians and that therefore both parties claimed from the same source, namely the Indians. This argument, of course, elevates communal native title to a height from which the Chief Justice was concerned to bring it down, and perhaps this too helps to explain his emphasis on the value and status of the Indian right of occupancy.

I have shown what seems to me to be the true explanation of what Marshall C.J. said in *Johnson* v. *M'Intosh*, but I concede that there is one passage which is not consistent with my explanation. I have already quoted it: "The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with a seisin in fee, than a lease for years, and might as effectually bar an ejectment" (p. 592). The "right" referred to in the last sentence in this passage must, I think, refer, not to the word "right" at the end of the preceding sentence, but to the "Indian title of occupancy". The Chief Justice seems to be saying that just as seisin in fee in one person is compatible with a lease for years in another, so the ultimate title to the land in the sovereign is compatible with the Indian title of occupancy. He goes on to say that the latter would be an effective defence to an action of ejectment. If this is what the Chief Justice really meant, one can only say that the statement appears not to be borne out by any other authority. It would be surprising, if there were such a case, that it was not mentioned in F. S. Cohen's article to which I have already referred—or by Mr. Woodward in this case. None such was cited to me, and notwithstanding Mr. Woodward's weighty submissions, I am clear that *Johnson* v. *M'Intosh* 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 ultimate title.

The matter next came before the Supreme Court of the United States in two cases relating to a dispute between the Cherokee Indians and the State of Georgia. In the first, *Cherokee Nation* v.

State of Georgia (24), the complainants were described in their own bill as " the Cherokee nation of Indians, a foreign state, not owing allegiance to the United States, nor to any State of this Union, nor to any prince, potentate or State, other than their own ". Their complaint was that the State of Georgia had passed certain enactments which were unjust and oppressive to them in various respects, and in particular in denying their right to occupy their land. They sought an injunction to restrain the State and its officers from executing and enforcing the laws of Georgia within the Cherokee territory, as designated by treaty between the United States and the Cherokee nation. An injunction was refused, on the ground that the matter was not within the court's jurisdiction. Article III, s. II, of the United States Constitution extends the judicial power of the United States to cases " between a State or the citizens thereof and foreign States, citizens, or subjects ". On the short ground that the Cherokee Indians were not a foreign State, nor were they foreign citizens or foreign subjects, the Supreme Court refused the injunction. Marshall C.J. described the position of Indian tribes in relation to the United States thus : " Though the Indians are acknowledged to have an unquestionable and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases " (p. 17).

The second case was *Worcester* v. *State of Georgia* (25). The plaintiff in error, a missionary from Vermont, went to live in the Cherokee territory, in Georgia, without a licence, contrary to a penal provision enacted by the legislature of Georgia. He was convicted and imprisoned. His defence, and his argument in the Supreme Court, was that the Georgia enactment was void as repugnant to the several treaties which had been entered into by the United States with the Cherokee nation. By art. VI of the United States Constitution treaties made under the authority of the United States " shall be the supreme law of the land ; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding ". On this ground the plaintiff in error was successful. The opinion of the Court was delivered by Marshall C.J., who once again surveyed the history of colonization on the North American continent, and once again stated the position of the Indians in relation to

(24) (1831) 5 Pet. 1.

(25) (1832) 6 Pet. 515.

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their land in strong and eloquent terms. What, he said, was conveyed by the charters given by European sovereigns to grantees of land in North America was " the exclusive right of purchasing such lands as the natives were willing to sell. The Crown could not be understood to grant what the Crown did not affect to claim ; nor was it so understood ". His judgment as a whole makes it quite clear, however, and he emphasizes at p. 560, that the decision in the case was based on the invalidity of the Georgia enactment. That invalidity did not rest upon any ground other than the incompatibility between the enactment and the treaties, which the Court held to be binding on the State of Georgia.

In *Mitchel* v. *United States* (26) the appellant claimed land in Florida, purporting to derive his title from a grant made by Indians to his predecessors in title, at a time when Florida was under the sovereignty of Spain, which grant had been ratified and approved by the Spanish authorities. The respondent claimed the land by virtue of the treaty whereby Spain ceded Florida to the United States. The matter came before the Supreme Court on appeal from a Florida court, pursuant to an Act of Congress which submitted claims of this kind to the courts as " courts of equity ". The question for the Court was stated by Baldwin J., who delivered the Court's judgment, as being whether Mitchel had, either by the law of nations, the stipulations of any treaty, the laws, usages and customs of Spain, or the province in which the land was situated, the acts of Congress or proceedings under them, or a treaty, acquired a right which would have been valid if the territory had remained under the dominion and in possession of Spain (p. 734). The Court held for the petitioner, Mitchel. The basis of the decision was that the title relied on by him was valid under Spanish law, that is to say Florida law before the cession of Florida by Spain to Britain in 1763 ; such validity remained, under British sovereignty over Florida, till 1783, and had remained under United States sovereignty since 1783. The title of Mitchel's predecessor was valid in Florida before 1763 not because it was a title derived by conveyance from Indians, but because it was ratified and approved by the Spanish authorities. The decision does not, therefore, turn on the validity of Indian title.

The high water mark of support for the status of Indian occupancy occurred in the following passage, on which Mr. Woodward placed great reliance : " The merits of this case do not make it necessary to inquire whether the Indians within the United States had any other rights of soil or jurisdiction ; it is enough to consider it as a settled principle that their right of occupancy is considered as sacred as the fee simple of the whites " (p. 746). But where are the cases which show the Indians upholding their right as if it were an estate in fee simple ?

(26) (1835) 9 Pet. 711.

I am well aware of my inexperience in American law, yet I cannot help concluding that despite the force and eloquence of the dicta in them, none of these cases is authority for the proposition that the mere fact of communal occupancy gives a title enforceable in the sovereign's courts against the sovereign or one claiming under him. I do not think it necessary to discuss several later United States cases which were cited to me, since none of them either contains such strong dicta as those I have cited or is authority for Mr. Woodward's contention. I set apart a long line of cases exemplified by *United States* v. *Alcea Band of Tillamooks* (27), in which, under special statutory provisions, rights had been created to compensation for the taking of Indian-occupied lands. To establish the existence of his doctrine Mr. Woodward must show it put into force without the command of statute.

The earlier cases which I have cited undoubtedly show a growing tendency to elevate the status of native occupancy. There is debate between the judges as to the respective qualities of the sovereign's title and of the Indian title, which, it is agreed, are not inconsistent with each other. Yet native occupancy never achieves the status of being unequivocally defined as a proprietary interest in relation to proprietary interests derived from the sovereign. One might think that even though it failed to gain acceptance in this respect, it might eventually have been held to be a right enjoying the protection of the Constitution. But what has emerged has been not the affirmation of that principle, but the denial of it.

The case is *Tee-Hit-Ton Indians* v. *United States* (28). The importance of this case is that the claim was made under the Fifth Amendment and not under any special statutory provision. The petitioners, an identifiable group of Indians, contended that their tribal predecessors had continually claimed, occupied and used certain land in Alaska from time immemorial, and that the Russian Government of Alaska before 1867 had never interfered with them. They claimed that the United States Government, by taking and selling timber from the land, was acting in violation of their constitutional rights under the Fifth Amendment. The opinion of the Court, delivered by Reed J., included this passage on the subject of " Indian title " (p. 279) : " It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised ' sovereignty ', as we use that term. This

(27) (1946) 329 U.S. 40. (28) (1955) 348 U.S. 272.

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is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians." And later (p. 281): "No case in this Court has ever held that taking of Indian title or use by Congress required compensation."

Having distinguished the *Tillamooks'* case (29) as one of compensation under a special statute, the opinion proceeded: " This leaves unimpaired the rule derived from *Johnson* v. *M'Intosh* (30) that the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment. This is true, not because an Indian or an Indian tribe has no standing to sue or because the United States has not consented to be sued for the taking of original Indian title, but because Indian occupation of land without Government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law." It is surprising, at any rate to one not well versed in United States law, to find *Johnson* v. *M'Intosh* cited as authority for this proposition; but the case must amount to a total denial that communal Indian occupancy of lands gives a proprietary right. If the doctrine of communal native title ever existed in the United States, it does no longer.

Canadian cases.

I turn to the cases from Canada. *St. Catherine's Milling and Lumber Co.* v. *The Queen* (31) was an important decision on the effect of the Royal Proclamation of 1763. The appellant company cut timber on certain land in Ontario without authority from the Government of the Province. This Government sued for an injunction and damages. The defence was that the appellant was licensed by the Government of the Dominion of Canada. The injunction was granted and the company appealed to the Privy Council. The land had been occupied by Indians, from the Royal Proclamation of 1763 to the year 1873, when by treaty the Indians then in occupation purported to cede it to the Government of the Dominion. The question was whether, at the time of the company's licence, the land belonged to the Province of Ontario or to the Dominion of Canada; if the former were the case, the appellant's licence was ineffective. Counsel for the Dominion (which was allowed to intervene in the appeal) submitted that the Indians had, and were always recognized as having, a complete proprietary interest, limited by an imperfect power of alienation; it followed

(29) (1946) 329 U.S. 40.
(30) (1823) 8 Wheaton 543.
(31) (1888) 14 App. Cas. 46.

that the cession to the Dominion was valid. Counsel for the respondent (the Attorney-General of Ontario) contended that the Indians had never had more than a personal right of occupation during the pleasure of the Crown, that the title to the land had always been in the Crown, and that both before and after the *British North America Act* of 1867 the title was in the Crown in right of the Province of Ontario.

The Judicial Committee decided that under the Royal Proclamation of 1763 the tenure of the Indians was a personal and usufructuary right, dependent upon the goodwill of the sovereign. The land having been ceded to the Crown by the Treaty of Paris in 1763, the full title had always been in the Crown. " There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished." The " plenum dominium " was therefore vested in the Crown in right of the Province, and the appellant failed. The argument which attributed to the Indians a proprietary interest under the Proclamation of 1763 was rejected. It is to be noted that in this case the rule that native title can be alienated only to the Crown was not involved. The alienation was to the Crown (sc. in right of the Dominion) and the question was what it was that was alienated. The case therefore stands as authority for two propositions :

1. Communal native occupancy can co-exist with the existence of the ultimate title in the Crown.

2. Communal native occupancy is a personal, not a proprietary right, which on surrender to the Crown is simply extinguished.

There is one other significant Canadian case. In *Calder* v. *Attorney-General of British Columbia* (32) an action was brought by representative plaintiffs, being members of the Nishga Indian tribe, seeking a declaratory judgment that the aboriginal title of the plaintiffs to their ancient tribal territory had never been lawfully extinguished. Gould J., at first instance, held that the Royal Proclamation of 1763 did not apply to the lands in question, on the ground that in the Proclamation the land to which it referred was described not by boundaries, but only by reference to its inhabitants, namely " Tribes of Indians with whom We are connected, and who live under our Protection ", and that this certainly could not be said of the Indians who in 1763 occupied what afterwards became British Columbia. The second argument for the plaintiffs was based upon the judgment of Marshall C.J. in *Johnson*

(32) (1969) 8 D.L.R. (3d) 59.

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v. *M'Intosh* (33). Having quoted extensively from that case, and referred to a number of other cases in which it was quoted with approval, his Honour referred to *Tee-Hit-Ton Indians* v. *United States* (34) and expressed the view that the doctrine of " the supreme power of Congress " (to use the phrase of Reed J.) " is equally applicable in English law in the form of the supreme power of the Crown, usually termed the Crown prerogative " (p. 72).

His Honour then turned to another question, which has significance for the case before me—that of the extinguishment of the Indian rights. He held that before the date in 1871 when British Columbia entered the Confederation of Canada, the sole sovereignty over British Columbia flowed from the Crown, and that such rights if any as the Nishgas might have had were firmly and totally extinguished by overt acts of the Crown by way of proclamation, ordinance and proclaimed statute. He proceeded to set out in full these various provisions, some thirteen in all, made between December 1858 and June 1870. I need not here give an account of these provisions; in general, they all purported to deal with the land of British Columbia, either on the implicit assumption, or the express assertion, that all such land belonged to the Crown. Thus, the second of these proclamations, dated 14th February, 1859, provided that: " All the lands in British Columbia, and all the mines and minerals therein, belong to the Crown in fee." What is also interesting about these provisions is that they expressly mentioned Indian reserves. Thus a proclamation dated 27th August, 1861, provided that both British subjects and aliens taking an oath of allegiance might acquire the right to hold and purchase in fee simple unoccupied, unsurveyed and unreserved Crown lands, and there was an express exception for " an Indian reserve or settlement ". A later ordinance of 31st March, 1866, excepted " aborigines of this colony " from the rights given in an earlier provision to British subjects to hold land, except with permission specially given. The previous provisions were repealed, and a new enactment made, on 1st June, 1870. An ordinance of this date provided as follows: " . . . any male person being a British subject . . . may acquire the right to pre-empt any tract of unoccupied, unsurveyed, and unreserved Crown Lands (not being an Indian settlement) . . . in that portion of the colony situate . . . provided that such right of pre-emption shall not be held to extend to any of the Aborigines of this Continent, except to such as shall have obtained the Governor's special permission in writing to that effect."

Referring to these thirteen statutory provisions, Gould J. said (at p. 82): " All thirteen reveal a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the

(33) (1823) 8 Wheaton 543. (34) (1955) 348 U.S. 272.

lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to ' aboriginal title, otherwise known as the Indian title ', to quote the statement of claim. . . . So how does one ascertain what has been the policy of the British Crown as to these lands ? There is no more emphatic or unequivocal way of enunciating policy as to a particular subject matter than by enacting competent legislation as to that very subject matter, and that is what has happened in this instance. . . . In result I find that, if there ever was such a thing as aboriginal or Indian title in, or any right analogous to such over, the delineated area, such has been lawfully extinguished in toto."

His Honour evidently thought that the express reference to Indian reserves in some of these provisions did not detract from, perhaps only emphasized, the Crown's intention to deal with the whole of the lands of British Columbia in a manner inconsistent with any Indian title. His Honour distinguished the *St. Catherine's Milling Co.* case on the ground that there the Indians had something to treat about—their rights under the Proclamation of 1763. He said (at p. 83) : " In the instant case sovereignty over the delineated lands came by exploration of terra incognita . . . no acknowledgement at any time of any aboriginal rights, and specific dealings with the territory so inconsistent with any Indian claim as to constitute the dealings themselves a denial of any Indian or aboriginal title. As the Crown had the absolute right to extinguish, if there was anything to extinguish, the denial amounts to the same thing, sans the admission that an Indian or aboriginal title had ever existed."

The plaintiffs appealed, and their appeal was dismissed by the Court of Appeal of British Columbia on 7th May, 1970. Copies of the reasons for judgment were made available to me by counsel in this case ; the appeal was not reported at the time when the case was cited to me*. Davey C.J. held in the first place that there was no evidence before him to justify the conclusion that the aboriginal rights claimed by the appellants were of a kind that it should be assumed that they had been recognized by the Crown. What his Honour said was that the boundaries were " territorial, not proprietary " and that they " had no connexion with notions of ownership of particular parcels of land ". Without access to the evidence it is not easy to be sure of his Honour's meaning here, but possibly it was that only proprietary rights which were capable of vesting in individual persons could be recognized. He went on to reject expressly the submission that " . . . the long-time policy of the Imperial Government in settling territory throughout the world, especially exemplified in its dealings with the Indians in the eastern part of North America and the Maoris of New Zealand,

*See now (1970) 13 D.L.R. (3d) 64.

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of buying from the native people those parts of the territory which were needed for the purpose of the colonies, has become part of the common law, or at least has become so firmly entrenched in the policies by which native territories are occupied, that an intention to observe those policies must be attributed to all colonial Governments. Those policies are fully described in the judgments of Marshall C.J. in *Johnson* v. *M'Intosh* (35) and *Worcester* v. *State of Georgia* (36). Whatever may be the law in the various States of the Union, it is clear from the authorities binding this Court (although some of them contain occasional statements that seem to give support to counsel) that there is no such principle embodied in our law. In each case it must be shown that the aboriginal rights were ensured by prerogative or legislative act, or that a course of dealing has been proved from which that can be inferred. Whether aboriginal rights ought to be confirmed or recognized depends entirely upon the Crown's or legislature's view of the policy required to deal properly with each situation. . . . I see no prerogative or legislative act ensuring to the Nishga Nation any aboriginal rights in their territory." His Honour concluded by saying that if he were wrong, and the Indians of British Columbia did acquire any aboriginal rights, he considered that they have been extinguished.

Maclean J. held that " aboriginal title " afforded to the Indians no claim capable of recognition in a court of law, and for this he relied on an Indian and a New Zealand case, to both of which I refer later, and to the *Tee-Hit-Ton* case (37). Furthermore, he agreed with the trial judge that if there ever had been any Indian title it had been extinguished by the legislation of the Province.

Tysoe J. agreed with everything that the trial judge had decided, and went on to give his own reasons. He referred to " . . . the clear distinction between mere policy of a sovereign authority, and rights of natives conferred or expressly recognized by statute of the sovereign authority or by treaty or agreement having statutory effect, and the different legal results that follow. There is no such statute applicable to the Nishga Indians and they have no such treaty or agreement." Indian title, his Honour said, would be a matter for the Nishgas to take up with the Government ; not having been recognized and incorporated in municipal law, the court had no authority to pass upon the question whether it was vested in the appellants. On the question of the extinguishment of the native title, his Honour relied, in addition to the provisions above cited, on the eleventh and thirteenth articles of the Terms of Union between the colony of British Columbia and the Dominion of Canada (1871), and he said : " It is true, as the appellants have submitted, that nowhere can one find express words extinguishing Indian title, but ' actions speak louder than words ', and in my

(35) (1823) 8 Wheaton 543.
(36) (1832) 6 Pet. 515.
(37) (1955) 348 U.S. 272.

opinion the policy of the Governor and the Executive Council of British Columbia and the execution of that policy were such that, if Indian title existed, extinguishment was effected by it. Reserves of land for the Indians were set up generally at places where the Indians had their villages and cultivated lands and where they caught their fish—their main food. The correspondence between those who were responsible for this work . . . shows that, at least in most cases, the location and boundaries of the reserves were arrived at in consultation with the local Indians. The remainder of the unoccupied lands were thrown open for settlement. Thus complete dominion over the whole of the lands in the colony of British Columbia adverse to any tenure of the Indians under Indian title was exercised. The fact is that the white settlement of the lands which was the object of the Crown was inconsistent with the maintenance of whatever rights the Indians thought they had."

I consider, with respect, that *Calder's* case, though it is not binding on this Court, is weighty authority for these propositions :

1. In a settled colony there is no principle of communal native title except such as can be shown by prerogative or legislative act, or a course of dealing.

2. In a settled colony a legislative and executive policy of treating the land of the colony as open to grant by the Crown, together with the establishment of native reserves, operates as an extinguishment of aboriginal title, if that ever existed.

Indian cases.

None of the Indian cases cited to me deals with *communal* native title ; all were concerned with claims by individuals which they based in some measure on the law said to have been applicable before the acquisition of the land by the Crown. All, moreover, related to ceded or conquered land. Their relevance may lie in this : that Mr. Woodward contended, though with somewhat less force, that the doctrine of communal native title applied to territory which had been ceded as well as to that which had been settled. There is, moreover, a much-quoted dictum in one of these cases which the defendants placed in the front rank of their authorities.

I draw attention again here to the rule about the application of English law to conquered or ceded colonies. Blackstone (I. 107) puts it thus : " In conquered or ceded countries, that have already laws of their own, the King may indeed alter and change those laws ; but, till he does actually change them, the ancient laws of the country remain. . . ." Blackstone's rule was stated again by Lord Mansfield in his judgment in *Campbell* v. *Hall* (38) : " Laws

(38) (1774) Lofft 655, at p. 741 ; 98 E.R. 1045, at p. 1047.

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of a conquered country continue until they are altered by the conqueror. The justice and antiquity of this maxim is uncontrovertible." But it is at least doubtful whether the law can still be stated in these terms ; at any rate, to do so leaves unstated an important qualification to it. In *Cook* v. *Sprigg* (39) (an African case) the plaintiffs had received a concession—apparently a right to search for and take minerals—from the Paramount Chief of Pondoland. Pondoland was afterwards ceded to the Crown in right of Cape Colony. The plaintiffs brought an action against a nominal defendant representing the Government of the Colony—a procedure which was in accordance with a statute of that Colony. They asked for declarations and damages, alleging that the Government had taken from them, or refused to recognize, their rights under the concession. Although in the argument there is some suggestion that the sovereignty of the Crown in some manner extended over Pondoland before the cession, the judgment of the Judicial Committee makes clear that the Paramount Chief of Pondoland was when he granted the concession a sovereign independent ruler. The Judicial Committee held that the plaintiffs (appellants) must fail on the ground that the acts of the Cape Government in refusing to recognize the concessions were acts of State with which the Court could not concern itself. The judgment is quite short, and relies simply on the earlier decision of the Board in *Secretary of State for India* v. *Kamachee Boye Sahaba* (40). A learned note at 51 *Law Quarterly Review* 1 points out that in the first place it is probable, as the Supreme Court of Cape Colony had held, that the concession conferred no legal right before the annexation and therefore could confer none afterwards ; secondly, the concession was at best probably a licence or contract, and not a right of property. These matters, however, were not mentioned by their Lordships. They relied simply on the *Kamachee* case. That was an appeal from the Supreme Court at Madras. The respondent was the widow of an Indian potentate whose death had caused the extinction of his hereditary dignity and sovereignty. The East India Company, as the agent of the Crown, decided that his official property had passed to the Crown. In consequence of some recalcitrance on the part of his household and servants, an officer of the company seized all his property, both official and private, and this conduct was approved by Government. The Judicial Committee decided in effect that the whole seizure was an act of State into which the courts could not inquire.

Cook v. *Sprigg* is of course binding on this Court, whatever it decided. But it may be permissible, with the greatest respect, to wonder whether the *Kamachee* case could have been distinguished on the ground that there there was one act of State which applied

(39) [1899] A.C. 572.

(40) (1859) 13 Moo. P.C. 22 ; 15 E.R. 9.

to both official and private property, whereas in *Cook* v. *Sprigg* the cession of the territory was one thing and the refusal to recognize the concession another. As it is, however, it seems that after *Cook* v. *Sprigg* Blackstone's and Lord Mansfield's rule has to be qualified by saying that it does not apply to a dispute between the Crown and a subject. The relevance of the qualification will now appear.

In *Secretary of State for India* v. *Bai Rajbai* (41) the subject land was in a district which had been ceded by its ruler to the British Government in 1817. The respondent was the sole surviving descendant of the person who was in possession of the land at the date of the cession. This person was termed a " kasbati ", which connoted the ownership of land together with the right to receive rent for it, and also certain powers of government over the land. After the cession, the Government took some time to make up its mind whether it would leave the kasbatis in possession of their land and if so on what terms ; it was eventually decided that the kasbatis should become lessees for terms of seven years.

The Judicial Committee considered what was the precise relation in which the kasbatis stood to the Government at the time of cession. Their Lordships said (at p. 237) : " The relation in which they stood to their native sovereigns before this cession, and the legal rights they enjoyed under them, are, save in one respect, entirely irrelevant matters. They could not carry in under the new regime the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have as against their new sovereign were those, and only those, which that new sovereign, by agreement expressed or implied, or by legislation, chose to confer upon them. Of course this implied agreement might be proved by circumstantial evidence, such as the mode of dealing with them which the new sovereign adopted, his recognition of their old rights, and express or implied election to respect them and be bound by them, and it is only for the purpose of determining whether and to what extent the new sovereign has recognized these ante-cession rights of the kasbatis, and has elected or agreed to be bound by them, that the consideration of the existence, nature, or extent of these rights becomes a relevant subject for inquiry in this case." At this point the judgment refers to the *Kamachee* case and to *Cook* v. *Sprigg*, and continues (pp. 238-239) : " As far, therefore, as the legal rights of the kasbatis, enforceable against the Indian Government in Indian courts, are concerned, the above-mentioned cession of territory must be taken as a new point of departure. . . . The kasbatis may have been absolute owners of their villages, as the respondent contends, and yet the consideration of their ante-cession rights is beside the point, save so far as it can be shown

(41) (1915) L.R. 42 Ind. App. 229.

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that the Bombay Government consented to their continuing to enjoy those rights under its own regime. In their Lordships' view, putting aside legislation for the moment, the burden of proving that the Bombay Government did so consent to any, and if so to what, extent rests upon the respondent."

In the result, the Judicial Committee decided that the respondent had failed to discharge the burden upon her and that the evidence showed that the Government " never by an agreement, express or implied, conferred upon the respondent or any of her ancestors the proprietary rights in, or ownership of, the village . . . claimed by her; that they never recognized or admitted the existence of such rights, or of any rights analogous to them, in them or her; that the only rights in this village which the Government conferred upon her ancestors were those conferred by the leases which the Government from time to time, at their own will and pleasure, chose to grant . . . " (p. 248).

The next case is one upon which the defendants relied strongly. It is *Vajesingji Joravarsingji* v. *Secretary of State for India* (42). The appellants sued for a declaration that they were proprietors of certain lands; the respondent contended that they were lessees. The lands were part of a territory transferred by treaty of cession to the British Government in 1860. The Judicial Committee began by laying down the law in much the same terms as had been laid down in *Secretary of State* v. *Bai Rajbai*. They also attributed the same effect to the " act of State " cases, the *Kamachee* case and *Cook* v. *Sprigg*. The words used by the Judicial Committee in the *Vajesingji* case were these (at p. 360): " When a territory is acquired by a sovereign State for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognized ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal courts. The right to enforce remains only with the high contracting parties." This was the passage strongly relied on by counsel for the defendants. Later the Judicial Committee said (at p. 361): " The whole object accordingly of inquiry is to see whether, after cession, the British Government has conferred or acknowledged as existing the proprietary right which the appellants claim."

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(42) (1924) L.R. 51 Ind. App. 357.

At this point it appeared that the appellants had sought to prove what their title was under the previous sovereign, but the Judicial Committee held expressly that this was irrelevant. A similar decision was made in *Bai Rajbai's* case. This seems to me to indicate that Blackstone's statement of the law of conquered or ceded colonies is no longer correct, as it stands, for if the old law remains until the sovereign decides otherwise, it must be of moment to inquire what the rights were under the former sovereign. The Judicial Committee went even further, and said that on a cession any statement in general terms that rights will be respected must necessarily mean as these rights are, on investigation, determined by the government officials. " To suppose that by such general statements in a proclamation the Government renounced their right to acknowledge what they thought right and conferred on a municipal court the right to adjudicate as upon rights which existed before cession, is, in their Lordships' opinion, to misapprehend the law as above set forth " (at p. 367).

The following propositions, relevant to the case before me, can in my opinion be derived from the *Vajesingji* case and the line of authority upon which it rests :

1. In a ceded or conquered territory a subject cannot in law resist the expropriation by the Crown of what under the previous sovereign was his property.

2. If the dictum relied on by the defendants in the case before me is correct, this (with the necessary amendment of the word " sovereign " if inappropriate) is true also of a settled or occupied territory.

3. The only ways of escape for the plaintiffs from the effect of proposition No. 2 are to contend (*a*) that the dictum, which was obiter in regard to a settled territory, is not correct in that respect ; (*b*) that the dictum applies to individual rights but not to communal rights.

Mr. Woodward took both these points, but it seems to me that to succeed in them he must show aliunde that there is a doctrine of communal native title and that their Lordships' dictum must be read as though in choosing their words they had treated the doctrine as something which could be omitted as irrelevant. A similar remark must be made about what was said in several Australian cases which I mention later.

It may be added that a precisely similar decision, relying on the same authorities, was given again by the Judicial Committee in *Secretary of State for India* v. *Sardar Rustam Khan* (43).

African cases.

The African cases (except in one respect, to be noticed) do not directly raise the same issues as those before me, but certain dicta

(43) [1941] A.C. 356.

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in them were relied on by counsel. I have already dealt with *Cook* v. *Sprigg* (44). The cases relate to conquered or ceded territories. In those in which communal ownership of land was recognized (as in Nigeria) it seems that there was a system by which a chief held a title in the ordinary form, which stood on the same footing as any ordinary title; the chief was, however, bound to hold the land for the benefit of those entitled by native custom. The words " trustee " and " beneficiary " were apparently not often used, but the resemblance was close. The cases on compulsory acquisition and the payment of compensation under statute are not helpful because ex hypothesi the rights are recognized by statute; the question whether they exist does not arise.

In re Southern Rhodesia (45) was a reference to the Judicial Committee under s. 4 of the *Judicial Committee Act*, 1833. Before 1889 the British Government recognized one Lobengula as sovereign ruler of a large area of what was later Southern Rhodesia. Lobengula was apparently a complete autocrat whose subjects enjoyed no recognizable form of law. In 1889 a charter was issued by the Crown to the British South Africa Company which gave the company wide powers of both administration and commercial activity over the country, including the power to grant land in the name of the Crown. Hostilities broke out, as a result of which Lobengula was defeated and his rule came to an end. In 1894 the company thus became the effective ruler, under its charter, of Southern Rhodesia; upon well-settled principles, the country was regarded as territory of the Crown acquired by conquest (see pp. 215-216 of the report). The matter referred to the Judicial Committee was, in effect, the ownership of those lands which, though the company were still in de facto possession of them under its charter, had not been granted by it. Several interests were represented by counsel before the Board. Among these was that of the native people of Southern Rhodesia. For them it was argued that they were the original owners of the unalienated lands from time immemorial, and that their title could not be divested without legislation, which had never been passed, or their own consent, which had never been given. The Board reported that the natives' ownership of the lands was communal, but on the scanty evidence could not go any further. In order to succeed, it was said, the natives would have to show that their rights belonged to the category of rights of private property such that " upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and forborne to diminish or modify them " (p. 233). Their Lordships then made a general comment on the difficulty of categorizing native rights, and the wide differences which exist between them.

(44) [1899] A.C. 572. (45) [1919] A.C. 211.

They considered that the system of law of these particular natives was low in the scale. This is an example of judicial reasoning which appears not often to have been required—the classification of a system of native law for the purpose of determining whether, or to what extent, rights under it are to be recognized at common law. In this particular case their Lordships hardly embarked upon it, the evidence before them being insufficient. But at least the case is authority for me to embark on the problem, similar in kind but very different in size, which is before me.

There is a further important point in *In re Southern Rhodesia*. Their Lordships discussed the *extinguishment* of communal native rights, and expressed their opinions on what was necessary to produce that result. Having put the argument for the natives at its highest, that is to say that they were entitled to maintain trespass against a white traveller in their lands, their Lordships continued (at p. 234): "If so, the maintenance of their rights was fatally inconsistent with white settlement of the country, and yet white settlement was the object of the whole forward movement, pioneered by the company and controlled by the Crown, and that object was successfully accomplished, with the result that the aboriginal system gave place to another prescribed by the Order in Council. This fact makes further inquiry into the nature of the native rights unnecessary. If they were not in the nature of private rights, they were at the disposal of the Crown when Lobengula fled and his dominions were conquered; if they were, any actual disposition of them by the Crown upon a conquest . . . would suffice to extinguish them as manifesting an intention expressly to exercise the right to do so." The Board decided, therefore, that the natives had no interest in the lands.

There is a further passage in the report which may be relevant. It occurs in that part of the report which dealt with the arguments for the company (pp. 240-241): "The true view seems to be that if when the protecting power of 1891 became the conquering power in 1893, and under the Orders in Council of 1894 and 1898 set up by its own authority its own appointee as administrator and sanctioned a land system of white settlement and of native reserves, it was intended that the Crown should assume and exercise the right to dispose of the whole of the land not then in private ownership, then it made itself owner of the land to all intents and purposes as completely as any sovereign can be the owner of lands which are publici juris, and that the forms of an annexation to itself followed by a grant and conveyance to others for the purpose of grants over to settlers do not avail by their presence or their absence to affect the substance of these acts of State."

In re Southern Rhodesia is therefore, in my view, inconclusive on the question whether there may be a doctrine of communal native title. Their Lordships certainly did not deny the possibility.

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But it has much more to say on the question of the extinction of such title. What their Lordships seem to say is that, where there is a conquest by the Crown followed by acts indicating an intention to exercise sovereignty, the effect upon native rights which cannot be categorized as proprietary is simply that of annihilation; upon private proprietary rights, the effect is that acts of State cannot be questioned. It is to be remembered that the company was in a peculiar position: its charter contained no grant of land, but empowered it to make grants to others. It was in possession as the Crown's agent, and the question being discussed in the passage I have last quoted was whether it had in its own right any proprietary interest in the unalienated lands. In this respect the case is a very special one; the company was sui generis. But the case is a weighty assertion of the significance, in regard to both the existence, and the extinction, of the rights of subjects, of a mere *intention* by the Crown to exercise sovereignty, when manifested in overt acts of policy. I refer to this matter later.

In *Amodu Tijani* v. *Secretary, Southern Nigeria* (46) the question was what compensation was payable, under a statute providing for compensation for acquisition, to a Nigerian chieftain who held native communal land. The fact that the chieftain held the title to the land in English form was merely a conveyancing device; he was bound by native law or custom to allow the lands to be used by the appropriate community. The Judicial Committee, reversing the decision of the courts in Nigeria, held that the chieftain was entitled to receive the value of an estate in fee simple.

Their Lordships found it necessary to consider, in the first place, the real character of the native title to the land. After a discussion in general terms of the wide differences which existed in different parts of the Crown's dominions (at pp. 402-404), their Lordships said this of land in the neighbourhood of Lagos: "As the result of cession to the British Crown by former potentates, the radical title is now in the British sovereign. But that title is throughout qualified by the usufructuary rights of communities, rights which, as the outcome of deliberate policy, have been respected and recognized" (at p. 404). They asserted (at p. 407) that the cession of the port and island of Lagos in 1861 was "made on the footing that the rights of property of the inhabitants were to be fully respected. This principle is a usual one under British policy and law when such occupations take place . . . it is not admissible to conclude that the Crown is generally speaking entitled to the beneficial ownership of the land as having so passed to the Crown as to displace any presumptive title of the natives. . . . A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are prima

(46) [1921] 2 A.C. 399.

facie to be construed accordingly." And at a later stage in the judgment their Lordships said (at p. 410): "The general words used in the treaty of cession are not in themselves to be construed as extinguishing subject rights. The original native right was a communal right, and it must be presumed to have continued to exist unless the contrary is established by the context or circumstances."

From much of this Mr. Woodward drew comfort. Blackstone and Lord Mansfield would have recognized this language as in accordance with what they had said. That its general tenor is, to say the least, different from that of the *Vajesingji* case (47) is hard to deny. What matters, however, is what the case actually decided on its own facts. It is clear that the recognized system of communal land-holding in Lagos, put into effect by statute, was that a chief had a title which was the same in kind as that of any individual: but he held the land for the benefit of his community. The case decided only that upon compulsory acquisition the chief should receive the full value. Whatever the difference in the tenor of the general statements of principle, there is possibly no ultimate inconsistency between the rationes decidendi of *Amodu Tijani's* case and the *Vajesingji* case and the other Indian cases, because in the former the native rights were recognized by statute and in the latter the Crown chose not to recognize them at all. Neither of those two lines of authority can offer much support to the plaintiffs in this case, who contend that, in a settled colony, the Crown is *bound* to recognize their communal right.

In *Adeyinka Oyekan* v. *Musendiku Adele* (48) the Judicial Committee had before it an appeal from the West African Court of Appeal. The facts were that in 1861 Docemo, the native ruler of Lagos, had by treaty with Great Britain ceded the territory of Lagos to the Crown. Until 1949 every successive ruler was a member of Docemo's family. By native custom the ruler had the right to live in a certain house. In 1870 there was a Crown grant to Docemo of the house and the land on which it stood; this grant was in a purely English form purporting to vest in the grantee an estate in fee simple in the land. In 1947 an Ordinance of Lagos, having recited that the effect of the treaty was that there passed to the Crown whatever rights the ruler possessed, enacted that a Crown grant of land should be deemed to have vested in the grantee an estate free from competing interests and restrictions save only such interests and restrictions recognized by native law and custom as at the date of the grant affected such estate. In 1949 the ruler died, and his duly appointed successor was not a member of the same family. He occupied the house and land, and the family of Docemo claimed possession and damages for trespass.

(47) (1924) L.R. 51 Ind. App. 357. (48) [1957] 1 W.L.R. 876; [1957] 2 All E.R. 785.

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What was therefore in question was whether the Crown grant of 1870 had the effect which its English form would suggest, or whether it was merely a means of maintaining the communal right to the house and land while making it still consistent with English ideas of property which were the basis of real property law in the colony. The Judicial Committee decided in favour of the defendant, on the grounds that the grant of 1870 was not intended to be a personal grant, but a grant for the purposes of the grantee's office as ruler and thus with an obligation to allow the land to be used in accordance with native custom, and that the 1947 Ordinance had made this doubly clear.

Lord Denning, who delivered the judgment of the Board, having repeated the well-recognized principle that the courts cannot inquire into an act of State or construe a treaty which is an act of State, went on to state what he described as " one guiding principle " in the inquiry what rights are recognized by the sovereign after a treaty of cession. His Lordship described it in this way : " The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected " (49). This supports Blackstone and Lord Mansfield rather than the *Vajesingji* principle. His Lordship went on to deal with compulsory acquisition : " Whilst, therefore, the British Crown, as sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it ; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law."

Mr. Woodward placed great reliance on this dictum as indicating an acceptance by the Judicial Committee of a doctrine of recognition by the courts of communal native title. The Solicitor-General, on the other hand, contended in the first place that their Lordships were speaking only about ceded territory, held under a treaty which is an act of State. Secondly, he said that the sentence " Whilst, therefore, the British Crown, as sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it " cannot be intended as a statement of law. It must, the Solicitor-General said, be a statement by their Lordships of the principles which have always, or at least usually, been adopted by the Crown when it makes laws in regard to the compulsory acquisition of private property in ceded territory. The sentence " The courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English

(49) [1957] 1 W.L.R., at p. 880 ; [1957] 2 All E.R., at p. 788.

law " must be taken, the Solicitor-General said, as a general statement of what the courts do when a right to compensation for compulsory acquisition is established. It cannot be taken as a general proposition that in every case where the Crown takes land of natives, the courts will award compensation according to the natives' several interests. This interpretation is fortified by the reference by their Lordships at this very point to two African cases (one of them *Amodu Tijani's* case (50)), both of which related to the rights to, and the ascertainment of, compensation under statutory schemes.

In my opinion the Solicitor-General's contentions upon this passage in the judgment in *Adeyinka Oyekan* v. *Musendiku Adele* are right. I find it impossible to believe that their Lordships were asserting that if the Crown compulsorily acquires land from natives in ceded territory, there will be in the native owners a common-law right, apart from anything granted by statute, to receive compensation. Only a few lines before, they had cited the much-quoted statement of principle in the *Vajesingji* case (51), though without apparently feeling any difficulty in reconciling it with what they were saying. There would be the further question whether their statement applied to settled territory, in which case it would certainly be obiter. Finally, obiter or not, if the dictum means what Mr. Woodward contended, then it was apparently per incuriam that *Calder* v. *Attorney-General* (52) was decided by the Court of Appeal of British Columbia in 1970 without mentioning it, though the report shows that that case was very carefully argued with reference to many authorities, including decisions of the Judicial Committee.

There are, of course, many African cases dealing with native law as such : the application of native law by colonial courts in Africa was a common[illegible]ce. I was referred to some of these cases but I do not think they are relevant ; they relate to litigation between African subjects, and there is invariably statutory authority both for the application and for the ascertainment of native law.

My conclusion on the African cases is that, while not being markedly in point, they do not support the existence of a doctrine of communal native title such as these plaintiffs assert. I add, with the greatest respect, that the statements of principle couched in general terms by the Judicial Committee in *Amodu Tijani's* case and in *Adeyinka Oyekan* v. *Musendiku Adele* are not easy for me to reconcile with either the statements of principle, or the actual decisions, in the Indian cases of *Bai Rajbai*, *Vajesingji Joravarsingji* and *Sardar Rustam Khan*.

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(50) [1921] 2 A.C. 399.
(51) (1924) L.R. 51 Ind. App. 357.
(52) (1969) 8 D.L.R. (3d) 59 ; affirmed (1970) 13 D.L.R. (3d) 64.

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The law in New Zealand.

New Zealand is one of those parts of the British Commonwealth which has a well-established and fairly elaborate system of recognition of communal occupancy of native land, set up by a series of statutes. This fact has historical explanations. The commissions of the early Governors of New South Wales defined their territories as including "the adjacent islands of the Pacific"; this was assumed to include Norfolk Island, but no one seems to have asked whether it was a satisfactory reference to the islands of New Zealand. Possibly the matter was not considered important. After all, the settlements in Australia at Melville Island (1824) and at Raffles Bay (1827) had at least an administrative connexion with New South Wales, though they were outside the boundaries of the colony. No official attempt was made to settle or occupy New Zealand until 1840.

During the 1830s it became known to the British Government that, in considerable numbers, British subjects were in fact living in New Zealand, and that many of them were persons of no scruple and of ill repute. On the other hand, there was in the United Kingdom a significant number of persons wanting to settle there, who were suitable colonists; in 1837 a New Zealand Association was formed to work for the colonization of the islands on Wakefield's scheme. These were forces tending to encourage the acquisition of New Zealand by the Crown and its development by organized colonization. But there were opposing forces. In the reformed Parliament there was a number of members, no doubt representing a considerable body of public opinion, who were aware of the harm done in various parts of the world to native races by white colonization. In 1836 a Select Committee of the House of Commons on Aborigines (British Settlements) made a report, annexing the evidence taken by it; and in 1837 another Select Committee was set up having the same title, with instructions to take into account the report of the earlier committee. The latter committee (of which W. E. Gladstone was a member) presented an elaborate report which revealed the appalling effects of contact with the white race on aboriginal races in various parts of the Empire. One current of feeling, therefore, ran strongly in opposition to any further colonization by Great Britain.

The Government hung back; its official policy was to regard the natives of New Zealand as the inhabitants of a sovereign and independent state. But in 1838 the New Zealand Company, as the Association was now called, lost patience and despatched, without the Government's approval, a large number of emigrants from the United Kingdom; no doubt these were of superior quality. They, and the company itself, proceeded to treat with the Maoris for cessions of land. In 1839 the Government decided to act, by sending Captain Hobson R.N. to the North Island as the Queen's representative. His instructions from the Secretary of State

expressly revealed the conflicting pressures and principles which agitated the Government, and are in themselves an interesting document on the subject of the principles of colonization. He was ordered to arrive in New Zealand as " Her Majesty's Consul " and thereupon " 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 dominion ". He was also expressly instructed that the chiefs of the Maoris should be induced, if possible, to contract with him, as representing Her Majesty, that thenceforward no lands should be ceded, either gratuitously or otherwise, except to the Crown of Great Britain.

These instructions were carried out. Hobson and the Maori chiefs of the North Island entered into the Treaty of Waitangi in 1840. The Maori chiefs ceded to the Queen all rights and powers of sovereignty. To them was confirmed and guaranteed " the full exclusive and undisturbed possession of their lands and estates forests fisheries and other properties ". They yielded to Her Majesty the exclusive right of pre-emption over such lands as the proprietors thereof might be disposed to alienate ; and the natives of New Zealand were to enjoy all the rights and privileges of British subjects.

Whatever may be the true status of the Treaty of Waitangi (a subject about which much has been written), it gave the appearance, to say the least, of a cession of territory by the sovereign authorities of an independent state. Yet apparently English law, so far as applicable, was held to apply to the colonists, and it has since been made clear that New Zealand was in law a settled, not a conquered country : *Wi Parata* v. *Bishop of Wellington* (53).

On arrival, Captain Hobson was theoretically under the administration of the Governor of New South Wales, but soon after the Treaty of Waitangi New Zealand became a separate colony by Letters Patent proclaimed in 1841. It appears that in the early years of the colony titles to land were in great confusion, there being claims by settlers and by the New Zealand Company to lands which had been " purchased " by them from their Maori proprietors. The policy of Government, of course, was as already described—that no purchases from natives should have any validity except those by the Crown.

By a New South Wales Act of 1841 (4 Vict. No. 7) it was enacted that all titles to land in New Zealand which were not, or might not thereafter, be allowed by Her Majesty, should be void. The *Land Claims Ordinance* of 1841 of New Zealand repealed this and provided as follows : " . . . that all unappropriated lands within the Colony of New Zealand, subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants

(53) (1877) 3 N.Z. Jur. (N.S.) 72, at pp. 77-78.

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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 said Majesty. . ." This was the first of many legislative provisions in New Zealand which expressly recognized Maori occupancy of tribal lands. In *Nireaha Tamaki* v. *Baker* (54) it was said by the Judicial Committee (at p. 567) that the Ordinance was a legislative recognition of the rights confirmed and guaranteed by the Treaty of Waitangi, but would not of itself be sufficient to create a right in the native occupiers cognizable in a court of law.

It was against this general background that the important case of *Reg.* v. *Symonds* (55) was decided ; upon it the plaintiffs placed great reliance. The claimant rested his title to land on an assurance from Maoris. He had purchased land from them and at the time of the assurance had a certificate from the Governor which purported to waive in his favour the Crown's exclusive right of acquiring the land. The defendant had a grant from the Crown of the same land. The claimant sought to have this grant set aside by scire facias proceedings. The judgment of Chapman J. is of great interest. After the passage (which I have quoted earlier) on the sources of the doctrines relating to native title, his Honour stated the principles that the Crown is the only legal source of private title, and that the colonial courts (apart from questions of prescription) cannot give effect to any title not derived from the Crown ; at that point, his Honour in effect said that he would be prepared to decide the case in favour of the defendant, for obvious reasons. He decided, however, to proceed with a more extensive examination of the law relating to native occupation of land. His reason for doing so was the peculiar circumstance that the claimant's case did not rest only on the assurance from the natives, but upon the Governor's certificate purporting to waive the Crown's exclusive right to extinguish the native title.

His Honour then proceeded to state the principle that no subject can for himself acquire new land ; such purported acquisition always operates in favour of the sovereign. He put it historically on the basis that discovery by a subject worked as acquisition of the discovered territory in favour of the sovereign. He next stated the proposition that such purchases (i.e. from natives) by subjects, were not absolutely null and void, but were good as against the native sellers ; authority for this proposition was not given. He then dealt in general terms with the practice of extinguishing native titles by fair purchases. He rightly described it as " more than two centuries old " and as widely adopted in the American colonies and later in the United States. His Honour then asserted this (at p. 390): " It is now part of the law of the land, and although

(54) [1901] A.C. 561.

(55) (1847) N.Z.P.C.C. 387.

the courts of the United States, in suits between their own subjects, will not allow a grant to be impeached under pretext that the native title has not been extinguished, yet they would certainly not hesitate to do so in a suit by one of the native Indians." The only authority which his Honour gave for this proposition was *Cherokee Nation* v. *State of Georgia* (56), together with a reference to Lecture 51 of vol. III of Kent's *Commentaries*. But, with respect, the case does not support that proposition; his Honour does not mention that in fact the Cherokees were unsuccessful in the action. If, as is possible, he intended to refer to *Worcester* v. *State of Georgia* (57), the comment is required that in that case the Indians were not parties and the Supreme Court reached its decision by way of giving effect to a treaty between the Cherokees and the State of Georgia, and not otherwise. *Cherokee Nation* v. *Georgia* certainly contains eloquent explanation of the high principles which the Supreme Court deemed to lie behind the practice of respecting native occupation. But I find it impossible to accept it as an authority for the proposition that American courts in 1847 would not hesitate to hold for an Indian plaintiff who attempted to impeach a grant of land from the State, or from the United States, on the ground that the native title had not been extinguished. In my reading of the American authorities, that was not the law in 1847, and it is certainly not the law now: *Tee-Hit-Ton Indians* v. *United States* (58). In *Wi Parata* v. *Bishop of Wellington* (59) Prendergast C.J. expressed the opinion that in this respect Chapman J. was simply mistaken.

His Honour continued (at p. 390): "Whatever may be the opinion of jurists as to the strength or weakness of the 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, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers." It followed, his Honour thought, that the Treaty of Waitangi did not "assert either in doctrine or in practice anything new and unsettled". If by this his Honour meant that in confirming to the Maori chiefs their rights and privileges over land the Treaty was only making express what was the Crown's obligation apart from the Treaty, then in my opinion the statement was correct only on the assumption that New Zealand was a conquered and ceded colony, and may now be no longer correct, as *Cook* v. *Sprigg* (60) and the *Vajesingji* case (61) perhaps show. I have already referred to this matter.

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(56) (1831) 5 Pet. 1.
(57) (1832) 6 Pet. 515.
(58) (1955) 348 U.S. 272.
(59) (1877) 3 N.Z. Jur. (N.S.), at p. 81.
(60) [1899] A.C. 572.
(61) (1924) L.R. 51 Ind. App. 357.

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His Honour then dealt with the point that if natives might alienate their land only to the Crown, their dominion over their land was obviously less than absolute. This he conceded, and justified it on the obvious ground that it was a desirable and practical way of protecting natives from being overreached in dealings with unscrupulous white men.

His Honour then proceeded to say that it was not necessary for the purposes of the case before him " to decide what estate the Queen has in the land previous to the extinguishment of the native title ". He seemed to favour the view that the Crown had " a technical seisin against all the world except the natives " and the natives a " modified dominion " (the two not being inconsistent). The gist of this assertion is, if I understand it correctly, a " maximization " of the native interest and a " minimization " of the Crown's interest. He conceded that this was an " extreme view " which had not been taken by any colonial court nor by any court in the United States. But he referred, without naming it, to a United States Supreme Court case, which was clearly *Fletcher* v. *Peck* (62), and he mentioned, apparently with approval, the dissenting judgment of Johnson J., which I have quoted above.

His Honour next dealt historically with the question whether the practice in the American colonies was to grant the fee simple first, and allow the grantee to get in the native title, or whether the practice was not to pass a grant until the native title had been got in. He asserted that although the former practice was sometimes adopted in earlier times, the latter practice had been general " for more than a century certainly ". I do not think that the material before me in this case enables me to comment on the accuracy of this generalization ; but at least the report of the case of *Marshall* v. *Clark* (63) appears to be some evidence of an exception to it. But it does not seem to me to matter, since all his Honour professed to be saying was what the practice was, not what the law was. He proceeded immediately to say that, whatever was the nature of the Crown's right pending the purchase of the native right—even " 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 "—the universal rule must apply to it, that an interest, whatever it might be, of the Crown, could be conveyed only by grant, i.e. by Letters Patent under the public seal of the colony. It followed that the Governor's purported waiver of the Crown's right to extinguish native title was an invalid attempt to convey an interest of the Crown. The claimant, therefore, by virtue of his assurance from the natives, took nothing which could be recognized in the courts. His Honour's decision was therefore for the defendant.

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(62) (1809) 6 Cranch 87.

(63) (1791) 1 Kentucky Reports 77.

In my respectful opinion, the central theme in his Honour's reasoning was the rule that acquisition from natives, by whatever manner it purported to operate, operated in the result only in favour of the Crown. In his discussion of the strength and nature of the native title he had to bear in mind that, as compared with title derived from a grant by the Crown, it suffered the indignity (as it were) of restricted capacity to be alienated. I respectfully think that in his anxiety to justify the strength and status of native rights and the moral value of the principle that only the Crown can acquire from natives, his Honour made statements about the validity of native title which were not necessary for his decision and cannot be supported on the authorities. These passages have been strongly relied on by the plaintiffs in this case.

The only other judgment in the case was given by Martin C.J., who confined himself to the principle that acquisition from natives could be only for the Crown, and to the invalidity of the purported waiver of the Crown's right in the case before him.

I have already suggested some of the historical explanation of the development in New Zealand of detailed laws relating to native occupancy of land. Of some significance also was the series of Maori Wars which took place between 1856 and 1870. I am not competent, nor is it necessary, to examine their effect upon the legislative policies which were adopted: it is enough to say that one of the reasons for the fact that a system of native land law exists in New Zealand and does not exist in Australia is that in New Zealand the Government had several times to wage armed conflict with organized bands of natives, which never occurred in Australia.

Two important Acts were passed in 1865, the *Native Rights Act* and the *Native Lands Act*. Their effect was to make express provision for the recognition of Maori occupancy of tribal land as a right and for the means of enforcing that right and for the making such right consistent with the ordinary law of real property. By the *Native Rights Act* all Maoris were made British subjects. Courts of law were given the same jurisdiction in matters touching the persons and property of the Maoris as they had in cases touching the persons and property of other subjects. By s. 4 it was provided that every title to and interest in land over which the native title should not have been extinguished should be determined according to the ancient custom or usage of the Maori people so far as the same could be ascertained. Section 5 provided that in any action involving the title to or interest in any such land, the judge before whom the same should be tried should direct issues for trial before the Native Land Court. The *Native Lands Act* was directed to the purpose of ascertaining the persons who according to Maori custom were the owners of tribal lands, and to converting Maori modes of ownership to titles derived from the Crown. It set up a

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Native Land Court for the investigation of the titles of persons to native lands, and provided that natives claiming to be interested in native land might, after investigation by the Court, receive a title "specifying the names of the persons or of the tribe who, according to native custom, own or were interested in the land, describing the nature of such a state or interest and describing the land comprised in such certificate".

These provisions place the whole question of native land title in the Dominion of New Zealand on a footing quite different from that which exists in Australia, the United States, or Canada. It is for this reason that, in my opinion, New Zealand decisions after the legislation of 1865 are of little assistance in deciding whether any doctrine of native title is applicable in Australia.

In *Wi Parata* v. *Bishop of Wellington* (64) the plaintiffs were Maoris who alleged that in 1848 they had given certain tribal land to the Bishop of Wellington, as a corporation sole, for the establishment of a school. In 1850 a grant from the Crown was made to the Bishop, expressly in trust for the foundation of a school, but without the knowledge of the tribe. The declaration claimed that no school had ever been established and that the native title to the land granted had never been lawfully extinguished, and that the Crown grant was void. The Attorney-General demurred to the declaration on the ground that a grant from the Crown could not be declared void for a matter not appearing on the face of the grant, except in scire facias proceedings.

The demurrer was allowed. Strictly speaking the decision takes the matter no further than it was taken in *Reg.* v. *Symonds* (65), the grounds of the decision being first, that the legal effect of the supposed cession to the Bishop was nil, since only the Crown had the right to extinguish native title, and secondly that only in scire facias proceedings could a Crown grant, apparently valid, be attacked. Prendergast C.J. went on to give a legal and historical account of the position of Maoris in relation to tribal land. He asserted that the settlement of New Zealand was the occupation of a colony by settlement, the aborigines not having any kind of civil government or settled system of law. He acknowledged that this was contrary to the official attitude of the British Government before 1840, namely that the natives of New Zealand occupied a sovereign and independent state (the basis upon which the Treaty of Waitangi was signed), but he insisted that what had actually happened had been the settlement of unoccupied territory. "In fact, the Crown was compelled to assume in relation to the Maori tribes, and in relation to native land titles, these rights and duties which, jure gentium, vest in and devolve upon the first civilized occupier of a territory thinly peopled by barbarians without any

(64) (1877) 3 N.Z. Jur. (N.S.) 72. (65) (1847) N.Z.P.C.C. 387.

form of law or civil government " (at p. 77). From this passage Mr. Woodward drew some comfort. But what the Chief Justice described as " rights and duties " he immediately qualified by the phrase " jure gentium ". The Chief Justice immediately proceeded to refer to the *New South Wales Act* of 1841 and the New Zealand *Land Claims Ordinance* of 1841 which repealed it, the latter, as I have shown, making express reference to " the rightful and necessary occupation and use thereof by the aboriginal inhabitants of the said colony ". He then said that " these measures . . . express the well-known legal incidents of a settlement planted by a civilized power in the midst of uncivilized tribes " (p. 77), and went on immediately to refer to Kent, Story, and *Johnson* v. *M'Intosh* (66). He pointed out that upon the cession of territory by one civilized power to another, the rights of private property are invariably respected, but in the case of primitive barbarians " the supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice. Its acts in this particular cannot be examined or called in question by any tribunal, because there exist no known principles whereon a regular adjudication can be based " (p. 78). Once again, Mr. Woodward drew some comfort from this reference to an obligation to respect native proprietary rights. But in my opinion the Chief Justice's meaning was the opposite of propounding a doctrine of native title which the courts were obliged to recognize. In talking of rights, duties and obligations, it is clear that he was using those words in a moral or political, and not a legal, sense, and he says in effect that whatever the supreme Government decides to do about the recognition of native title is not a matter for adjudication at law.

He then referred to the Treaty of Waitangi and the case of *Reg.* v. *Symonds*. He gave another reason why the acts of the Crown in dealings with the aborigines for the cession of their title were not examinable in New Zealand courts, namely that such acts are in the nature of treaties, that is to say acts of State. He next dealt with the argument that the *Native Rights Act* 1865 had in some way made the plaintiffs' declaration valid. He rejected this contention, and in the course of doing so put a somewhat restrictive construction upon the *Native Rights Act* which was afterwards disapproved in *Nireaha Tamaki* v. *Baker* (67) by the Judicial Committee. He proceeded to point out what he considered to be an error in the judgment of Chapman J. in *Reg.* v. *Symonds* ; I have already referred to this. The rest of the judgment is not in point.

Nireaha Tamaki v. *Baker* is of importance in this case only as a clear and authoritative assertion of the validity and effectiveness of Maori claims to tribal land as a result of the various New Zealand Acts.

(66) (1823) 8 Wheaton 543. (67) [1901] A.C. 561.

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In my opinion it is quite clear that in the law of New Zealand the doctrine of native title has application only under the special statutory provisions providing for the recognition and enforcement of Maori customary law. That these enactments are very substantial in scope and in actual effect, and that, so far as my knowledge of the matter goes, the ancestral claims of Maoris throughout New Zealand to their land have been dealt with in accordance with the enactments, is beside the point for the purposes of this case. As I understand it, the position in New Zealand is, if I may say so with great respect, accurately summarized by this dictum of North J. in the New Zealand Court of Appeal in the case of *In re Ninety-Mile Beach* (68): " . . . on the assumption of British sovereignty—apart from the Treaty of Waitangi—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, whether above high-water mark or below high-water mark. But, as we all know, the Crown did not act in a harsh way and from earliest times was careful to ensure the protection of native interests and to fulfil the promises contained in the Treaty of Waitangi." The doctrine of communal native title, in other words, never existed at common law in New Zealand ; 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.

The Australian authorities.

As I have already said, it is undoubted law that acquisitions of territory by the Crown fall into two classes : conquered or ceded territory and settled or occupied territory. Whether a subdivision can be made of the first category is here beside the point. It is also in my opinion clear that whether a colony comes into one category or the other is a matter of law. True, there may, in some territories and at certain periods, have been some doubt or dispute as to the category into which the territory came. But in my opinion there is no doubt that Australia came into the category of a settled or occupied colony. This is established for New South Wales by an authority which is clear and, as far as this Court is concerned, binding : *Cooper* v. *Stuart* (69).

In this case, the Judicial Committee, on appeal from the Supreme Court of New South Wales, had to decide whether an exception or reservation, in a Crown grant of lands in fee simple, dated 1823, was valid. The appellant was the successor in title of the grantee. The grant contained an exception or reservation of " any quantity of land, not exceeding ten acres, in any part of the said grant, as may be required for public purposes ". In 1882 the Government

(68) [1963] N.Z.L.R. 461, at p. 468. (69) (1889) 14 App. Cas. 286.

of New South Wales, in pursuance of this reservation, resumed and took possession of a parcel of land ten acres in extent, and excluded the appellant from it. The appellant brought the action for a declaration that the reservation was void, an injunction, and an account of damage. The appellant's contentions were that the reservation was invalid as being void for repugnancy, and secondly that it violated the rule against perpetuities. It was the second of these two arguments which led to that part of the Judicial Committee's reasoning which is now relevant. The appellant maintained that the rule against perpetuities applied in its entirety to New South Wales in the year 1823 and that it applied to reservations made by the Crown in the interests of the public. The Judicial Committee held that it was unnecessary to decide whether the rule against perpetuities would apply to a reservation of this kind by the Crown in England, but that the appellant failed.

To reach this conclusion the Board founded itself upon the proposition that the colony of New South Wales belonged to the class of settled colonies; that is to say, that it was "a colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions". Their Lordships cited the passage in Blackstone's *Commentaries* to which I have already referred. What followed, they said, was this: "There was no land law or tenure existing in the colony at the time of its annexation to the Crown; and, in that condition of matters, the conclusion appears to their Lordships to be inevitable that, as soon as colonial land becomes the subject of settlement and commerce, all transactions in relation to it were governed by English law, in so far as that law could be justly and conveniently applied to them." They held that the rule against perpetuities applied to Crown grants in England in 1823, but was at that time inapplicable to such grants in the colony of New South Wales.

For present purposes, the decision is an authority binding on this Court that New South Wales was a settled or peaceably occupied colony. Mr. Woodward contended that the statement of their Lordships that New South Wales was "a colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law" was a statement which was historically inaccurate, particularly in the light of modern anthropological knowledge; the very evidence in this case, Mr. Woodward contended, was that the subject land, at any rate, was not without settled inhabitants or settled law; indeed, he said, the evidence showed that the subject land had highly settled inhabitants and settled law. In my opinion, in the light of the authorities, notably *Campbell* v. *Hall* (70), and having regard both to the judgment

(70) (1774) 20 State Tr. 239; Lofft 655; 98 E.R. 1045.

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and to the whole tenor of the arguments in that much-argued case, this attempt to distinguish *Cooper* v. *Stuart* is hopeless ; the question is one not of fact but of law. Whether or not the Australian aboriginals living in any part of New South Wales had in 1788 a system of law which was beyond the powers of the settlers at that time to perceive or comprehend, it is beyond the power of this Court to decide otherwise than that New South Wales came into the category of a settled or occupied colony.

There was a very considerable debate in New South Wales and in Whitehall in the 1820s as to the precise effects of this principle in New South Wales. The debate resulted in the inclusion of s. 24 in the Imperial Act 9 Geo. IV c. 83 (1828), which provided in effect that " all Laws and Statutes in force within the Realm of England " on 25th July, 1828, should, as far as applicable, be applied in New South Wales. This did not detract from the effect at common law of the foundation of the colony. Moreover, the provision itself caused debate ; Forbes C.J. and Stephen C.J. held different opinions of its effect. The point, for present purposes, is that the existence of the debate confirms the existence of the rule of law that New South Wales was a settled colony. The matter is made clear in an article by Sir Victor Windeyer at 1 *Tasmanian University Law Review* 635, at pp. 667-668.

That South Australia came into the same category, as a matter of law, has been held by the Supreme Court of that State : *White* v. *McLean* (71). This decision was given in full awareness of the provision in s. 1 of the Act 4 & 5 Will. IV c. 95 (authorizing the foundation of the State) which excluded from South Australia the application of laws already made in New South Wales. See also *Winterbottom* v. *Vardon & Sons Ltd.* (72), per Poole J. I respectfully adopt these authorities.

What follows from this rule, as I have already shown, is that in principle from the moment of the foundation of a settled colony English law, so far as it was applicable, applied in the whole of the colony. English law, as applied in England, certainly did not, for obvious reasons, include a rule that communal native title had to be respected. The question whether English law, *as applied to a settled colony*, included, or now includes, a rule that communal native title where proved to exist must be recognized, is one which can be answered only by an examination of what has happened in the laws of the various places where English law has been applied. I have examined carefully the laws of various jurisdictions which have been put before me in considerable detail by counsel in this case, and, as I have already shown, in my opinion no doctrine of communal native title has any place in any of them, except under express statutory provisions. I must inevitably therefore come

(71) (1890) 24 S.A.L.R. 97.

(72) [1921] S.A.S.R. 364, at p. 369.

to the conclusion that the doctrine does not form, and never has formed, part of the law of any part of Australia.

I can reach this conclusion from the reasoning which I have just set out, for the plaintiffs concede that no Australian decision supports the existence of the doctrine. No other authority is necessary.

There is, however, much additional authority from which, in my opinion, the same conclusion must be drawn. This includes all the Australian cases to which I was referred on this aspect of the case. None of them either expressly or impliedly refers to any doctrine of communal native title; the issues in all of them arose between non-aboriginal subjects, or between such subjects and the Crown. They all affirm the principle, fundamental to the English law of real property, that the Crown is the source of title to all land; that no subject can own land allodially, but only an estate or interest in it which he holds mediately or immediately of the Crown. On the foundation of New South Wales, therefore, and of South Australia, every square inch of territory in the colony became the property of the Crown. All titles, rights, and interests whatever in land which existed thereafter in subjects of the Crown were the direct consequence of some grant from the Crown. The plaintiffs, who cannot point to any grant from the Crown as the basis of the title which they claim, cannot succeed unless they can show that there is a doctrine in their favour which in Australia co-exists in some manner with the dominium of the Crown. To this, in one sense, the answer has already been given: but I turn to the Australian cases to see what they in fact decide

There is authority binding on this Court that at the moment when the Crown acquired sovereignty over land in Australia, that land became the property of the Crown in demesne, and so remained so long as it was not alienated. The High Court rested its decision on this basic principle in *Williams* v. *Attorney-General for New South Wales* (73), where the question was whether the public had a right, as against the Crown, to have the Government House domain in Sydney used as a residence for the Governor of New South Wales. Barton A.C.J. said (at p. 428): "Waste lands of the Crown, where not otherwise defined, are simply, I think, such of the lands of which the Crown became the absolute owner on taking possession of this country as the Crown had not made the subject of any proprietary right on the part of any citizen." Isaacs J. said (at p. 439): "It has always been a fixed principle of English law that the Crown is the proprietor of all land for which no subject can show a title. When colonies were acquired this feudal principle extended to the lands oversea. The mere fact that men discovered and settled upon the new territory gave them no title to the soil. It belonged to the Crown until the Crown chose to grant it. . . . So we start with

(73) (1913) 16 C.L.R. 404.

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the unquestionable position that, when Governor Phillip received his first commission from King George III on 12th October, 1786, the whole of the lands of Australia were already in law the *property* of the King of Engl d. It follows that no act of appropriation, or reservation, or setting apart, was necessary to vest the land in the Crown."

Whether in law his Honour was correct in suggesting as he did that land in Australia was the property of the Crown before Governor Phillip left the shores of Great Britain—a proposition based either on the idea that Lieutenant James Cook's declaration of 1770 was effective for that purpose, or that the right of the Crown arose from the sealing of Phillip's commission—has been doubted; but the question is beside the point. The case was a decision directly based on the proposition that the Crown is the owner of all unalienated land in Australia.

Another High Court decision to the same effect was *Council of the Municipality of Randwick* v. *Rutledge* (74). The question shortly stated was whether Randwick Racecourse was exempt from rating by reason of its being "used for a public reserve". The expression "public reserve" was defined in the relevant Act as meaning "public park and any land dedicated or reserved from sale by the Crown for public health, recreation, enjoyment or other public purpose of the like nature . . .". The High Court had to decide what was meant by "dedicated or reserved from sale by the Crown" and to do so had to examine the history of the Crown lands legislation. Windeyer J. in the principal judgment, which had the concurrence of Dixon C.J., Fullagar and Kitto JJ., began his review of that history in these words (at p. 71): "On the first settlement of New South Wales (then comprising the whole of eastern Australia), all the land in the colony became in law vested in the Crown. The early Governors had express powers under their commissions to make grants of land. The principle of English real property law, with socage tenure as the basis, were introduced into the colony from the beginning—all lands of the territory lying in the grant of the Crown, and until granted forming a royal demesne. The Colonial Act, 6 Wm. IV No. 16 (1836) recited in its preamble that the Governors by their commissions under the Great Seal had authority 'to grant and dispose of the waste land'—the purpose of the Act being simply to validate grants which had been made in the names of the Governors instead of in the name of the Sovereign. And when in 1847 a bold argument, which then had a political flavour, challenged the right of the Crown, that was to say of the Home Government, to dispose of land in the colony, it was as a legal proposition firmly and finally disposed of by Sir Alfred Stephen C.J.: *Attorney-General* v. *Brown* (75)."

(74) (1959) 102 C.L.R. 54.

(75) (1847) Legge 312; 2 S.C.R. (N.S.W.) App. 30.

The phrases " waste lands " and " waste lands of the Crown " have been many times used in Imperial and Australian statutes and judgments. It is noteworthy that according to the *Oxford English Dictionary* the word " waste ", as a noun, has as its *primary* meaning " uninhabited (or sparsely inhabited) and uncultivated country ", the first recorded use being in c. 1200 ; and for " waste " as an adjective, a corresponding meaning is given. The meaning of " waste land " in common speech was therefore clear long before it acquired its modern literary flavour ; but in law it has for a long time meant " lands of the Crown which have not been alienated " ; thus Barton A.C.J. in *Williams* v. *Attorney-General for New South Wales* (76) : " If the term ' waste lands of the Crown ' were in any way a cryptic expression as applied, in a territory which the Crown has acquired by possession, to lands with which the Crown has not parted, there might be some need of a definition " and in the same case Isaacs J. at p. 440 : " Then the expression ' waste lands ' of the Crown, apart from legislative definition, appears to have been understood long before Phillip's time down to 1842 to designate colonial lands not appropriated under any title from the Crown."

The *Randwick Corporation* case is therefore an authority, binding on me, and necessarily deciding, that the Crown became the owner in demesne of all the land of New South Wales immediately the settlement was established. But the principle had been stated more than a century before in early New South Wales cases. One of them was referred to by Windeyer J. in the *Randwick Corporation* case—that is *Attorney-General* v. *Brown* (77) ; no doubt his Honour specially mentioned that case because in it counsel expressly argued (see *Legge*, p. 314) that there was a difference between the Crown's political sovereignty and the Crown's title to the soil, with power to grant the same at the Crown's discretion. That argument was expressly rejected, with a full statement of the legal and historical reasons for doing so, by Stephen C.J. Other cases affirming the same principle were *R.* v. *Steel* (78) ; *Hatfield* v. *Alford* (79), per Stephen C.J., and *Doe d. Wilson* v. *Terry* (80), especially per Stephen C.J. at p. 508.

It was the contention of counsel for the defendants that the principle enunciated in all these cases is exhaustive ; the Crown being the absolute owner in demesne of all unalienated lands, there is no room for any doctrine of communal native title. As the plaintiffs cannot show a title derived from a Crown grant, they must fail. Mr. Woodward had several replies to this contention.

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(76) (1913) 16 C.L.R. 404, at p. 427.
(77) (1847) Legge 312 ; 2 S.C.R. (N.S.W.) App. 30.
(78) (1834) Legge 65.
(79) (1846) Legge 330, at p. 336.
(80) (1849) Legge 505.

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In the first place, it was said that in Canada (for example in the *St. Catherine's Milling Co.* case (81)), in the United States (for example in *Johnson v. M'Intosh* (82)) and in New Zealand (for example in *Reg.* v. *Symonds* (83) and several other cases) it has been said that the communal native title is quite capable of co-existing with the ultimate title in the Crown. Indeed the plaintiffs in this case have always insisted that the ultimate title to the subject land is in the Crown. The breadth and generality of the statements about Crown ownership of unalienated land in all these Australian cases therefore do not imply a denial of the existence of communal native title.

Secondly, it was said that none of the Australian cases dealt with the problem of communal native title ; they were all concerned to deal only with disputes between subjects, or between a subject and the Crown, and it was not therefore necessary to state the doctrine of communal native title as any qualification upon the Crown's title. Indeed, as was truly said, hardly any of the Australian cases even make any passing reference to aboriginals. One such reference was made by Stephen C.J. in *Attorney-General* v. *Brown* (84) and that in terms not favourable to the plaintiffs. His Honour was referring to an argument which had been addressed to the Court that the ownership of land in New South Wales was not feudal but allodial. Of that argument he said : "There are two answers to this, and they have already been given. First, the title to lands in this colony is in the Crown ; equally on constitutional principles, as by the adoption of the feudal fiction. Such a title, on either ground, is fatal to the idea of the allodium. Whether the term implies a property acquired by lot, or a conquest, or one left in the occupation of the ancient owners (that is of the aboriginal inhabitants, see *Stephen's Commentaries*, title Tenures, and the authorities there cited), it equally rejects the supposition of a title, in or from the Sovereign. The objection, therefore, is only another mode of disputing that title." This is certainly not any affirmation of the principle that there is in some sense a title in the aboriginals which co-exists with that of the Crown ; on the contrary, his Honour puts them in two contradictory categories.

Mr. Woodward pointed out that *R.* v. *Steel*, *Hatfield* v. *Alford* and *Attorney-General* v. *Brown* were all decided before *Reg.* v. *Symonds* (1847) in New Zealand. I cannot regard this as of any significance in view of the affirmation of the same principle in 1913 in *Williams* v. *Attorney-General* and in 1959 in *Randwick Corporation* v. *Rutledge*. On the other hand, *Attorney-General* v. *Brown* was referred to in *Reg.* v. *Symonds* ; Martin C.J. said this (at p. 395) : "So soon, then, as the right of the native owner is withdrawn,

(81) (1888) 14 App. Cas. 46.
(82) (1823) 8 Wheaton 543.
(83) (1847) N.Z.P.C.C. 387.
(84) (1847) Legge 312, at p. 324 ; 2 S.C.R. (N.S.W.) App. 30, at p. 39.

the soil vests entirely in the Crown for the behoof of the nation." By itself, that supports the plaintiffs' contention in this case rather than the defendants', if it assumes that "the right of the native owner" is something which survives the fact of occupation of the colony. His Honour went on in the very next sentence to refer to *Attorney-General* v. *Brown*: "To borrow the words of a very learned judgment recently pronounced by the Supreme Court of New South Wales, *Attorney-General* v. *Brown*: 'In a newly-discovered country, settled by British subjects, the occupancy of the Crown with respect to the waste lands of that colony is no fiction. . . . Here is a property depending for support on no feudal notions or principle.' It is true that the colonization of New Zealand has differed from the mode pursued in many of the older colonies. As was said by the learned Attorney-General, it has been distinguished by a practical advance of the doctrine that 'power has duties as well as rights'. But the adoption of a more righteous and wiser policy towards the native people cannot furnish any reason for relinquishing the exercise of a right adapted to secure a general and national benefit." At most, I think, this amounts to a comment by Martin C.J. that the policy adopted in New Zealand towards communal native occupancy of land was morally superior to that adopted in New South Wales. I find no suggestion that his Honour is criticizing the correctness of the law laid down in *Attorney-General* v. *Brown*.

Mr. Woodward also used in relation to these early Australian cases the argument that he used in relation to *Cooper* v. *Stuart* (85): that they proceeded on the incorrect assumption of fact, that New South Wales was "unoccupied" at settlement. I have said elsewhere that I do not think this a possible argument; the categorization of New South Wales as a colony acquired by settlement or peaceful occupation, as being inhabited only by uncivilized people, is a matter of law.

Mr. Woodward also formulated an argument which I found, and still find, difficult to understand, and I may not therefore be doing it justice. Phillip's commissions and instructions (and the same was true of those of several of his successors) made him Governor and Commander-in-Chief over a large area, including the subject land. No attempt was made to occupy or even explore the subject land before 1863; it was 1,700 miles or more from Sydney in a direct line, and far more by sea. No act of State, no judicial decision, no legislation before 1863 had any relevance, he said, to the subject land. It seems to me that there cannot be any substance in this argument. The matter is simply one of construction. To construe the words "land", "New South Wales", or "the colony", as the case may be, one must ask the

(85) (1889) 14 App. Cas. 286.

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question—"Over what territory did the Crown, by its agent Governor Phillip, exercise its prerogative or statutory power to establish its sovereignty?" The answer must be found by construing the documents which defined Phillip's authority, and these are unambiguous: they refer to the whole continent westward to the 135th meridian. Since 1760, when Harrison's chronometer was produced, a given meridian had been capable of being drawn with satisfactory precision on the ground; Phillip's commissions therefore, at the time when they were sealed, referred to a precisely definable area. They were quite different in this respect from the Royal Proclamation of 1763, which was not expressed to apply to a defined area of land, and cannot be construed to refer to what is now British Columbia: *Calder* v. *Attorney-General of British Columbia* (86). I refer again later to this argument of Mr. Woodward's on the question of the extinguishment of native title, if it existed.

There may (I do not know) be force, in international law, in the argument that there was no effective occupation of the subject land in 1788 or for many years afterwards. But this is not an argument which can be relevant in these proceedings.

We are left, then, with the first and the second of Mr. Woodward's answers to the argument that the Crown's ownership in demesne excludes any title in the plaintiffs: that in theory the plaintiffs' title is capable of co-existing with that of the Crown, and that the cases on Crown title can be distinguished on the ground that they did not relate to aboriginal title: the dicta of Isaacs J. and Windeyer J. are to be taken as subject to an unexpressed qualification. But these contentions in themselves cannot, as I understand them, take the plaintiffs' case any further. They would be necessary if the doctrine of native title could be established aliunde. I have already given my reasons for holding the view that it cannot be established at all.

There is one more case to which I must refer: it is Australian in the sense that it was decided by the High Court and related to land in an Australian territory. In *Geita Sebea* v. *Territory of Papua* (87) the appellants, who were Papuan natives, had in 1937 granted a lease of certain land in Papua to the Crown. The lease described them as the sole owners of the land. During the term of the lease, the land was acquired by the Crown by means of a *Gazette* notice authorized by the express terms of an Ordinance of the Territory, the terms of compensation being fixed by reference to another Ordinance, the *Lands Acquisition Ordinance*. The owners being dissatisfied with the amount awarded as compensation by the Supreme Court of the Territory, appealed to the High Court, which remitted the matter to the Supreme Court for an inquiry

(86) (1969) 8 D.L.R. (3d) 59; affirmed (1970) 13 D.L.R. (3d) 64.

(87) (1941) 67 C.L.R. 544.

into certain questions. Eventually, the High Court allowed the appeal after consideration of the answers to the questions. The judgments of their Honours dealt only with the proper principles of valuation applicable to the land; the questions, and the answers given to them by the Supreme Court, are therefore of importance for the purposes of this case.

The questions were as follows:

"(a) What, according to the native customs applicable to the lands acquired, was the nature of the title to such lands, and in particular, what, in accordance with such customs, were the incidents as to duration, devolution and otherwise of the rights of ownership or enjoyment which subsisted in such lands?

(b) What persons, according to such customs, had any and what rights of ownership or enjoyment over or in respect to the lands?

(c) What, according to such customs, were the rights of the appellants over and in respect to such lands, and what rights had they, according to such customs or by Ordinance or regulation, to represent all persons interested in the said lands or to receive and dispose of the compensation money payable in respect thereof?

(d) What native customs, if any, existed defining or affecting the rights of persons interested in the said lands and other persons in respect of the title to and the right to use or to remove buildings and other articles erected or placed upon the land?"

The answers of the Supreme Court were as follows:

"(a) The title to the lands in question was a communal usufructuary occupation with a perpetual right of possession in the community. There was no individual devolution of any part of these lands. The death of a member did not affect the collective title. In such an event, the lands still remained Iduhu lands, the property of the community.

(b) The whole of the people of Kila Kila have the right of enjoyment in respect of the lands and there was no custom in relation to the right of ownership other than the right to enjoy except the right of control in the Iduhu, which is loosely called ownership.

(c) The appellants have no greater rights than the other members of the community according to custom. They are merely acknowledged as the representatives of the community in this particular transaction. By the Second Schedule to the *Land Ordinance* 1911-1935 for the purpose of the lease they were deemed to be the owners.

(d) There was no custom with respect to the title to and the right to use or to remove buildings and other articles erected or placed upon the land."

The lease of 1937 was, by virtue of a statutory provision, conclusive evidence of the ownership of the land by the lessors and of the title of the Crown to its leasehold interest (see per Starke J. at p. 552) and therefore the case was precisely similar to *Amodu*

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Tijani v. *Secretary, Southern Nigeria* (88), to which the High Court referred. No question of the doctrine of communal native title at common law arose: the case proceeded on the footing that the communal interest of the natives was recognized by statute, and the question was what was the proper basis of compensation for its acquisition.

The Australian historical material.

A very great number of statutes and executive acts, as well as historical documents of many kinds, was put before me in detail in the first place by counsel for the Commonwealth; counsel for Nabalco and for the plaintiffs also addressed me on various parts of this material. The defendants contended that this material showed that there never had been any doctrine of communal native title in Australia from its foundation, or that it had been extinguished, and that whatever *had* been done to further the interests of the natives was distinct from the notion that the natives had enforceable rights to land and indeed based on the assumption that they had none.

The examination of all this material was significant in several ways. The most important was the question whether, if communal native title ever existed in the subject land, it was extinguished after 1788.

On one view, the question of extinction never arose in Australia. If the doctrine of communal native title never formed part of the law of Australia, and there is therefore no unexpressed qualification to the generality of the principles stated by Stephen C.J. in *Attorney-General* v. *Brown* (89), Isaacs J. in *Williams* v. *Attorney-General for N.S.W.* (90) and Windeyer J. in the *Randwick Corporation* case (91), then there was nothing to be extinguished. That view in my opinion is the correct one. But if I am wrong in that, the principle of the co-existence of communal native title with the ultimate or radical title in the Crown, which has been so often stated in cases decided outside Australia, makes the question of its extinction relevant. I need not examine again the authorities supporting the co-existence of communal native title with the title of the Crown. The relationship between the two has been explained in a variety of ways, ranging from the dissenting judgment of Johnson J. in *Fletcher* v. *Peck* (92), approved by Chapman J. in *Reg.* v. *Symonds* (93), which leaves only a "technical seisin" in the Crown, to the decision of the Judicial Committee in the *St. Catherine's Milling Co.* case (94) that under the Royal Proclamation of 1763 the Indians had a mere personal usufruct.

(88) [1921] 2 A.C. 399.
(89) (1847) Legge 312; 2 S.C.R. (N.S.W.) App. 30.
(90) (1913) 16 C.L.R. 404.
(91) (1959) 102 C.L.R. 54.
(92) (1809) 6 Cranch 87.
(93) (1847) N.Z.P.C.C. 387.
(94) (1888) 14 App. Cas. 46.

The leading authority on the subject of the extinction of native title is *In re Southern Rhodesia* (95), which I have already mentioned. Their Lordships considered that the policy put into effect by the Crown, in chartering the British South Africa Company to make grants of land in its name, and by the company in fact, in opening up the country to white settlement, which was " the object of the whole forward movement, pioneered by the company and controlled by the Crown, [which was] successfully accomplished, with the result that the aboriginal system gave place to another prescribed by the Order in Council " (p. 234), was so crucial to the facts before them, that it relieved them of the necessity to consider what the rights of the natives actually were.

Mr. Woodward distinguished this on the ground that Southern Rhodesia was a conquered colony. For a settled colony, there is the authority of *Calder* v. *Attorney-General of British Columbia* (96), both at first instance and in the Court of Appeal. I have already referred to the relevant passages in the judgments. Those of Gould J. (at first instance) and Tysoe J. in the Court of Appeal are the most explicit on this subject. Their general effect is that successive executive and legislative acts, which do not expressly mention native title, but all indicate an intention that all the land, which is under the sovereignty of the Crown, shall be open to purchase or grant are " actions which speak louder than words " (to use the words of Tysoe J.) and operate to extinguish communal native title, if that ever existed. The express creation of native reserves strengthens this manifestation of intention ; it does not detract from it ; for it implies, not that the sovereign recognizes rights in the natives, but that it has power to dispose for their benefit of any lands, irrespective of what the natives claim.

Such is the doctrine of extinction of communal native title in a settled colony, as applied in *Calder's* case. I do not know of any other such authority. If I am obliged to decide the question whether it applies in Australia, my answer is that, with great respect to the Court of Appeal of British Columbia, I could not say that the doctrine is wrong, but that I do not feel convinced that it is right. I would treat as binding upon me the principles stated by the Judicial Committee in *In re Southern Rhodesia*, if I were dealing with a conquered or ceded colony. *Calder's* case appears to me to be simply an application of those principles to a settled colony. My doubt arises from wondering whether it is proper to apply them to a settled colony.

There are special features of *Calder's* case. The appellants sought a declaration that their title had not been extinguished. One of their arguments was that they had rights under the Royal Proclamation of 1763. True, the Judicial Committee had decided that these

(95) [1919] A.C. 211.

(96) (1969) 8 D.L.R. (3d) 59 : affirmed (1970) 13 D.L.R. (3d) 64.

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amounted to a mere personal usufruct, extinguished on surrender to the Crown, but nevertheless not nothing. In *Calder's* case the Court first decided that the Royal Proclamation of 1763 had no application to the Indians of British Columbia. The exposition of the doctrine of extinction was said to be relevant " if the native title ever existed "—in other words, if the Court was wrong in deciding that the Proclamation did not apply. In this case, the plaintiffs have nothing corresponding to the Proclamation of 1763 ; they rely on a broad basis of doctrine. My attitude to the doctrine of " extinction by manifest policy " (if I may so call it) cannot help being affected by my judgment that the doctrine of communal native title does not exist and by my opinion (to be explained more fully later) that the *Minerals (Acquisition) Ordinance* 1953 and the *Mining (Gove Peninsula Nabalco Agreement) Ordinance* 1968 in themselves are an answer to the plaintiffs' claim.

It may be that it is at this point that an argument of Mr. Woodward's, which I have mentioned before, becomes again relevant. That is the argument that what happened in New South Wales before 1863 had no relevance either express or implied to the subject land, which was so remote from the areas of settlement. Perhaps this is really only another way of saying that extinction of native title must be express—a view with which I deal later. Or possibly Mr. Woodward implied only that no conclusions, adverse to the application of the doctrine of native title to the subject land, should be drawn from legislative or executive acts, or any other historical material, relating to the colony as it was at any early time in its history. I do not really understand the argument. I must accept that there was a colony called New South Wales which had defined boundaries and one law which extended throughout it. I have little doubt that when Matthew Flinders went ashore in Melville Bay in 1803 he was conscious of the fact that he was in New South Wales and that when shortly afterwards he was further to the westward he was conscious of the fact that he was outside it. I cannot say that the law did not exist on the subject land because it was not invoked or applied there.

But to return to the doctrine of extinction of native title as applied in *Calder's* case. What I am bound to say is that if that doctrine applies in Australia then the entire history of land policy and legislation in New South Wales and in South Australia, and the corresponding history in the Northern Territory under the Commonwealth, is similar in kind to the history which the judges found so cogent in *Calder's* case. The first event in that history, for the purposes of this case, was the inclusion in Governor Phillip's second commission of the words " full power and authority to agree for such lands tenements and hereditaments as shall be in our power to dispose of and them to grant to any person or persons

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. . . ". The last event in it was the granting of the leases over the subject land in accordance with the agreement approved by the *Mining (Gove Peninsula Nabalco Agreement) Ordinance* 1968. Between these two events there is a long succession of legislative and executive acts designed to facilitate the settlement and development of the country, not expressly by white men, but without regard for any communal native title. The creation of aboriginal reserves—a policy which goes back at least to the time of Governor Macquarie—implies the negation of communal native title, for they are set up at the will of the Government and in such places as the Government chooses. There is never the slightest suggestion that their boundaries are negotiated between parties by way of the adjustment of rights.

If the doctrine of *Calder's* case applies, no more need be said: the details are unnecessary. For myself, I found the historical material also significant in a somewhat different way. If the approach is made to the question of the existence of a doctrine of communal native title, on the assumption that it may have been the law notwithstanding that no court applied or declared it, then it is reasonable to ask a question which is rather a historian's than a lawyer's question—" Did people say or do anything which suggests that it was the law ? " To the lawyer the answer cannot be decisive whatever it is, but it need not be insignificant.

Such an inquiry may be made more fruitful by asking another question, namely—" To what extent, at any time, does there appear to have been a realization on the part of either officials or the public generally, in Australia and in the United Kingdom, that the relationship of the aboriginals to the land of the colonies posed any serious problem ? " If in general the answer to this question is that hardly anyone seems to have been conscious of the problem, then it is the less surprising that Australian judges have neither had to deal with questions of native title nor have even given utterance to dicta like those of Marshall C.J. or Chapman J. On that supposition, there is the more force in Mr. Woodward's suggestion that the absence of any indication of the doctrine in Australia is a historical accident of no significance. The problem is before this Court now, and can be dealt with as it ought to have been dealt with in, say, 1850, if it had arisen then.

If on the other hand, there is historical evidence of a significant degree of informed concern about the aboriginal land problem, either in Australia or in the United Kingdom, then the absence of any provision for the recognition of communal native title—indeed, whatever was done or was not done in regard to aboriginals and the land—becomes of greater significance as representing a conscious policy rather than a historical accident.

Throughout the historical material there runs a consistent thread of official benevolence to the aboriginals. Governor Phillip

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was specifically instructed " to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them " and to punish white men who should " wantonly destroy them, or give them any unnecessary interruption in the exercise of their several occupations . . . ". These instructions were given in complete ignorance of the real nature of the aboriginals' relationship to the land. It may be—there is no evidence on the point—that the aboriginals of the Port Jackson area had a relationship to the land similar to that which has been given in evidence. If so—indeed perhaps it is true whatever that system was—it is now possible to say that the mere establishment of the settlement at Sydney, and a fortiori the colonization of the continent, was to the aboriginals an " interruption in the exercise of their several occupations ". This very instance is an illustration—typical of many—of official benevolence combined with the absence of consciousness of, and therefore of reference to, aboriginal claims to land, which was certainly characteristic of the earliest period of New South Wales history. But it was not long before there was some realization that the occupation of the land affected the aboriginals.

I am not here concerned to give a balanced historical account of the relations between the aboriginal and white races in Australia. Everyone knows that the white race has a great deal to be ashamed of. What cannot be denied is that there was always an official concern for the welfare of the aboriginals—even where punitive measures were applied—and with this went the growth of an understanding, slow at first but later much more vital, that the occupation of land by white men was ipso facto a deprivation of the aboriginals. For the purposes of this case, what is significant is that notwithstanding this growth of understanding, the historical material shows that no attempt was made to solve this problem by way of the creation or application of law relating to title to land, which the aboriginals could invoke.

Governor Macquarie took a keen interest in the welfare of the aboriginals: he set aside a tract of land for cultivation by them, and founded a school (1815). Encouraged by the success of the school, in 1820 he set aside 10,000 acres for a " native establishment " which was to combine both education and profitable industry: the despatch contains the significant words: " The rapid increase of British Population, and the Consequent Occupancy of the Lands formerly dwelt on by the Natives having driven these harmless Creatures to more remote Situations. . . ." In his final report, written in London in 1822, he claimed that he " prevailed upon *Five different Tribes* to become settlers, giving them their choice of situations. Three of the Tribes chose to settle on the Shores of Port Jackson. . . . The other two Tribes preferred taking their farms in the Interior." There is not the slightest

suggestion that this encouragement of the aboriginals to abandon their normal manner of life represented any recognition that they were entitled to any particular land. My comment is intended to be dispassionate.

In 1835 occurred the famous episode of John Batman's " treaty " with aboriginals in the Port Phillip area. The official response was a Proclamation of 26th August, 1835, by Governor Bourke. In this there does not appear to be any conscious reference to the doctrine that acquisition by subjects from natives can only be for the Crown, which had already been so clearly stated in America and was later to be restated in *Reg.* v. *Symonds* (1847) in New Zealand. The Proclamation declares that " every such treaty, bargain, or contract with the Aboriginal Natives . . . is void and of no effect against the rights of the Crown " and the geographical limits of the colony—by now extended westward to the 129th meridian—are again set out. The Proclamation goes on to emphasize that persons in possession of land anywhere within the colony without authority will be treated as trespassers by the Crown.

In other words, Batman's " treaty " was never officially considered to be in the nature of the purchases from Indians which were customary in America. It was simply a trespass on Crown land. I agree with Mr. Harris's contention that this is a cogent demonstration of the total absence from official policy of any idea that aboriginals had any proprietary interest in the land.

I have elsewhere referred to the growth of public sentiment in England in the 1820s and 1830s on the subject of the plight of native people in the colonies. In the reformed House of Commons this sentiment had effect in the reports of two Select Committees, the latter being published in 1837. This report is a document which still shocks the reader. The committee recorded without restraint the deplorable effects on aboriginal races in all the colonies of their contact with the white race. In dealing with " New Holland " the report says : " In the formation of these settlements it does not appear that the territorial rights of the natives were considered. . . ." A few pages further on appears this passage : " A new colony is about to be established in South Australia, and it deserves to be placed upon record, that Parliament, as lately as 1834, passed an Act disposing of the lands of the country without once adverting to the native population." This reference was to the Act 4 & 5 Will. IV c. 95, which authorized the establishment of the Province of South Australia. The description of the Act was quite correct, for it purported to lay open the entire territory of the Province for purchase and settlement as public lands, excepting only such as was required for roads and footpaths. I refer to this later.

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The report concludes with a series of " Suggestions ". The first is that in each colony the protection of the natives should devolve on the executive. Notwithstanding that the committee represented a House of Commons elected by a suffrage extended by the first *Reform Act*, it was not prepared to entrust the protection of the natives to colonial legislatures. More important were the suggestions as to land regulations. These were that land purchases from natives by subjects should be void and illegal and that new territories should not be acquired without the sanction of the home Government. To these two suggestions were added these words : " This . . . does not apply to the settlement of *vacant* lands comprised within any of the existing British Colonies, the extent of which . . . is certainly sufficient to absorb whatever labour or capital could profitably be devoted to colonization."

In short, the Select Committee—(a) realized the evils arising from the dispossession of aboriginals from land ; (b) contemplated, at least as a theoretical possibility, that aboriginals might stand in a proprietary relationship to land ; (c) nevertheless did not recommend that any system of the recognition of native title should be set up ; (d) stated as a fact that there were " vacant " lands in the colonies which could properly be settled.

When the executive steps were being considered to establish the Province of South Australia it was clearly realized, both by the Colonization Commissioners, who were directly concerned with the practical details of administration in the new Province, and by the Colonial Office officials who advised the Secretary of State, that the terms of the Act made it difficult to provide for the protection of the aboriginals' interests in the land. I refer later to the details of the Act and to the correspondence between the Colonial Office and the Commissioners, when I deal with the legal effect of the proviso to the Letters Patent of 1836. Here it is sufficient to say that the Government was deeply concerned that the Wakefield scheme for the purchase of the lands of the Province by its settlers—for which the Act expressly made the whole Province available—should not result in the dispossession of " numerous Tribes of People, whose Proprietary Title to the Soil, we have not the slightest ground for disputing ". The quotation is from a letter of 15th December, 1835, written on behalf of the Secretary of State. The result was a compromise. The Letters Patent establishing the colony contained a proviso upon which the plaintiffs in this case relied, in one of their major arguments. In my opinion, as I explain in detail later, the proviso is in fact no more than the expression of a principle of benevolence, inserted into an important constitutional document. The Government expressed its intention, or hope, of amendment of the Act, and in the meantime approved of the measures proposed, no doubt entirely sincerely, by the Commissioners, to protect the interests of the aboriginals

and advance their welfare, by various executive policies. It was never suggested that any system of native title should be recognized.

This episode from the history of the foundation of South Australia clearly illustrates a consistent feature of Australian history—that is to say, the consciousness that a native land problem existed together with the absence of even a proposal for a system of native title. In my opinion this is the outstanding conclusion to be drawn, for the purposes of this case, from all the Australian historical material which was placed before me.

I do not think it is necessary to pursue this theme through the history of New South Wales to 1863, of South Australia to 1910, and of the Northern Territory under the Commonwealth from 1911. I am grateful to counsel for their exposition of the historical material in detail, and that was both necessary and, to me, of great interest; but I think that only a few matters need be mentioned here. In New South Wales the process of opening up the lands of the colony for settlement went on apace until 1863. The attempts to confine occupation within limits, the adoption of the Ripon Rules for the sale of land in 1831, the advance of the squatters, are all chapters of history dismissed here in a few words as only repeating the pattern already described.

In South Australia strong efforts were made to resolve the difficulty which was inherent in the scheme for the establishment of the Province—that colonization by the whites involved dispossession of the aboriginals. Governor Gawler, in particular, tried, in accordance with his instructions, to adopt the principle that "the aboriginal inhabitants of this province have an absolute right of selection . . . of reasonable portions of the choicest land, for their special use and benefit, out of the very extensive districts over which, from time immemorial, these Aborigines have exercised distinct, defined, and absolute rights of proprietary and hereditary possession" (1840), but it is very doubtful whether the adoption of such a principle in practice was lawful, and in any event the instruction to that effect was omitted from those given to his successor. The preferred policy was that of "general measures for the protection and preservation" of the aboriginals.

The duties of Protectors of Aboriginals, the provisions made for welfare, education, and reserves for aboriginals, all followed the same kind of policy which, vastly developed, is still the official policy at this day in the Northern Territory. It is a policy which—again I speak dispassionately—does not provide for the recognition of any communal title to land.

Mention should be made of an attempt which was consistently made to ensure that the pastoral leases which have been such a prominent feature of the development of the Northern Territory since its annexation to South Australia, interfered as little as possible with the use by the aboriginals of the leased land. A

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similar step had been taken much earlier in New South Wales. In 1848 instructions were given to Governor FitzRoy that pastoral leases were to " give the grantees only an exclusive right of pasturage for their cattle, and of cultivating such land as they may require . . . " but that the leases were not intended " to deprive the natives of their former right to hunt over these Districts, or to wander over them in search of subsistence, in the manner to which they have been heretofore accustomed, from the spontaneous produce of the soil, except over land actually cultivated or fenced in for that purpose ". The Governor replied that there was a legal difficulty in making satisfactory provision to this effect in the leases to be granted under the relevant Act. As a result, an Order in Council was made in 1849 in very general terms, that in future pastoral leases should " contain such conditions, clauses of forfeiture, exceptions, and reservations, as may be necessary for securing the peaceful and effectual occupation of the lands comprised in such leases, and for preventing the abuses and inconveniences incident thereto ". It is clear from the relevant correspondence that this was intended to provide, inter alia, for the difficulty about the use by aboriginals of land included in pastoral leases.

In South Australia more express provision was made. From 1850 onwards a clause appeared in pastoral leases to the following effect. It was not significantly changed in Northern Territory pastoral leases many years later. I quote from the first lease granted over the subject land (1886) : " Reserving nevertheless and excepting out of the said demise to Her Majesty . . . for and on account of the present Aboriginal Inhabitants of the Province and their descendants . . . full and free right of ingress egress and regress into upon and over the said Waste Lands of the Crown . . . and in and to the Springs and surface water thereon and to make and erect such wurlies and other dwellings as the said Aboriginal Natives have been heretofore accustomed to make and erect and to take and use for food birds and animals ferae naturae in such manner as they would have been entitled to if this demise had not been made."

Mr. Woodward conceded that this clause was not a recognition of any native title, but said that at least it had the effect of preventing the lease from terminating the native title. He said that the clause showed an intention to preserve the status quo. The language, he said, is in terms of an existing right which is being continued.

It seems to me that the utmost effect of the clause is to ensure that aboriginals *generally* (not any in particular) should not be prevented from using any of the land demised in the manner in which it had previously been used by aboriginals. The fact that in the earlier leases the reservation was expressed to be not only to the Crown but also to the aboriginals themselves (who were

not parties to the lease) merely makes a legal puzzle. If it is argued that the words " as they would have been entitled to do if this demise had not been made " support the existence of title in the aboriginals before the lease, the effect is two-edged ; a lease without such a clause must then be effective to extinguish such title, and the argument can be used to meet Mr. Woodward's contention (to be mentioned later) that the Nabalco leases can be invalidated apart from the *Lands Acquisition Act*.

In truth, however, I do not think that this form of pastoral lease has any particular relevance except that it is entirely consistent with the whole pattern of non-recognition of communal native title by Australian law.

I refer to only one other matter. That is the fact that on two occasions a judicial attitude was adopted in the sphere of the criminal law, consistent with the idea that aboriginals, at any rate those not in contact with white civilization, had some other law than the law of the colony applicable to them, or were somehow not amenable to the common law. In 1840 Cooper C.J. of the Supreme Court of South Australia expressed the opinion in advice to the executive that the murder of one tribal aboriginal by another (neither being in de facto contact with civilization) was not a crime against the law of South Australia, on the ground that, claiming no protection from the law, they owed it no allegiance. The same view was expressed more elaborately, and with much learning and passionate feeling, by Willis J. in Victoria in 1841. In the course of his summing up in which he expressed these views, his Honour dealt with original aboriginal property in the land in terms very like those used in some of the American cases. He also expressed the opinion that New South Wales was neither occupied, nor conquered, nor ceded, but in a special position.

These views did not prevail. The contrary view, which is beyond question the law, that the criminal law, unless it is expressly provided otherwise, applies to aboriginals as fully as to white men, had been applied earlier by the Supreme Court of New South Wales in *R.* v. *Jack Congo Murrell* (97). The accused was an aboriginal charged with the murder of another aboriginal. This Court was furnished with a document of great interest—a copy of the official file on this case, now in the archives of the State of New South Wales, which shows among other things that one of the grounds of the demurrer to the indictment was that conviction on the charge would not be a bar to proceedings under tribal law. The report in Legge deals only with the question of the amenability of the aboriginals to the law of the colony. The file shows also that the case was not one where the accused and his victim were totally out of contact with civilization ; the murder took place on the

(97) (1836) Legge 72.

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Richmond Road, Windsor, New South Wales. But the principle is clear and has remained the law.

The only significance of these cases, apart from the dicta of Willis J. about aboriginal title to land, is I think to show that, in another field, there were some judicial suggestions that there was a law outside the ordinary common law, which applied to aboriginals. I do not think they are significant except as curiosities of Australian legal history.

Conclusions on the doctrine of communal native title.

I have considered this aspect of the case with very great care, since it may possibly have the most far-reaching results. I realize that I have repeatedly come to a conclusion of a negative kind—that a particular case does not support Mr. Woodward's contention, or that a particular event or document does not imply the existence of the doctrine. I hope I have not lost sight of the general among a multitude of particulars. I have tried to remember 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 these considerations do not alter my conviction that the plaintiffs' contention must fail for want of authority to support it. It is possible for a decision of a court of first instance to contribute to, or perhaps even to found, a body of legal doctrine. But I cannot come to a decision of that kind on the materials before me. The most striking feature of all these materials, in my opinion, is that wherever the principles for which Mr. Woodward contended have to any extent been put into practice, that has been done by statute or by executive policy.

Was the clans' relationship to the land a recognizable and a proprietary interest?

This question arises because it is expressly pleaded. Paragraph 4 of the statement of claim says: " . . . each clan holds certain communal lands. The interest of each member of the clan in such communal lands is a proprietary interest and is a joint interest with each other member of the clan. Each such individual interest arises at birth and continues until death." Paragraph 5 refers to " the interest of each clan in the land which it holds " and par. 9 to " the proprietary interests of the Gumatj and Rirratjingu clans ", and there are several subsequent references to the interests of the clans, but no others to the interests of the members of the clans. It is the clans, not the members, who are claimed (in pars. 22 and 24) to have interests in land within the meaning of the *Lands Acquisition Act*.

I do not think that anything turns on any possible difference between the rights of the clans and the rights of the individual

members of the clans. None was suggested in argument. Moreover, the evidence shows that, at any rate as between initiated males, no member of a clan makes any claim different from, or adverse to, that of any other member.

I have earlier explained that the reason for dealing with this question at this stage is that it can now be seen in the light of the authorities which I have already examined. This course requires that attention be directed back to my findings of fact about the aboriginals' social organization and the areas of land to which they lay claim.

In most of the cases to which I have referred, the question has not been dealt with expressly. Sometimes there has been no analysis, or very little, of the facts of native law or custom. In some of the cases the parties concerned to oppose the claim of title by the natives were content to rely on arguments other than the nature of the natives' interest. But this was not always so; for example, in the *St. Catherine's Milling Co.* case (98) there was considerable argument on the point, and a decision by the Judicial Committee that the Indians' interest was " a mere personal and usufructuary right ". So in *In re Southern Rhodesia* (99) there was a discussion by the Judicial Committee of the nature of the process of characterizing native rights, and in *Amodu Tijani* v. *Secretary, Southern Nigeria* (1) the Board considered in general terms the problems involved in " interpreting the native title to land ".

In the case before me, the issues posed by the pleadings expressly require me to decide whether or not the claims of the plaintiff clans are claims of a proprietary nature, for the plaintiffs rely primarily upon the provisions of the *Lands Acquisition Act* to invalidate the Northern Territory Ordinances which otherwise stand in their way. If the plaintiffs' interest was not a proprietary interest, there is no ground for declaring the actions of the defendant Nabalco unlawful. Mr. Woodward did also put, as a secondary argument, a contention which he claimed could stand on its own feet without recourse to the *Lands Acquisition Act*. To this I refer later, but I believe that it none the less depends upon the categorization of the plaintiffs' claims as proprietary.

In *In re Southern Rhodesia* (2) the question which had to be decided by the Judicial Committee had arisen because the Legislative Council of Southern Rhodesia had passed a three-fold resolution, each part of which expressly asserted a proposition of law about the ownership of the unalienated land in Southern Rhodesia. The question referred to the Judicial Committee was whether the contentions contained in the resolution were well-founded. Among the parties whose interests were represented by counsel before the Board were the native peoples of the territories

(98) (1888) 14 App. Cas. 46.
(99) [1919] A.C. 211.
(1) [1921] 2 A.C. 399.
(2) [1919] A.C. 211.

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in question, and the Board had therefore directly before it the question of characterizing the rights of such people. Their Lordships said of the natives (at pp. 232-233): " . . . in substance their case was that they were the owners of the unalienated lands long before either the company or the Crown became concerned with them and from time immemorial, that their title could not be divested without legislation, which had never been passed, or their own consent, which had never been given, and that the unalienated lands belonged to them still . . . the aborigines of Lobengula's time have both changed and been scattered. . . . Whether the Matabele or the Mashonas of today are, in any sense consistent with the transmission or descent of rights of property, identical with the Matabele or the Mashonas of more than twenty years ago is far from clear. . . . It seems to be common ground that the ownership of the lands was ' tribal ' or ' communal ', but what precisely that means remains to be ascertained. In any case it was necessary that the argument should go the length of showing that the rights, whatever they exactly were, belonged to the category of rights of private property. . . ."

Here then we have the problem. Their Lordships proceeded to make some general observations which must be significant for my present purposes (at pp. 233-234): " The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor ' richer than all his tribe '. On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law. Between the two there is a wide tract of much ethnological interest, but the position of the natives of Southern Rhodesia within it is very uncertain; clearly they approximate rather to the lower than to the higher limit." Their Lordships then gave their reasons for deciding that further inquiry into the nature of the native rights was in the case before them unnecessary. They had earlier suggested that Lobengula's autocracy was so complete that under his rule the natives could hardly be said to have had any form of law.

In *Amodu Tijani* v. *Secretary, Southern Nigeria* (3) the Judicial Committee said expressly: " . . . it is necessary to consider . . .

(3) [1921] 2 A.C. 399, at pp. 402-403.

the real character of the native title to the land. Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the sovereign where that exists. In such cases the title of the sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence." Their Lordships then noted the importance of getting rid of the assumption that rights of property in land must necessarily involve something of the nature of the doctrine of estates. They went on (at pp. 403-404): " In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of the title to land which must be borne in mind. The title, such as it is, may not be that of the individual, as in this country it nearly all is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are often as not misleading."

With this formidable warning ringing in my ears, I proceed to attempt to decide a question which was expressly put before me in the pleadings, had much evidence directed to it, and was the subject of extensive argument by counsel.

It will be noted that in the heading to this part of my reasons for judgment I have used the words " recognizable and proprietary " but in truth these two questions overlap. Counsel for the defendants relied in the first alternative upon the argument that the question whether the natives' rights were proprietary really never arose—that in the aboriginal world there was nothing recognizable as law at all. The Solicitor-General contended that before any system can be recognized by our law as a system of

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law, there must be not only a definable community to which it applies, but also some recognized sovereignty giving the law a capacity to be enforced. This argument, or something like it, appeared at a number of points in the case for the defendants. I have already referred to the contention that there was no recognizable community to which the rights claimed related, so as to make reputation evidence admissible under the relevant rules of the law of evidence. Elsewhere it was put to me that the claims of the Rirratjingu and the Gumatj to areas of land could not be regarded as in the category of law at all, because there was no authority shown which was capable of enforcing them. Counsel used the analogy of international law, the nature of which as law has often been challenged on the ground that there is no authority capable of enforcing its rules. Implicit in much of the Solicitor-General's argument on this aspect of the case was, I think, an Austinian definition of law as the command of a sovereign. At any rate, he contended, there must be the outward forms of machinery for enforcement before a rule can be described as a law. He did not deny the deep religious sanctions which underlay the customs and practices of the aboriginals; indeed, he stressed them, and contended that such sanctions as there were were religious and not otherwise.

I do not find myself much impressed by this line of argument. The inadequacy of the Austinian analysis of the nature of law is well known. I do not believe that there is utility in attempting to provide a definition of law which will be valid for all purposes and answer all questions. If a definition of law must be produced, I prefer "a system of rules of conduct which is felt as obligatory upon them by the members of a definable group of people" to "the command of a sovereign", but I do not think that the solution to this problem is to be found in postulating a meaning for the word "law". I prefer a more pragmatic approach.

I take, first, the suggestion that recognition is in principle impossible because the system claiming recognition is manifestly on the other side of the unbridgeable gulf to which their Lordships referred in *In re Southern Rhodesia*. It may be that it is possible to place native systems of law into some sort of scale ranging from the unrecognizable to the juristically advanced. I venture to think that such a scale could be valid only if arranged upon a common footing of anthropological knowledge and legal assumptions. In particular, the advance of scientific method must be significant; having heard the evidence in this case, I am, to say the least, suspicious about the truth of the assertions of the early settlers of New South Wales that the aboriginals had no ordered manner of community life. I do not know of any case in which the impossibility of comparison was the foundation of the court's decision. *In re Southern Rhodesia* itself showed that such a principle

might be applied to a state of society in which the whims of an unprincipled autocrat were all that the people had for law; but clearly their Lordships thought that the evidence before them was far too scanty to make any final judgment on such a matter, and they decided that it was unnecessary to proceed to a final decision on the question.

I cannot complain of any lack of evidence, and I am very clearly of opinion, upon the evidence, that the social rules and customs of the plaintiffs cannot possibly be dismissed as lying on the other side of an unbridgeable gulf. The evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called "a government of laws, and not of men", it is that shown in the evidence before me.

But granted that comparison is categorically possible, does it, when made, lead to the conclusion that the plaintiffs' system was a system of law from which conclusions can be drawn about particular rules of law? One argument much stressed by counsel for the defendants was that the system was not shown to apply to any definable community. The statement of claim uses the phrase: "Pursuant to the laws and customs of the aboriginal native inhabitants *of the Northern Territory*, each clan holds certain communal lands" (par. 4). Paragraph 23 similarly refers to "the aboriginal laws and customs *of the Northern Territory*". This choice of words was perhaps not beyond criticism, but I do not read it as requiring the plaintiffs to establish a system of laws applicable to all aboriginals in the Northern Territory. What is now in question is the recognition of the plaintiffs' system of law, and for that purpose the question is asked—To what definable community does the system apply? The statement of claim is capable of being understood, and in my opinion should reasonably be understood, as meaning that the system proved by the plaintiffs is, at least, a part of the totality of the laws and customs of aboriginals in the Northern Territory. After all, it is the plaintiffs' case that the doctrine of communal native title is part of the law of the Northern Territory.

What is shown by the evidence is, in my opinion, that the system of law was recognized as obligatory upon them by the members of a community which, in principle, is definable, in that it is the community of aboriginals which made ritual and economic use of the subject land. In my opinion it does not matter that the precise edges, as it were, of this community were left in a penumbra of partial obscurity. Upon the evidence, the community could possibly be described as the community of the people of those clans which now have members living in the neighbourhood of the Yirrkala Mission, with the qualification that there might now

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be some clans represented only at Elcho Island or Milingimbi. But the exact definition of the community is inessential. What matters, in my opinion, is the fact that the existence of *a* community was proved and that it was shown to be *in principle* definable

I turn to the question of the absence of sanctions, and machinery for enforcement. The argument amounted to saying that in a system where people merely behave in certain predictable or patterned ways, apparently without the inclination to behave otherwise, and with no recognizable section of the community designed for the repression of anti-social behaviour, or the application of compulsion to ensure adherence to the pattern, or the determination of disputes, there is no recognizable law. Where, it was asked, was there any indication of authority over all the clans, and where, beyond the influence of the elders, was the authority within each clan ? Feuds were admitted to be common : did not this show that law was absent ? None of these objections is in my opinion convincing. The absence of an identifiable sovereign authority is a characteristic of the community of nations ; it does not convince me that there is no such thing as international law. The specialization of the functions performed by the officers of an advanced society is no proof that the same functions are not performed in primitive societies, though by less specially responsible officers. Law may be more effective in some fields to reduce conflict than in others, as evidently it is more effective among the plaintiff clans in the field of land relationships than in some other fields. Mutatis mutandis, the same is patently true of our system of law. Not every rule of law in an advanced society has its sanction, as for example a statutory expression of the " duty " of a statutory body, such as s. 10 (2) of the *Reserve Bank Act* 1959-1965. Is that subsection not recognizable as law ?

In my opinion, the arguments put to me do not justify the refusal to recognize the system proved by the plaintiffs in evidence as a system of law. Great as they are, the differences between that system and our system are, for the purposes in hand, differences of degree.

I hold that I must recognize the system revealed by the evidence as a system of law.

The next question is whether the proved relationship of the plaintiffs to their defined areas of land is a relationship which ought to be described as proprietary, either in a general sense or in any special sense which may be required by the *Lands Acquisition Act*. Mr. Woodward's contentions were these. First, he put it that the evidence showed that the aboriginals " think and speak of the land as being theirs, as belonging to them ". It seems to me that to ask what they " think " begs the question ; the problem at present before the Court is to characterize what the aboriginal relationship is as manifested by what they say and

do, to the land. What they " speak " is in the first place a matter of their own language. About this I had nothing which could strictly speaking be called evidence, except for the fact that much of what the aboriginals said in evidence, both in their own languages as interpreted and sometimes in English, was expressed in language which is consistent with ownership—the phrases " my country ", " our country ", " land of the Rirratjingu ", " land belonging to Gumatj ", and phrases of that nature. For myself, I do not think that this language is of itself of very much weight. In the English language, the possessive pronouns, and the word " of ", are used with the widest variety of meanings, some of which do, and some of which do not, imply interests of a proprietary nature. For example, a great variety of relationships is indicated by the following phrases—" my house ", " my son ", " my father ", " my occupation ", " my club ", " my journey ", " my birthday ", " my incompetence in mathematics ". There was before the Court in this case only the slightest material upon which any opinion could be formed about the linguistic usages of the aboriginals. The lady who did most of the interpretation of such of the aboriginal evidence as was given in native languages, spoke and understood Gumatj but not Rirratjingu or any other language, and anything spoken to her or by her, not in English, was in Gumatj. At one stage she explained (and I accept it without reservation) that a certain suffix was used in the Gumatj language to indicate property as distinct from loan or temporary possession. This suffix was being used by the witness in relation to the land. But upon such meagre material it would not be safe to base any generalizations, for there was no investigation of the matter in any depth—for example, what other implications has that same suffix and how are other English uses of the possessive pronouns or the preposition " of " rendered into Gumatj ? Moreover there could be no justification, without any evidence, for generalizing about linguistic usages in the other languages from what the Court was told about Gumatj (which was not evidence). Mr. Woodward's proposition that the aboriginals " think and speak of the land as being theirs " may be properly paraphrased as " they think and speak of the land as being in a very close relationship to them " and in this form there would be no dispute about it.

The next contention was that other aboriginals who go on the Gumatj and Rirratjingu land think and speak about it in the same way as the Gumatj and Rirratjingu respectively ; this of course in itself takes the matter no further ; but Mr. Woodward pointed out that the others do not make a claim of relationship to the Gumatj and Rirratjingu land, but acknowledge it as belonging to the Gumatj and Rirratjingu. There are, he said, no disputes over land. The evidence on the whole tends to support this last proposition. There is certainly evidence of disputes between

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clans—" feuds " was the word used by the expert witnesses—but it is at least doubtful whether the real subject of these disputes was ever, or at any rate usually, the question of land. I cannot regard the story recorded by the Reverend Mr. Chaseling about the successive fights which caused migrations of clans from land to be satisfactory proof that quarrels about entitlement to land were the casus belli, even if the truth of the account of the fights themselves be accepted. But this second argument of Mr. Woodward's does not, I think, take the matter any further, for it only goes to show that whatever the relationship of the clans to the land is, it is not disputed by other clans.

The third argument was the argument from mythology. It was said that the aboriginals regard the land as given to the clans by their spirit ancestors. I do not find this persuasive, because that was not the impression that the aboriginal evidence made upon me. To say that the land was " given " to each clan seems to me to be merely extracting a part of the myths of creation and regarding that part in isolation. It seemed to me that the ancestral spirits were regarded as having created all things—the land, the clans, the sun, the stars, the animal and vegetable kingdoms, and the sacred ritual, and set them all in their proper relationships. But I hesitate to venture into this field, and I do not think it is necessary. My task is to examine the relationship of the clan to territory associated with it and to decide whether that association is a matter of property. In my view, my 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 ". With great respect for the plaintiffs' beliefs, I do not think that they help me to decide the issue before me.

Mr. Woodward then dealt with the use which the clans made of their lands. This argument relied upon the concept of the band as being the economic arm of the clan, and as establishing a practical link between particular land and a particular clan. I have already found that the evidence does not show this. In my view, the clan is not shown to have a significant economic relationship with the land. The spiritual relationship is well proved. One of the manifestations of this is the fact that sacred sites associated with a particular clan are to be found there (though sometimes other clans have spiritual links with these sites). Another manifestation is that the rites performed by the clans have as part of their object the fructification and renewal of the fertility of the land. The evidence seems to me to show that the aboriginals have a more cogent feeling of obligation to the land than of ownership of it. It is dangerous to attempt to express a matter so subtle and difficult by a mere aphorism, but it seems easier, on the evidence, to say

that the clan belongs to the land than that the land belongs to the clan.

The Solicitor-General in argument made much of what he said were the deficiencies of the plaintiffs' evidence of the clans' relationship to areas of land. He relied, for instance, on the absence of proof of satisfactory boundaries. I have made my finding on this subject, which is that the boundary is in principle definable, though with only such precision as the users of the land require for the uses to which the land is put; the same is true of boundaries in our law. I would not withhold from a clan's relationship to a piece of land the description "proprietary" because the boundary of the land is less precisely definable than those to which we are accustomed. Nor did I think that the Solicitor-General succeeded in showing that there was insufficient unanimity in all the aboriginal witnesses as to every piece of land mentioned in the case to prove the respective proprietary interests of the Rirratjingu and the Gumatj. I have already referred to the table which the Solicitor-General produced, as a summary of the evidence, showing which pieces of land (described by name) were attributed to which clans by which witnesses. He conceded that there were no cases of actual contradiction. What he stressed was that the list of Rirratjingu place-names given by each witness, of whatever clan—and similarly the list of Gumatj places—was different from that given by every other witness. These lists had some names in common. But the Solicitor-General's contention was that in order to establish that the Rirratjingu clan had a proprietary interest in certain areas or sites, every witness, whether Rirratjingu or not, should have been able to say what those areas or sites were, and should not only have been unanimous, but word-perfect. I exaggerate the gist of his argument in attempting to make clear what it was that he was saying; his real point was not that the witnesses were not word-perfect, but only that they were too far from being so. To give an example, Munggurrawuy was the only Gumatj witness. He gave a total of eight names as the names of Gumatj places or areas. Of these, I can leave out Port Bradshaw, which was obviously a large area in which more than one clan had claims. Of the remaining seven places named by Munggurrawuy, two were mentioned, either by an aboriginal or an English name, by seven of the other nine aboriginal witnesses; two were mentioned by five of those other witnesses; one was mentioned by three of those other witnesses and two were mentioned by two of those other witnesses. Moreover, quite a number of other places were mentioned as Gumatj places by witnesses other than Munggurrawuy. The Solicitor-General's contention was that the situation of which this particular instance is an example was one so remote from anything resembling a universal consensus on the totality of the land of the Rirratjingu and the Gumatj respectively,

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as to demonstrate that the relationship of clans to land could not approximate to anything in the nature of property.

This argument also I found unconvincing. It seems to me to amount to saying that if there is property in land, there must be either a written or pictorial means of discovering who is the owner of any particular piece of land (the function carried out by title-deeds or registers of title) or, if that is not possible among primitive people, then there must be a sufficient number of witnesses who can produce a register of title out of their memories; that is that an oral register of title must be repeated in full detail by each witness. In my opinion, the fallacy in this argument is the assumption that there cannot be rights of property without records or registers of title. Even if some witnesses said "I do not know whose land this is" (and hardly any did so), I would not put much weight on that fact in comparison with the high degree of consistency with which the attribution of each area of land was made by those who spoke of it.

I think this problem has to be solved by considering the substance of proprietary interests rather than their outward indicia. I think that property, in its many forms, generally implies the right to use or enjoy, the right to exclude others, and the right to alienate. I do 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. But by this standard I do not think that I can characterize the relationship of the clan to the land as proprietary.

It makes little sense to say that the clan has the right to use or enjoy the land. Its members have a right, and so do members of other clans, to use and enjoy the land of their own clan and other land also. The greatest extent to which it is true that the clan as such has the right to use and enjoy the clan territory is that the clan may, in a sense in which other clans may not (save with permission or under special rules), perform ritual ceremonies on the land. That the clan has a duty to the land—to care for it—is another matter. This is not without parallels in our law, which sometimes imposes duties of such a kind on a proprietor. But this resemblance is not, or at any rate is only in a very slight degree, an indication of a proprietary interest.

The clan's right to exclude others is not apparent: indeed it is denied by the existence of the claims of the plaintiffs represented by Daymbalipu. Again, the greatest extent to which this right can be said to exist is in the realm of ritual. But it was never suggested that ritual rules ever excluded members of other clans completely from clan territory; the exclusion was only from sites.

The right to alienate is expressly repudiated by the plaintiffs in their statement of claim.

In my opinion, therefore, 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.

That disposes of the question in general terms, but it is proper also to consider the applicability of the *Lands Acquisition Act* 1955-1966. That Act does not define "property" but defines "interest", in relation to land, as "(*a*) a legal or equitable estate or interest in the land; or (*b*) a right, power or privilege over, or in connexion with, the land" (s. 5 (1)). The earlier Act had substantially the same definition, applied to "land", with the inclusion of the word "easement".

The Solicitor-General submitted shortly (the point, in his submission, did not require extensive argument) that the Act does not apply to any interest other than one already known to the law of property at the time when the Act was passed. It therefore could not protect the plaintiffs' interests. I do not think I need decide the theoretical question whether a proprietary interest of a new kind which was created, or held to exist, after the passing of the Act, would be protected by it. Mr. Woodward submitted that the words "right, power, or privilege over, or in connexion with, the land" were wide enough to cover "communal native title" which was shown by the evidence to be vested in the Rirratjingu and the Gumatj in respect of the land attributed to their respective clans. With respect, I think this is begging the question. It amounts to saying that whenever aboriginal natives are found in occupation of land under a system which does not recognize private property in land, that is "communal native title", and that that alone is sufficient to attract the protection of the words "right, power, or privilege over, or in connexion with, the land" in the Act. If that were so, why was it necessary to explain in such detail the interests of the clans in particular land?

If the relationship of the Rirratjingu and the Gumatj to particular areas of land can not be shown to be some form of proprietary interest, then there is only one meaning left for the phrase "communal native title" in relation to the facts of this case, namely that all those aboriginals, irrespective of clan, who at any time are or were accustomed to be on the subject land for any purpose regarded by them as lawful, are the joint holders of the communal native title in the whole of the subject land. The action could, on this footing, have been brought by one representative plaintiff in respect of the whole of the subject land. This was certainly not the plaintiffs' case.

Upon the whole of this aspect of the matter, my conclusion is that the evidence shows a recognizable system of law which

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did not provide for any proprietary interest in the plaintiffs in any part of the subject land.

The proviso to the Letters Patent of 1836.

Reliance was placed by the plaintiffs, independently of their other arguments, on the proviso to the Royal Letters Patent of 19th February, 1836, whereby the Province of South Australia was established. In the statement of claim the proviso was said to have various effects in law. These were, first, that "Upon the annexation of the Northern Territory to South Australia the proviso . . . operated to make the . . . rights of occupation . . . by the clans . . . of the land cognizable by, and subject to the protection of, British and South Australian law" (par. 19). Secondly, that the proviso operated as a basic condition of the foundation of the Province and as a constitutional guarantee, and that its effect persisted after the inclusion of the Northern Territory into South Australia and the acceptance of the Northern Territory by the Commonwealth (par. 20A).

All these effects were denied by the defendants.

Reference has been made elsewhere in these reasons to the Letters Patent of 1836 as an event in the history of official policy towards the Australian aboriginals. Here, I am concerned with their legal effect.

South Australia had its legal origin in the Act 4 & 5 Will. IV c. 95, which received assent on 15th August, 1834. The Act began with various recitals. First, the land, described by latitude and longitude, was cautiously said to consist "of waste and unoccupied lands which are supposed to be fit for the purposes of colonization". It was then recited that there were persons of property wishing to embark for that part of Australia, and that it was expedient that they should be enabled "to carry their said laudable Purpose into effect". Then came the important recital: "And whereas the said Persons are desirous that in the said intended Colony an uniform System in the Mode of disposing of Waste Lands should be permanently established". The material words of the first limb of the first section of the Act were as follows: "That it shall and may be lawful for His Majesty, with the Advice of His Privy Council, to erect within that Part of *Australia* which lies between the Meridians of the One hundred and thirty-second and One hundred and forty-first Degrees of East Longitude, and between the Southern Ocean and the Twenty-Six Degrees of South Latitude, together with all and every the Islands adjacent thereto, and the Bays and Gulfs thereof, with the Advice of His Privy Council, to establish One or more Provinces and to fix the respective Boundaries of such Provinces. . . ."

The meaning of this ill-drawn provision appears to be that the King in Council might (a) erect one or more provinces; (b)

establish one or more provinces; and (c) fix the respective boundaries of such provinces. In an acid Colonial Office memorandum of 10th December, 1835, James Stephen pointed out that the Crown under its prerogative power could have done what this section of the Act purported to authorize it to do. It is clear that in these circumstances the validity of anything so done depends entirely on the power granted by the Act, and in no degree on the prerogative: *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (4), per Lord Dunedin.

Other provisions of the Act must be noticed. The second limb of the first section provided in effect that all persons who should at any time thereafter live in the Province should not be bound by any laws of any other parts of Australia, but should be subject to all laws validly enacted for the government of South Australia. This appears to rule out the theoretical possibility that any rights created by the law of New South Wales before 1836 could be vested in the plaintiffs' predecessors thereafter. The plaintiffs do not, of course, propound this possibility; they say that their rights were created at common law and not taken away by any enactments, whether of New South Wales, South Australia or the Commonwealth.

The second section empowered the Crown by Order in Council to set up a legislative authority for South Australia. The third section provided for the appointment of Commissioners to carry into effect certain parts of the Act. Various powers were given to the Commissioners, among which were those given by s. 6: "To declare all the Lands of the said Province or Provinces (excepting only Portions which may be reserved for Roads and Footpaths) to be Public Lands, open to Purchase by *British* Subjects . . . and to employ the Monies from Time to Time received as the Purchase Money of such Lands, or as Rent of the Common of Pasturage of unsold Portions thereof, in conducting the Emigration of poor Persons from *Great Britain* or *Ireland* to the said Province or Provinces: Provided always, that no Part of the said Public Lands shall be sold except in public for ready Money, and either by Auction or otherwise as may seem best to the said Commissioners, but in no Case and at no Time for a lower Price than the Sum of Twelve Shillings Sterling per *English* Acre. . . ."

Section 20 of the Act provided that in the event of the Commissioners being unable to raise sufficient sums of money by the methods authorized elsewhere in the Act, "then and in that Case, but not otherwise, the Public Lands of the said Province or Provinces then remaining unsold, and the Monies to be obtained by the Sale thereof, shall be deemed a collateral Security for Payment of the Principal and Interest of the said Colonial Debt".

(4) [1920] A.C. 508, at p. 526.

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Section 23 authorized the Crown by Order in Council to establish a "Constitution of Local Government" when the population reached 50,000, with this proviso—"that the Mode herein before directed of disposing of the Public Lands of the said Province or Provinces by Sale only, and of the Fund obtained by the Sale thereof, shall not be liable to be in anywise altered or changed otherwise than by the Authority of His Majesty and the Consent of Parliament".

Section 25 provided that if after ten years from the passing of the Act the population of the Province was less than 20,000, "then and in that Case all the Public Lands of the said Province or Provinces which shall then be unsold shall be liable to be disposed of by His Majesty . . . in such Manner as to him . . . shall seem meet. . . ."

The Letters Patent themselves were dated 19th February, 1836. The text recited, first, the Act itself, and then all its recitals seriatim except the last. There was then a recital of the enactment of the first limb of the first section—the provision which authorized the Crown to erect and establish one or more provinces and to fix the respective boundaries of such provinces. It is clear, therefore, that the Letters Patent did not purport to be an exercise of the power, contained in the second section of the Act, to establish a legislative authority.

There followed the substantive provision of the Letters Patent: "NOW KNOW YE that with the advice of our Privy Council and in pursuance and exercise of the powers in Us in that behalf vested by the said recited Act of Parliament We do hereby Erect and Establish one Province to be called The Province of SOUTH AUSTRALIA—And We do hereby fix the Boundaries of the said Province in manner following (that is to say) On the North the twenty-sixth degree of South Latitude—On the South the Southern Ocean—On the West the one hundred and thirty-second degree of East Longitude—And on the East the one hundred and forty-first degree of East Longitude including therein all and every the Bays and Gulfs thereof together with the Island called Kangaroo Island and all and every the Islands adjacent to the said last mentioned Island or to that part of the main Land of the said Province. . . ."

So far the Letters Patent appear to be a normal and valid exercise of the power contained in the first section of the Act. There followed the proviso: "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 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 first questions are those of construction. The obvious question to be asked, as to the meaning of a proviso purporting

to say that nothing contained in a document should have a certain effect, would be what, were it not for the proviso, would be the effect of the substantive part of the document upon the matters referred to in the proviso. It is difficult to see how the erecting and establishing of the Province of South Australia, and the fixing of its boundaries, could per se affect the rights of aboriginals to the actual occupation or enjoyment of lands. One might thus be inclined to say that the proviso is totally meaningless, since without it the Letters Patent could not possibly affect those rights. One construction might enable such a conclusion to be avoided. Can the proviso mean that any lands within the boundaries described, which at the date of the Letters Patent were " actually occupied or enjoyed " by aboriginal natives, should not become part of the territory of the Province so erected ? This may appear extravagant, but in truth it seems to me the only way of making some sense of the proviso. What other construction would limit the meaning which the Letters Patent would otherwise have ?

Mr. Woodward was unable to support such a construction, but sought to uphold a somewhat less drastic one : that areas proved to be in the occupation of aboriginals were to be " outside the boundaries of the Province for the particular purpose of non-interference with aboriginal title " though not for all purposes. I find it very difficult to give this suggestion any meaning except that pleaded in par. 20A of the statement of claim, that the proviso was a constitutional guarantee of the rights of the aboriginals—that is to say, a limitation of the powers of the executive and the legislative authorities of the Province to interfere with such rights. I deal with this later.

The Solicitor-General made two further points of construction. First, the proviso could relate only to " lands therein "—that is to say to land within the boundary of the Province as defined in the Letters Patent ; on this construction, the proviso could have no effect on the subject land. Secondly, it related only to " Lands therein *now* actually occupied or enjoyed ". If the proviso was to support the plaintiffs' claim, the plaintiffs must show that their predecessors actually enjoyed or occupied the subject land on 19th February, 1836. This might be easier to prove than that the clans occupied their lands in 1788. But to the first point there seems to be no answer. The Letters Patent purported to be the exercise of a power granted to erect a province or provinces within a described part of the earth's surface. The first substantive clause purported to erect and establish one such province, and to name it. The second substantive clause purported to fix the boundaries of the province so erected and established, and in this clause the phrase " the said Province " was used twice, with unmistakable meaning. The proviso then purported to deal with " the rights of any Aboriginal Natives of the said Province " and " any

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Lands *therein now* actually occupied or enjoyed by such Natives ". In my opinion it is an impossible construction of the proviso that the word " lands " should include land which, though not then part of the Province, might at any time thereafter be added to it, and that the words " aboriginal natives " should have a corresponding meaning.

But even if such wider construction can be accepted, I still do not see how the proviso can be construed to have the effects which are pleaded. It is said (cl. 19 of the statement of claim) that " Upon the annexation of the Northern Territory to South Australia the proviso to the Letters Patent . . . operated to make the said rights of enjoyment and occupation by the said clans of their respective portions of the said land cognizable by, and subject to the protection of, British and South Australian law ". But whatever happened in 1863 to make the proviso affect the rights of the plaintiffs' predecessors on the subject land must have been something of the same kind as happened in 1836 to the rights of any aboriginals who then had a similar relationship to land in the Province as originally defined. Was this the creation of new rights or the preservation of existing rights ? The former alternative—the creation of new rights—is a construction which the proviso simply will not bear. " It sins against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment "—as Fletcher Moulton L.J. said in *R.* v. *Dibdin* (5). Even this rule will yield to a plainly contrary intention, but here I can find nothing of the sort. If the latter alternative is correct (that the effect was the preservation of existing rights) then the proviso does not provide the plaintiffs with an independent ground of claim. The real question is that which I have already decided, whether or not the rights are recognized at common law.

The plaintiffs also pleaded (par. 20A of the statement of claim) that " the proviso . . . operated as a basic condition of the establishment of the Province and the affixation of its boundaries, its settlement . . . and the grant . . . of self-government, and in relation to the Aboriginal Natives of the Province it operated as a constitutional guarantee of their rights . . .". I have anxiously tried to understand this pleading and Mr. Woodward's submissions on it. I can come to only one conclusion : that the two limbs of the pleading just quoted, and the contention that the proviso had the effect of putting lands actually occupied by aborigines out of the boundaries of the Province for a limited purpose, all mean the same thing : that the legislative and executive authorities of the Province were to have no power to interfere with aboriginals' rights to enjoy land actually occupied by them.

(5) [1910] P. 57, at p. 125.

That the words of the Letters Patent do not naturally suggest this meaning appears to me to be self-evident. That the Government would have tried to effect such a result by an instrument in such terms seems unlikely. The strongest argument for such a construction seems to be that one is compelled to find some meaning for a proviso deliberately inserted into an instrument of such constitutional significance and solemnity, and no other meaning can be applied to it.

Mr. Woodward contended that the Court would be assisted in arriving at this construction if it were to consider the correspondence between the Secretary of State for the Colonies and the Commissioners appointed under the Act; this correspondence led to the insertion of the proviso. The correspondence was put before me in evidence. It shows that by December 1835, more than a year after the Act had been passed, the Commissioners were anxious that the Province should be established without delay and were urging that the necessary steps should be taken. In a letter written on behalf of the Secretary of State on 15th December to the Chairman of the Commission, the following passage occurred: " . . . the Act of Parliament presupposes the existence of a vacant Territory and not only recognizes the Dominion of the Crown, but the Proprietary right to the soil of the Commissioners or of those who shall purchase lands from them in any part of the Territory to be comprised within the Boundary Lines now to be drawn. Yet if the utmost limits were assumed within which Parliament has sanctioned the erection of this Colony, it would extend very far into the Interior of New Holland and might embrace in its range numerous Tribes of People, whose Proprietary Title to the Soil, we have not the slightest ground for disputing. Before His Majesty can be advised to transfer to His Subjects the property in any part of the Land of Australia he must have at least some reasonable assurance that He is not about to sanction any act of Injustice towards the Aboriginal Natives of that part of the Globe. In drawing the lines of demarcation of the new Province or Provinces, the Commissioners therefore, must not proceed any further than those limits within which they can show by some sufficient evidence, that the land is unoccupied, and that no earlier and preferable Title exists."

The Commissioners replied pointing out that in view of the terms of the Act, which included a recital that the whole area to which it related consisted of waste and unoccupied lands, it would have been inconsistent with their duty to have delayed providing the preliminary funds necessary to the erection of the colony until they had obtained evidence sufficient to prove the non-existence of any preferable claim to the soil on the part of the aborigines; moreover, that there was no financial provision for the obtaining of such evidence. They pointed out that formerly it had been

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assumed as an established fact that aboriginal tribes in Australia had not arrived at that stage of social improvement in which a proprietary right to the soil existed. They pointed out that they had a settled policy of benevolence towards the aboriginals, and they proposed that the difficulty should be overcome by giving precise and positive instructions to the Colonial Commissioner, their representative in the Province, not to colonize any district which the aborigines might be found occupying or enjoying or possessing any right of property in the soil. They then proceeded to recommend the insertion in the Letters Patent of a proviso reserving the right of the aboriginal natives to any lands of which they might then be in actual occupation or enjoyment. They enclosed a draft of Letters Patent which included a proviso in exactly the terms which were in fact adopted.

On 11th January, 1836, a reply was sent to the Commissioners on behalf of the Secretary of State, approving the proposed policy for dealing with the difficulty relating to the aboriginals, but expressing doubt whether the arrangements proposed were consistent with the terms of the Act. Indications were given of some of the amendments which seemed desirable, and it was suggested that the intention of the Government to seek amendments in the existing law should be communicated by " distinct written notice " to all persons who had made or should make contracts for the sale of lands with the Commissioners. The Commissioners by letter of 16th January acceded to these suggestions, and once again urged the great importance of the early issue of the Letters Patent so that embarkation for the Province could begin. The Letters Patent, as already mentioned, were issued on 19th February.

The correspondence is of course of great historical interest, but I am unable to see how resort can properly be had to it to assist in the construction of the Letters Patent. The instrument is in exactly the same position as an Act of Parliament in this respect; the rule that preparatory papers are inadmissible on the question of the construction of a statute is too well known to need authority. Mr. Woodward made a valiant effort to persuade me to treat this as a special case, on the basis that the arrangement so made between the Colonial Office, representing the Government, and the Commissioners who had a statutory duty under the Act, being considered by both parties as setting out the very terms upon which the colony was to be established, was such as to take this case outside the ordinary rule as to the construction of statutes and statutory instruments. I do not think this contention can possibly succeed.

Let it be assumed, however, that I am wrong in this ruling. Does the correspondence justify the construction of the proviso to the Letters Patent as establishing a constitutional limitation

upon legislative and executive powers in the Province? Upon my mind the effect is exactly the opposite. The Government appears to have been concerned to ensure that aboriginals would not be dispossessed from lands which they were occupying. It seems to me that if the intention had been to provide a constitutional limitation of the sort contended for by the plaintiffs, far more rigorous and explicit language would have been used to bring about that result. Instead of merely accepting a proviso submitted by the Commissioners to an instrument proposed to be issued under s. 1 of the Act, great care would have been taken to prepare an appropriately worded instrument under s. 2, which was the section empowering the establishment of a legislative authority. If, contrary to my opinion, I were allowed to have regard to the documents which show how the proviso came to be inserted in the Letters Patent, I would be confirmed in my opinion that the proviso was not intended to be more than the affirmation of a principle of benevolence, inserted in the Letters Patent in order to bestow upon it a suitably dignified status. The means whereby the Government intended to put its benevolent principles into effect were not a constitutional limitation, but the practical arrangements proposed by the Commissioners and approved by the Government, together with the expressed intention to make suitable amendments to the legislation.

Let it now be supposed that my conclusions on the true construction of the Letters Patent are wrong, and that the proviso does purport to establish a constitutional limitation of the kind contended for by the plaintiffs. What then arises is the question of the validity and effect of the proviso, both as an exercise of the power granted by the Act of 1834, and in the light of later legislation. It has already been pointed out that the Act under which the Letters Patent were sealed authorized the Commissioners to declare *all* the lands of the Province (excepting only portions which might be reserved for roads and footpaths) to be public lands, open to purchase by British subjects. The Commissioners duly exercised this power by order sealed on 5th February, 1836. I have already quoted the several provisions of ss. 6, 20, 23 and 25, which related to the public lands of the Province. It is impossible to see how, if the proviso to the Letters Patent is to be construed as either giving or preserving to any persons any proprietary rights in any lands of the Province, it was not repugnant to the express provisions of the Act, and thus invalid to that extent.

This conclusion is open to the formidable objection that before the Letters Patent were issued the draft was approved, in a joint opinion, by the Law Officers of the Crown, afterwards none other than Lord Campbell L.C. and Lord Cranworth L.C. I note, however, that they were instructed to advise whether there was any such objection to the *form* of the instrument as should prevent the

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Secretary of State from laying it before the King in Council, and that their advice was that there was no such objection to the form. I am not clear what was meant by " form " in this context ; it may be that this was merely the resolution of a doubt which had arisen about the proper nature of the instrument. Stephen in his memorandum had suggested a Commission under the Great Seal, as being in conformity with the " Ancient Constitutional Practice ". The official letter of 15th December, 1835, to the Chairman of the Commissioners suggested Letters Patent under the Great Seal. The Commissioners, perhaps less concerned with form than with substance, promptly submitted a draft of Letters Patent. However that may be, I venture to think it possible that, for whatever reason, the substantive compatibility of the proviso with various provisions of the Act was not considered by the Law Officers.

There is next the question of the effect of later legislation. The Act 4 & 5 Will. IV c. 96 was repealed by the Act 5 & 6 Vict. c. 61, which received assent on 30th July, 1842, and came into force in South Australia on 20th February, 1843. This Act contained a saving clause for all laws and ordinances passed under the authority of the repealed Act and all things lawfully done by virtue of the repealed Act. No doubt the Province would have remained validly established, with the boundaries which had been given to it, even without the saving clause. Its establishment was a " transaction passed and closed ", as Lord Tenterden C.J. said in *Surtees* v. *Ellison* (6), which is an exception to the general rule that " when an Act of Parliament is repealed, it must be considered as if it had never existed ". There remained, then, a Province validly established, and if Mr. Woodward's contention is correct, validly established with an in-built constitutional protection for the rights of certain aboriginals.

It can be argued with some weight that the Letters Patent were included in the meaning of the phrase " all laws and ordinances passed " in the saving clause. " The word ' ordinance ' has no technical signification ; it means no more than an instrument embodying an order or direction "—as Lord Herschell L.C. said in *Metcalfe* v. *Cox* (7). In that case the House of Lords held that an order made by a statutory body pursuant to an Act of Parliament was an " ordinance " within the meaning of the Act. It may, on the other hand, be said that the phrase " all laws and ordinances passed " refers only to legislation, whereas the Letters Patent had an executive, not a legislative, effect. The question would be important if the Solicitor-General's contention, that after the repeal of the Act 4 & 5 Will. IV c. 96 the Letters Patent could not possibly remain a source of protection for the rights of aboriginals, were crucial. But I do not think it is. The repealing

(6) (1829) 9 B. & C. 750, at p. 752; 109 E.R. 278, at p. 279.

(7) [1895] A.C. 328, at p. 338.

Act, 5 & 6 Vict. c. 61, contained in s. 5 a power for the Crown to establish a Legislative Council of appointed members " to make Laws for the Peace, Order and good Government of the said Colony ". By the Act 13 & 14 Vict. c. 59, s. 7, the legislature of the colony was empowered to establish a partly elective Legislative Council with power " to make Laws for the Peace, Welfare, and good Government " of the colony (s. 14). By s. 32 of the same Act the legislature of the colony was further empowered to provide for a legislature of two Houses, and to vest in them " the Powers and Functions of the Legislative Council for which the same may be substituted ". This provision is regarded as the foundation of the present constitution of South Australia : see the *Constitution Act*, No. 2 of 1855-1856 (S.A.) and the existing *Constitution Act*, 1934-1969 (S.A.). Furthermore, the *Commonwealth of Australia Constitution Act*, 1900 (U.K.), authorized the establishment of the Commonwealth with a Parliament which was to have power inter alia to " make laws for the government of any territory ", etc. (s. 122 of the Constitution).

The plaintiffs pleaded that the proviso to the Letters Patent of 1836 " was paramount to any repugnant legislation save an Act of the Imperial Parliament " (statement of claim, par. 20A (a)). In my opinion, the provisions of Imperial Acts which I have just set out, granting a succession of legislative powers effective over the subject land, necessarily imply the repeal of any constitutional limitation on legislative power contained in the proviso to the Letters Patent.

For all these reasons, I am clearly of opinion that the plaintiffs' contentions on the proviso to the Letters Patent of 1836 cannot succeed.

The Effect of the Lands Acquisition Act and Ordinances.

It was a major element in the plaintiffs' case that the *Minerals (Acquisition) Ordinance* 1953 of the Northern Territory was invalid. The bauxite ores, and the land in which they exist, had, on this argument, never ceased to belong to the plaintiffs. The *Mining (Gove Peninsula Nabalco Agreement) Ordinance* 1968 was thus also invalid. The operations of the defendant Nabalco Pty. Ltd. on the land were thus unlawful.

The argument rested upon the effect of the *Lands Acquisition Act* 1906 of the Commonwealth in its application to the Northern Territory. It was not disputed that minerals, existing in the land in their natural state, are within the definition of " land " in all relevant statutory provisions.

Section 51 of the Constitution empowered the Parliament to make laws with respect to " the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws ". The *Lands Acquisition*

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Act 1906 provided for a system whereby the Commonwealth could, by executive action, acquire land " for public purposes " (s. 13).

By virtue of the *Northern Territory Acceptance Act* 1910, ratifying the agreement made between the Commonwealth and the State of South Australia in 1907, the Northern Territory, formerly part of the State of South Australia, became a Territory of the Commonwealth, and the *Northern Territory (Administration) Act* 1910, which came into force at the same time, provided for its administration. By s. 7 of the *Northern Territory Acceptance Act* existing South Australian law in the Territory remained in force, subject to amendment or repeal by or under any law of the Commonwealth. The *Northern Territory (Administration) Act* contained, under a heading " Application of Commonwealth Acts ", five sections expressly providing for the application to the Northern Territory of certain statutory provisions of the Commonwealth. Among these was s. 9 : " The provisions of the *Lands Acquisition Act* 1906 shall apply to the acquisition by the Commonwealth, for any public purpose, of any lands owned in the Territory by any person. . . ." There followed a proviso relating to the method of valuation of such land. The proviso need not be set out here ; its effect was apparently to provide a somewhat less generous method of compensation than that provided in the original Act.

Section 9 was repealed by s. 4 of the *Northern Australia Act* 1926, but the latter Act was repealed by s. 3 of the *Northern Territory (Administration) Act* 1931, which, by s. 6, re-enacted s. 9 of the principal Act almost verbatim, with the same number. The *Lands Acquisition Act* 1906, with its amendments, was repealed and superseded by the *Lands Acquisition Act* 1955, but that fact does not affect the plaintiffs' argument.

The argument was that s. 9 amounted to a limitation of the power of the legislative authority for the Northern Territory so that that legislative authority could not validly enact legislation providing for the acquisition of, or actually acquiring, any land otherwise than in accordance with the *Lands Acquisition Act* as applied to the Northern Territory. The *Minerals (Acquisition) Ordinance* 1953 was thus ultra vires.

From 1910 to 1947 the legislative authority for the Northern Territory was the Governor-General in Council ; his powers were derived from s. 13 of the *Northern Territory (Administration) Act* 1910, which was re-enacted as s. 21 of the *Northern Territory (Administration) Act* 1931. The essential part of this provision was as follows : " Until the Parliament makes other provision for the government of the Territory, the Governor-General may make Ordinances having the force of law in and in relation to the Territory." In 1947 the Act was amended to provide for a Legislative Council, to which power was granted by the following section :

"4c. Subject to this Act, the Council may make Ordinances for the peace, order and good government of the Territory."

The argument for the plaintiff necessarily involved an attack on a decision of Bridge J. in this Court in *Kean* v. *The Commonwealth* (8). In that case also, the validity of the *Minerals (Acquisition) Ordinance* 1953 was attacked upon the ground (inter alia) that it was inconsistent with s. 9 of the *Northern Territory (Administration) Act*, which limited the legislative power of the Legislative Council. The answer given by Bridge J. (at p. 441) was this: "I can see nothing so exclusive in the application of the *Lands Acquisition Act* 1906-1916 to the Territory on 22nd April, 1953, as to preclude Commonwealth acquisition of Territory land by or under another law of the kind embodied in the *Minerals (Acquisition) Ordinance* 1953. The *Lands Acquisition Act* 1906-1916, far from exclusively covering the entire acquisition field, provides for acquisition being effected through the executive by means of either voluntary agreement or compelling powers: *Commonwealth* v. *New South Wales* (9). The *Minerals (Acquisition) Ordinance* 1953 operates quite differently in effecting the acquisition itself as a direct legislative process without resort to executive action of any kind. This method, being quite outside the ambit of the *Lands Acquisition Act* 1906-1916, remained open as an alternative to anything available under that Act. Hence each piece of legislation has had a mutually independent existence."

If I understand this reasoning correctly, it assumes that s. 9 of the *Northern Territory (Administration) Act* does provide a limit to the legislative power of the Legislative Council, and proceeds to hold that such limit was not exceeded by the *Minerals (Acquisition) Ordinance* because, on their true construction, the *Lands Acquisition Act* and the *Minerals (Acquisition) Ordinance* are not inconsistent. I agree with this view of the construction of the two statutes. To me, however, it appears that it is not necessary to resort to this argument. In my opinion s. 9 of the *Northern Territory (Administration) Act* is not in itself a limitation on the legislative power of the Legislative Council. As Bridge J. said in another case, *Reg.* v. *Lampe*; *Ex parte Maddalozzo* (10), the legislative power of the Legislative Council is "plenary". The effect of s. 9 of the *Northern Territory (Administration) Act* is in my opinion no more than the application of the *Lands Acquisition Act* to the Northern Territory. No doubt, the Northern Territory Legislative Council could not validly enact anything directly contradictory of s. 9, as for example a provision that the *Lands Acquisition Act* should have no application to the Northern Territory. But the invalidity of such a provision would stem not from s. 9 of the *Northern Territory (Administration) Act*, but from the

(8) (1963) 5 F.L.R. 432.
(9) (1923) 33 C.L.R. 1, at p. 55.
(10) (1963) 5 F.L.R. 160, at p. 170.

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constitutional impotence of the Legislative Council of the Northern Territory to repeal a provision of the legislature which created it, namely the Parliament of the Commonwealth. That Parliament has provided that the *Lands Acquisition Act*, with a certain proviso, shall apply in the Northern Territory. There is no reason why the Legislative Council could not validly enact, say, that another scheme of land acquisition should also be in force in the Northern Territory. Such a provision might well not receive the assent of the Administrator or the Governor-General, but that is beside the point; it would be a valid exercise of legislative power. Indeed, a not dissimilar legislative exercise has in fact been performed. The *Lands Acquisition Ordinance* 1911 of the Northern Territory contained this provision: "2. Subject to this Ordinance, the *Lands Acquisition Act* 1906 . . . shall apply to the acquisition by the Commonwealth of land in the Northern Territory for any public purpose of the Territory." The Ordinance proceeded to make various special provisions relating to the application of the Act to the Territory, including, for example, s. 5: "Section fifty-one of the Act shall not apply in the case of land acquired under the Act and this Ordinance. . . ." If the *Minerals (Acquisition) Ordinance* is beyond power, so must surely be any attempt by the legislature of the Territory to vary the provisions of the *Lands Acquisition Act*.

Some comfort might be derived by the plaintiffs from the words "subject to this Act" in s. 4c of the *Northern Territory (Administration) Act* 1947; it might be said that the phrase is an indication that Parliament did intend that the legislative power of the Legislative Council was to be limited by (inter alia) s. 9 of the Act. It seems to me that even if the words "subject to this Act" are intended to affect, substantively, the power of the Legislative Council, nevertheless they add nothing to s. 9. If the words of s. 9 do not provide a limit to the legislative power of the Council, the phrase "subject to this Act" does not take the matter any further. But in any event I agree with what Bridge J. said in *Lampe's* case, that the phrase is a limitation, not on the legislative power of the Council, but on the manner of its exercise.

Mr. Woodward urged upon me that in construing s. 9 I should bear in mind the traditional hostility of the law and of Parliament itself to the arbitrary acquisition of private property; the doubts which were expressed in *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (11) whether the prerogative power to acquire compulsorily was ever exercised without compensation; and what he called the political and constitutional importance of the subject. In the light of all this, he said, Parliament must have intended s. 9 to be a code for the control of acquisition in the Northern

(11) [1920] A.C. 508.

Territory, and a limit upon the power of the legislature to acquire in any other way. I cannot, however, regard these considerations as weighty enough to displace the view that the sections headed "Application of Commonwealth Acts" (of which s. 9 is one) were intended to make legislative provision, in their respective fields, for the Territory, but not to restrict the scope of the legislative power of the Governor-General under s. 13, or of the Legislative Council under s. 4U.

I hold, therefore, that nothing in the *Northern Territory (Administration) Act* 1910, as amended, invalidates the *Minerals (Acquisition) Ordinance* 1953. Even if I am wrong in my view of the proper construction of s. 9 of the *Northern Territory (Administration) Act*, and even if it does put a substantive limit upon the legislative power of the Legislative Council, so that the Council may not validly provide for any other system of acquisition of land, nevertheless I would still hold that the *Minerals (Acquisition) Ordinance* 1953 is valid, because I agree with the distinction made by Bridge J. in *Kean's* case (12) between a system of land acquisition by executive action and acquisition by the direct effect of a statute. The *Lands Acquisition Act* provides the former: the *Minerals (Acquisition) Ordinance* is an example of the latter.

The Solicitor-General put another argument in favour of the validity of the Ordinance, based on the words "any public purpose" in s. 9 of the *Northern Territory (Administration) Act* 1950 and on legislation passed subsequently. No definition of the phrase was given in the *Northern Territory (Administration) Act*, but the *Lands Acquisition Act* 1906 defined it as "any purpose in respect of which the Parliament has power to make laws". Parliament has such power under Pt. V of Ch. I of the Constitution, and land acquired in a State must be acquired for a purpose referable to that Part. I call such a purpose, arbitrarily, "a non-Territory purpose". Parliament also has power to make laws under s. 122 of the Constitution, and I give the arbitrary label "a Territory purpose" to a purpose which is referable to s. 122 but not to Pt. V of Ch. I. The two categories so defined are mutually exclusive. Obviously, Parliament has power to make laws for the acquisition of land in a Territory, for either Territory or non-Territory purposes: *Tau* v. *The Commonwealth* (13).

There are no express indications in the *Lands Acquisition Act* 1906 that the Act was to apply to Territories of the Commonwealth. In this particular argument the Solicitor-General contended that no reference to a Territory could be implied. The words "any purpose in respect of which the Parliament has power to make laws" were to be read as if the words "under Part V of Chapter I of the Constitution" followed them. The Act thus

(12) (1963) 5 F.L.R. 432.

(13) (1969) 44 A.L.J.R. 25.

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had no application to land in a Territory, and as applied by the *Northern Territory (Administration) Act* 1910 it authorized acquisition only for non-Territory purposes, since the meaning of "public purpose" in the latter Act must be assumed to be the same as in the former. The enactment of the *Lands Acquisition Ordinance* 1911, the Solicitor-General argued, was a fresh exercise of legislative power, extending the system of acquisition to purposes to which it had not before been extended, namely Territory purposes. Section 3 of the Ordinance read :

"3. In the application of the Act to the acquisition of land in pursuance of this Ordinance— . . . (*b*) Any reference in the Act to any public purpose shall be read as including any purpose of a public nature in connexion with the Government of the Territory. . . ."

This deliberate extension of the permissible purposes of land acquisition showed, the Solicitor-General contended, that before the passing of the Ordinance the power to acquire land even in the Territory was limited to acquisition for a non-Territory purpose. Moreover, a much later statute (this time an Act of the Parliament) demonstrated the same thing : the *Darwin Lands Acquisition Act* of 1945. Here the words "the Act" meant the *Lands Acquisition Act* "as applied by the *Lands Acquisition Ordinance* 1911-1926 of the Territory, subject to any modifications of that Act in its application to the Territory made by that Ordinance or by any other Ordinance of the Territory . . . ". The Act provides that land in Darwin "may be acquired . . . in accordance with the provisions of the Act, for either or both of the following purposes which shall be deemed to be public purposes of the Territory, namely :—(*a*) The re-planning and development of the Town of Darwin and its environs ; and (*b*) The institution of a system of leasehold tenure from the Crown in respect of any such land ". This, said the Solicitor-General, showed clearly that Parliament itself considered that the *Lands Acquisition Act* 1906, even after the passing of s. 9 of the *Northern Territory (Administration) Act*, did not authorize the acquisition of land in the Territory for a Territory purpose.

No question, therefore, arose of any inconsistency between s. 9 and the *Minerals (Acquisition) Ordinance* 1953. The widest possible scope of s. 9, as a limitation of the power of the legislature of the Northern Territory, was the field of acquisition for a non-Territory purpose. The *Minerals (Acquisition) Ordinance* was an enactment in a different field, that of acquisition for a Territory purpose, and in this field Parliament had placed no limit on the power of the Northern Territory legislature.

I have already given reasons, which appear to me to be sufficient, for holding that the *Minerals (Acquisition) Ordinance* 1953 is

valid. I reach that conclusion without reliance on this argument, which does not satisfy me. There is surely no reason in principle why, in 1906, Parliament should not have enacted legislation in terms wide enough to be applied to a Territory after its acquisition by the Commonwealth. There seems to me no good reason for restricting the meaning of words which are not on their face obscure. Why cannot "any purpose in respect of which the Parliament has power to make laws" mean "a non-Territory purpose where the land in question is in a State, and a non-Territory or a Territory purpose where the land in question is in a Territory"? The constitutional power to pass the Act (so construed) was s. 51 in so far as the Act applied to land in a State, and s. 122 in so far as it applied to land in a Territory.

The "any public purpose" in s. 9 of the *Northern Territory (Administration) Act* 1910 therefore included both Territory and non-Territory purposes. I do not think that it is an answer to this view to say that the *Lands Acquisition Ordinance* 1911 of the Northern Territory, and the *Darwin Lands Acquisition Act* 1945, suggest the contrary. I do not think I am entitled to draw inferences, from an Ordinance made by the Executive, as to the earlier intention of the Parliament itself; and in principle an Act of 1945 cannot govern the construction of an Act of 1910 even if these two could be said to be in pari materia. But apart from all this, there is s. 3 (3) of the *Northern Territory (Administration) Act* 1955: "It is hereby declared that the reference to any public purpose in section nine of the *Northern Territory (Administration) Act* 1910, or of that Act as amended at any time before the commencement of this Act, included a reference to any purpose in relation to the Northern Territory."

The Solicitor-General's argument apparently was that this enactment of 1955 should not deter me from deciding what, as a matter of history, s. 9 of the *Northern Territory (Administration) Act* 1910 meant at the time when the *Minerals (Acquisition) Ordinance* was passed in 1953. I do not think that this view is open to me as a judge deciding this case in 1971, whatever I may think as a matter of history. Section 3 (3) of the 1955 Act operates, in my opinion, as a command by the legislature to the Court to treat s. 9 as always having meant what it is there said to mean. In *Attorney-General* v. *Marquis of Hertford* (14) Parke B. said: "... the Act, though not expressly mentioned to be so, yet, by way of construction, is declaratory of an antecedent Act, which is placed within the operation of the present Act; so that we must treat as part of it all cases falling within the antecedent Act. ..." A fortiori I must do likewise here, for s. 3 (3) of the 1955 Act is expressed to be declaratory of the 1910 Act, and the verb used

(14) (1849) 3 Ex. 670, at p. 685; 154 E.R. 1014, at p. 1021.

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(" included ") is in the past tense. The fact that there are indications, in legislation passed between 1910 and 1955, that a different view has been taken, even by Parliament itself, of the meaning of s. 9, is in my opinion immaterial.

The independent validity of the Mining (Gove Peninsula Nabalco Agreement) Ordinance.

One further argument was put by the Solicitor-General to justify the validity of the *Mining (Gove Peninsula Nabalco Agreement) Ordinance* 1968, on the assumption that all the issues already discussed were to be decided against the defendants; that is to say, even if the plaintiffs had, in the land and in the bauxite ores, proprietary interests which had not previously been validly destroyed or acquired by the Commonwealth. The argument was simply that notwithstanding that the Commonwealth had no interest and thus could not pass any interest to Nabalco, nevertheless the " leases " which it purported to grant, being validated by the Ordinance, were effective at least to make Nabalco's actions lawful, or perhaps to create proprietary interests in Nabalco. Such " leases ", it was contended, were analogous to those granted under Pt. VII of the *Mining Ordinance* 1939-1970 of the Northern Territory, which deals with mining on private land; or to those granted under such provisions as s. 60 and s. 70B of the *Mining Act*, 1906, as amended, of New South Wales. These latter provisions were discussed and explained by the High Court in *Wade* v. *N.S.W. Rutile Mining Co. Pty. Ltd.* (15) and especially by Windeyer J. at pp. 252-253. The importance of these provisions, his Honour said," is as an inroad upon basic legal principle ". They authorize the grant of leases by the Crown over land and minerals in which the Crown has no interest. The language is irrational, but the provisions are effective to create rights in the " lessees ". It is unnecessary for me to discuss whether in strictness the rights so created are proprietary rights or merely statutory immunities from suit in trespass and conversion. In either case, the result is certainly one which is within the law-making power of Parliament under s. 122 of the Constitution and of the Legislative Council under s. 4U of the *Northern Territory (Administration) Act*: *Tau* v. *The Commonwealth* (16), which overrules the contrary decision of this Court in *Kean* v. *The Commonwealth* (17). To this argument the *Lands Acquisition Acts* are irrelevant, because they deal with acquisition by the Commonwealth; at the most, the question is one of acquisition by a subject (Nabalco).

Mr. Woodward contended, in reply to this argument, that the defendants must take their stand on the principle that the *Mining (Gove Peninsula Nabalco Agreement) Ordinance* 1968 operated

(15) (1969) 43 A.L.J.R. 247.
(16) (1969) 44 A.L.J.R. 25.
(17) (1963) 5 F.L.R. 432.

in the manner in which it purported to operate. He distinguished provisions of the kind which were in question in *Wade's* case on the ground that they were by their very terms anomalous, in expressly creating rights in "lessees" by virtue of documents described as "leases" notwithstanding that the so-called lessor had no interest in the land or the minerals leased. The *Mining (Gove Peninsula Nabalco Agreement) Ordinance* 1968, on the other hand, was based on the assumption that the Crown had rights to grant to Nabalco. It was therefore not in terms anomalous, and should not be construed to have any anomalous effect.

Mr. Woodward took a further point, that even if the Ordinance were effective to create mineral leases, its anomalous effect must be limited to that. This, he said, is a recognized legislative device in the field of mining law, and should not be extended so as to validate the granting of special purposes leases (e.g., for the setting up of a treatment plant for bauxite). But I do not think this contention is sound. The effect of provisions of the kind referred to in *Wade's* case does not depend on a special concession which the courts have decided to make in the field of mining law, but on the words of the statutes.

In my opinion this argument of the Solicitor-General was correct, and is a further justification for the validity of the *Mining (Gove Peninsula Nabalco Agreement) Ordinance* 1968. That Ordinance is in principle closely analogous to Div. 4A of Pt. IV of the *Mining Act* of New South Wales, which is explained by Windeyer J. at p. 253 in *Wade's* case. The difference, which is not material, is that the Ordinance deals with one particular lessee. Section 6 of the Ordinance provides in effect that the Minister may grant leases to the company. Subsection (2) is important: "Any lease ... has effect according to its terms." The New South Wales provisions are general, not particular, but their method of operation is the same. Mr. Woodward was right in saying that the anomalous effect is plain on the face of the New South Wales provisions, but latent in the Northern Territory Ordinance because the latter is founded on the assumption that the Commonwealth had an interest to grant. But there is no principle, so far as I am aware, which enables a court to declare a statute inoperative on the ground that it is founded on a mistake of law.

This is the point at which I must deal with a contention of Mr. Woodward's, based on one of his basic propositions, namely that communal native title can be extinguished only by express enactment and not by implication. I have elsewhere referred to this as an argument which the plaintiffs relied on as being independent of the *Lands Acquisition Act*.

By postulating a rule that extinction of communal native title must be express, Mr. Woodward was able to contend that the Nabalco leases were simply ineffective; they passed no interest

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to Nabalco because the communal native title to the subject land had never been *expressly* extinguished. This argument, of course, must still involve the contentions that the *Minerals (Acquisition) Ordinance* and the *Mining (Gove Peninsula Nabalco Agreement) Ordinance* were invalid to affect the plaintiffs' title to the bauxite in the subject land. The ground of their invalidity is simply the " fundamental " rule that extinction of native title must be by express legislation. To carry the argument to that length, it must be said that the doctrine of communal native title is beyond the reach of the ordinary concept of " necessary implication ". In other words, a provision that " the communal native title to Blackacre is hereby extinguished " is valid, but one which says " Blackacre henceforth belongs to John Doe " is invalid. The doctrine of communal native title, Mr. Woodward contended, is " more fundamental ".

I think that there can be no substance in this argument. I can find no authority for the proposition that the extinction of native title, if by enactment, must be by express enactment. There may be dicta in such cases as *Johnson* v. *M'Intosh* (18) and *Reg.* v. *Symonds* (19) from which something of the sort could be implied, if the dicta were taken in isolation; but there is certainly no decision to that effect. Mr. Woodward also relied on the proviso to the South Australian Letters Patent in this argument, but for reasons already given, in my opinion this does not help him.

To put the matter as one of construction—as might be argued—that the court will lean against a construction of a statute which entails the extinction of communal native title—will hardly do, because the *Minerals (Acquisition) Ordinance* 1953 is expressed to affect all minerals which were not the property of the Crown or of the Commonwealth. If the words " or the communal property of the natives " are to be implied as a matter of construction, it can only be because there is a *special* rule of construction applicable to communal native title—a rule for which authority is equally lacking. Similarly, the words " any . . . lease has effect according to its terms " in s. 6 (2) of the *Mining (Gove Peninsula Nabalco Agreement) Ordinance* are impossible to construe otherwise than as an abrogation pro tanto of whatever rights the plaintiffs had.

I would reach these conclusions, I think, without regard to s. 12 of the *Mining (Gove Peninsula Nabalco Agreement) Ordinance*, but that section strongly fortifies me: " This Ordinance prevails over any inconsistent statute or rule or practice of law or equity."

I must therefore hold that the *Mining (Gove Peninsula Nabalco Agreement) Ordinance* 1968 is in itself a complete answer to the plaintiffs' claims.

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(18) (1923) 8 Wheaton 543. (19) (1847) N.Z.P.C.C. 387.

Conclusion.

For the reasons given, my decision must be for the defendants. I do not rely on any reason in particular, but on all those given which support my conclusion.

All the prayers for relief must be refused. Mr. Woodward also asked for an injunction in aid of future rights, having in mind the possibility that further leases over the subject land may be granted to Nabalco. I am inclined to think that this would be an appropriate case for such relief, if such leases would infringe any right of the plaintiffs, but no such right has been established.

I am most grateful to counsel for their assistance in this heavy case, which I know is of great importance to all parties. I cannot help being specially conscious that for the plaintiffs it is a matter in which their personal feelings are involved.

I express my admiration of the manner in which all counsel conducted their cases and of the work which must have been done by those instructing them.

The action is dismissed. At the request of counsel the question of costs is reserved.

Order accordingly.

Solicitors for the plaintiffs : *Purcell & Purcell.*

Solicitors for the first defendant : *Dudley Westgarth & Co.*

Solicitor for the second defendant : *R. B. Hutchison* (Commonwealth Crown Solicitor).

A.J.L.

[IN THE SUPREME COURT.]

S.C.
AUCKLAND.
1847.
MARTIN, C.J.
H. S. CHAPMAN, J.

THE QUEEN (ON THE PROSECUTION OF C. H. McINTOSH) v. SYMONDS.

Constitutional Law—Powers of Governor—Validity of Proclamations Waiving Pre-emption—Land Claims Ordinance, 1841, Sess. I, No. 2—Nature of Native Title—Treaty of Waitangi—Australian Waste Lands Act, 1842 (Imp.), 5 & 6 Vict., c. 36.

At common law the Crown is the exclusive source of private title. The Land Claims Ordinance, 1841, enunciates the same principle. Courts—*sc.*, subject to the rules of prescription—can therefore not 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.

The Governor derives his authority partly from his Commission, and partly from the Royal Charter of the Colony.

From the rule that the Crown has the exclusive right of acquiring new territory, and that whatsoever the subject may acquire vests in the Crown, flows the rule that the Crown has the exclusive right of extinguishing the Native title to land.

Purchases of land by subjects from Natives are good against the Native seller—*sc.*, subject to legislative provisions—but not against the Crown. Subject to the rights of the Crown, the Natives may deal in their land amongst themselves.

The Crown's exclusive right to extinguish title is more than such a pre-emptive right of first refusal as would import a right (after refusal) for others to buy.

Quaere, What estate the Crown has in the land previous to the extinguishment of Native title.

The Proclamations of March 26, 1844, and October 10, 1847, waiving the Crown's right of pre-emption (*Government Gazette*, 1844, pp. 68, 160) were made in evasion of the Australian Waste Lands Act, 1842 (Imp.), 5 and 6 Vict., c. 36, and cannot be acted upon.

With the true meaning of the Treaty of Waitangi, as it stands in the Maori language, the Court has no concern. The right of the Crown to land in New Zealand, as between the Crown and British subjects—*sc.*, other than Maori—is not derived from the Treaty nor could the Treaty alter it.

SUIT upon Scire Facias. The claimant's title to the land was an assurance from Natives upon a purchase from them coupled with a certificate from the Governor purporting to waive in the claimant's favour the Crown's exclusive right of acquiring the land. The defendant's title was a grant from the Crown under the Public Seal.

Bartley, for the claimant.

Swainson, Attorney-General, for the defendant.

CHAPMAN, J. This case comes before the Court upon demurrer to a declaration in a suit upon a writ of *Scire Facias*—whereby the party suing out the writ seeks to set aside a grant from the Crown, made under the public seal of the Colony to the defendant, on the ground that the claimant has a prior valid title to the same land, by virtue of a

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certain certificate, whereby, it is alleged, the late Governor waived, in the present claimant's favour, the Queen's exclusive right of acquiring the land in question from the Natives.

The question which this Court has to determine is, Did the claimant, Mr. C. Hunter McIntosh, acquire by the certificate and his subsequent purchase (admitted to have been in all respects fair and *bona fide*) such an interest in the land, as against the Crown, as invalidates a grant made to another, subsequently to the certificate and purchase?

As this question involves principles of universal application to the respective territorial rights of the Crown, the aboriginal Natives, and the European subjects of the Queen; as moreover its decision may affect larger interests than even this Court is up to this moment aware of, I think it is incumbent on us to enunciate the principles upon which our conclusion is based with more care and particularity than would, under other circumstances, be necessary.

The intercourse of civilized nations, and especially of Great Britain, with the aboriginal Natives of America and other countries, during the last two centuries, has gradually led to the adoption and affirmation by the Colonial Courts of certain established principles of law applicable to such intercourse. Although these principles may at times have been lost sight of, yet 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 the colonial Governments, have concurred to clothe with certainty and precision what would otherwise have remained vague and unsettled. These principles are not the new creation or invention of the 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; and they are in part deduced from those higher principles, from charters made in conformity with them, acquiesced in even down to the charter of our own Colony; and from the letter of treaties with Native tribes, wherein those principles have been asserted and acted upon.

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 year-book—M. 24, Edw. III—"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; it pervades and animates the whole of our jurisprudence in relation to the tenure of land; and so *protective* has it been found, that although strictly a prerogative rule, the Republican States of America, at least all those States which recognize the common law as the origin and basis of their own municipal laws, have found it expedient, if not necessary, to adopt it into their jurisprudence: *Kent's Commentaries*, vol. iii, Part vi, lecture 51.

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 rules 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. This mode of verification is nothing more than a full adoption and affirmation by the colonial Courts of the rule of English law; "that (as well for the protection "of the Crown, as for the security of the subjects, and on account of "the high consideration entertained by the law towards Her Majesty)

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"no freehold, interest, franchise, or liberty can be transferred by the "Crown, but by matter of record"—*Viner Abr. Prerog.*; *Bac. Abr. Prerog.*—that is to say, by letters patent under the great seal in England, or (what is equivalent thereto in the Colony) under the public colonial seal. In the instruments delegating a portion of the royal authority to the Governors of colonies, this state of the law is without any exception, that I am aware of, universally and necessarily recognized and acted upon. In some cases the authority and powers of the Governor are set out in his Commissions—*Quebec Commissions by Baron Mazeres*, 4to., 1772—but in this Colony the Governor derives his authority partly from his Commission, and partly from the Royal Charter of the Colony—*Parl. Paper*, May 11, 1841, p. 31—referred to in and made part of such Commission. In this Charter, we find the invariable and ancient practice followed: the Governor, for the time being, being authorized to make and execute in Her Majesty's name, and on her behalf, *under the public seal of the Colony*, grants of waste lands, &c. In no other way can any estate or interest in land, whether immediate or prospective, be made to take effect; and this Court is precluded from taking notice of any estate, interest, or claim, of whatsoever nature, which is not conformable with this provision of the Charter; which in itself is only an expression of the well-ascertained and settled law of the land.

Here, under ordinary circumstances, I think we might stop. On the one hand, the defendant has a grant from His Excellency the Governor, complying in all respects with the law, which grant is not impeached upon this record on any one of the grounds upon which grants are liable to be repealed. There is no allegation, on the part of the adverse claimant, of any illegality, uncertainty, mistake, misdescription, misinformation, or deception: *2 Bl. Comm.* 348; *Co. Lit.* 5, 6; *Gladstanes* v. *Earl of Sandwich*(1). On the other hand, the claimant founds his title on an instrument not under the seal of the Colony, having none of the features of a patent, and therefore not complying either with the common law, or with the Charter of this Colony, framed evidently with special reference thereto.

But the peculiar character of the instrument under which Mr. McIntosh claims, being the act of the late Governor of the Colony, whose acts ought to be supported, if not repugnant to the law of the land, and issued in conformity with a Proclamation, with which it is admitted the claimant has faithfully complied, demands that we should go further, and examine the validity of his claim upon its own intrinsic merits.

It seems to flow from the very terms in which the principle, "that the Queen is the only source of title," is expressed, that no subject can for himself acquire new lands by any means whatsoever. Any acquisition of territory by a subject, by conquest, discovery, occupation, or purchase from Native tribes (however it may entitle the subject, conqueror, discoverer, or purchaser, to gracious consideration from the Crown) can confer no right on the subject. Territories therefore, acquired by the subject in any way vest at once in the Crown. To state the Crown's right in the broadest way: it enjoys the exclusive right of acquiring newly found or conquered territory, and of extinguishing the title of any aboriginal inhabitants to be found thereon. Anciently private war was not unusual. The history of Sir Francis Drake is an instance of a subject acquiring territory for the Queen, by a mixture of conquest and discovery, without a Commission. In like manner an accidental discovery is taken possession of, not for the benefit of the discoverer himself, but for that of the Crown. The rule, therefore, adopted in our colonies, "that the Queen has the exclusive right of extinguishing the Native "title to land," is only one member of a wider rule, that the Queen has the exclusive right of acquiring new territory, and that whatso-

(1) (1842) 4 Man. & G. 995; 134 E.R. 407.

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ever the subject may acquire, vests at once, as already stated, in the Queen. And this, because in relation to the subjects, the Queen is the only source of title.

As to the practical consequence that the Queen may lawfully oust any subject who attempts to retain possession of any lands he has acquired, it is a power which has often been exercised. The settlement of New Haven (now part of Connecticut) is an early case. Connecticut had originally been colonized under a royal grant to Lord Say and Sele. New Haven was settled by people from Connecticut, who purchased from the Indians; yet that title was not recognized, and a new charter was obtained from Charles II, incorporating New Haven with Connecticut. The early settlements of Port Philip are equally in point. The opinions of eminent lawyers were without exception against the claims of the purchasers, and, as in New Zealand, the claimants were glad to take a Crown grant of a portion of their acquisitions, leaving a large portion of territory in the hands of the Crown. To say that such purchases are absolutely null and void, however, is obviously going too far. If care be taken to purchase off the true owners, and to get in all outstanding claims, the purchases are good as against the Native seller, but not against the Crown. In like manner, though discovery followed by occupation vests nothing in the subject, yet it is good against all the world except the Queen who takes. All that the law predicates of such acquisitions is that they are null and void as against the Crown: and why? because "the Queen is the exclusive source of title."

The practice of extinguishing Native titles by fair purchases is certainly more than two centuries old. It has long been adopted by the Government in our American colonies, and by that of the United States. It is now part of the law of the land, and although the Courts of the United States, in suits between their own subjects, will not allow a grant to be impeached under pretext that the Native title has not been extinguished, yet they would certainly not hesitate to do so in a suit by one of the Native Indians. In the case of the *Cherokee Nation* v. *State of Georgia*(2) the Supreme Court threw its protective decision over the plaintiff-nation, against a gross attempt at spoliation; calling to its aid, throughout every portion of its judgment, the principles of the common law as applied and adopted from the earliest times by the colonial laws: *Kent's Comm.* vol. iii, lecture 51. Whatever may be the opinion of jurists as to the strength or weakness of the 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, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It follows from what has been said, that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice any thing new and unsettled.

Mr. *Bartley* contends that all that the Natives convey to the Queen by the Treaty of Waitangi is a right to have the first offer of the land, or, say, in one word, the refusal, a conclusion which he draws from the etymological structure of the word pre-emption. There can be no doubt that according to the strict meaning of the word, the right of "buying before" others connotes the existence of a right residing in others to buy after refusal by him who has the pre-emptive right. But the right which resides in the Crown is, as we have seen, the exclusive right of extinguishing the Native title. Mr. *Bartley's* criticism is therefore rather philological than legal. It

(2) (1831) 5 Peters 1.

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amounts to this, that the Crown's right is loosely named; that the word pre-emption is not the one which ought to have been chosen. Be that as it may, the Court must look at the legal import of the word, not at its etymology. The word used in the Treaty is not now used for the first time. If it were so, it perhaps might be contended that a limited right being expressed the larger right is excluded. But the framers of the Treaty found the word in use with a peculiar and technical meaning, and, as a short expression for what would otherwise have required a many-worded explanation, they were justified by very general practice in adopting it. No one now thinks of objecting to the use of the word sycophant, in its secondary meaning, because its true meaning is a "shower of figs."

The legal doctrine as to the exclusive right of the Queen to extinguish the Native title, though it operates only as a restraint upon the purchasing capacity of the Queen's European subjects, leaving the Natives to deal among themselves, as freely as before the commencement of our intercourse with them, is no doubt incompatible with that full and absolute dominion over the lands which they occupy, which we call an estate in fee. But this necessarily arises out of our peculiar relations with the Native race, and out of our obvious duty of protecting them, to as great an extent as possible, from the evil consequences of the intercourse to which we have introduced them, or have imposed upon them. To let in all purchasers, and to protect and enforce every private purchase, would be virtually to confiscate the lands of the Natives in a very short time. The rule laid down is, under the actual circumstances, the only one calculated to give equal security to both races. Although it may be apparently against what are called abstract or speculative rights, yet it is founded on the largest humanity; nor is it really against speculative rights in a greater degree than the rule of English law which avoids a conveyance to an alien. In this Colony, perhaps, a few better instructed Natives might be found who have reduced land to individual possession, and are quite capable of protecting their own true interest; but the great mass of the Natives, if sales were declared open to them, would become the victims of an apparently equitable rule; so true it is, that "it is possible to oppress "and destroy under a show of justice": *Hauctress*. The existing rule then contemplates the Native race as under a species of guardianship. Technically, it contemplates the Native dominion over the soil as 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.

In order to enable the Court to arrive at a correct conclusion upon this record, I think it is not at all necessary to decide what estate the Queen has in the land previous to the extinguishment of the Native title. Anciently, it seems to have been assumed, that notwithstanding the rights of the Native race, and of course subject to such rights, the Crown, as against its own subjects, had the full and absolute dominion over the soil, as a necessary consequence of territorial jurisdiction. Strictly speaking, this is perhaps deducible from the principle of our law. 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, 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. This extreme view has not been judicially taken by

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any colonial Court that I am aware of, nor by any of the United States' Courts, recognizing the principles of the common law. But in one case before the Supreme Court in the United States there was a mere naked declaration to that effect by a majority of the Judges. One of the Judges, however, differed from his brethren, he considering the Natives as absolute proprietors of the soil, with the single restriction arising out of the incompetency of all but the sovereign power to buy, and he treated what is commonly called the pre-emptive right as "a right to acquire the fee-simple by purchase when "the proprietors should be disposed to sell."

The Charters of the Stuarts certainly assumed the fee to be in the Crown, and they were never impeached on the ground that the King had conveyed a larger estate than he had in him, though attempts were often made to get rid of them. In spite of this assumption, the Native outstanding title was usually got in by purchase. The Charter to the New England Puritans in 1620 granted the land in fee, leaving it to the grantees to extinguish the Native title. In the case of William Penn, usually cited as a model of humanity and fair dealing, the Charter was granted in 1681; then Penn proceeded to settle the land; and lastly "the settlers having made and improved "their plantation to good advantage, Penn, in order to secure the "plantation from the Indians, appointed Commissioners to purchase "the land, &c.": *Encyclop. Brit.*, article "Penn." It was not until 1683 that Penn reached the Colony. *Vattel* sees no violation of law in this course. He and the writers before his time seem to have attached little weight to the Native title; and he cites the cases of Penn and the New Englanders as evidence of their moderation, rather than as fulfilling a condition necessary to the completion of their title and precedent to its full enjoyment: *Law of Nations*, Book I, c. xviii, para. 209.

But for more than a century certainly, neither in the British American colonies nor subsequently in the United States has it been the practice to permit any patent to pass the public seal of the Colony of States previous to the extinguishment of the Native title—*Collection of Indian Treaties*, Washington, 1837—a practice certainly far more conducive to the security of Native rights than the ancient practice. To part with the Crown's interest during the existence of the Native title, leaving it to the grantee to acquire that title, is obviously fraught with evil to both races, and with great inconvenience and perplexity to the colonial Governments.

Such are the principles in conformity with which, I conceive, this Court is bound to view the rights of the Crown, the Queen's European subjects, and Her Majesty's new subjects, respectively; and guided by their light, we are enabled to decide the question raised upon this record. 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.

I am also of opinion, after very carefully considering the statement of Mr. *Bartley*, and the apparent admission of the Attorney-General, that the want of compliance with the Australian Waste Lands Act, until lately in force in this Colony, would, even in the absence of a grant to the defendant, be a fatal defect in Mr. McIntosh's claim, and this on two grounds: First, notwithstanding the words "waste "lands of the Crown" may seem to import lands the title to which was complete, I think the language of s. 5, extending the formalities

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prescribed by the Act to "any less estate or interest," would be sufficient to include that interest which the Crown has in all the lands of the Colony; and that, consequently, a Proclamation made in evasion of the Act of Parliament cannot legally be acted upon; secondly, by Mr. McIntosh's purchase (assuming it to be a complete extinguishment of the title of all Native claimants) the land vests in the Crown, and so becomes part of the waste lands of the Crown, even in contemplation of the Attorney-General's distinction; and as such could only be alienated (so long as the 5 & 6 Vict., c. 36, was in force here) in strict compliance with its provisions.

For these reasons I think the judgment of the Court upon this record must be for the defendant.

MARTIN, C.J. The facts admitted in this case are the following: First, that a complete and honest purchase of the land now in question was effected by the claimant, Mr. McIntosh; and, secondly, that the purchase was made under and in conformity with a certificate issued by Governor Fitz Roy, as set forth on the record. Upon these two facts the claimant's case rests.

It may make the whole matter clearer to consider, in the first place, the legal effect of such a purchase, viewed by itself, and apart from the certificate or alleged authority.

Now the general law of England, or rather of the British colonial empire, in respect of the acquisition of lands, such as those which are comprised within the claimant's purchase and the defendant's grant, has from very early time stood as follows: Wherever, in any country to which (as between England and the other European nations) England had acquired a prior title by discovery or otherwise, there were found land lying waste and unoccupied, and the same came to be occupied and appropriated by subjects of the British Crown it was holden that such subjects did not and could not thereby acquire any legal right to the soil as against the Crown. And this rule was understood to apply equally, whether the country was partially peopled or wholly unpeopled and whether the settlers entered and obtained possession with or without the consent of the original inhabitants. Accordingly, colonial titles have uniformly rested upon grants from the Crown. This was the case in the oldest British colonies in America; and it is notorious that the same rule has been acted upon without deviation or exception in the more recent colonization of Australia.

Nor is the rule and practice of England only, but of all the colonizing States of Europe, and (by derivation from England) of the United States of America. The very full discussion of this subject in the judgment of my learned brother, Mr. Justice *Chapman*, renders it superfluous for me to enter further upon the question. I shall content myself with citing two passages from the well-known *Commentaries on American Law*, by Mr. Chancellor Kent, of the State of New York. I quote this book, not as an authority in an English Court, but only as a sufficient testimony that the principle contained in the rule of law above laid down—and which same principle, with no other change than the necessary one of form, is still recognized and enforced in the Courts of the American Union, is understood there to be derived by them from the period when the present States were Colonies and Dependencies of Great Britain. "The European "nations," says Mr. Chancellor Kent, Vol. 3, p. 379, "which respec- "tively established Colonies in America, assumed the ultimate "dominion to be in themselves, and claimed the exclusive right to "grant a title to the soil, subject only to the Indian right of occupancy. "The Natives were admitted to be the rightful occupants of the soil, "with a legal as well as just claim to retain possession of it and to use "it according to their own discretion, though not to dispose of the "soil at their own will, except to the Government claiming the right

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" of pre-emption." Again, in p. 385, after speaking of the " several " local governments both before and after " the American revolution, he says: " Those governments asserted and enforced the exclusive " right to extinguish Indian titles to lands inclosed within the exterior " lines of their jurisdictions, by fair purchase, under the sanction " of treaties; and they held all individual purchases from the Indian, " whether made with them individually or collectively as tribes, " to be absolutely null and void. The only power that could lawfully " acquire the Indian title was the State, and a Government grant " was the only lawful source of title admitted in the Courts of justice. " The *Colonial* and State Governments, and the Government of the " United States, uniformly dealt upon these principles with the Indian " nations dwelling within their territorial limits."

Now, at the very commencement of the colonization of this country, the same principle was distinctly enunciated. Section 2 of the Land Claims Ordinance of June, 1841 (Sess. 1, No. 2), declares and enacts that " the sole and absolute right of pre-emption from " the aboriginal inhabitants vests in and can only be exercised by " Her Majesty, Her heirs and successors, and that all titles to land " in the said Colony of New Zealand which are held or claimed by " virtue of purchases or gifts or pretended gifts, conveyances or pre- " tended conveyances, leases or pretended leases, agreements or other " titles, either mediately or immediately from the chiefs or other " individuals or individual of the aboriginal tribes inhabiting the said " Colony, and which are not or may not hereafter be allowed by her " Majesty, Her heirs and successors, are, and the same shall be, abso- " lutely null and void:" and, as if to carry the principle which I have mentioned to the extreme length, it is by s. 6 provided that even after the Commissioners acting under that Ordinance shall have reported in favour of any claimant, yet " nothing herein contained " shall be held to oblige the said Governor to make and deliver any such " grants as aforesaid, unless His Excellency shall deem it proper so " to do." In fact, if we pass in review the various provisions of this Ordinance, both as to the limitations and restrictions under which grants are to be made in any case, and as to the express directions that lands of certain descriptions shall not be proposed to be granted to any claimant whatsoever, we see throughout the Ordinance a distinct recognition and assertion of the doctrine just now stated. It is everywhere assumed that where the Native owners have fairly and freely parted with their lands the same at once vest in the Crown, and become subject wholly to the disposing power of the Crown. This Ordinance, whilst it asserts the Crown's absolute right of control and disposal over the purchased lands, and is careful to show that the recognition of the claims was not to be taken as an acknowledgment of any right in the purchasers as against the Crown, does at the same time clearly intimate the object with reference to which that power of control and disposal is to be exercised. It points to subjects of the Crown other than those purchasers, and whose interests would likewise demand consideration. Section 3 recites that " Her Majesty " hath been pleased to declare Her Majesty's gracious intention to " recognize claims to land, which may have been obtained on equitable " terms from the chiefs or aboriginal inhabitants or inhabitant of the " said Colony of New Zealand, and which may not be prejudicial " to the present or prospective interests of such of Her Majesty's " subjects who have already resorted, *or who may hereafter resort*, to " and settle in the said Colony." Moreover, the Ordinance closes with an express proviso " that nothing in this Ordinance contained " shall be deemed in any way to affect any Right or Prerogative of " Her Majesty, Her heirs or successors."

It may well be presumed that a rule so strict and apparently severe, and yet so generally received, must be founded on some principle of great and general concernment. And this presumption would be

strengthened by observing, that not only in England but also in the United States of America, not only in a country which retains many traces of the old feudalism, but also in a State which sways all things by the will of the majority of its individual citizens and in which, too, the business of colonization—the disposing of the public domain for the benefit of the nation—is made a regular and distinct branch of public Administration, this rule is yet most strongly recognized and enforced.

The principle is apparently this: that colonization is a work of national concernment, a work to be carried on with reference to the interests of the nation collectively; and therefore to be controlled and guided by the Supreme Power of the nation.

This rule may have had its origin in the feudal doctrine which vested the supreme dominion and ultimate ownership of all land personally in the Sovereign; but in modern times, and especially since the Domain of the Crown passed under the control of Parliament, it has acquired an enlarged significancy and importance. It is now understood that the waste lands of the Crown are to be administered for the national behoof upon an impartial and (so far as may be) a uniform system. This is expressed or implied in all the Statutes, Ordinances, and Instructions which have had reference to this Colony. Now, the Sovereign right of control, without which no uniform or general system would be possible, is secured by this rule. If a subject of the Crown could by his own act, unauthorized by the Crown, acquire against the Crown a right to any portion of the lands of a new country, it is plain that he might, acting upon that right, proceed to form a colony there. Now, the law of England denies to any subject the right of forming a Colony without the license of the Crown. And when we consider the complicated responsibilities which flow out of the existence of a colony, and which may seriously affect the power to which the settlers owe allegiance, and from which they expect to receive protection, and when we also estimate the means and appliances needed for successful colonization, that denial can scarcely fail to appear reasonable and necessary.

So soon, then, as the right of the Native owner is withdrawn, the soil vests entirely in the Crown for the behoof of the nation. To borrow the words of a very learned judgment recently pronounced by the Supreme Court of New South Wales, *Attorney-General* v. *Brown*(3): "In a newly-discovered country, settled by British subjects, the occupancy of the Crown with respect to the waste lands of that Colony is no fiction. If, in one sense, these lands be the patrimony of the nation, the Sovereign is the representative and the executive authority of the nation; the 'moral personality' (as Vattel calls him, *Law of Nations*, bk. 1, chap. 4) by whom the nation acts, and in whom, for such purposes, its power resides. Here is a property depending for support on no feudal notions or principle"(4).

It is true that the colonization of New Zealand has differed from the mode pursued in many of the older colonies. As was said by the learned Attorney-General, it has been distinguished by a practical advance of the doctrine that "Power has duties as well as rights." But the adoption of a more righteous and a wiser policy towards the Native people cannot furnish any reason for relinquishing the exercise of a right adapted to secure a general and national benefit. This right of the Crown, as between the Crown and its British subjects, is not derived from the Treaty of Waitangi; nor could that Treaty alter it. Whether the assent of the Natives went to the full length of the principle, or (as is contended) to a part only, yet the principle itself was already established and in force between the Queen and Her British subjects. The Treaty of Waitangi was made in February,

(3) (1847) 1 Legge 312 (4) *Ibid.*, 318.

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1840. The Land Claims Ordinance, on which I have already commented, was passed in June of the same year. There is no indication, then, of an abandonment of the principle.

This rule then does in substance and effect assert that, whenever the original Native right is ceded in respect of any portion of the soil of these Islands, the right which succeeds thereto is not the right of any individual subject of the Crown, not even of the person by whom the cession was procured, but the right of the Crown on behalf of the whole nation, on behalf of the whole body of subjects of the Crown; that the land becomes from the moment of cession not the private property of one man, but the heritage of the whole people; that accordingly no private right shall be recognized as interfering with the public and national right; that no single member of the nation shall have any power to impede in any way the progress and working of the plan ordained by the Supreme Authority of the nation for the nation's benefit. It is a rule which excludes all private interest, in order to maintain and vindicate a general and public good. It does not forbid a careful and equitable regard to the circumstances of particular cases (as in the instance of the original land claims) but it reserves the entire discretion to the Sovereign Power. It says nothing of the fitness or unfitness of the regulations or conditions under which the State may from time to time allow this property to be distributed and appropriated to individual citizens, but only that to the State shall belong the management and responsibility of such distribution. In general, it asserts nothing as to the course which shall be taken for the guidance of colonization, but only that there shall be one guiding Power.

The doctrine now laid down was not denied by the learned counsel for the claimant: rather, by the ingenuity spent in endeavouring to trace an authority for the issue of the pre-emption certificate, it appeared to be indirectly admitted. Therefore, in what I have said, I have gone beyond what it was strictly necessary to say; but this I have done partly because the rule appeared not to have been clearly understood, and partly because a previous comprehension of its meaning may be useful in the considerations to which we now pass.

The claimant, McIntosh, acquired then no title by the purchase alone? Did he acquire any by the purchase in connection with the certificate?

The claimant says he has purchased this land with the Queen's authority; that he has expended his money with her sanction; and, therefore, has a legal right to have the land so purchased granted to him. This he says, without alleging any objection to the grant, or to the conduct of the grantee, without suggesting any illegality or irregularity at all. Leaving the Court to assume (as in this state of things must be assumed) that the grant is in itself good and unimpeachable, he calls on the Court to set aside that grant upon such grounds alone as are disclosed on this record. Now, when any loss or injury has arisen to any subject from any breach of any contract or undertaking on the part of the Crown, the law prescribes a mode in which the wrong done to the subject may be not of course enforced against the Crown but brought under the consideration of the Crown to the end that justice may be done. But the claimant's proceeding is quite a different one. He asks that the defendant's property, which (for all that is now shown) has been rightfully acquired, be taken from him.

Now, as the case stands, the defendant has the best and highest title upon which a subject can rely, and that wholly unimpeached. What is the title which Mr. McIntosh opposes to this? It is the certificate set forth upon the record. Now this certificate, though purporting to convey a right or interest in respect of certain lands within the Colony, is not only not under the colonial seal, but it does not even bear the signature of the Governor. It is really a certificate by the Colonial Secretary that the Governor had consented to waive

the Queen's right of pre-emption in respect of certain lands. Strictly speaking, it is not a waiver, but only evidence of a waiver having been made. It is quite plain that such a paper cannot convey anything which can be called a legal right or title to the land mentioned therein. Such a title did not arise by the purchase alone, as we have seen; neither could it arise by virtue of this certificate.

Here, then, the claimant's case fails. But as the waiver is admitted to have been in fact the act of the Governor, and as the remaining question is, in several respects, an important one, I proceed to consider it.

Was there any authority in the Governor to make such a waiver, so as to bind the Crown? This, indeed, is the point on which the main stress of the argument was laid.

I premise that with the questions raised as to the true meaning of the Treaty of Waitangi as it stands in the Native language—whether it does or does not speak of "the exclusive right of pre-emption," or of "pre-emption" at all, or only and simply of "purchase"—we have obviously no concern. Nor, indeed, is it material to inquire whether the word "pre-emption," which is found in the English copy, be used in the sense now contended for—that is to say as indicating merely a prior right in the Crown upon the non-exercise whereof a subsequent right would, as of course and without anything further, accrue to the subjects of the Crown; or whether it was intended to express that superior right which the law recognizes in the Crown overriding and controlling all purchases of Native lands by subjects of the Crown. For the plaintiff stands upon the Crown's right as it is in the Crown, and upon nothing else. He bases his claim, not upon any right accruing to himself subsequently to, or independently of, that right, but upon a transfer of that very right to himself. The certificate purports to be something more than a mere waiver. A mere waiver or relinquishment of a Crown right would leave to all the Queen's subjects equally whatever benefit might arise therefrom. Whereas, this document purports to convey that right to one individual to the exclusion of all others; and to him, for a time undefined.

That there was no express authority for the issue of certificates of this kind is acknowledged. If there was an implied authority, it must be gathered from the acts and dealings of the Crown, the laws which have been made, and instructions which have been issued in respect of this Colony. Now, among the first Instructions given by one of Her Majesty's Principal Secretaries of State to the first Governor of New Zealand we find the following passage: "It is not, however, "to the mere recognition of the sovereign authority of the Queen that "your endeavours are to be confined, or your negotiations directed. "It is further necessary that the chiefs should be induced, if possible, "to contract with you, as representing Her Majesty, that hence-"forward no lands shall be ceded, either gratuitously or otherwise, "except to the Crown of Great Britain. Contemplating the future "growth and extension of a British Colony in New Zealand, it is an "object of the first importance that the alienation of the unsettled "lands within its limits should be conducted from its commencement "upon that system of sale of which experience has proved the wisdom, "and the disregard of which has been so fatal to the prosperity of other "British settlements": *Parliamentary Papers*, 1840, p. 38. Now, these directions appear to have been in no way confined to the Governor to whom they were personally addressed. They were clearly indicative of a policy to be steadily pursued by successive Governors, whilst the colonization of the country should be proceeding. These instructions were carried out, first, by the Treaty of Waitangi; and, afterwards by the Land Claims Ordinance, upon which I have already commented. Moreover, in respect of all lands which should in consequence vest in and become disposable on behalf of the Crown, strict rules were laid down; they were contained, at first, in Royal Instruc-

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tions, and afterwards embodied in an Act of Parliament, which was in force at the date of this certificate. Under either form, the rules were in substance the same. The two main points were common to both—namely, the provisions for raising an emigration fund, and the provisions for securing fair competition among purchasers. Now, doubtless, we may imply in the agent all authorities necessary for carrying into execution these two expressed purposes of his principal: but how can we imply an authority to do acts which tend directly to defeat them?

I pass by various topics which were strongly urged by Mr. *Bartley*, for two reasons—*viz.*, because they cannot be properly raised upon this record, which does not contain one word referring to them; and, further, because they are directly negatived by the terms of the Proclamation under which this certificate was issued. In fact, Governor Fitz Roy appears to have been careful to put all persons who might be disposed to act under that Proclamation upon their guard, and to give them to understand that, if they purchased at all, they would do so at their own risk. The concluding words of the Proclamation are these: "The public are reminded that no title to land in this "Colony, held or claimed by any person not an aboriginal Native of "the same, is valid in the eye of the law, or otherwise than null and "void, unless confirmed by a grant from the Crown."

These same words are found at the close both of the earlier Proclamation of March and the later one of October, under which Mr. McIntosh claims.

Upon the whole, then, Mr. McIntosh is simply a purchaser from the Natives, without authority or confirmation from the Crown. He cannot possibly stand in a better position than did the original land claimants. He cannot possess, any more than they did, a title against the Crown or the Crown's grantee.

Of course, we, in this place, have nothing to do with any question except the bare legal question of the existence or non-existence of a legal right and title in the claimant.

It may also be proper to remark that this judgment does not affirm the absolute validity of the grant to the defendant. It decides this only, that that grant cannot be set aside on the grounds which are set forth on the record.

Judgment for the defendant.

[PRIVY COUNCIL.]

NIREAHA TAMAKI . . . . . PLAINTIFF;

AND

BAKER . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

J. C.*
1900
May 9, 16.
1901
May 11.

Law of New Zealand—Native Title to Possession of Land—Land Act of 1892, *ss.* 136, 137—*Jurisdiction as to Cession to the Crown—Native Rights Act* 1865, *ss.* 3, 4, 5.

The Civil Courts have jurisdiction under the Native Rights Act, 1865, ss. 3, 4, 5, to ascertain as therein provided native title to and interest in land according to custom or usage of the Maori people. And they are bound in any action in which such title is involved to recognise the rightful possession and occupation of lands by the natives until lawfully extinguished, and to give effect to it.

The appellant having alleged a native title of occupancy to the lands in suit in a manner which was consistent with the Crown's seisin thereof in fee:—

Held, that his suit to restrain an unauthorized invasion of it was maintainable, and that the Court had jurisdiction to decide at least that the title alleged was in existence and had not been extinguished by cession to the Crown in manner provided by statute, or by other proceeding legally effective for that purpose.

Wi Parata v. *Bishop of Wellington*, 3 N. Z. J. R. (N.S.) S. C. 72, considered.

Quære, whether native title can be extinguished by an exercise of the prerogative.

The respondent as Commissioner of Crown Lands having notified the land in suit under s. 136 of the Land Act of 1892, offered it for sale or selection in terms of s. 137, and advertised the sale thereof:—

Held, that the appellant was entitled to sue for an injunction until his title was extinguished according to law, and the Court had jurisdiction to decide whether the respondent's action was within his statutory powers.

APPEAL from a judgment of the Court of Appeal (May 28, 1894) upon certain points of law which had been ordered to be argued before the trial of the action. The case is reported in 12 N. Z. L. R. 483.

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and SIR HENRY DE VILLIERS.

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NIREAHA TAMAKI v. BAKER.

The appellant is an aboriginal native and a member of the Rangitane tribe of Maories. The respondent is the Commissioner of Crown Lands in the provincial district of Wellington appointed under the Land Act, 1892.

The subject-matter of the action was the title to a certain triangular block of land containing about 5184 acres, and a further piece of land between the southern boundary thereof and the Makahaki river which the appellant claimed to be either lands owned by the natives under their customs and usages, or lands belonging to his tribe under an order dated September 13, 1871 (set out in their Lordships' judgment), of the Native Land Court, but which the respondent contended were vested in Her Majesty the Queen.

Upon the settlement of the Colony in the year 1840, a treaty, known as the Treaty of Waitangi, and set out in their Lordships' judgment, was entered into by Lieutenant-Governor Hobson and a number of the native chiefs, by which the latter ceded to Her Majesty all their rights and powers of sovereignty, and Her Majesty confirmed and guaranteed to the chiefs and tribes of New Zealand and to the respective families and individuals thereof the full, exclusive, and undisturbed possession of their lands, estates, forests, fisheries, and other properties which they might collectively or individually possess so long as it was their wish and desire to retain the same in their possession; but the chiefs yielded to Her Majesty the exclusive right of pre-emption over such lands as the proprietors thereof might be disposed to alienate at such prices as might be agreed between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf.

The Governor having on July 7, 1893, notified in the *Gazette*, under s. 136 of the Land Act, 1892, that a block of land which included the land in dispute in this action was open for sale or selection, subsequently advertised the same for that purpose as second class unsurveyed rural land. The appellant thereupon sued for a declaration that the same still remained land owned by natives under their customs and usage, whether under the aforesaid order of September 13, 1871, or otherwise, and for an injunction against selling or advertising the same.

The respondent by his defence raised (inter alia) objections to the jurisdiction of the Supreme Court of New Zealand to try the matter put in issue by these proceedings, and by consent certain issues of law were formulated and submitted for decision. The third and fourth issues were as follows:—

(3.) Can the interest of the Crown in the subject-matter of this suit be attacked by this proceeding?

(4.) Has the Court jurisdiction to inquire whether as a matter of fact the land in dispute herein has been ceded by the native owners to the Crown?

At the hearing of those issues it was admitted that the Attorney-General should have been made a defendant, and it was agreed that the questions should be argued and determined as though he had been made a party and had raised the defences raised by the respondent.

The Court held that, so far as the plaintiff based his title on the order of September 13, 1871, the fact that no survey had ever been deposited in pursuance of such order was fatal to his claim, which consequently rested on a pure Maori title of occupancy; and that the case accordingly fell within the direct authority of *Wi Parata* v. *Bishop of Wellington* (1), according to which the assertion of the claim of the Crown was sufficient to oust the jurisdiction of that or any other Court in the Colony to try a claim which rested on such a title. "There can be no known rule of law," it said, "by which the validity of dealings in the name and under the authority of the Sovereign with the native tribes of this country for the extinction of their territorial rights can be tested. Such transactions began with the settlement of these islands: so that native custom is inapplicable to them. The Crown is under a solemn engagement to observe strict justice in the matter, but of necessity it must be left to the conscience of the Crown to determine what is justice. The security of all titles in the country depends on the maintenance of this principle."

The course of legislation bearing upon the questions decided in this appeal is stated in their Lordships' judgment.

(1) 3 N. Z. J. R. (N.S.) S. C. 72.

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Cohen, Q.C., and *J. W. Gordon*, for the appellant, contended that the assertion of a claim by the Crown was not sufficient to oust the jurisdiction of the Courts. The decision of the matters in controversy in this suit does not involve any question of prerogative or of the validity of any act of the Crown. The real point at issue is the authority of the respondent to notify and advertise for sale or selection the land in suit. The respondent is an executive officer of the Crown, whose authority is limited and defined by statute. The question is whether he has exceeded his authority, and its decision turns on the construction of statutes and other documents from which his authority is alleged to be derived. He has no power to exercise the prerogative, or by any act of his to extinguish the native title to the lands in suit. Nor has the Crown through any other agent dealt with the appellant or with any other natives for the extinction of their title, whether the aboriginal title or the title as judicially ascertained. The Court has and must have jurisdiction to decide the main issue in this suit—whether the respondent's acts are acts of usurpation done without any warrant of authority. The prerogative title of the Crown is not attacked. The native title, that of possession and occupancy, coexists with and is based upon the Crown title. The case of *Wi Parata* v. *Bishop of Wellington* (1), on which the Court of Appeal founded its judgment, has no application. The respondent founded his claim to take the proceedings complained of upon s. 136 of the Land Act, 1892. The question of prerogative does not arise. The appellant is entitled to question, and the Court has jurisdiction to decide, the legality of the respondent's acts, whether they were duly authorized by ss. 136 and 137 of the Land Act, 1892, which depends upon the true construction of those sections, the true effect of the circumstances which led to his acts, and the nature and regularity of those acts: see *Tobin* v. *Reg.* (2) The questions raised by this suit are all within the cognizance of a Court of Law; there is no act complained of which can properly be regarded as an act of State; the act complained of is one done by a servant of the Crown in the supposed performance of his duty.

(1) 3 N. Z. J. R. (N.S.) S. C. 72. (2) (1864) 16 C. B. (N.S.) 310, 359.

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Blake, Q.C., and *G. R. Northcote*, contended that the Court had no jurisdiction to entertain or decide this suit. The Crown has the sole right, as invariably held by the Courts of the Colony, of determining whether the interests of the natives in any lands had or had not been ceded to the Crown. Any declaration by the Crown to that effect, or any proceeding of the Crown, such as the proceeding complained of in this suit, implying such a determination, was conclusive of the fact and could not be reviewed by a Court of Law. This view, moreover, has been adopted by the Legislature in several Acts: see Native Lands Act, 1867, s. 10; Native Land Act, 1873, s. 105; Land Act, 1885, s. 247; Land Act, 1892, s. 250. All transactions with the natives for the cession of their rights in any lands to the Crown are acts of State. The right of determining when the title of natives to any lands has been extinguished is a prerogative right of the Crown. The assertion by the Crown of its title to the lands in suit as Crown lands involves an exercise of that prerogative right, and cannot be called in question in any Court. Reference was made to *Cook* v. *Sprigg*. (1) A case of *Reg.* v. *Symonds* was also referred to as reported in Parliamentary Paper, December, 1847, relative to the affairs of New Zealand, p. 64. It was a case as to the legality of the course pursued by Sir G. Grey's predecessor in waiving the Crown's right of pre-emption from the natives over large tracts of lands in favour of specified individuals, and it decided that such waiver was illegal and void, and that the persons specified acquired no legal right by such waiver. The view adopted by the Legislature and the Courts, that it is for the Crown alone to decide whether the title of natives to lands in the Colony has or has not been extinguished, has become the foundation of all titles to land in the Colony, and it would be unjust and contrary to principle that that view, even if erroneous, should now be upset. Notwithstanding the complicated proceedings in this case the issue is very simple, whether there is a right to sue the Crown and a jurisdiction to entertain the suit; and under all the circumstances it should be held that the appellant was not entitled to sue to have it

(1) [1899] A. C. 572.

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declared that what was practically an act of the Crown and of the State was unauthorized: see *Wi Parata* v. *Bishop of Wellington*. (1) Reference was also made to *Cherokee Nation* v. *State of Georgia* (2); *Worcester* v. *State of Georgia* (3); *Fletcher* v. *Peck* (4); *Johnson* v. *Mackintosh*. (5)

Cohen, Q.C., replied, citing *Reg.* v. *Hughes* (6), *Rogers* v. *Rajendro Dutt* (7).

1901 May 11.

The judgment of their Lordships was delivered by

LORD DAVEY. This is an appeal by an aboriginal inhabitant of New Zealand against an order of the Court of Appeal in that Colony, dated May 28, 1894, in which questions of great moment affecting the status and civil rights of the aboriginal subjects of the Crown have been raised by the respondent. In order to make these questions intelligible it will be necessary to review shortly the course of legislation on the subject in the Colony.

The Treaty of Waitangi (February 6, 1840) is in the following words:—

"*Article the First.*

"The Chiefs of the Confederation of the United Tribes of New Zealand, and the separate and independent Chiefs who have not become members of the Confederation, cede to Her Majesty the Queen of England, absolutely and without reservation, all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess, over their respective territories as the sole sovereigns thereof.

"*Article the Second.*

"Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand, and to the respective families and individuals thereof, the full, exclusive, and undisturbed possession of their Lands and Estates, Forests, Fisheries,

(1) 3 N. Z. J. R. (N.S.) S. C. 72.
(2) (1831) 5 Peters, U. S. 1.
(3) (1832) 6 Peters, U. S. 515.
(4) (1810) 6 Cranch, 87.
(5) (1823) 8 Wheaton, 543.
(6) (1865) L. R. 1 P. C. 81.
(7) (1860) 13 Moo. P. C. 209.

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, at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf.

"*Article the Third.*

"In consideration thereof, Her Majesty the Queen of England extends to the Natives of New Zealand Her Royal protection, and imparts to them all the rights and privileges of British subjects."

By the 2nd section of the Land Claims Ordinance of 1841 (repealing the New South Wales Act, 4 Vict. No. 7) it was—

"Declared enacted and ordained that 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 Her heirs and Successors and that the sole and absolute right of pre-emption from the said aboriginal inhabitants vests in and can only be exercised by Her said Majesty Her Heirs and Successors."

No doubt this Act of the Legislature did not confer title on the Crown, but it declares the title of the Crown to be subject to the "rightful and necessary occupation" of the aboriginal inhabitants, and was to that extent a legislative recognition of the rights confirmed and guaranteed by the Crown by the second article of the Treaty of Waitangi. It would not of itself, however, be sufficient to create a right in the native occupiers cognizable in a Court of Law.

In the year 1852 New Zealand, which up to that time had been a part of New South Wales, received a constitution as a self-governing Colony. By the New Zealand Constitution Act of that year (15 & 16 Vict. c. 72), s. 72, the Assembly was empowered to make laws for the sale, disposal, and occupation of waste lands of the Crown and lands wherein the title of

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natives shall be extinguished as thereafter mentioned, and (s. 73) it was made unlawful for any person other than Her Majesty to purchase or accept from aboriginal natives land of or belonging to or used by them in common as tribes or communities, or to accept any release or extinguishment of the rights of such aboriginal natives in any such land. By s. 8 of 25 & 26 Vict. c. 48, power was given to the General Assembly to repeal s. 73 of the previous Act.

By the Native Rights Act, 1865, of the Colonial Legislature (29 Vict. No. 11), it was enacted (s. 2) that every person of the Maori race within the Colony of New Zealand, whether born before or since New Zealand became a dependency of Great Britain, should be taken and deemed to be a natural-born subject of Her Majesty to all intents and purposes whatsoever; (s. 3) that 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 or 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; (s. 4) that every title to and interest in land over which the native title shall not have been extinguished shall be determined according to the ancient custom or usage of the Maori people so far as the same can be ascertained. And (s. 5) that in any action involving the title to or interest in any such land, the judge before whom the same shall be tried shall direct issues for trial before the Native Land Court.

By the Native Lands Act, 1865 (29 Vict. No. 71), after a recital that it was expedient to amend and consolidate the laws relating to lands in the Colony which were still subject to Maori proprietary customs, and to provide for the ascertainment of the persons who according to such customs were the owners thereof, and to encourage the extinction of such proprietary customs, and to provide for the conversion of such modes of ownership into titles derived from the Crown and for other purposes therein mentioned, it was enacted (s. 2) that "native land" should mean lands in the Colony which were owned by

natives under their customs or usages; (s. 5) that the Native Land Court (which had been established under earlier legislation) should be a Court of Record for, amongst other purposes, the investigation of the titles of persons to native lands; (s. 21) that any native claiming to be interested in a piece of native land might apply for the investigation of his claim by the Court in order that a title from the Crown might be issued to him; (s. 23) that the Court (after certain notices had been given) should ascertain the right, title, or interest of the applicant and all other claimants to or in the land in question, and order a certificate of title to be issued specifying the names of the persons or of the tribe who, according to native custom, own or were interested in the land, describing the nature of such estate or interest and describing the land comprised in such certificate. By s. 25 it was provided that no order for a certificate of title should be made unless a survey of the lands in question made by a duly licensed surveyor was produced during the investigation, and it should be proved that the boundaries had been distinctly marked out on the ground. It is from the neglect of this very useful provision that the whole difficulty of fact has arisen in the present litigation. By ss. 46 to 48 provision is made for the issue of Crown grants to the persons mentioned in any certificates and to purchasers from them, which latter grants were to be as valid and effectual as if the lands had been ceded by "the native proprietors" to Her Majesty.

By the Native Land Act, 1877 (41 Vict. No. 91), s. 6, power was given to the Native Minister to apply to the Native Land Court to ascertain and determine what interest in any plot of land had been acquired by or on behalf of Her Majesty, and all lands declared in any order made on such application to have been so acquired should from the date of the order be deemed to be absolutely vested in Her Majesty. This section has been repealed, but is re-enacted in a subsequent Act.

The Native Land Act, 1865, has been repealed by the Native Land Act, 1873, but was in force at the date of the orders made by the Native Land Court on September 13, 1871, hereafter mentioned. The provisions of the earlier Act with some

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alterations and additions were re-enacted in the Act of 1873. The only sections to which reference need be made for the present purpose are ss. 101 and 102, by which the Native Land Court is directed to hear and determine any reference from the Supreme Court under the Native Rights Act, 1865, and the effect of the decision of the Land Court thereon is defined, and s. 105, by which it is enacted that any notification published in the *New Zealand Gazette*, and purporting to be made by or by the authority of the Governor, and stating that the native title over any land therein described was extinguished previously to a date therein specified, shall for all purposes be received as conclusive proof that the native title over the land described in such notice was extinguished at some time previously to the date therein specified, and that such land on such date ceased to be native land within the meaning of the Act.

Their Lordships do not think it necessary to review the series of Land Acts which were passed prior to 1892 for the purpose of enabling the Government to sell and dispose of Crown lands discharged from native claims. The Act in force at the commencement of the present action was the Land Act of 1892, No. 37. By s. 3 of that Act Crown lands are defined to mean and include (amongst other things)—

"All native lands which have been ceded to Her Majesty by the natives, or have been purchased or otherwise acquired in freehold from the natives on behalf of Her Majesty, or have become vested in Her Majesty by right of Her prerogative."

By ss. 22 and 26 provision was made for the constitution of ten land districts (of which the Wellington Land District is one) with a Commissioner of Crown Lands for each district, and by s. 28 the powers and duties of the Commissioners were defined. By s. 106 Crown lands were divided into three classes: (1.) town land, (2.) suburban land, and (3.) rural land. By s. 136 the Governor was empowered by notification in the *Gazette* to declare that any rural land within the Colony (with an immaterial exception) should be open for sale or selection in the manner and upon the conditions mentioned in the Act. By s. 250 it is enacted that whenever the Governor is satisfied that any native lands acquired by Her Majesty in any way or

purchased out of moneys authorized to be expended on purchase of lands in the North Island are free from native claims and any difficulties in connection therewith, he shall by proclamation ordain such lands to be Crown lands subject to be sold and disposed of; and thereupon such lands so proclaimed shall become subject to the provisions of the laws in force regulating the sale and disposal of Crown lands.

On September 13, 1871, three orders were made by the judge of the Native Land Court.

The first order was for the issue of a certificate of title under the Native Land Acts, 1865 and 1869, to certain natives (not including the appellant) in respect of a block of land containing about 22,000 acres, known as and called Kaihinu No. 1, when a proper survey of the said land should have been furnished to the satisfaction of the Chief Judge. And it was further ordered that, whenever a Crown grant should be made of the said land, the legal estate therein should vest in the grantees on September 13, 1871.

The second was a similar order in all respects as to a block of land containing about 19,000 acres, and called Kaihinu No. 2, in favour of certain natives (also not including the appellant).

The third was again a similar order in all respects as to a block of land containing 62,000 acres, and called Mangatainoka Block, in favour of certain natives (including the appellant) and all others (if any) of the members of the Rangitane tribe. By subsequent proceedings certain parts of this block (not including the areas in dispute) have been detached, and have been ceded to the Crown.

By a deed dated October 10, 1871, various blocks of land (including Kaihinu No. 1 and Kaihinu No. 2, but not including the Mangatainoka Block) were surrendered by the natives interested to the Crown. The boundaries of these blocks were not mentioned in this deed, but there is a plan on the deed the accuracy and effect of which are in controversy.

By a proclamation dated July 2, 1874, the then Governor of the Colony, "being satisfied that the lands described in the schedule hereto are free from native claims, and all difficulties

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in connection therewith, in pursuance and exercise of the power and authority vested in me by the Immigration and Public Works Act, 1873," proclaimed the said lands to be waste lands of the Crown, subject to be sold and dealt with in accordance with the provisions of the laws in force. The schedule includes all the blocks of land ceded by the deed of October 10, 1871, as the same are particularly delineated on the plan drawn in the margin of the deed.

On July 13, 1895, the respondent by public notice offered a block of land called Kaiparoro, 20,000 acres in extent, and containing portions of Kaihinu No. 1 and Kaihinu No. 2, and part of an area of 5184 acres, the title to which is in dispute in this action, for sale or selection "in terms of s. 137 of the Land Act, 1892," and he subsequently advertised the intended sale in the local newspapers. It is stated in the respondent's case in this appeal that a previous notification was made by the Governor pursuant to s. 136 of the Act of 1892, and published in the *Gazette*, declaring open for sale the block called Kaiparoo, but there is no mention of such document in the statement of claim or the defence, and it is not referred to in the judgment of the Court, nor does it appear to their Lordships to be material to the questions which they have to decide on this appeal.

The appellant thereupon commenced the present action. The allegations in the amended statement of claim are confused, and some of them are irrelevant, and the prayer certainly goes beyond any relief which, in the most favourable view of his case, he can be entitled to. He sets out the several documents the effect of which has been already stated. He does not in terms allege his title to block Mangatainoka, or that he and the other members of his tribe are enjoying the use and occupation of the lands in dispute, but he sets out the order relating to that block, and in paragraph 36 alleges that no licence has been granted to any other person to occupy the lands in dispute. Their Lordships think that for the present purpose they are not bound to scan the sufficiency of the allegations too closely, and they must assume that the appellant has alleged, or can by amendment allege, a

sufficient title of occupancy in himself and the other members of his tribe to raise the questions in controversy on this appeal.

The substance of the appellant's case appears to be that no proper or sufficient surveys of blocks Kaihinu No. 1, Kaihinu No. 2, or Mangatainoka have ever been made, and that the respective boundaries between the last two blocks have never been ascertained, and that a certain triangular block of 5184 acres and another piece of land are not parts of Kaihinu No. 2 (as claimed by the respondent), but parts of Mangatainoka, and that the native title in those portions of the last-named block has never been extinguished by cession to the Crown or otherwise. By paragraph 36 of the statement of claim the appellant submits that the said triangular piece of land and the other piece of land still remain land owned by himself and other aboriginal natives under their customs and usages, whether under the said order of the Native Land Court or otherwise. His prayer is:—

1. For a declaration in the terms of his previous submission.

2. That the pieces of land form part of the Mangatainoka Block.

3. For a perpetual injunction to restrain the respondent from selling the two pieces of land, or from advertising the same for sale or disposal, as being the property of the Crown, and for further relief.

Their Lordships observe that the order of the Land Court, not being completed by a certificate, does not confer any title on the appellant, but they think it is evidence of his title, and the Act does not appear to make the obtaining of the certificate a condition precedent to the assertion of a native title. In fact, no certificates were issued in respect of blocks Kaihinu No. 1 and Kaihinu No. 2.

The issue of fact between the parties is, whether the pieces of land in question were parts of Kaihinu No. 2 or of Mangatainoka. But if the action comes to trial there will be another question, whether the pieces of land have in fact, even if erroneously, been included in the deed of cession of Kaihinu No. 2, or in some proclamation or other act of the Governor,

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which by the Acts in force is made conclusive evidence against the appellant.

Their Lordships, however, have not now to deal with the merits of the case, or to say whether the appellant has or ever had any title to the pieces of land in question, or whether such title (if any) has or has not been duly extinguished, or to express any opinion on the regularity or otherwise of the respondent's proceedings. The respondent has pleaded, amongst other pleas, that the Court has no jurisdiction in this proceeding to inquire into the validity of the vesting or the non-vesting of the said lands, or any part thereof, in the Crown.

An order was made for the trial of four preliminary issues of law, of which two only (the 3rd and 4th) were dealt with in the order now under appeal. They are in these terms:—

"3. Can the interest of the Crown in the subject-matter of this suit be attacked by this proceeding?

"4. Has the Court jurisdiction to inquire whether, as a matter of fact, the land in dispute has been ceded by the native owners to the Crown?" Both questions were answered by the Court of Appeal in the negative.

Their Lordships are somewhat embarrassed by the form in which the third question is stated. If it refers to the prerogative title of the Crown, the answer seems to be that that title is not attacked, the native title of possession and occupancy 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 or possession. If, on the other hand, the unincumbered title alleged by the respondent to have been acquired by the Crown by extinguishment of the native title be referred to, it is the same question as No. 4, and the answer to it must depend on a consideration of the character of the action and the nature of the relief prayed against the defendant. As the Court of Appeal point out, what they had to determine was in the nature of a demurrer to the statement of claim. The substantial question, therefore, is whether the appellant can sue, and whether, if the allegations in the statement of claim are proved, he will be entitled to some relief

against the respondent. It is not necessary for him to shew in this proceeding that he will be entitled to all the relief which he seeks.

The learned judges in the Court of Appeal thought that the case was within the direct authority of *Wi Parata* v. *Bishop of Wellington* (1), previously decided in that Court. They held that "the mere assertion of the claim of the Crown is in itself sufficient to oust the jurisdiction of this or any other Court in the Colony. There can be no known rule of law," they add, "by which the validity of dealings in the name and under the authority of the Sovereign with the native tribes of this country for the extinction of their territorial rights can be tested." The argument on behalf of the respondent at their Lordships' bar proceeded on the same lines.

Their Lordships think that the learned judges have misapprehended the true object and scope of the action, and that the fallacy of their judgment is to treat the respondent as if he were the Crown, or acting under the authority of the Crown for the purpose of this action. The object of the action is to restrain the respondent from infringing the appellant's rights by selling property on which he alleges an interest in assumed pursuance of a statutory authority, the conditions of which, it is alleged, have not been complied with. The respondent's authority to sell on behalf of the Crown is derived solely from the statutes, and is confined within the four corners of the statutes. The Governor, in notifying that the lands were rural land open for sale, was acting, and stated himself to be acting, in pursuance of the 136th section of the Land Act, 1892, and the respondent in his notice of sale purports to sell in terms of s. 137 of the same Act. If the land were not within the powers of those sections, as is alleged by the appellant, the respondent had no power to sell the lands, and his threat to do so was an unauthorized invasion of the appellant's alleged rights.

In the case of *Tobin* v. *Reg.* (2), a naval officer, purporting to act in pursuance of a statutory authority, wrongly seized a ship of the suppliant. It was held on demurrer to a petition

(1) 3 N. Z. J. R. (N.S.) S. C. 72. (2) 16 C. B. (N.S.) 310.

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of right that the statement of the suppliant shewed a wrong for which an action might lie against the officer, but did not shew a complaint in respect of which a petition of right could be maintained against the Queen, on the ground, amongst others, that the officer in seizing the vessel was not acting in obedience to a command of Her Majesty, but in the supposed performance of a duty imposed upon him by Act of Parliament, and in such a case the maxim "Respondeat superior" did not apply. On the same general principle it was held in *Musgrave* v. *Pulido* (1) that a Governor of a Colony cannot defend himself in an action of trespass for wrongly seizing the plaintiff's goods merely by averring that the acts complained of were done by him as "Governor" or as "acts of State." It is unnecessary to multiply authorities for so plain a proposition, and one so necessary to the protection of the subject. Their Lordships hold that an aggrieved person may sue an officer of the Crown to restrain a threatened act purporting to be done in supposed pursuance of an Act of Parliament, but really outside the statutory authority. The Court of Appeal thought that the Attorney-General was a necessary party to the action; but it follows, from what their Lordships have said as to the character of the action, that in their opinion he was neither a necessary nor a proper party. In a constitutional country the assertion of title by the Attorney-General in a Court of Justice can be treated as pleading only, and requires to be supported by evidence.

But it is argued that the Court has no jurisdiction to decide whether the native title has or has not been extinguished by cession to the Crown. It is said, and not denied, that the Crown has an exclusive right of pre-emption over native lands and of extinguishing the native title. But that right is now exercised by the constitutional Ministers of the Crown on behalf of the public in accordance with the provisions of the statutes in that behalf, and there is 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. There does not seem to be any greater difficulty in deciding whether

(1) (1879) 5 App. Cas. 102.

the provisions of an Act of Parliament have been complied with in this case than in any other, or any reason why the Court should not do so. In so saying their Lordships assume, without deciding, that if it be shewn that by an act of the Governor done pursuant to the statutes the land has been declared free from native claims, it will be conclusive on the appellant.

A more formidable objection to the jurisdiction is that no suit can be brought upon a native title. And the first paragraph of the prayer was referred to as shewing that the appellant sought a declaration of his title as against the Crown. Their Lordships, however, do not understand that paragraph to mean more than that the native title has not been extinguished according to law. The right, it was said, depends on the grace and favour of the Crown declared in the Treaty of Waitangi, and the Court has no jurisdiction to enforce it or entertain any question about it. Indeed, it was said in the case of *Wi Parata* v. *Bishop of Wellington* (1), which was followed by the Court of Appeal in this case, that there is no customary law of the Maoris of which the Courts of Law can take cognizance. Their Lordships think that this argument goes too far, and that it is rather late in the day for such an argument to be addressed to a New Zealand Court. It does not seem possible to get rid of the express words of the 3rd and 4th sections of the Native Rights Act, 1865, by saying (as the Chief Justice said in the case referred to) that "a phrase in a statute cannot call what is non-existent into being." It is the duty of the Courts to interpret the statute 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. By the 5th section it is plainly contemplated that cases might arise in the Supreme Court in which the title or some interest in native land is involved, and in that case provision is made for the investigation of such titles and the ascertainment of such interests being remitted to a Court specially constituted for the purpose. The legislation both of the Imperial Parliament and of the Colonial Legislature is consistent with this view of the construction and effect of the Native Rights Act;

(1) 3 N. Z. J. R. (N.S.) S. C. 72.

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and one is rather at a loss to know what is meant by such expressions "native title," "native lands," "owners," and "proprietors," or 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. Their Lordships think that the Supreme Court are bound to recognise the fact of the "rightful possession and occupation of the natives" until extinguished in accordance with law in any action in which such title is involved, and (as has been seen) means are provided for the ascertainment of such a title. The Court is not called upon in the present case to ascertain or define as against the Crown the exact nature or incidents of such title, but merely to say whether it exists or existed as a matter of fact, and whether it has been extinguished according to law. If necessary for the ascertainment of the appellant's alleged rights, the Supreme Court must seek the assistance of the Native Land Court; but that circumstance does not appear to their Lordships an objection to the Supreme Court entertaining the appellant's action. Their Lordships, therefore, think that, if the appellant can succeed in proving that he and the members of his tribe are in possession and occupation of the lands in dispute under a native title which has not been lawfully extinguished, he can maintain this action to restrain an unauthorized invasion of his title. The question whether the appellant should sue alone or on behalf of himself and the other members of his tribe on an allegation that they are too numerous to be conveniently made co-plaintiffs is not now before their Lordships, but it does not seem to present any serious difficulty.

If all that is meant by the respondent's argument is that in a question between the appellant and the Crown itself the appellant cannot sue upon his native title, there may be difficulties in his way (whether insurmountable or not it is unnecessary to say); but for the reasons already given that question, in the opinion of their Lordships, does not arise in the present case.

In the case of *Wi Parata* v. *Bishop of Wellington* (1),

(1) 3 N. Z. J. R. (N.S.) S. C. 72.

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already referred to, the decision was that the Court has no jurisdiction by scire facias or other proceeding to annul a Crown grant for matter not appearing on the face of it, and it was held that the issue of a Crown grant implies a declaration by the Crown that the native title has been extinguished. If so, it is all the more important that natives should be able to protect their rights (whatever they are) before the land is sold and granted to a purchaser. But the dicta in the case go beyond what was necessary for the decision. Their Lordships have already commented on the limited construction and effect attributed to the 3rd section of the Native Rights Act, 1865, by the Chief Justice in that case. As applied to the case then before the Court, however, their Lordships see no reason to doubt the correctness of the conclusion arrived at by the learned judges.

In an earlier case of *Reg.* v. *Symonds* (1) it was held that a grantee from the Crown had a superior right to a purchaser from the natives without authority or confirmation from the Crown, which seems to follow from the right of pre-emption vested in the Crown. In the course of his judgment, however, Chapman J. made some observations very pertinent to the present case. He says: "Whatever may be the opinion of jurists as to the strength or weakness of the native title, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers." And while affirming "the Queen's exclusive right to extinguish it" secured by the right of pre-emption reserved to the Crown, he holds that it cannot be extinguished otherwise than in strict compliance with the provisions of the statutes.

Certain American decisions (2) were quoted in the course of the argument. It appears from the cases referred to, and others which have been consulted by their Lordships, that the nature of the Indian title is not the same in the different States,

(1) Parliamentary Papers relative to the affairs of New Zealand, Dec., 1847, p. 67.

(2) *Cherokee Nation* v. *State of Georgia*, 5 Peters, U. S. 1; *Worcester* v. *State of Georgia*, 6 Peters, U. S. 515; *Fletcher* v. *Peck*, 6 Cranch, 87; *Johnson* v. *Mackintosh*, 8 Wheaton, 543.

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and where the European settlement has its origin in discovery and not in conquest different considerations apply. The judgments of Marshall C.J. are entitled to the greatest respect, although not binding on a British Court. The decisions referred to, however, being given under different circumstances, do not appear to assist their Lordships in this case. But some of the judgments contain dicta not unfavourable to the appellant's case.

Their Lordships are, therefore, of opinion that the order of the Court of Appeal should be reversed, and a declaration should be made in answer to the third and fourth issues of law as follows: That it not appearing that the estate and interest of the Crown in the subject-matter of this suit, subject to such native titles (if any) as have not been extinguished in accordance with law, are being attacked by this proceeding, the Court has jurisdiction to inquire whether as a matter of fact the land in dispute has been ceded by the native owners to the Crown in accordance with law, and the respondent should be ordered to pay the costs of the hearing before the Court of Appeal, and they will humbly advise His Majesty accordingly.

Their Lordships observe that the declaration asked for by the statement of claim is too wide in its terms, and if the appellant succeeds in the action he can at the most be entitled to a declaration that the native title in the lands in dispute has not been, or is not shewn by the respondent to have been, duly extinguished according to law (which is probably what is meant), and the injunction asked for should be limited by omitting the word "perpetual" and inserting "until the native title in the said lands has been duly extinguished according to law," or some similar words. Their Lordships, of course, say nothing as to the other defences, and express no opinion on the question which was mooted in the course of the argument, whether the native title could be extinguished by the exercise of the prerogative, which does not arise in the present case.

By the Order in Council of July 8, 1895, leave is given to the appellant to appeal from the judgment of the Court of Appeal of July 13, 1894. It is not denied by the respondent, and the appeal has been argued on the assumption on both

sides, that the order of May 28, 1894, was intended, and that leave to appeal from that order was intended to be given. Their Lordships, therefore, will humbly advise His Majesty that the Order in Council should be read and have effect as if the words "the judgment of the Court of Appeal of New Zealand of May 28, 1894," were substituted therein instead of the words "the said judgment of the Court of Appeal of New Zealand of July 13, 1894."

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The respondent will pay the costs of this appeal.

Solicitors for appellant: *Hollams, Sons, Coward & Hawksley.*
Solicitors for respondent: *Mackrell, Maton, Godlee & Quincey.*

[PRIVY COUNCIL.]

FALKNERS GOLD MINING COMPANY, LIMITED . . . . . APPELLANTS;

AND

McKINNERY . . . . . RESPONDENT.

J. C.* 1901 *July* 9, 27.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Practice—Appealable Value—Issue as to Appealable Value to be decided by Court of Appeal—Admissibility of Affidavits.

Sect. 115 of the New South Wales Mining Act, 1874, gives a right of appeal to the Supreme Court in mining cases where the amount involved is not less than 500*l.*:—

Held, that the Supreme Court was wrong in refusing to hear an appeal on the ground that the value should be found and stated by the Court appealed from, and could not be ascertained by themselves on affidavit.

Scully v. *Murn*, (1893) 14 N. S. W. R. 289, overruled.

APPEAL from an order of the Supreme Court (Feb. 23, 1900) dismissing an appeal from a District Court under the New South Wales Mining Act, 1874, because it had not been proved at the hearing before the District Court Judge, and before his

* *Present:* LORD HOBHOUSE, LORD DAVEY, LORD ROBERTSON, and SIR RICHARD COUCH.

For the foregoing reasons, we conclude that the Government, in each case, is entitled to retain the interest now in controversy. Therefore, in No. 29, the judgment of the Court of Claims is reversed and, in No. 41, the judgment of the Court of Appeals is affirmed.

No. 29—Reversed.

No. 41—Affirmed.

Mr. Justice Reed and Mr. Justice Douglas dissent.

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*TEE-HIT-TON INDIANS, an Identifiable Group of Alaska Indians, Petitioner,

v.

UNITED STATES

(348 US 272, 99 L ed 314, 75 S Ct 313)

SUMMARY OF DECISION

As against a claim by a clan of an Alaskan Indian tribe of a right, under the Fifth Amendment, to compensation for the sale by the federal government of Alaskan timber, five members of the Supreme Court, in an opinion by REED, J., held that the sale did not amount to a compensable taking. The majority rested its decision on the grounds, first, that no federal statute had recognized the Indians' right to unrestricted possession, occupancy, and use of the land; and second, that the history of the tribe did not indicate that it had a proprietary interest in the land which survived the conveyance of Alaska to the United States.

DOUGLAS, J., with the concurrence of WARREN, Ch. J., and FRANKFURTER, J., dissented, taking the view that the first Organic Act for Alaska (which provided that Indians should not be disturbed in their possession of any lands in their use or occupancy or claimed by them, and reserved for future congressional determination the exact nature of Indian rights in such lands) amounted to a congressional recognition of Indian "title" to Alaskan lands used and occupied by them, and that the instant case should be remanded for a determination of what kind of "title" the congressionally accorded right of use and occupancy embraced.

HEADNOTES

Classified to U.S. Supreme Court Digest, Annotated

Indians § 52 — timber — appropriation by government.

1. The Fifth Amendment accords no right of compensation to Alaskan Indians for timber sold by the federal government where the Indians have no proprietary ownership of the timberland and the federal government has not recognized their right to unrestricted possession, occupancy, and use of such land.

Eminent Domain § 75 — partial taking.

2. A partial taking of private property by the federal government is compensable under the Fifth Amendment.

[*See annotation reference* 1.]

Timber § 1 — rights of owner of fee.

3. One having a fee simple interest in a tract of land has an interest in the timber thereon.

[*See annotation reference* 2.]

ANNOTATION REFERENCES

1. What constitutes a taking by eminent domain, 40 L ed 188.

2. Scope and import of term "owner" in statute penalizing unlawful cutting of timber, 2 ALR 799 and 95 ALR 1098.

Eminent Domain § 103 — sale of timber.

4. The sale by the federal government of timber growing upon land in which the fee simple is held by another amounts to a partial taking of such other's right to possess, use, and dispose of the land.

Indians § 33.5 — lands — taking by government.

5. Where Congress by treaty or other agreement has declared that thereafter Indians are to hold particular lands permanently, the Fifth Amendment requires that compensation be paid for a subsequent taking by the federal government.

Indians § 34 — lands in Alaska — extent of rights.

6. Neither § 8 of the Organic Act for Alaska of May 17, 1884 (23 Stat 24), nor § 27 of the Act of June 6, 1900, providing for a civil government for Alaska (31 Stat 321, 330), indicates any intention by Congress to grant to the Indians any permanent rights in the lands of Alaska occupied by them by permission of Congress.

Indians § 34 — grant of rights by Congress — extent.

7. There is no particular form for congressional recognition of Indian right of permanent occupancy of land; such recognition may be established in a variety of ways so long as there is the definite intention by congressional action or authority to accord legal rights and not merely permissive occupation.

Indians § 34 — title to land — extent.

8. In all of the states of the Union, Indian tribes who inhabited the lands of the states held claim thereto, after the coming of the white man, under original Indian title or permission from the whites to occupy, such Indians having mere possession not specifically recognized by Congress as ownership.

Indians §§ 33.5, 34 — title to lands — disposal by government.

9. The right of Indians to occupy lands in the United States over which they had sovereignty prior to conquest by the white man is not a property right but amounts to a right of occupancy which the sovereign grants and, although protecting against intrusion by third parties, may terminate; such lands may be fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

Indians § 33.5 — lands — taking — compensation.

10. Compensation for the taking by the United States of unrecognized Indian title to land is not required by the Fifth Amendment; Indian occupation of land without government recognition of ownership creates no rights against taking or extinction protected by the Fifth Amendment or any other principle of law.

Indians § 34 — title to lands — Alaska Indians.

11. A finding by the Court of Claims that rights, as against the federal government, of Alaskan Indians in Alaskan lands are no stronger than the rights of American Indians in Indian-occupied land within the United States is supported by evidence that such Alaskan Indians' use of their lands was essentially the same as the use of the nomadic tribes of United States Indians.

[No. 43.]

Argued November 12, 1954. Decided February 7, 1955. Rehearing denied March 14, 1955.

ON WRIT of Certiorari to review a judgment of the United States Court of Claims denying compensation for a taking by the federal government of timber allegedly owned by certain Alaskan Indians. Affirmed.

See same case below, 128 Ct Cl 82, 120 F Supp 202.

James Craig Peacock, of Washington, D. C., argued the cause, and, with Martin W. Meyer, John E. Skilling, and John H. Myers, also of Washington, D. C., William L. Paul, Jr., of Juneau, Alaska, and Frederick Paul, of Seattle Washington, filed a brief for petitioner:

Petitioner's aboriginal full proprietary ownership continued unimpaired throughout the period of Russian sovereignty, and the court below therefore erred in its fallacious premise that somehow or other that ownership had been cut down to mere so-called "original Indian title". Cf. Johnson v. M'Intosh (US) 8 Wheat 543, 5 L ed 681; Mitchel v. United States (US) 9 Pet 711, 9 L ed 283; Holden v. Joy (US) 17 Wall 211, 21 L ed 523.

The acts of 1884 and 1900 recognized and confirmed petitioner's aboriginal ownership and at the same time independently created a new and coexisting right of full proprietary ownership.

It is "possession"—irrespective of whether of aboriginal origin or more currently acquired under the other conditions of the statute itself—which is the true subject of both. It is "possession" by the Indians which is not to be disturbed.

That term when so used in an Act of Congress is a word of art and must be presumed to have been used by Congress in the sense in which it had been so construed. United States v. Arredondo (US) 6 Pet 691, 8 L ed 547; Kepner v. United States, 195 US 100, 49 L ed 114, 24 S Ct 797, 1 Ann Cas 655.

"Possession" and "occupation" are not synonymous, but on the contrary are distinct legal concepts, and that use of the former in legal parlance necessarily implies full and complete ownership. United States v. Arredondo (US) 6 Pet 691, 8 L ed 547. See also Funk & Wagnalls New Standard Dictionary defining "possess", "possession", and "dominion".

Quite irrespective of aboriginal rights, if petitioner is found to have either in 1884 or 1900 satisfied any one of the statutory conditions, the substantial possessory rights of undisturbed possession which thereby inured to it were to all intents and purposes legally equivalent to full proprietary ownership. Practically all Tlingit Indian occupancy or use in either of those years stemmed from aboriginal ownership of the same respective areas, so that the practical effect of these two Acts was recognition and confirmation of that ownership

Ralph A. Barney, of Washington, D. C., argued the cause, and, with Solicitor General Sobeloff, Assistant Attorney General Perry M. Morton, and John C. Harrington, also of Washington, D. C., filed a brief for respondent:

Petitioner's alleged property interest in the Alaskan lands involved is nothing more than "original Indian title." Cf. Johnson v. M'Intosh (US) 8 Wheat 543, 5 L ed 681; United States v. Cook (US) 19 Wall 591, 22 L ed 210; United States v. Paine Lumber Co. 206 US 467, 51 L ed 1139, 27 S Ct 697.

The discovering nations acquired absolute title to the lands of this continent subject only to the Indian right of occupancy. See Johnson v. M'Intosh (US) supra; Martin v. Waddell (US) 16 Pet 367, 10 L ed 997; United States v. Alcea Band of Tillamooks, 329 US 40, 91 L ed 29, 67 S Ct 167.

The Indian right of occupancy, also called "original" or "aboriginal" Indian title, is merely a usufructuary right. Cf. United States v. Alcea Band of Tillamooks (US) supra; Northwestern Band of Shoshone Indians v. United States, 324 US 335, 89 L ed 985, 65 S Ct 690; Fletcher v. Peck (US) 6 Cranch 87, 3 L ed 162 (argument of the defendant in error); Blair v. The Pathkiller, 10 Tenn (2 Yerg) 407; Marsh v. Brooks (US) 8 How 223, 12 L ed 1056; The Cherokee Trust Funds, 117 US 288, 29 L ed 880, 6 S Ct 718; Buttz v. Northern Pac. R. Co. 119 US 55, 30 L ed 330, 7 S Ct 100.

A "usufructuary right" is ordinarily defined as the right or privilege of using and enjoying a thing which belongs to another, without impairing the substance—that is, the right to have the profits and use of the property but not its disposition or ownership. See Heintzen v. Binninger, 79 Cal 5, 21 P 377; Schwartz v. Gerhardt, 44 Or 425, 75 P 698. See also Kaiser Co. v. Reid, 30 Cal2d 610, 184 P2d 879; Clark v. Lindsay Light & Chemical Co. 405 Ill 139, 89 NE2d 900; Modern Music Shop, Inc. v. Concordia Fire Ins. Co. 131 Misc 305, 226 NYS 630. Cf. Johnson v. M'Intosh (US) 8 Wheat 543, 5 L ed 681; United States v. Cook (US) 19 Wall 591, 22 L ed 210; United States v. Paine Lumber Co. 206 US 467, 51 L ed 1139, 27 S Ct 697. See also the dissenting opinion in United States v. Alcea Band of Tillamooks, 329 US 40, 91 L ed 29, 67 S Ct 167.

Under the law of nations Russia acquired the full title to Alaska, including the lands claimed by petitioner, by virtue of discovery and possession, and consequently during the period of Russian sovereignty and thereafter petitioner had no greater right in the soil than a right of occupancy known as "original Indian title."

Unrecognized "original Indian title" is not a property interest the taking of which is compensable under the Fifth Amendment. See Hynes v. Grimes Packing Co. 337 US 86, 93 L ed 1231, 69 S Ct 968; United States v. Alcea Band of Tillamooks, 341 US 48,

95 L ed 738, 71 S Ct 552. See also Johnson v. M'Intosh (US) 8 Wheat 543, 5 L ed 681; Fletcher v. Peck (US) 6 Cranch 87, 3 L ed 162; Martin v. Waddell (US) 16 Pet 367, 10 L ed 997; Clark v. Smith (US) 13 Pet 195, 10 L ed 123; Buttz v. Northern Pac. R. Co. 119 US 55, 30 L ed 330, 7 S Ct 100; United States v. Santa Fe Pacific R. Co., 314 US 339, 86 L ed 260, 62 S Ct 248; Northwestern Bands of Shoshone Indians v. United States, 324 US 335, 89 L ed 985, 65 S Ct 690. Cf. Barker v. Harvey, 181 US 481, 45 L ed 963, 21 S Ct 690; Sioux Tribe of Indians v. United States, 316 US 317, 86 L ed 1501, 62 S Ct 1095; Confederate Bands of Ute Indians v. United States, 330 US 169, 91 L ed 823, 67 S Ct 650.

The actions of the United States and Congress at the time the Union was formed and shortly thereafter disclose an understanding that unrecognized "Indian title" was not a property interest protected by the Fifth Amendment.

Petitioner's original Indian title was never "recognized" by either Russia or the United States. Cf. Shoshone Tribe v. United States, 299 US 476, 81 L ed 360, 57 S Ct 244; Barker v. Harvey, 181 US 481, 45 L ed 963, 21 S Ct 690.

Neither the Act of May 17, 1884, 23 Stat 24, 26, ch 53 or the Act of June 6, 1900, 31 Stat 321, 330, ch 786, 48 USC § 356, both mentioned the definition of possessory rights in § 1 of the Joint Resolution of August 8, 1947, 61 Stat 920, ch 515, 26 USC § 23, purports to create any new rights. Cf. Northwestern Bands of Shoshone Indians v. United States, 324 US 335, 89 L ed 985, 65 S Ct 690.

Robert E. Smylie, Attorney General of Idaho, and J. Clinton Peterson, Assistant Attorney General, both of Boise, Idaho, filed a brief for the Attorney General of Idaho, amicus curiae.

Richard H. Robinson, Attorney General of New Mexico, and Fred E. Wilson, both of Sante Fe, New Mexico, filed a brief for the state of New Mexico, amicus curiae.

E. R. Callister, Attorney General of Utah, of Salt Lake City, Utah, filed a brief for the state of Utah, amicus curiae.

Mr. Justice Reed delivered the opinion of the Court.

This case rests upon a claim under the Fifth Amendment by petitioner, an identifiable group of

Headnote 1

American Indians of between 60 and 70 individuals residing in Alaska, for compensation for a taking by the United States of certain timber from Alaskan lands allegedly belonging to the group.[1] The area claimed is said to contain over 350,000 acres of land and 150 square miles of water. The Tee-Hit-Tons, a clan of the Tlingit Tribe, brought this suit in the Court of Claims under 28 USC § 1505. The compensation claimed does not arise from any statutory direction to pay. Payment, if it can be compelled, must be based upon a constitutional right of the Indians to recover. This is not a case that is connected with any phase of the policy of the Congress, continued throughout our history, to extinguish Indian title through negotiation rather than by

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force, and to grant payments *from the public purse to needy descendants of exploited Indians. The legislation in support of that policy has received consistent interpretation from this Court in sympathy with its compassionate purpose.[2]

Upon petitioner's motion, the Court of Claims under its Rule 38

1. A partial taking is compensable. United States v. Kansas City Life Ins. Co. 339 US 799, 809, 94 L ed 1277, 1285, 70 S Ct 885; United States

Headnote 2

v. Gerlach Live Stock Co. 339 US 725, 739, 94 L ed 1231, 1242, 70 S Ct 955, 20 ALR2d 633; United States v. General Motors Corp. 323 US 373, 89 L ed 311, 65 S Ct 357, 156 ALR 390; United States v. Shoshone Tribe, 304 US 111, 118, 82 L ed 1213, 1219, 58 S Ct 794.

2. See Indian Claims Commission Act, 60 Stat 1049; Worcester v. Georgia (US) 6 Pet 515, 582, 8 L ed 483, 509; Alaska Pacific Fisheries v. United States, 248 US 78, 87, 89, 63 L ed 138, 140, 141, 39 S Ct 40; United States v. Santa Fe P. R. Co. 314 US 339, 354, 86 L ed 260, 273, 62 S Ct 248.

(b)[3] directed a separate trial with respect to certain specific issues of law and any related issues of fact essential to the proper adjudication of the legal issues.[4] Only those pertinent to the nature of the petitioner's interest, if any, in the lands are *[275] here for review. Substantial *evidence, largely documentary, relevant to these legal issues was introduced by both parties before a Commissioner who thereupon made findings of fact. The Court of Claims adopted these findings and held that petitioner was an identifiable group of American Indians residing in Alaska; that its interest in the lands prior to purchase of Alaska by the United States in 1867 was "original Indian title" or "Indian right of occupancy." Tee-Hit-Ton Indians v. United States, 128 Ct Cl 82. 85, 87. 120 F Supp 202, 203, 204, 205. It was further held that if such original Indian title survived the Treaty of 1867, 15 Stat 539, Arts III and VI, by which Russia conveyed Alaska to the United States, such title was not sufficient basis to maintain this suit as there had been no recognition by Congress of any legal rights in petitioner to the land in question. 128 Ct Cl, at 92, 120 F Supp, at 208. The court said that no rights inured to plaintiff by virtue of legislation by Congress. As a result of these conclusions, no answer was necessary to questions 2, 5 and 6. The Tee-Hit-Tons' petition was thereafter dismissed.

Because of general agreement as to the importance of the question of compensation for congressionally approved taking of lands occupied in Alaska under aboriginal Indian use and claim of ownership,[5] and the conflict concerning the effect of federal *[276] legislation protecting *Indian occupation between this decision of the Court of Claims, 128 Ct Cl, at 90, 120 F Supp at 206, 207, and the decision of the Court of Appeals for the Ninth Circuit in Miller v. United States (Alaska) 159 F2d 997, 1003, we granted certiorari, 347 US 1009, 98 L ed 1133, 74 S Ct 864.

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3. "Separate Trials: The Court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, counterclaim, or of any separate issues or of any number of claims, counterclaims, or issues; and may enter appropriate orders or judgments with respect to any of such issues, claims, or counterclaims that are tried separately."

4. "1. Is the plaintiff an 'identifiable group of American Indians residing within the territorial limits of . . . Alaska' within the meaning of 28 USC § 1505?

"2. What property rights, if any, would plaintiff, after defendant's 1867 acquisition of sovereignty over Alaska, then have had in the area, if any, which from aboriginal times it had through its members, their spouses, in-laws, and permittees used or occupied in their accustomed Indian manner for fishing, hunting, berrying, maintaining permanent or seasonal villages and other structures, or burying the dead?

"3. What such rights, if any, would have inured to it under the Act of May 17, 1884, 23 Stat 24, in the area, if any, which on that date was either so used or occupied by it or was claimed by it?

"4. What such rights, if any, would have inured to it under the Act of June 6, 1900, 31 Stat 321, 330, in the area, if any, which on that date was so used or occupied by it?

"5. In the event a decision of an affirmative nature on any of issues 2, 3, or 4, is followed by evidence indicating specific property rights on the part of plaintiff at any of those times, then would the testimony of plaintiff's witness Paul as to recent less intensive use of the areas claimed by plaintiff (Tr. 13–14, 29–30, 44–45, 96–97) constitute prima facie evidence of termination or loss of such rights?

"6. If any such property rights are established, and had not meanwhile been terminated or lost, then would the execution of the Timber Sale Agreement of August 20, 1951, (as admitted in paragraph 10 of defendant's Answer) constitute a compensable taking of such rights, or would it give rise to a right to an accounting within the jurisdiction of this Court, or both?" 128 Ct Cl 82, 85, 120 F Supp 202, 204.

5. See Hearings before House Committee on Agriculture on H J Res 205, 80th Cong, 1st Sess; Committee Print No 12, House Committee on Interior and Insular Affairs, 83d Cong, 2d Sess.

The Alaskan area in which petitioner claims a compensable interest is located near and within the exterior lines of the Tongass National Forest. By Joint Resolution of August 8, 1947, 61 Stat 920, the Secretary of Agriculture was authorized to contract for the sale of national forest timber located within this National Forest "notwithstanding any claim of possessory rights."[6] The Resolution defines "possessory rights"[7] and provides for all receipts from the sale of timber to be maintained in a special account in the Treasury until the timber and land rights are finally determined.[8] Section 3 (b) of the Resolution provides:

"Nothing in this resolution shall be construed as recognizing or denying the validity of any claims of possessory rights to lands or timber within the exterior boundaries of the Tongass National Forest."

The Secretary of Agriculture, on August 20, 1951, pursuant to this authority contracted for sale to a private company of all merchantable timber in the area claimed by petitioner. This is the sale of timber

*[277]

which petitioner *alleges constitutes a compensable taking by the United States of a portion of its proprietary interest in the land.

The problem presented is the nature of the petitioner's interest in the land, if any. Petitioner claims a "full proprietary ownership" of the land; or, in the alternative, at least a "recognized" right to unrestricted possession, occu-

Headnote 3 Headnote 4 pation and use. Either ownership or recognized possession, petitioner asserts, is compensable. If it has a fee simple interest in the entire tract, it has an interest in the timber and its sale is a partial taking of its right to "possess, use and dispose of it." United States v. General Motors, 323 US 373, 378, 89 L ed 311, 318, 65 S Ct 357, 156 ALR 390. It is petitioner's contention that its tribal predecessors have continually claimed, occupied and used the land from time immemorial; that when Russia took Alaska, the Tlingits had a well-developed social order which included a concept of property ownership; that Russia while it possessed Alaska in no manner interfered with their claim to the land; that Congress has by subsequent acts confirmed and recognized petitioner's right to occupy the land permanently and therefore the sale of the timber off such lands constitutes a taking pro tanto of its asserted rights in the area.

The Government denies that petitioner has any compensable interest. It asserts that the Tee-Hit-Tons' property interest, if any, is merely that of the right to the use of the land at the Government's will; that Congress has never recognized any legal interest of petitioner in the land and therefore without such recognition no compensation is due the petitioner for any taking by the United States.

I. *Recognition.*—The question of recognition may be disposed of shortly. Where the Congress

Headnote 5 by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation

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must be paid *for subsequent taking.[9] The petitioner contends that

6. 61 Stat 921, § 2 (a).

7. Id. § 1: "That 'possessory rights' as used in this resolution shall mean all rights, if any should exist, which are based upon aboriginal occupancy or title, or upon section 8 of the Act of May 17, 1884 (23 Stat 24), section 14 of the Act of March 3, 1891 (26 Stat 1095), or section 27 of the Act of June 6, 1900 (31 Stat 321), whether claimed by native tribes, native villages, native individuals, or other persons, and which have not been confirmed by patent or court decision or included within any reservation."

8. Id. § 3 (a).

9. United States v. Creek Nation, 295 US 103, 109, 110, 79 L ed 1331, 1335, 1336, 55 S Ct 681; Shoshone Tribe v. United States, 299 US 476, 497, 81 L ed 360, 369; 57 S Ct 244; Chippewa Indians v. United

Congress has sufficiently "recognized" its possessory rights in the land in question so as to make its interest compensable. Petitioner points specifically to two statutes to sustain this contention. The first is § 8 of the Organic Act for Alaska of May 17, 1884, 23 Stat 24.[10] The second is § 27 of the Act of June 6, 1900, which was to provide for a civil government for Alaska, 31 Stat 321, 330.[11] The Court of Appeals in the Miller Case (F) supra, felt that these Acts constituted recognition of Indian ownership. 159 F2d 997, 1002, 1003.

We have carefully examined these statutes and the pertinent legislative history and find nothing

Headnote 6

to indicate any intention by Congress to grant to the Indians any permanent rights in the lands of Alaska occupied by them by permission of Congress. Rather, it clearly appears that what was intended was merely to retain the *status quo* until further congressional or judicial action was taken.[12] There is no particular form for congressional recognition of

Headnote 7

Indian right of permanent occupancy. It may be established in a variety of ways

*[279]

but there must be *the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation. Hynes v. Grimes Packing Co. 337 US 86, 101, 93 L ed 1231, 1245, 69 S Ct 968.

This policy of Congress toward the Alaskan Indian lands was maintained and reflected by its expression in the Joint Resolution of 1947 under which the timber contracts were made.[13]

II. *Indian Title.*—(a) The nature of aboriginal Indian interest in land and the various rights as between the Indians and the United States dependent on such interest are far from novel as concerns our Indian inhabitants. It is well settled that in all the States of the

Headnote 8

Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but amounts to

Headnote 9

a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

This position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained. 1 Wheaton's International Law, ch V. The great case of Johnson v. M'Intosh (US) 8 Wheat 543, 5 L ed 681, denied the power of an Indian tribe to

States, 301 US 358, 375, 376, 81 L ed 1156, 1166, 1167, 57 S Ct 826; United States v. Klamath & M. Tribes, 304 US 119, 82 L ed 1219, 58 S Ct 799; Sioux Tribe v. United States, 316 US 317, 326, 86 L ed 1501, 1507, 62 S Ct 1095.

10. ". . . That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: . . ."

11. "The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use or occupation, ..."

12. 23 Stat 24; see 15 Cong Rec 530–531; HR Rep No 476, 48th Cong, 1st Sess 2; 31 Stat 321; see 33 Cong Rec 5966.

13. 61 Stat 921, § 3 (b), see p 319, supra; HR Rep No 873, 80th Cong, 1st Sess.

*[280]
pass their *right of occupancy to another. It confirmed the practice of two hundred years of American history "that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest." P 587.

"We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted." P 588.

"Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers, and skill, prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighbourhood of agriculturists became unfit for them. The game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies." Pp 590, 591. See Buttz v. Northern Pacific R. Co. 119 US 55, 66, 30 L ed 330, 334, 7 S Ct 100; Martin v. Waddell (US) 16 Pet 367, 409, 10 L ed 997; Clark v. Smith (US) 13 Pet 195, 201, 10 L ed 123, 126.

In Beecher v. Wetherby, 95 US 517, 24 L ed 440, a tract of land which Indians were then expressly permitted by the United States to occupy was granted to Wisconsin.

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In *a controversy over timber, this Court held the Wisconsin title good.

"The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians: that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government." P 525.

In 1941 a unanimous Court wrote, concerning Indian title, the following:

"Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues." United States v. Santa Fe Pacific R. Co. 314 US 339, 347, 86 L ed 260, 270, 62 S Ct 248.

No case in this Court has ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has

*[282]
been willingly *made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability. 60 Stat 1050.

(b) There is one opinion in a case decided by this Court that contains language indicating that unrecognized Indian title might be compensable under the Constitution when taken by the United States. United

States v. Tillamooks, 329 US 40, 91 L ed 29, 67 S Ct 167.

Recovery was allowed under a jurisdictional Act of 1935, 49 Stat 801, that permitted payments to a few specific Indian tribes for "legal and equitable claims arising under or growing out of the original Indian title" to land, because of some unratified treaties negotiated with them and other tribes. The other tribes had already been compensated.[14] Five years later this Court unanimously held that none of the former opinions in Vol. 329 of the United States Reports expressed the view that recovery was grounded on a taking under the Fifth Amendment. United States v. Tillamooks, 341 US 48, 95 L ed 738, 71 S Ct 552. Interest, payable on recovery for a taking under the Fifth Amendment, was denied.

Before the second Tillamook Case, a decision was made on Alaskan Tlingit lands held by original Indian title. Miller v. United States (CA 9th Alaska) 159 F2d 997. That opinion holds such a title compensable under the Fifth Amendment on reasoning drawn from the language of this Court's first Tillamook Case.[15] After the Miller decision,

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*this court had occasion to consider the holding of that case on Indian title in Hynes v. Grimes Packing Co. 337 US 86, 106, note 28, 93 L ed 1231, 1249, 69 S Ct 968. We there commented as to the first Tillamook Case: "That opinion does not hold the Indian right of occupancy compensable without specific legislative direction to make payment." We further declared "we cannot express agreement with that [compensability of Indian title by the Miller Case] conclusion."[16]

Later the Government used the Hynes v. Grimes Packing Co. note in the second Tillamook Case, petition for certiorari, p. 10, to support its argument that the first Tillamook opinion did not decide that taking of original Indian title was compensable under the Fifth Amendment.[17] Thereupon this Court in the second Tillamook Case, 341 US 48, 95 L ed 738, 71 S Ct 552, held that the first case was not "grounded on a taking under the Fifth Amendment." Therefore no interest was due. This later Tilla-

*[284]

mook *decision by a unanimous Court supported the Court of Claims in its view of the law in this present case. See Tee-Hit-Ton Indians v. United States, 128 Ct Cl at 87, 120 F Supp at 204, 205. We think it must be concluded that the recovery in the Tillamook Case was based upon stat-

14. 329 US, at p 44.

15. It relies also, p 1001, on Minnesota v. Hitchcock, 185 US 373, 46 L ed 954, 22 S Ct 650, and United States v. Klamath Indians, 304 US 119, 82 L ed 1219, 58 S Ct 799. These cases, however, concern Government taking of lands held under Indian title recognized by the United States as an Indian reservation. See 185 US, at 390, 304 US, at 121, 16 Stat 707; United States v. Algoma Lumber Co. 305 US 415, 420, 83 L ed 260, 263, 59 S Ct 267, and 329 US 40, 52, note 29, 91 L ed 29, 38. See United States v. 10.95 Acres of Land (DC Alaska) 75 F Supp 841.

16. The statement concerning the Miller Case was needed to meet the Grimes Packing Company argument that Congress could not have intended to authorize the Interior Department to include an important and valuable fishing area, see Hynes v Grimes Packing Co. 337 US at 95, note 10, in a permanent reservation for an Indian population of 57 eligible voters. Actual occupation of Alaskan lands by Indians authorized the creation of a reservation. 337 US, at 91. One created by Congress through recognition of a permanent right in the Indians from aboriginal use would require compensation to them for reopening to the public. Id. 337 US, at 103–106. It was therefore important to show that there was no right arising from aboriginal occupation.

17. Three million dollars was involved in the Tillamook Case as the value of the land, and the interest granted by the Court of Claims was $14,000,000. The Government pointed out that if aboriginal Indian title was compensable without specific legislation to that effect, there were claims with estimated interest already pending under the Indian jurisdictional act aggregating $9,000,000,000.

utory direction to pay for the aboriginal title in the special jurisdictional act to equalize the Tillamooks with the neighboring tribes, rather than upon a holding that there had been a compensable taking under the Fifth Amendment.[18] This leaves unimpaired the rule derived *from Johnson v. M'Intosh that the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment.

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Headnote 10

This is true, not because an Indian or an Indian tribe has no standing to sue or because the United States has not consented to be sued for the taking of original Indian title, but because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law.

(c) What has been heretofore set out deals largely with the Indians of the Plains and east of the Mississippi. The Tee-Hit-Tons urge, however, that their stage of civilization and their concept of ownership of property takes them out of the rule applicable to the Indians of the States. They assert that Russia never took their lands in the sense that European nations seized the rest of America. The Court of Claims, however, saw no distinction between their use of the land and that of the Indians of the Eastern United States. See Tee-Hit-Ton Indians v. United States, 128 Ct Cl 82, 87, 120 F Supp 202, 204, 205. That court had no evidence that the Russian handling of the Indian land problem differed from ours. The natives were left the use of the great part of their vast hunting and fishing territory but what Russia wanted for its use and that of its licensees, it took. The court's conclusion on this issue was based on strong evidence.

In considering the character of the Tee-Hit-Tons' use of the land, the Court of Claims had before it the testimony of a single witness who was offered by plaintiff. He stated that he was the chief of the Tee-Hit-Ton tribe. He qualified as an expert on the Tlingits, a group composed of numerous interconnected tribes including the Tee-Hit-Tons. His testimony showed that the Tee-Hit-Tons had become greatly reduced in numbers. Membership descends *only through the female line. At the present time there are only a

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18. In Carino v. Insular Government of the Philippine Islands, 212 US 449, 53 L ed 594, 29 S Ct 334, this Court did uphold as valid a claim of land ownership in which tribal custom and tribal recognition of ownership played a part. Petitioner was an Igorot who asserted the right to register ownership of certain land although he had no document of title from the Spanish Government and no recognition of ownership had been extended by Spain or by the United States. The United States Government had taken possession of the land for a public use and disputed the fact that petitioner had any legally recognizable title.

The basis of the Court's decision, however, distinguishes it from applicability to the Tee-Hit-Ton claim. The Court relied chiefly upon the purpose of our acquisition of the Philippines as disclosed by the Organic Act of July 1, 1902, which was to administer property and rights "for the benefit of the inhabitants thereof." 32 Stat 695. This purpose in acquisition and its effect on land held by the natives was distinguished from the settlement of the white race in the United States where "the dominant purpose of the whites in America was to occupy the land." 212 US, at 458. The Court further found that the Spanish law and exercise of Spanish sovereignty over the islands tended to support rather than defeat a prescriptive right. Since this was no communal claim to a vast uncultivated area, it was natural to apply the law of prescription rather than a rule of sovereign ownership or dominium. Carino's claim was to a 370-acre farm which his grandfather had fenced some fifty years before and was used by three generations as a pasture for livestock and some cultivation of vegetables and grain. The case bears closer analogy to the ordinary prescriptive rights situation rather than to a recognition by this Court of any aboriginal use and possession amounting to fee simple ownership.

few women of childbearing age and a total membership of some 65.

The witness pointed out that their claim of ownership was based on possession and use. The use that was made of the controverted area was for the location in winter of villages in sheltered spots and in summer along fishing streams and/or bays. The ownership was not individual but tribal. As the witness stated, "Any member of the tribe may use any portion of the land that he wishes, and as long as he uses it that is his for his own enjoyment, and is not to be trespassed upon by anybody else, but the minute he stops using it then any other member of the tribe can come in and use that area."

When the Russians first came to the Tlingit territory, the most important of the chiefs moved the people to what is now the location of the town of Wrangell. Each tribe took a portion of Wrangell harbor and the chief gave permission to the Russians to build a house on the shore.

The witness learned the alleged boundaries of the Tee-Hit-Ton area from hunting and fishing with his uncle after his return from Carlisle Indian School about 1904. From the knowledge so obtained, he outlined in red on the map, which petitioner filed as an exhibit, the territory claimed by the Tee-Hit-Tons. Use by other tribal members is sketchily asserted. This is the same 350,000 acres claimed by the petition. On it he marked six places to show the Indians' use of the land: (1) his great uncle was buried here, (2) a town, (3) his uncle's house, (4) a town, (5) his mother's house. (6) smokehouse. He also pointed out the uses of this tract for fishing salmon and for hunting beaver, deer and mink.

The testimony further shows that while membership in the tribe and therefore ownership in the common *[287] property *descended only through the female line, the various tribes of the Tlingits allowed one another to use their lands. Before power boats, the Indians would put their shelters for hunting and fishing away from villages. With the power boats, they used them as living quarters.

In addition to this verbal testimony, exhibits were introduced by both sides as to the land use. These exhibits are secondary authorities but they bear out the general proposition that land claims among the Tlingits, and likewise of their smaller group, the Tee-Hit-Tons, was wholly tribal. It was more a claim of sovereignty than of ownership. The articles presented to the Court of Claims by those who have studied and written of the tribal groups agree with the above testimony. There were scattered shelters and villages moved from place to place as game or fish became scarce. There was recognition of tribal rights to hunt and fish on certain general areas, with claims to that effect carved on totem poles. From all that was presented, the Court of Claims concluded, and we agree, that the Tee-Hit-Tons were in a hunting and fishing stage of civilization, with shelters fitted to their environment, and claims to rights to use identified territory for these activities as well as the gathering of wild products of the earth.[19] We think this evidence introduced by both sides confirms the Court of Claims' con- *[288] clusion *that the petitioner's use of

Headnote 11

19. Krause, Die Tlinkit-Indianer (The Tlinkit Indians), pp 93–115 and 120–122; Oberg, The Social Economy of the Tlingit Indians (a dissertation submitted to the University of Chicago, Dept. of Anthropology for the Degree of Doctor of Philosophy, Dec. 1937); Goldschmidt-Haas Report to Commissioner of Indian Affairs on Possessory Rights of the Natives of Southeastern Alaska, pp i, ii, iv, 1–25, 31–33, 123–133, related statements numbered 65, 66, 67, 68 and 69, and chart 11; S Doc No. 152, 81st Cong, 2d Sess (Russian Administration of Alaska and the Status of the Alaskan Natives); see Johnson v. Pacific Coast S. S. Co. 2 Alaska 224.

its lands was like the use of the nomadic tribes of the States Indians.[20]

The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy, not *specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation.[21] Every American schoolboy knows that the savage tribes of this continent were deprived *of their

*[289] *[290]

20. It is significant that even with the Pueblo Indians of the Mexican Land Sessions, despite their centuries-old sedentary agricultural and pastoral life, the United States found it proper to confirm to them a title in their lands. The area in which the Pueblos are located came under our sovereignty by the Treaty of Guadalupe Hidalgo, 9 Stat 922, and the Gadsden Purchase Treaty of December 30, 1853, 10 Stat 1031. The Treaty of Guadalupe Hidalgo contained a guarantee by the United States to respect the property rights of Mexicans located within the territory acquired. Art. VIII, 9 Stat 929. This provision was incorporated by reference into the Gadsden Treaty. Art. V, 10 Stat 1035. The latter treaty also contained a provision that no grants of land within the ceded territory made after a certain date would be recognized or any grants "made previously [would] be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico." Art. VI, 10 Stat 1035. This provision was held to bar recognition of fee ownership in the Pueblo of Santa Rosa which claimed such by immemorial use and possession as well as by prescription against Spain and Mexico because they could produce no paper title to the lands. Pueblo of Santa Rosa v. Fall, 56 App DC 259, 262, 12 F2d 332, 335, revd on other grounds 273 US 315, 71 L ed 658, 47 S Ct 361.

Disputes as to the Indian titles in the Pueblos and their position as wards required congressional action for settlement. See Brayer, Pueblo Indian Land Grants of the "Rio Ahajo", New Mexico; Cohen, Handbook of Federal Indian Law, ch 20. These problems were put in the way of solution only by congressional recognition of the Pueblos' title to their land and the decisions of this Court as to their racial character as Indians, subject to necessary federal tutelage. 10 Stat 308, Creation of Office of Surveyor-General of New Mexico to report area of bona fide holdings; Report of Secretary of the Interior, covering that of the Surveyor-General of New Mexico, S Exec Doc No. 5, 34th Cong, 3d Sess 174, 411; Confirmation of titles for approved Pueblo Land Claims, 11 Stat 374; S Doc No. 1117, 37th Cong, 2d Sess 581, 582; Report of Secretary of Interior showing New Mexico Pueblos with confirmed titles.

Representative Sandidge, who reported the first Pueblo Confirmation Act to the House of Representatives, stated that the Pueblo claims, "although they are valid, are not held to be so by this Government, nor by any of its courts, until the claim shall have been acted on specifically. I will say, furthermore, that the whole land system of the Territory of New Mexico is held in abeyance until these private land claims shall have been acted on by Congress." Cong Globe, 35th Cong, 1st Sess 2090 (1858).

The position as Indians of the inhabitants of the Pueblos was considered in United States v. Joseph, 94 US 614, 24 L ed 295, and United States v. Sandoval, 231 US 28, 58 L ed 107, 34 S Ct 1.

For an interesting sidelight on the difficulties inherent in the problems, see Brayer, supra, p 14, and United States v. Ritchie (US) 17 How 525, 15 L ed 236.

Thus it is seen that congressional action was deemed necessary to validate the ownership of the Pueblos whose claim was certainly founded upon stronger legal and historical basis than the Tlingits.

21. The Departments of Interior, Agriculture and Justice agree with this conclusion. See Committee Print No. 12, Supplemental Reports dated January 11, 1954, on HR 1921, 83d Cong2d—Sess.

Department of Interior: "That the Indian right of occupancy is not a property right in the accepted legal sense was clearly indicated when United States v. Alcea Band of Tillamooks, 341 US 48, 95 L ed 738, 71 S Ct 552 (1951), was reargued. The Supreme Court stated, in a per curiam decision, that the taking of lands to which Indians had a right of occupancy was not a taking within the meaning of the fifth amendment entitling the dispossessed to just compensation.

"Since possessory rights based solely upon aboriginal occupancy or use are thus of an unusual nature, subject to the whim of the sovereign owner of the land who can give good title to third parties by extinguishing such rights, they cannot be regarded as clouds upon title in the ordinary sense of the word. Therefore, we suggest

ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land. The duty that rests on this Nation was adequately phrased by Mr. Justice Jackson in his concurrence, Mr Justice Black joining, in Shoshone Indians v. United States, 324 US 335, at 355, a case that differentiated "recognized" from "unrecognized" Indian title, and held the former only compensable. Id. 324 US at 339, 340. His words will be found at 354–358. He ends thus:

"We agree with Mr. Justice Reed that no legal rights are today to be recognized in the Shoshones by reason of this treaty. We agree with Mr. Justice Douglas and Mr. Justice Murphy as to their moral deserts. We do not mean to leave the impression that the two have any relation to each other. The finding that the treaty creates no legal obligations does not restrict Congress from such appropriations as its judgment dictates 'for the health, education, and industrial advancement of said Indians,' which is the position in which Congress would find itself if we found that it did create legal obligations and tried to put a value on them." Id. 324 US at 358.

In the light of the history of Indian relations in this Nation, no other course would meet the problem of the growth of the United States except to make congressional contributions for Indian lands rather than to subject the Government to an obligation to pay the value when taken with interest to the date of *[291] payment. Our conclusion *does not uphold harshness as against tenderness toward the Indians, but it leaves with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle.

The judgment of the Court of Claims is

Affirmed.

Mr. Justice Douglas, with whom The Chief Justice and Mr. Justice Frankfurter concur, dissenting.

The first Organic Act for Alaska became a law on May 17, 1884, 23 Stat 24. It contained a provision in § 8 which reads as follows: "the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: *And provided further*, That parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid."

Section 12 provided for a report upon "the condition of the Indians residing in said Territory, what lands, if any, should be reserved for their use, what provision shall be made for their education [,], what rights by occupation of settlers should be recognized," etc.

Respondent contends, and the Court apparently agrees, that this provision should be read, not as rec- *[292] ognizing Indian *title, but as

the deletion, in section 3 (c) of the bill, of the words 'upon aboriginal occupancy or title, or.'" P 3.

Department of Agriculture: "We also concur in the belief which we understand is being expressed by the Department of the Interior that no rights presently exist on the basis of aboriginal occupancy or title. We believe that this is equally true with respect to lands within the Tongass National Forest just as it is with respect to lands elsewhere in Alaska." P 7.

Department of Justice: "Thus, there is no legal or equitable basis for claims or rights allegedly arising from 'aboriginal occupancy or title.'" P 11.

reserving the question whether they have any rights in the land.

It is said that since § 8 contemplates the possible future acquisition of "title," it expressly negates any idea that the Indians have any "title." That is the argument; and that apparently is the conclusion of the Court.

There are, it seems to me, two answers to that proposition.

First. The first turns on the words of the Act. The general land laws of the United States were not made applicable to Alaska. § 8. No provision was made for opening up the lands to settlement, for clearing titles, for issuing patents, all as explained in Gruening, The State of Alaska (1954), pp 47 et seq. There were, however, at least two classes of claimants to Alaskan lands—one, the Indians; the other, those who had mining claims. Section 8 of the Act did not recognize the "title" of either. Rather, it provided that one group, the miners, should be allowed to "perfect their title"; while the others, the Indians, were to acquire "title" only as provided by future legislation. Obviously the word "title" was used in the conveyancer's sense; and § 8 did service in opening the door to perfection of "title" in the case of miners, and in deferring the perfection of "title" in the case of the Indians.

Second. The second proposition turns on the legislative history of § 8. Section 8 of the Act commands that the Indians "shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them." The words "or now claimed by them" were added by an amendment offered during the debates by Senator Plumb of Kansas. 15 Cong Rec 627, 628. Senator Benjamin Harrison, in accepting the amendment, said, ". . . it was the intention of the committee to protect to the fullest extent all the rights of the Indians in Alaska and of any residents

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who had settled there, but *at the same time to allow the development of the mineral resources . . . ." Id.

Senator Plumb spoke somewhat humorously about the rights of the Indians:

"I do not know by what tenure the Indians are there nor what ordinarily characterizes their claim of title, but it will be observed that the language of the proviso I propose to amend puts them into very small quarters. I think about 2 feet by 6 to each Indian would be the proper construction of the language 'actually in their use or occupation.' Under the general rule of occupation applied to an Indian by a white man, that would be a tolerably limited occupation and might possibly land them in the sea." Id., at 530.

Senator Plumb went on to say, "I propose that the Indian shall at least have as many rights after the passage of this bill as he had before." Id., at 531. Senator Harrison replied that it was the intention of the committee "to save from all possible invasion the rights of the Indian residents of Alaska." Id., at 531. He gave emphasis to the point by this addition:

"It was the object of the committee absolutely to save the rights of all occupying Indians in that Territory until the report which is provided for in another section of the bill could be made, when the Secretary of the Interior could ascertain what their claims were and could definitely define any reservations that were necessary to be set apart for their use. We did not intend to allow any invasion of the Territory by which private rights could be acquired by any person except in so far as it was necessary in order to establish title to mining claims in the Territory. Believing that that would occupy but the smallest portion of the territory here and there,

*[294]

isolated and detached *and small quantities of ground, we thought the reservation of lands occupied by the Indians or by anybody else was a sufficient guard against any serious

invasion of their rights." Id., at 531.

The conclusion seems clear that Congress in the 1884 Act recognized the claims of these Indians to their Alaskan lands. What those lands were was not known. Where they were located, what were their metes and bounds, were also unknown. Senator Plumb thought they probably were small and restricted. But all agreed that the Indians were to keep them, wherever they lay. It must be remembered that the Congress was legislating about a Territory concerning which little was known. No report was available showing the nature and extent of any claims to the land. No Indian was present to point out his tribe's domain. Therefore, Congress did the humane thing of saving to the Indians all rights claimed; it let them keep what they had prior to the new Act. The future course of action was made clear—conflicting claims would be reconciled and the Indian lands would be put into reservations.

That purpose is wholly at war with the one now attributed to the Congress of reserving for some future day the question whether the Indians were to have any rights to the land.[1]

*[295]

*There remains the question what kind of "title" the right of use and occupancy embraces. Some Indian rights concern fishing alone. See Tulee v. Washington, 315 US 681, 86 L ed 1115, 62 S Ct 862. Others may include only hunting or grazing or other limited uses. Whether the rights recognized in 1884 embraced rights to timber, litigated here, has not been determined by the finders of fact. The case should be remanded for those findings. It is sufficient now only to determine that under the jurisdictional Act the Court of Claims is empowered to entertain the complaint by reason of the recognition afforded the Indian rights by the Act of 1884.

1. The reading which the Court gives the 1884 Act dispels the slight hope which Ernest Gruening, our foremost Alaskan authority, found in its provisions dealing with the Indians. In The State of Alaska (1954) 355, 356, Gruening states:

"For the first seventeen years of United States rule over Alaska, the aboriginal inhabitants, who constituted an overwhelming majority of its approximately thirty thousand souls, were as devoid of attention, or even mention, as was the population as a whole. They became, by virtue of the organic act of 1884, in one respect at least, a mildly privileged, or at least a less disadvantaged, group, as compared with subsequently arriving Americans.

"For the act provided 'that the Indians or other persons . . . shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them.' The natives' right of occupancy was, in other words, affirmed, while all later arrivals had to await the slow evolution of the land laws for even the assurance of the right to possess land.

" 'The terms under which such persons [the Indians or other persons],' continued the act, 'may acquire title to such lands is reserved for future legislation by Congress.'

"Seventy years of future had passed by 1954 and the legislation by which the titles to Indians' lands could be acquired had not yet been enacted by Congress."

this the supreme court of Connecticut said (p. 280, Atl. p. 308):

"This change as to the valuation of the property and franchise of a corporation owning taxable real estate, for the purposes of municipal taxation, may produce in some instances more inequality, may be uncalled for or unwise (upon such considerations the action of the legislature is conclusive), but it certainly does not transmute the legislation in question from permissible taxation to a denial to citizens of other states of that common right in the use and enjoyment of property secured to our own citizens. The plan of taxation remains the same; after the change in valuation, as before, it is simply a mode of securing to towns for purposes of
[371] municipal taxation *the benefit of that part of the corporate property represented by shares owned by their inhabitants, and subjecting to state taxation that part represented by shares owned by nonresidents, and which cannot be thus subjected to municipal taxation. Here is no hidden purpose to attack the rights of citizens of other states,—no evidence that the underlying intention and real substance of the legislation is to hinder citizens of other states in acquiring and holding property. The alleged hindrance is confined to those who buy stock in corporations paying taxes on real estate. Only a small number of the corporations within the scope of the act own taxable real estate to any appreciable amount. Can it be said that the law regulating the taxation of half a dozen different kinds of corporations is really intended to hinder citizens of other states from owning stock in the small number of these corporations that may from time to time invest in taxable real estate; or, that the real substance of the law changes from legitimate taxation to hostile and forbidden discrimination with each change of its investments by a corporation? Clearly the legislature is free from any sinister motive in this legislation."

But, further, the validity of this legislation does not depend on the question whether the courts may see some other form of assessment and taxation which apparently would result in greater equality of burden. The courts are not authorized to substitute their views for those of the legislature. We can only consider the legislation that has been had, and determine whether or no its necessary operation results in an unjust discrimination between the parties charged with its burdens. It is enough that the state has secured a reasonably fair distribution of burdens, and that no intentional discrimination has been made against nonresidents.

This court has frequently held that mere inequality in the results of a state tax law is not sufficient to invalidate it. Thus, in *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 504, 22 L. ed. 189, 195, it was said:

"Absolute equality in taxation can never be attained. That system is the best which comes the nearest to it. The same rules cannot be applied to the listing and valuation
[372] of all kinds *of property. Railroads, banks, partnerships, manufacturing associations, telegraph companies, and each one of the numerous other agencies of business which the inventions of the age are constantly bringing into existence, require different machinery for the purposes of their taxation. The object should be to place the burden so that it will bear as nearly as possible equally upon all. For this purpose different systems adjusted with reference to the valuation of different kinds of property are adopted. The courts permit this."

Again, in *State Railroad Tax Cases*, 92 U. S. 575, 612, 23 L. ed. 669, 673:

"Perfect equality and perfect uniformity of taxation as regards individuals or corporations, or the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect. And when we come to its application to the property of all the citizens, and of those who are not citizens, in all the localities of a large state like Illinois, the application being made by men whose judgments and opinions must vary as they are affected by all the circumstances brought to bear upon each individual,—the result must inevitably partake largely of the imperfection of human nature and of the evidence on which human judgment is founded."

And in *Merchants' & Mfrs. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 464, 42 L. ed. 236, 238, 17 Sup. Ct. Rep. 829, 830:

"This whole argument of a right under the Federal Constitution to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533."

For these reasons we are of opinion that the act challenged cannot be held to conflict with either of the clauses of the Federal Constitution referred to, and *the judgment of the Supreme Court of Connecticut is affirmed.*

Mr. Justice **Harlan** did not hear the argument, and took no part in the decision of this case.

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*STATE OF MINNESOTA, *Complainant*, [37
v.
ETHAN ALLEN HITCHCOCK, Secretary of the Interior, and Binger Hermann, Commissioner of the General Land Office.

(See S. C. Reporter's ed. 373–402.)

Original jurisdiction of Supreme Court—when United States is a party to suit—suit by state—school lands—Indian cession.

1. Neither the silence of counsel nor the express consent of the parties will justify the Supreme Court of the United States in ignoring the question whether it has original jurisdiction of a suit commenced therein.

2. A suit by a state to enjoin the Secretary of the Interior and the Commissioner of the Land Office from selling school lands in the Red Lake Indian reservation must be regarded as a controversy to which the United States is a party, and of which, as a state is also a party, the Supreme Court of the United States has, under U. S. Const. art. 3, § 2, original jurisdiction, in view of the provision of the act of March 2, 1901 (31 Stat. at L. 950, chap. 808), that the Indians need not be made parties to such a suit if the Secretary of the Interior is made a party thereto, and that the Attorney General on request of the Secretary shall represent and defend the Indian rights.

3. The state of Minnesota has no interest in any of the land included in the cession, by the Chippewa Indians in Minnesota, of all their title and interest in unsurveyed and unallotted lands, whose fee was in the United States subject to the Indian right of occupancy by an agreement made in conformity with the act of January 14, 1889 (25 Stat. at L. 642, chap. 24), under which such lands were to be sold and the proceeds devoted to the benefit of such Indians, although by a prior provision in the act of February 26, 1857 (11 Stat. at L. 166, chap. 60), authorizing the organization of the state of Minnesota, there was granted to that state for the use of schools sections 16 and 36 in every township of the public lands in such state, except when sold or otherwise disposed of, in which event the state might take other lands "equivalent thereto and as contiguous as may be."

[No. 4, Original.]

Argued November 1, 4, 1901. Decided May 5, 1902.

A SUIT in equity by the State of Minnesota to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from selling certain sections in what was formerly known as the Red Lake Indian reservation. *Bill dismissed.*

Statement by Mr. Justice **Brewer:**

This is a suit in equity commenced in this court by the state of Minnesota to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from selling any sections 16 and 36 in what was on January 14, 1889, known as the Red Lake Indian reservation.

By the bill, answer, and an agreed statement the following facts appear: By § 18 of the act to establish the territorial government of Minnesota, approved March 3, 1849 (9 Stat. at L. 403, chap. 121), it was enacted "that when the lands in the said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered 16 and 36 in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said territory and in the states and territories hereafter to be erected out of the same."

On February 26, 1856, the legislature of the territory of Minnesota sent a memorial to Congress for the relief of settlers upon school lands (Minn. Laws 1856, p. 368), which reads:

[374] "To the Honorable the Senate and House of Representatives of the United States in Congress assembled:

"The memorial of the legislative assembly of the territory of Minnesota respectfully represents:

"That under the provisions of the act of Congress, extending the provisions of the pre-emption law of 1841 over the unsurveyed lands of Minnesota, many of our settlers have heavy investments, both of money and labor, in the opening of farms, erection of buildings, and the laying out and improving of town sites (lots in which said town sites were frequently transferred before the government survey, at high prices, to the occupants thereof), who were found, when the government survey was made, to be upon the school sections, and that the said settler had no means of ascertaining previous to the survey where the school sections would come.

"That it is a great injustice and hardship to compel such persons to repurchase or lose entirely the improvements and homes made by themselves in good faith in the expectation of pre-empting or entering them according to the provisions of the statute. Therefore, your memorialists would respectfully request your honorable body to pass an act giving such persons in this territory as have, previously to the government survey, settled upon the school sections (and have otherwise the right of pre-emption), the right to pre-empt the same as other government lands are pre-empted. And also providing for the entry of the town sites in this territory which are on school sections and were occupied as such previous to the government survey, as other town sites upon unoffered government lands are entered.

"And also allowing the county commissioners of the county in which such lands may be situate to enter in lieu thereof, for the benefit of the school fund of the township in which such land so as aforesaid settled or occupied may be, and without charge, an equal amount of such surveyed lands, subject either to private entry or pre-emption, in the same land district as they may select.

"And as in duty bound your memorialists will ever pray."

In response to this memorial Congress passed the following joint resolution March 3, 1857 (11 Stat. at L. 254):

[375] "That where any settlements, by the erection of a dwelling house or the cultivation of any portion of the land, shall have been or shall be made upon the sixteenth or thirty-sixth sections (which sections have been reserved by law for the purpose of being applied to the support of schools in the territories of Minnesota, Kansas, and Nebraska, and in the states and territories hereafter to be erected out of the same) before the said sections shall have been or shall be surveyed; or when such sections have been or may be selected or occupied as town sites, under and by virtue of the act of Congress approved twenty-third of May, eighteen hundred and forty-four, or reserved for public

uses before the survey, then other lands shall be selected by the proper authorities, in lieu thereof, agreeably to the provisions of the act of Congress approved twentieth May, eighteen hundred and twenty-six, entitled 'An Act to Appropriate Lands for the Support of Schools in Certain Townships and Fractional Townships not Before Provided for.' And if such settler can bring himself, or herself, within the provisions of the act of fourth of September, eighteen hundred and forty-one, or the occupants of the town site be enabled to show a compliance with the provisions of the law of twenty-third of May, eighteen hundred and forty-four, then the right of preference granted by the said acts, in the purchase of such portion of the sixteenth or thirty-sixth sections so settled and occupied, shall be in them respectively, as if such sections had not been previously reserved for school purposes."

On February 26, 1857, Congress passed an act authorizing the formation of a state government. 11 Stat. at L. 166, chap. 60. Section 5, so far as is applicable, is as follows:

"And be it further enacted, That the following propositions be, and the same are hereby, offered to the said convention of the people of Minnesota for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory on the United States and upon the said state of Minnesota, to wit:

"First, That sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands, equivalent thereto and as contiguous as may be, shall be granted to said state for the use of schools."

[376] *On October 13, 1857, a Constitution was formed, in which, by § 3 of article 2, the foregoing proposition was accepted in this language:

"The propositions contained in the act of Congress entitled 'An Act to Authorize the People of the Territory of Minnesota to Form a Constitution and State Government, Preparatory to Their Admission into the Union on Equal Footing with the Original States,' are hereby accepted, ratified, and confirmed, and shall remain irrevocable without the consent of the United States; and it is hereby ordained that this state shall never interfere with the primary disposal of the soil within the same by the United States, or with any regulations Congress may find necessary for securing the title to said soil to bona fide purchasers thereof; and no tax shall be imposed on lands belonging to the United States, and in no case shall nonresident proprietors be taxed higher than residents."

By an act of date May 11, 1858, Minnesota was admitted into the Union. 11 Stat. at L. 285, chap. 31. In that it was recited "that the state of Minnesota shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original states in all respects whatever."

At the date of this admission a large part of the territory in the northwestern part of the state, including the tracts in controversy, was and for a long time thereafter remained unceded Indian lands, subject to the Indian title of occupancy. It was, among other things, stipulated in the agreed statement:

"That, except as its status may have been affected or changed by the treaty of October 2, 1863 (13 Stat. at L. 667), by the President's order of March 18, 1879, enlarging what was then known as the White Earth Indian reservation, by the act of Congress of January 14, 1889 (25 Stat. at L. 642, chap. 24), or by the act of Congress of June 2, 1890 (26 Stat. at L. 126, chap. 391), or by one or more of these, the district or country embracing the lands in controversy continued to be unceded Indian lands subject to the original right of occupancy of the Chippewa Indians up to the time of the action had on March 4, 1890, under the said act of January 14, 1889."

Referring to the matter stated in this stipulation, it may be *noticed that by the treaty [377 of October 2, 1863, the Red Lake and Pembina bands of Chippewa Indians dwelling in northwestern Minnesota ceded lands within certain defined boundaries to the United States, and in article 6 of the treaty the portion of the territory occupied by them and not ceded is spoken of as a reservation, for by it the President was required to appoint a board of visitors, "whose duty it shall be to attend at all annuity payments of the said Chippewa Indians, to inspect their fields and other improvements, and to report annually thereon on or before the 1st day of November, and also as to the qualifications and moral deportment of all persons residing upon the reservation under the authority of law."

This tract was thereafter known as the Red Lake Indian reservation, and is referred to in the President's order of March 18, 1879, in which he bounds a proposed reservation on one side by the "Red Lake Indian reservation." The act of June 2, 1890 (26 Stat. at L. 126, chap. 391), grants to the Duluth & Winnipeg Railroad Company a right of way through the "Red Lake (and other) reservations." The 2d section of the act provides the mode of fixing the compensation to be paid the Indians for the right of way, and that no right of way shall vest in the company until, among other things, "the consent of the Indians on said reservation as to the amount of said compensation and right of way shall have been first obtained in a manner satisfactory to the President of the United States." On January 14, 1889, an act was passed (25 Stat. at L. 642, chap. 24), providing for a commission to negotiate with all the bands or tribes of Chippewa Indians in Minnesota for the cession and relinquishment, "for the purposes and upon the terms" stated in the act, and subject to the approval of the President, "of all their title and interest in and to all the reservations of said Indians in the state of Minnesota, except the White Earth and Red Lake reservations, and to all and so much of those two reservations as in the judgment of said

commission is not required to make and fill the allotments required by this and existing acts."

That act directed that all the Chippewa Indians in Minnesota, "except those on the Red Lake reservation," were to be removed to and allotted lands in the White Earth
[378] reservation, *and those on the Red Lake reservation were to be allotted lands on so much of that reservation as should be reserved by the commission for that purpose. The ceded lands were thereafter to be surveyed, inspected, classified as agricultural or pine lands, the latter appraised by 40-acre tracts and sold at vendue, and the agricultural lands disposed of to actual settlers at $1.25 per acre. The proceeds arising from the disposition of the two classes of land were to be held and applied as directed in § 7, which reads:

"That all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals in this act provided, be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the state of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years, after the allotments provided for in this act have been made, and which interest and permanent fund shall be expended for the benefit of said Indians in manner following: One half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; and one fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares *per capita* to all other classes of said Indians; and the remaining one fourth of said interest shall, during the said period of fifty years, under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit; and at the expiration of the said fifty years the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares: *Provided*, that Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said
[379] Indians, *a portion of said principal sum, not exceeding five per centum thereof. The United States shall, for the benefit of said Indians, advance to them as such interest as aforesaid the sum of ninety thousand dollars annually, counting from the time when the removal and allotments provided for in this act shall have been made until such time as said permanent fund, exclusive of the deductions hereinbefore provided for, shall equal or exceed the sum of three million dollars, less any actual interest that may in the meantime accrue from accumulations of said permanent fund; the payments of such interest to be made yearly in advance, and, in the discretion of the Secretary of the Interior, may, as to three fourths thereof, during the first five years, be expended in procuring live stock, teams, farming implements, and seed for such of the Indians, to the extent of their shares, as are fit and desire to engage in farming, but as to the rest, in cash; and whenever said permanent fund shall exceed the sum of three million dollars the United States shall be fully reimbursed out of such excess for all the advances of interest made as herein contemplated and other expenses hereunder."

Under this act a commission was appointed and an agreement made with the Indians for a cession of a large part of the Red Lake Indian reservation, which agreement was approved by the President March 4, 1890, the unceded portion being reserved by the commissioners "for the purpose of making and filling the allotments" provided for in the act.

According to the agreed statement of facts the lands in the reservation were wholly unsurveyed at the time of the passage of this last act, January 14, 1889, and until after the approval of the agreement for this cession, March 4, 1890.

On February 28, 1891 (26 Stat. at L. 796, chap. 384), Congress passed this act:

"Where settlements with a view to preemption or homestead have been or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the state or territory in which they lie, other lands of equal acreage are
hereby appropriated and *granted, and may [380]
be selected by said state or territory, in lieu of such as may be thus taken by pre-emption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said state or territory, where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided*, where any state is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said state or territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said state or territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, with-

out awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the state or territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations: *Provided, however*, that nothing herein contained shall prevent any state or territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing."

Upon these facts the state contends that the territory in question was not an Indian reservation, but what is known as unceded Indian country, subject to the original right of occupancy by the Chippewa Indians, and
[381] also that, whether the country was an Indian reservation or unceded Indian country, it was subject to the grant of sections 16 and 36 to the state when the Indian right of occupancy was extinguished.

Defendant's contentions are:

1. That this tract of country was a reservation, set apart and appropriated to the uses of the civilization and support of the Indians.

2. That these lands never became "public lands," and so never became subject to the state's school-land grant.

3. That the school-land grant attached to no particular lands until surveyed. Until then the specific sections remained subject to disposition by Congress, the state, in the event of such disposition, being remitted to the selection of other lands as indemnity. Especially did the joint resolution of March 3, 1857, subject these sections in Minnesota to reservation for public uses at any time before survey, and, in the event of any such reservation, make the state's grant, to that extent, one of indemnity lands.

4. That the act of January 14, 1889, and the agreement negotiated thereunder with the Indians, dedicated and appropriated all the lands in the Red Lake reservation exclusively to the civilization, education, and support of the Indians. This was a disposal of the lands within the meaning of the enabling act of February 26, 1857, and in any event was a reservation of them for public uses under the joint resolution of March 3, 1857.

5. That in interpreting the act of 1889, it is of no moment that the state has a system of common schools aided by a grant of lands from the general government. That act in terms keeps the education of these Indians under national control, and dedicates a portion of the proceeds of the sale of these lands "exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst, and for their benefit."

6. That in determining whether the act of 1889 and the agreement negotiated thereunder were intended to appropriate sections 16 and 36, along with the other lands, to the civilization, education, and support of the Indians, inquiry must be made as to how the act and agreement were understood by the Indians.

Messrs. **Frank B. Kellogg** and **Henry W. Childs** argued the cause, and, with *Messrs. C. A. Severance, Robert E. Olds*, and *W. B. Douglas*, filed a brief for complainant:

The fee to public lands occupied by Indian tribes, whether the status be that of an Indian reservation created by law or a treaty, or merely Indian country, is in the United States, and passes by grant, subject to the Indian right of occupancy, and no patent is necessary.

Cherokee Nation v. *Georgia*, 5 Pet. 48, 8 L. ed. 42; *Beecher* v. *Wetherby*, 95 U. S. 517, 24 L. ed. 440; *Heydenfeldt* v. *Daney Gold & S. Min. Co.* 93 U. S. 634, 23 L. ed. 995; *Buttz* v. *Northern P. R. Co.* 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100; *Clark* v. *Smith*, 13 Pet. 195, 10 L. ed. 123; *United States* v. *Cook*, 19 Wall. 591, 22 L. ed. 210; *St. Paul, M. & M. R. Co.* v. *Phelps*, 137 U. S. 528, 34 L. ed. 767, 11 Sup. Ct. Rep. 168; *Gaines* v. *Nicholson*, 9 How. 356, 13 L. ed. 172.

The rights of the state were merely in abeyance or suspension during the period of Indian occupancy, and vested *eo instanti* upon the extinction of the Indian right of occupancy and identification by public survey. The only qualification of this is when there has been an appropriation of a section, prior to survey, for any public purpose contemplated by the compact between the United States and the state.

Buttz v. *Northern P. R. Co.* 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100; *Gaines* v. *Nicholson*, 9 How. 356, 13 L. ed. 172.

The appropriation of the public lands for the encouragement of education is a cherished policy of the national government, initiated before the adoption of the present Constitution of the United States.

Cooper v. *Roberts*, 18 How. 178, 15 L. ed. 339.

When a grant is made to a state, for the use of its schools, of certain sections of land out of the public domain, the grant as to such sections falling within Indian reservations or territory to which the Indian right of occupancy has not been extinguished, is in suspension only during the period of such occupancy.

Beecher v. *Wetherby*, 95 U. S. 517, 24 L. ed. 440; *Cooper* v. *Roberts*, 18 How. 173, 15 L. ed. 338; *United States* v. *Thomas*, 151 U. S. 577, 38 L. ed. 276, 14 Sup. Ct. Rep. 426; *Buttz* v. *Northern P. R. Co.* 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100; *Yatoma Water & Min. Co.* v. *Bugbey*, 96 U. S. 165, 24 L. ed. 621.

Lands embraced within an Indian reservation at the time of the passage of the granting act were subject to the act.

Re Kansas, 2 Copp, 1107.

If at the date of the survey it is found that sections 16 and 36 are embraced within an Indian reservation or are Indian country, the state may elect to make indemnity selections at once, or may await the extinguishment of the Indian right, and eventually take the original sections.

Re Colorado, 6 Land Dec. 412; *Re Bornard*, 9 Land Dec. 553; *Re Michigan*, 8 Land Dec. 308; *Callanon* v. *Chicago, M. & St. P. R. Co.* 10 Land Dec. 285; *Re Sherry*, 12 Land Dec. 176.

Where land is at the time of the survey occupied under a homestead pre-emption, the state's title does not vest, but if the pre-emptor fails thereafter to perfect his claim, or for any reason abandons it, the state's title will spring up and vest as of the date of the survey.

Re Watson, 6 Land Dec. 71. See also *Re Lowe*, 1 Land Dec. 630; *Metts* v. *California*, 1 Copp, 632; *Larsen* v. *Peckierer*, 1 Land Dec. 401; *Re Miner*, 9 Land Dec. 408; *Re Marceau*, 9 Land Dec. 554; *Re Talbot*, 8 Land Dec. 495; *Gonzales* v. *Flagstaff*, 10 Land Dec. 348; *Keenaugh* v. *Washington*, 13 Land Dec. 434.

The right which the settler has at the date of survey is personal, and a purchaser from him subsequent to the survey and prior to the publication of the settler's title secures no rights as against the state.

Lorsen v. *Peckierer*, 1 Land Dec. 401; *Re Watson*, 4 Land Dec. 169; *Re Johansen*, 5 Land Dec. 408; *Gonzales* v. *Flagstoff*, 10 Land Dec. 348; *Re Marceau*, 9 Land Dec. 554; *Re Dermody*, 10 Land Dec. 419; *Keenaugh* v. *Washington*, 13 Land Dec. 434.

Of course, so long as the Indians or other parties were rightfully in possession, the state could not enter or derive any benefit from the land to which, under this arrangement, it actually took the fee.

Re Sherry, 12 Land Dec. 176.

A proviso limiting a grant will be strictly construed.

United States v. *Dickson*, 15 Pet. 165, 10 L. ed. 698.

The reservation of land for public uses was intended to cover "public uses, as for arsenals, fortifications, lighthouses, customhouses, and other public purposes for which real property is required by the government."

Gonzales v. *French*, 164 U. S. 338, 41 L. ed. 458, 17 Sup. Ct. Rep. 102; *Shepley* v. *Cowan*, 91 U. S. 330, 23 L. ed. 424; *Spalding* v. *Martin*, 11 Wis. 273.

The grant having been expressly made of sections 16 and 36, the act of 1889 will not be deemed to contemplate any other disposition of them, in the absence of express words evincing such a purpose.

Beecher v. *Wetherby*, 95 U. S. 517, 24 L. ed. 440.

No deed was necessary to vest the title of school lands in the state.

Gaines v. *Nicholson*, 9 How. 356, 13 L. ed. 172.

Sections 16 and 36 not having been mentioned in the act of 1889, and those sections having been previously granted to the state for the use of public schools, the act of 1889 will be construed not to embrace these sections.

Wilcox v. *Jackson ex dem. M'Connel*, 13 Pet. 498, 10 L. ed. 264; *Spaulding* v. *Martin*, 11 Wis. 262; *Lake Superior Ship Canal R. & Iron Co.* v. *Cunningham*, 155 U. S. 373, 39 L. ed. 189, 15 Sup. Ct. Rep. 103; *Ex parte Crow Dog*, 109 U. S. 556, *sub nom.* *Ex parte Kang-Gi-Shun-Ca*, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396.

The later act must be so read as to harmonize with and effectuate the policy of the earlier one.

Sutherland, Stat. Constr. §§ 287, 288.

In interpreting a statute or a constitutional provision, resort may properly be had to the history of the times, to the conditions of the country as they existed at the date of the enactment, to the previous condition of the law, and the object to be accomplished by the legislative body.

Church of Holy Trinity v. *United States*, 143 U. S. 459, 36 L. ed. 228, 12 Sup. Ct. Rep. 511; *United States* v. *Union P. R. Co.* 91 U. S. 79, 23 L. ed. 228; *Croomes* v. *State*, 40 Tex. Crim. Rep. 672, 51 S. W. 927, 53 S. W. 882; *Collins* v. *New Hampshire*, 171 U. S. 34, 43 L. ed. 61, 18 Sup. Ct. Rep. 768; *United States* v. *Wong Kim Ark*, 169 U. S. 653, 42 L. ed. 892, 18 Sup. Ct. Rep. 456.

No patent, no selection, no certification by the Department, no act whatever was required to vest the title of these lands in the state, except identification by survey. Even in the selection of lieu lands it has been held that no patent is necessary; that the bare selection by the state vests the title.

Hodrick v. *Hughes*, 15 Wall. 123, 21 L. ed. 52.

Assistant Attorney General **Van Devanter** argued the cause and filed a brief for defendants:

The tract of country embracing the sections in controversy was a reservation set apart and appropriated to the uses of the civilization and support of the Indians.

Spalding v. *Chandler*, 160 U. S. 394, 40 L. ed. 469, 16 Sup. Ct. Rep. 360; *Wilcox* v. *Jackson ex dem. M'Connel*, 13 Pet. 498, 10 L. ed. 264.

A grant will be presumed upon proof of an adverse, exclusive, and uninterrupted possession for twenty years, and such rule will be applied as a *presumptio juris et de jure* wherever, by possibility, a right may be acquired in any manner known to the law.

United States v. *Chaves*, 159 U. S. 452, 40 L. ed. 215, 16 Sup. Ct. Rep. 57.

The lands in controversy never became public lands, and so never became subject to the state's school-land grant.

Newhall v. *Sanger*, 92 U. S. 761, 23 L. ed. 769; *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 23 L. ed. 634; *Missouri, K. & T. R. Co.* v. *Roberts*, 152 U. S. 114, 38 L. ed. 377, 14 Sup. Ct. Rep. 496; *Barker* v. *Harvey*, 181 U. S. 481, 45 L. ed. 963, 21 Sup. Ct. Rep. 690; *Mann* v. *Tacoma Land Co.* 153 U. S. 273, 38 L. ed. 714, 18

Sup. Ct. Rep. 820; *Doolan* v. *Carr*, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228; *Burdon* v. *Northern P. R. Co.* 145 U. S. 535, 36 L. ed. 806, 12 Sup. Ct. Rep. 856.

Until the survey and identification of the specific sections the right of the state is inchoate merely, and full power of disposition remains in Congress.

Heydenfeldt v. *Daney Gold & Silver Min. Co.* 93 U. S. 634, 23 L. ed. 995; *Re Colorado*, 6 Land Dec. 412; *Re Colorado*, 12 Land Dec. 70; *Minnesota* v. *Bachelder*, 1 Wall. 109, 17 L. ed. 551.

The obligation to protect the Indians from local hostility, and to provide for their maintenance, instruction, and civilization, has always been recognized as a national obligation, which could not, with justice to the Indians, be intrusted to local governments.

United States v. *Kagama*, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; *Worcester* v. *Georgia*, 6 Pet. 515, 8 L. ed. 483; *Fellows* v. *Blacksmith*, 19 How. 366, 15 L. ed. 684; *The Kansas Indians*, 5 Wall. 737, *sub nom. Blue Jacket* v. *Johnson County*, 18 L. ed. 667; *The New York Indians*, 5 Wall. 761, *sub nom. Fellows* v. *Denniston*, 18 L. ed. 708.

How the care and duty shall be exercised is a political question, and it is not the province of the court to intrude "upon the domain committed by the Constitution to the political departments of the government," or "in effect determine questions of mere governmental policy."

United States v. *Choctaw Nation*, 179 U. S. 494, 45 L. ed. 291, 21 Sup. Ct. Rep. 149.

How the words of the agreement were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

Worcester v. *Georgia*, 6 Pet. 515, 8 L. ed. 483; *The Kansas Indians*, 5 Wall. 737, *sub nom. Blue Jacket* v. *Johnson County*, 18 L. ed. 667; *Choctaw Nation* v. *United States*, 119 U. S. 1, 30 L. ed. 306, 7 Sup. Ct. Rep. 75; *Jones* v. *Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; *United States* v. *Choctaw Nation*, 179 U. S. 494, 45 L. ed. 291, 21 Sup. Ct. Rep. 149.

Messrs. Frank B. Kellogg and *Henry W. Childs*, with *Assistant Attorney General Van Devanter*, filed a brief on the question of jurisdiction:

This is a suit between a state and citizens of another state, within the meaning of the decisions.

Osborn v. *Bank of United States*, 9 Wheat. 738, 856, 6 L. ed. 204, 232; 1 Foster, Fed. Pr. 2d ed. § 19; *Bonnafee* v. *Williams*, 3 How. 574, 11 L. ed. 732; *Susquehanna & W. Valley Coal Co.* v. *Blatchford*, 11 Wall. 172, 20 L. ed. 179; *Childress* v. *Emory*, 8 Wheat. 642, 5 L. ed. 705; *Rice* v. *Houston*, 13 Wall. 66, 20 L. ed. 484; *Dodge* v. *Tulleys*, 144 U. S. 451, 36 L. ed. 501, 12 Sup. Ct. Rep. 728; *Davies* v. *Lathrop*, 20 Blatchf. 397, 12 Fed. 353; *Harper* v. *Norfolk & W. R. Co.* 36 Fed. 102; *Shirk* v. *La Fayette*, 52 Fed. 857.

For purposes of determining the jurisdictional question, this suit is not to be deemed one against the United States.

Osborn v. *Bank of United States*, 9 Wheat. 738, 856, 6 L. ed. 204, 232; *Davis* v. *Gray*, 16 Wall. 203, 21 L. ed. 447; *Tomlinson* v. *Branch*, 15 Wall. 460, 21 L. ed. 189; *Litchfield* v. *Webster County*, 101 U. S. 773, 25 L. ed. 925; *United States* v. *Lee*, 106 U. S. 212, 27 L. ed. 179, 1 Sup. Ct. Rep. 240; *Allen* v. *Baltimore & O. R. Co.* 114 U. S. 311, 29 L. ed. 200, 5 Sup. Ct. Rep. 924; *Louisiana Bd. of Liquidation* v. *McComb*, 92 U. S. 531, 23 L. ed. 623; *Virginia Coupon Cases*, 114 U. S. 270, *sub nom. Poindexter* v. *Greenhow*, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; *Illinois C. R. Co.* v. *Adams*, 180 U. S. 28, 45 L. ed. 410, 21 Sup. Ct. Rep. 256.

Authorities holding that a suit to enjoin a state official is not a suit against a state apply with equal force to a suit to enjoin a government official, because the United States cannot be sued without its own consent, which consent can only be given by an act of Congress.

United States v. *Lee*, 106 U. S. 216, 27 L. ed. 180, 1 Sup. Ct. Rep. 240.

In those cases where the jurisdiction of this court has been invoked to enjoin the action or threatened action of government officials, the original jurisdiction of this court has been, not only exercised, but expressly conceded.

Mississippi v. *Johnson*, 4 Wall. 475, 18 L. ed. 437; *Georgia* v. *Stanton*, 6 Wall. 75, 18 L. ed. 724.

The failure to join the Chippewa Indians as parties defendant cannot affect the jurisdiction of the court.

The relation between the government and the Indians is one similar to that of guardian and ward, and the Indians may be looked upon as in a state of pupilage.

Cherokee Nation v. *Georgia*, 5 Pet. 1, 8 L. ed. 25; *Worcester* v. *Georgia*, 6 Pet. 515, 8 L. ed. 483; *Elk* v. *Wilkins*, 112 U. S. 94, 28 L. ed. 643, 5 Sup. Ct. Rep. 41; *United States* v. *Kagama*, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; *Cherokee Nation* v. *Southern Kansas R. Co.* 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *Jones* v. *Meehan*, 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1; *United States* v. *Flournoy Live-Stock & Real-Estate Co.* 71 Fed. 576; *United States* v. *Choctaw Nation*, 119 U. S. 1, 30 L. ed. 307, 7 Sup. Ct. Rep. 75; *Barker* v. *Harvey*, 181 U. S. 492, 45 L. ed. 968, 21 Sup. Ct. Rep. 690.

The case is within the rule that a trustee may sue or be sued without the appearance of his beneficiary in the action, where the trust is of such a nature as to warrant the construction that the trustee has been authorized to appear in behalf of the beneficiary.

Carey v. *Brown*, 92 U. S. 171, 23 L. ed. 469; *Kerrison* v. *Stewart*, 93 U. S. 155, 23 L. ed. 843; *Vetterlein* v. *Barnes*, 124 U. S. 169, 31 L. ed. 400, 8 Sup. Ct. Rep. 441.

On analogy drawn from the rule excluding legatees and next of kin in bills for a debt or legacy brought against the personal representative of a deceased person the Indians need not be joined in this action.

Adams, Eq. pp. 315, 316.

[382] *Mr. Justice **Brewer** delivered the opinion of the court:

A preliminary question is one of jurisdiction. It is true counsel for defendants did not raise the question, and evidently both parties desire that the court should ignore it and dispose of the case on the merits. But the silence of counsel does not waive the question, nor would the express consent of the parties give to this court a jurisdiction which was not warranted by the Constitution and laws. It is the duty of every court of its own motion to inquire into the matter, irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law. Consent may waive an objection so far as respects the person, but it cannot invest a court with a jurisdiction which it does not by law possess over the subject-matter. The question having been suggested by the court, a brief has been presented, and our jurisdiction sought to be sustained on several grounds. The question is one of the original, and not of the appellate, jurisdiction. The pertinent constitutional provisions are found in § 2 of article 3 as follows:

"The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state or the citizens thereof and foreign states, citizens, or subjects.

"In all cases affecting ambassadors, other [383] public ministers, *and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

The first of these paragraphs defines the matters to which the judicial power of the United States extends, and the second divides the original and appellate jurisdiction of this court. By the latter paragraph this court is given original jurisdiction of those cases "in which a state shall be party." This paragraph distributing the original and appellate jurisdiction of this court is not to be taken as enlarging the judicial power of the United States or adding to the cases or matters to which by the 1st paragraph the judicial power is declared to extend. The question is, therefore, not finally settled by the fact that the state of Minnesota is a party to this litigation. It must also appear that the case is one to which by the 1st paragraph the judicial power of the United States extends. There are three clauses in the 1st paragraph which call for notice; one, that which extends the judicial power of the United States to controversies "between a state and citizens of another state;" second, that which extends it "to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;" and, third, that which extends it to controversies "to which the United States shall be a party." To bring the case within the 1st clause referred to, the bill alleges that the defendant, Ethan Allen Hitchcock, Secretary of the Interior, is a citizen of Missouri, and the defendant, Binger Hermann, Commissioner of the General Land Office, a citizen of Oregon, and therefore it is said the case comes strictly within the language of the 1st paragraph in that there is presented a controversy between a state—Minnesota—and citizens of other states. To that it may be replied that there is no real controversy between the state, the plaintiff, and the defendants as individuals; that the latter, merely as citizens, have no interest in the controversy for or against the plaintiff; that in case either of the defendants should die or resign and a citizen of Minnesota be *appointed in his place, the jurisdic- [384] tion of the court would cease, and this although the real parties in interest remain the same. In respect to the 2d it may be said that if it were held that this court had original jurisdiction of every case of a justiciable nature in which a state was a party and in which was presented some question arising under the Constitution, laws of the United States, or treaties made under their authority, many cases, both of a legal and an equitable nature, in respect to which Congress has provided no suitable procedure, would be brought within its cognizance. To this it may be replied that this court cannot deny its jurisdiction in a case to which it is extended by the Constitution. As to the 3d it may be objected that the United States is not in terms a party to the litigation, and has no pecuniary interest in the controversy, it being in reality one between the state and the Indians.

We omit, as unnecessary to the disposition of this case, any consideration of the applicability of the first two clauses, because we think the case comes within the scope of the 3d clause, and we need not now go farther. This is a controversy to which the United States may be regarded as a party. It is one thereiore to which the judicial power of the United States extends. It is, of course, under that clause, a matter of indifference whether the United States is a party plaintiff or defendant. It could not fairly be adjudged that the judicial power of the United States extends to those cases in which the United States is a party plaintiff, and does not extend to those cases in which it is a party defendant.

The case of *United States* v. *Texas*, 143 U.

S. 621, 36 L. ed. 285, 12 Sup. Ct. Rep. 488, is in point, and upon many aspects of the question very suggestive. That was a suit brought by the United States against the state of Texas to determine the title to a tract, called the county of Greer, which was claimed by the state to be within its limits and a part of its territory, and by the United States to be outside the state of Texas and belonging to the United States. The jurisdiction of this court was challenged, but was sustained. After referring to the provisions of the Constitution and the judiciary act of 1789, Mr. Justice Harlan, speaking for the court, said:

[385] "'The words in the Constitution, "in all cases . . . in which a state shall be a party, the Supreme Court shall have original jurisdiction,' necessarily refer to all cases mentioned in the preceding clause in which a state may be made, of right, a party defendant, or in which a state may, of right, be a party plaintiff.

. . . . . .

"It is, however, said that the words last quoted refer only to suits in which a state is a party, and in which, also, the opposite party is another state of the Union or a foreign state. This cannot be correct, for it must be conceded that a state can bring an original suit in this court against a citizen of another state. *Wisconsin* v. *Pelican Ins. Co.* 127 U. S. 265, 287, 32 L. ed. 239, 242, 8 Sup. Ct. Rep. 1370. Besides, unless a state is exempt altogether from suit by the United States, we do not perceive upon what sound rule of construction suits brought by the United States in this court—especially if they be suits the correct decision of which depends upon the Constitution, laws, or treaties of the United States—are to be excluded from its original jurisdiction as defined in the Constitution. That instrument extends the judicial power of the United States 'to *all* cases' in law and equity, arising under the Constitution, laws, and treaties of the United States, and to controversies in which the United States shall be a party, and confers upon this court original jurisdiction 'in *all* cases' 'in which a state shall be party:' that is, in all cases mentioned in the preceding clause in which a state may, of right, be made a party defendant, as well as in all cases in which a state may, of right, institute a suit in a court of the United States. The present case is of the former class. We cannot assume that the framers of the Constitution, while extending the judicial power of the United States to controversies between two or more states of the Union, and between a state of the Union and foreign states, intended to exempt a state altogether from suit by the general government. They could not have overlooked the possibility that controversies capable of judicial solution might arise between the United States and some of the states, and that the permanence of the Union might be endangered if to some tribunal was not intrusted the power to determine

[386] *them according to the recognized principles of law. And to what tribunal could a trust so momentous be more appropriately committed than to that which the people of the United States, in order to form a more perfect Union, establish justice, and insure domestic tranquillity, have constituted with authority to speak for all the people and all the states, upon questions before it to which the judicial power of the nation extends? It would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more states, but not jurisdiction of controversies of like character between the United States and a state." P. 643, L. ed. p. 292, Sup. Ct. Rep. p. 493.

While the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy. Indeed, the whole jurisdiction of the court of claims rests upon this proposition.

It may be said that the United States is not named as defendant, and therefore it cannot be considered a party to the controversy. It is true that it was at one time held that the 11th Amendment to the Constitution of the United States, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state," was applicable only to cases in which the state was named in the record as a party defendant. *Osborn* v. *Bank of United States*, 9 Wheat. 738, 6 L. ed. 204. But later rulings have modified that decision, and held that the amendment applies to any suit brought in name against an officer of the state, when "the state, though not named, is the real party against which the relief is asked, and the judgment will operate." *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164. Of course, this statement has no reference to and does not include those cases in which officers of the United States are sued, in appropriate form, to compel them to perform some ministerial duty imposed upon them by law, and which they wrongfully neglect or refuse to perform. Such suits would not be deemed suits against the United States within the rule that the government cannot be sued except by its consent, nor within the rule established in the *Ayers Case*.

[387] *Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to devest the government of its title and vest it in the state. The United States is therefore the real party affected by the judgment and against which in fact it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a state is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely

nominal party on the record, but by the question of the effect of the judgment or decree which can be entered.

But it may be said that the United States has no substantial interest in the lands; that it holds the legal title under a contract with the Indians, and in trust for their benefit. This is undoubtedly true, and if the case stood alone upon the construction of the treaty between the United States and the Indians, there might be substantial force in this suggestion. But Congress has, for the government, assumed a personal responsibility. On March 2, 1901, it passed the following act:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in any suit heretofore or hereafter instituted in the Supreme Court of the United States to determine the right of a state to what are commonly known as school lands within any Indian reservation or any Indian cession where an Indian tribe claims any right to or interest in the lands in controversy, or in the disposition thereof by the United States, the right of such state may be fully tested and determined without making the Indian tribe, or any portion thereof, a party to the suit, if the Secretary of the Interior is made a party thereto; and the duty of representing and defending the right or interest of the Indian tribe, or any portion thereof, in the matter, shall devolve upon the Attorney General upon the request of such Secretary." 31 Stat. at L. 950, chap. 808.

[388] *It has by this legislation in effect declared that the Indians, although the real parties in interest, need not be made parties to the suit; that the United States will, for the purposes of the litigation, stand as the real party in interest, and, so far as it could within constitutional limits, has expressed the consent of the government to the maintenance of this suit in this court. By the act it, in effect, declares that it waives all objections on the ground that it is a mere trustee; that it assumes the full responsibilities of ownership; and that it will, whatever may be the outcome of any litigation, stand responsible to the Indians for the full value of the lands in controversy. Can the court say that the United States may not assume such responsibility; may not waive all objections on account of the mere matter of trusteeship, and stand in court as the responsible owner, against whom all litigation may be directed? If it stands as such owner, then within the proposition heretofore referred to a suit which is against its agents, not affecting them individually, but affecting only its title to the real estate, is in substance and effect a suit against the United States. The controversy is made by the act of 1901 one to which the United States is a party in interest, to be directly affected by the result, and therefore the case is within the 1st paragraph, as one to which the judicial power of the United States extends.

Our conclusion therefore is that the original jurisdiction vested by the Constitution in this court over controversies in which a state is a party is not affected by the question whether the state is party plaintiff or party defendant; that a dispute as to the title to real estate is a question of a justiciable nature, and can properly be determined in a judicial proceeding; and that the United States is to be taken, for the purposes of this case, as the real party in interest adverse to the state. We are of opinion, therefore, that this court has jurisdiction of this controversy, and is called upon to determine the case upon its merits.

We pass, therefore, to a consideration of such merits.

Whether this tract, which was known as the Red Lake Indian reservation, was properly called a reservation, as the defendant contends, or unceded Indian country, as the plaintiff insists, is *a matter of little moment. [389] Confessedly the fee of the land was in the United States, subject to a right of occupancy by the Indians. That fee the government might convey, and whenever the Indian right of occupancy was terminated (if such termination was absolute and unconditional) the grantee of the fee would acquire a perfect and unburdened title and right of possession. At the same time, the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon.

It is true that in the third division of the agreed statement there is a stipulation that the territory embraced within the so-called Red Lake Indian reservation remained unceded Indian lands up to the action had on March 4, 1890, unless its status was affected by certain matters named. Doubtless its status, if by that is meant simply the character of the title, was not affected by those matters. While its boundaries were indicated, while it was called the Red Lake Indian reservation, yet the acts referred to did not purport to change the rights of the Indians or the government, neither did they in fact change them. The land remained on March 4, 1890, land the fee of which was in the United States, but subject to the Chippewa Indians' right of occupancy. No patent had ever been executed by the United States to the Indians in severalty or to the tribe at large. The mere calling of the tract a reservation instead of unceded Indian lands did not change the title. It was simply a convenient way of designating the tract.

Yet if it was necessary to determine the question we should have little doubt that this was a reservation within the accepted meaning of the term. Prior to the treaty of October 2, 1863, the boundaries of the lands occupied by the Chippewa Indians had been defined by sundry treaties, and by that treaty a large portion of the lands thus occupied were ceded by the Indians; that is, the Indians ceded to the United States all their interest and right of possession. While there was no formal action in respect to the remaining tract, the effect was to leave the Indians in a distinct tract reserved for their occupation, and in the same act this tract was spoken of as a reservation. Now, *in or- [390] der to create a reservation, it is not neces-

sary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes. Here the Indian occupation was confined by the treaty to a certain specified tract. That became, in effect, an Indian reservation. *Spalding* v. *Chandler*, 160 U. S. 394, 40 L. ed. 469, 16 Sup. Ct. Rep. 360, is in point. There, as here, was presented the question of the origin of a reservation, and in respect thereto it was said (pp. 403, 404, L. ed. p. 473, Sup. Ct. Rep. p. 364):

"It is not necessary to determine how the reservation of the particular tract, subsequently known as the 'Indian reserve,' came to be made. It is clearly inferable from the evidence contained in the record that at the time of the making of the treaty of June 16, 1820, the Chippewa tribe of Indians were in the actual occupation and use of this Indian reserve as an encampment for the pursuit of fishing. . . . But whether the Indians simply continued to encamp where they had been accustomed to prior to making the treaty of 1820, whether a selection of the tract afterwards known as the Indian reserve was made by the Indians subsequent to the making of the treaty, and acquiesced in by the United States government, or whether the selection was made by the government and acquiesced in by the Indians, is immaterial. . . . If the reservation was free from objection by the government, it was as effectual as though the particular tract to be used was specifically designated by boundaries in the treaty itself. The reservation thus created stood precisely in the same category as other Indian reservations, whether established for general or limited uses, and whether made by the direct authority of Congress in the ratification of a treaty or indirectly through the medium of a duly authorized executive officer."

Turning to the legislation of Congress in respect to school lands in Minnesota, the clause in the act establishing the territorial government has only this significance. It provided that when the lands in the territory should be surveyed sections Nos. 16 and 36 "shall be and the same are hereby reserved," for the purpose of being applied to schools. But the agreed statement shows that these lands were not surveyed until after [391] the act of January 14, 1889, and the agreement with the Indians made in pursuance thereof, and approved by the President March 4, 1900. Further, the state had been admitted into the Union, and the rights of the state are to be determined by the act of admission rather than by any prior declaration by Congress of its purpose in respect to certain lands. The act of admission provided:

"That sections numbered sixteen and thirty-six in every township of public lands in said state, and where either of said sections or any part thereof has been sold or otherwise been disposed of, other lands, equivalent thereto and as contiguous as may be, shall be granted to said state for the use of schools."

It will be perceived that this grant was of "public lands." It was held in *Newhall* v. *Sanger*, 92 U. S. 761, 763, 23 L. ed. 769, that—

"The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

In *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 741, 23 L. ed. 634, 637, speaking of a grant to the state of Kansas in aid of the construction of a railway, as affecting lands within an Indian reservation, it was said:

"But did Congress intend that it should reach these lands? Its general terms neither include nor exclude them. Every alternate section designated by odd numbers, within certain defined limits, is granted; but only the public lands owned absolutely by the United States are subject to survey and division into sections, and to them alone this grant is applicable. It embraces such as could be sold and enjoyed, and not those which the Indians, pursuant to treaty stipulations, were left free to occupy."

In *Missouri, K. & T. R. Co.* v. *Roberts*, 152 U. S. 114, 119, 38 L. ed. 377, 380, 14 Sup. Ct. Rep. 496, 498, are these words, referring to the reservation of sections 16 and 36 to Kansas as school lands:

"If the reservation named was intended as a grant of the sections sixteen (16) and thirty-six (36) to the territory and to the states to be created out of them, or as a dedication of them for schools, it could only apply to such lands as were public lands for [392] no other lands in our land system are subdivided into sections, nor could it embrace lands which had been set apart and reserved by statute or treaty with them for the use of the Indians, as was the case with the lands involved in this controversy, as we have already shown."

See also *Doolan* v. *Carr*, 125 U. S. 618, 632, 31 L. ed. 844, 849, 8 Sup. Ct. Rep. 1228; *Burdon* v. *Northern P. R. Co.* 145 U. S. 535, 538, 36 L. ed. 806, 809, 12 Sup. Ct. Rep. 956; *Mann* v. *Tacoma Land Co.* 153 U. S. 273, 284, 38 L. ed. 714, 717, 14 Sup. Ct. Rep. 820; *Barker* v. *Harvey*, 181 U. S. 481, 490, 45 L. ed. 963, 968, 21 Sup. Ct. Rep. 690.

Again, the language of the section does not imply a grant *in præsenti*. It is "*shall* be granted." Doubtless under that promise whenever lands became public lands they came within the scope of the grant. As said in *Beecher* v. *Wetherby*, 95 U. S. 517, 523, 24 L. ed. 440, 441, with reference to a similar clause in the act for the admission of Wisconsin into the Union:

"It was therefore an unalterable condition of the admission, obligatory upon the United States, that section sixteen (16) in every township of the public lands in the state, which had not been sold or otherwise disposed of, should be granted to the state for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in future, or as operating to transfer the title to the state upon her acceptance of the propositions as soon as the sections could

be afterwards identified by the public surveys. In either case the lands which might be embraced within those sections were appropriated to the state. They were withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted."

And again, in *United States* v. *Thomas*, 151 U. S. 577, 583, 38 L. ed. 276, 278, 14 Sup. Ct. Rep. 426, 428:

"Mr. Justice Lamar, while Secretary of the Interior, had frequent occasion to consider the nature and effect of the grant of school lands, where the title was at all encumbered or doubtful; and on this subject he said (6 Land Dec. 418) that the true theory was this: 'That where the fee is in the United States at the date of survey, and the land is so encumbered that full and complete title and right of possession cannot then vest in [393] *the state, the state may, if it so desires, elect to take equivalent lands in fulfilment of the compact, or it may wait until the right and title of possession unite in the government, and then satisfy its grant by taking the lands specifically granted.' And this view he considered 'as fully sustained by the decision of the courts and the opinions of the Attorneys General,' and cited in support of it *Cooper* v. *Roberts*, 18 How. 173, 15 L. ed. 338; 3 Ops. Atty. Gen. 56; 8 Ops. Atty. Gen. 255; 9 Ops. Atty. Gen. 346; 10 Ops. Atty. Gen. 430; *Ham* v. *Missouri*, 18 How. 126, 15 L. ed. 334."

So, also, in *Cooper* v. *Roberts*, 18 How. 173, 179, 15 L. ed. 338, 340, the question presented was whether certain mineral lands were excepted from the grant of school lands to the state. The words of the school-land grant were, as here, "shall be granted," and it was said:

"We agree that until the survey of the township and the designation of the specific section, the right of the state rests in compact,—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object upon which it can attach, and if there is no legal impediment the title of the state becomes a legal title. The *jus ad rem* by the performance of that executive act becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others. *Gaines* v. *Nicholson*, 9 How. 356, 13 L. ed. 172."

But while this is true it is also true that Congress does not, by the section making the school-land grant, either in letter or spirit, bind itself to remove all burdens which may rest upon lands belonging to the government within the state, or to transform all from their existing status to that of public lands, strictly so called, in order that the school grant may operate upon the sections named. It is, of course, to be presumed that Congress will act in good faith; that it will not attempt to impair the scope of the school grant; that it intends that the state shall receive the particular sections or their equivalent in aid of its public school system. But considerations may arise which will *justify [394] an appropriation of a body of lands within the state to other purposes, and if those lands have never become public lands the power of Congress to deal with them is not restricted by the school grant, and the state must seek relief in the clause which gives it equivalent sections. If, for instance, Congress in its judgment believes that within the limits of an Indian reservation or unceded Indian country—that is, within a tract which is not strictly public lands—certain lands should be set apart for a public park, or as a reservation for military purposes, or for any other public uses, it has the power notwithstanding the provisions of the school-grant section. So it is that when Congress came in 1889 to make provision for this body of lands it could have by treaty taken simply a cession of the Indian rights of occupancy, and thereupon the lands would have become public lands and within the scope of the school grant. But it also had the power to make arrangements with the Indians by which the entire tract would be otherwise appropriated.

What was in fact done? The act of January 14, 1889, provided for a commission to negotiate for the cession and relinquishment of "all and so much of" the White Earth and Red Lake reservations as in the judgment of the commission should not be required to satisfy the allotments required by the existing acts, the cession to be "for the purposes and upon the terms hereinafter stated." The allotments referred to were allotments in severalty, made in conformity to the provisions of the act of February 8, 1887, 24 Stat. at L. 388, chap. 119. The ceded lands were to be divided into two classes, one appraised and sold at auction, and the other disposed of to actual settlers at $1.25 per acre. The proceeds of these sales were to be placed in the Treasury of the United States as a permanent fund to the credit of the Indians, drawing interest at 5 per centum for fifty years, the interest to be expended, three fourths paid in cash to the Indians severally and the remaining one fourth devoted, under the direction of the Secretary of the Interior, "exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit." The cession was not to the United States absolutely, *but in trust. It was a [395] cession of all of the unallotted lands. The trust was to be executed by the sale of the ceded lands and a deposit of the proceeds in the Treasury of the United States to the credit of the Indians, such sum to draw interest at 5 per cent, and one fourth of the interest to be devoted exclusively to the maintenance of free schools among the Indians and for their benefit.

Now it is contended that this legislation, though dealing with, in terms, all the unallotted lands, is subordinated to the prior promise of the government to grant sections 16 and 36 to the state for school purposes. In other words, the cession and relinquish-

ment of the Indians, it is said, extend to all the unallotted lands, but that cession and relinquishment having been accomplished, the trust which by the same legislation is created in respect to the same lands is limited and restricted by the prior promise of the government, and this notwithstanding the fact that the government had provided that the state might take other lands, in case any particular sections 16 and 36 had become appropriated to other public uses. We are not disposed to belittle this contention. The arguments in favor of it, both those founded on technical rules of statutory construction and those based upon the long-established policies of the government in respect to both the Indians and the public schools, are presented by counsel for the state with exceeding force and ability. Notwithstanding this, we are constrained to believe that not only the technical rules of statutory construction, but also the general scope of the legislation in these matters, and the policy of the United States in respect to public schools, and also to Indians, as the wards of government, concur in sustaining the contention of the government that none of these ceded lands passed under the school grant to the state.

And first in reference to technical rules of statutory construction. The cession was, as we have seen, of all the unallotted lands, and the cession was of those lands "for the purposes and upon the terms hereinafter stated." It was a distinct conveyance by the Indians of certain lands for a named purpose. Now if the United States, the recipient of this cession, was competent to carry into execution the expressed purposes, does [396] it *not follow that the cession subjected all the lands to them? Can it be said that the Indians making the cession for a moment supposed that the lands ceded were not to be used for the purposes named; and if the language carries upon its face one obvious meaning, and would naturally be so understood by the Indians, that construction, within all the rules respecting Indian treaties, must be enforced. As said in *Worcester* v. *Georgia*, 6 Pet. 515, 582, 8 L. ed. 483, 508:

"The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. To contend that the word 'allotted,' in reference to the land guaranteed to the Indians in certain treaties, indicates a favor conferred rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction."

And in *Choctaw Nation* v. *United States*, 119 U. S. 1, 28, 30 L. ed. 306, 315, 7 Sup. Ct. Rep. 75, 90:

"The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons equally subject to the same laws."

But reliance is placed upon the doctrine that a later general statute does not repeal by implication a prior special statute, unless there is an absolute incompatibility between the two, * and the earlier will remain as an [3 exception to the later. It is said that here the earlier statute was a special grant or promise to grant two particular sections in each township; the later a general statute in respect to all of a large body of lands. There is no necessary incompatibility between the two, and the earlier should be taken as an exception to the later, and the later held applicable to all the lands except the specially named sections. *Beecher* v. *Wetherby*, 95 U. S. 517, 24 L. ed. 440, is referred to as an illustration of the doctrine and in point in reference to school lands. But in that case the cession from the Indians was not subject to any trust. The facts were these: The action was replevin to recover logs cut upon a particular section, and the title to the logs depended on the title to the land. The Wisconsin school grant, in 1846, though of only section 16, was in form similar to that to Minnesota, and the defendant claimed under that grant. A treaty had been concluded with the Menominees February 8, 1831, containing a provision that two specified townships should be set apart for the use of the Stockbridge and Munsee Indians. In these townships was the section 16 in controversy. By treaty, ratified January 23, 1849, the Menomonees, in consideration of the sum of $350,000 and a reservation west of the Mississippi, agreed to cede all their lands in Wisconsin. The 8th article of the treaty stipulated that they should be permitted to remain on the ceded lands for two years, and until notified by the President that the lands were wanted. By treaty of May 12, 1854, this proposed reservation west of the Mississippi river was retroceded by the Indians to the United States, and in consideration of such cession the United States agreed to give them a home, "to be held as Indian lands are held," upon Wolf river, in Wisconsin, which tract included the townships set apart for the benefit of the Stockbridge and Munsee Indians. On February 6, 1871, Congress passed an act for the sale of these two townships, except eighteen contiguous sections thereof, and the appropriation of the proceeds for the benefit of the Stockbridge and Munsee Indians; and in pursuance of that act the United States sold the land in con-

troversy to the plaintiff. The court held that the title of the defendant under the school grant was superior to that of the [398] plaintiff under the *sale by the United States. Two facts are apparent: First, the Menomonee Indians in the first instance received a cash and real estate consideration for the large reservation which they conveyed to the United States; second, that while thereafter a tract was ceded to them to be held as Indian lands are held,—a tract which included the section in controversy,—and while by an earlier treaty with the Menomonees two townships of such tract (including this particular section 16) had been set apart for the use and benefit of the Stockbridge and Munsee Indians, yet there appears no treaty or agreement with either the Menomonee or Stockbridge or Munsee Indians in reference to the sale of these two townships. Yet, as stated by the court, "when the logs in suit were cut, those tribes had removed from the land in controversy, and other sections had been set apart for their occupation." The ruling was that the United States held the fee, subject only to the Indian right of occupancy; that by the school-land section in the enabling act there was a grant, or promise to grant,—in either event to be taken as an appropriation of the fee to the state, subject to the Indian right of occupancy; that the Indians had removed from the lands and had received other lands for their occupation; that hence all Indian rights had ceased. The court, quoting in its opinion from *United States* v. *Cook*, 19 Wall. 591, 22 L. ed. 210, said (p. 526, L. ed. p. 441): "The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy. The possession, when abandoned by the Indians, attaches itself to the fee without further grant."

Hence, applying the doctrine in respect to earlier special and later general statutes, the government having received from the Indians their right of occupancy, without any stipulation or agreement or trust in respect thereto, it was held that the act providing for the sale of the two townships could not have been intended to authorize a sale of specific sections therein which had been already conveyed or promised to the state. But this case stands on entirely different grounds. Before any survey of the lands, before the state right had attached to any particular sections, the United States made a treaty or agreement with the Indians, by [399] which they accepted a cession of the *entire tract under a trust for its disposition in a particular way. The question is not as to the construction of two separate statutes, but as to the scope and effect to be given to a treaty or agreement with the Indians, and whether it is to be narrowed in its scope by any rules applicable to the construction of statutes,—rules with which it is not to be supposed the Indians were familiar.

Buttz v. *Northern P. R. Co.* 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100, is also referred to. In that case the controversy was in respect to a tract of land within the place limits of the grant to the Northern Pacific Railroad Company (13 Stat. at L. 365, chap. 217) and which at the time of the filing of the map of definite location was within the limits of an Indian reservation. By the 2d section of the granting act it was provided that "the United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the [road] named in this bill." In 1872 the United States entered into a treaty with the Indians by which for a cash consideration so much of the reservation as covered the land in controversy was ceded to the United States. It was held that by the original act the fee which was in the United States passed to the railroad company, subject to the Indian right of occupancy, which was afterwards, in pursuance of the promise to the company in the granting act, extinguished for a cash consideration, and immediately there was vested in the company a title paramount to that of one attempting a pre-emption. Here then, as in the prior case, the cession by the Indians was subject to no trust or condition, and the question was simply as to the effect to be given to various statutes.

Heydenfeldt v. *Daney Gold & Silver Min. Co.* 93 U. S. 634, 23 L. ed. 995, while not involving any question of Indian rights, is worthy of notice, as affecting a state's claim to school lands. The Nevada enabling act, approved March 21, 1864 (13 Stat. at L. 30, 32, chap. 36), contained this provision: "That sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands equivalent thereto, in legal subdivisions of not less *than one quarter section, and as contiguous [400] as may be, shall be, and are hereby, granted to said state for the support of common schools." The plaintiff claimed title by conveyance from the state of a part of a section sixteen. The defendant rested upon a mineral patent from the United States, his entry upon the lands having been prior to any survey, and in conformity to the miners' laws, customs, and usages of the district. Although the terms of the school-land section were terms of present grant, and although the entry by the defendant was after the state had been admitted, yet his title was adjudged superior to that obtained from the state, the court holding that the United States had full power to dispose of the land until after a survey and the identification thereby.

Again, it is well to bear in mind the joint resolution passed by Congress on March 3, 1857, a resolution which was prompted by a memorial from the legislature of the territory of Minnesota, and which, recognizing the possibility of settlements or town site entries before the public surveys on lands which by such surveys were afterwards found to be school sections, provided that when any such sections should be occupied by settlers or selected as town sites "or reserved for public uses before the survey," then other lands might be selected in lieu thereof. That

the sale of the ceded lands for the purpose of creating a fund for the benefit of the Indians was a use of them for a public purpose cannot be doubted. But the contention of counsel for the state is "that the public uses which were intended to operate as an appropriation prior to the services were uses to which the land itself might be put or employed for governmental uses." It is unnecessary to rest upon a determination of this question. We refer to the resolution as an express declaration by Congress that the school sections were not granted to the state absolutely, and beyond any further control by Congress, or any further action under the general land laws. As in *Heydenfeldt v. Daney Gold & Silver Min. Co.* 93 U. S. 634, 23 L. ed. 995, priority was given to a mining entry over the state's school right, so here, in terms, preference is given to private entries, town site entries, or reservations for public uses. In other words, the act of admission, with its clause in respect to school [401] *lands, was not a promise by Congress that under all circumstances, either then or in the future, these specific school sections were or should become the property of the state. The possibility of other disposition was contemplated, the right of Congress to make it was recognized, and provision made for a selection of other lands in lieu thereof. In this connection may also be noticed the act of February 28, 1891, although passed after the approval of the agreement for the cession of these lands by the Indians. That act in terms authorized the selection of other lands "where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States."

We come finally to a consideration of the policy of the government both in respect to schools and to Indians. It is undoubtedly true that such policy from the beginning has been liberal in the appropriation of lands for school purposes. See a review of the legislation in respect thereto in the opinion in *Cooper v. Roberts*, 18 How. 173, 15 L. ed. 338.

It is not to be supposed that Congress intended any departure from this policy in its legislation in respect to lands within Minnesota, and the courts are justified in any fair construction of such legislation as will secure to the state its full quota of lands for aid in the development of its public school system. It is also true that much of the legislation in respect to Indians and many of the treaties with them have contemplated simply the cession of their lands and their removal to tracts further west. In such cases, where there has been simply a cession by the Indian tribe of its reservation and a removal to some new territory, it is not strange that the school grants have been generally held operative in the ceded reservations. The interests of public schools have always been considered paramount to those of railroad companies in grants made to aid in their construction. The one speaks for intellectual, the other for material, development. Of course, when the Indian tribe has been removed by treaty from one body of land to another the interest of the tribe in the land from which it has been removed ceases, and the full obligation of the government to the Indians is satisfied when the pecuniary or real-estate consideration for the cession is secured *to them. But in some in- [402] stances, and this is one of them, the Indians have not been removed from one reservation to another, but the government has proceeded upon the theory that the time has come when efforts shall be made to civilize and fit them for citizenship. Allotments are made in severalty, and something attempted more than provision for the material wants of the Indians. In construing provisions designed for their education and civilization as fully, if not more than in construing provisions for their material wants, is it a duty to secure to the Indians all that by any fair construction of treaty or statute can be held to have been understood by them or intended by Congress. Instead of removing these Chippewa Indians from Minnesota, the purpose of the legislation and agreement was to fit them for citizenship by allotting them lands in severalty and providing a system of public schools. Surely it could not have been understood by the Indians that only part of the lands they ceded were to be used for these purposes. They were dealing with the tract as an entirety, and they had a right to expect that the entire tract would be used as declared in the act and agreement. No provision is made for compensating the Indians for lands which would be lost if the right of the state was sustained, whereas, on the other hand, the right of the state to compensation for the particular school sections within the tract had already been secured. Contrasting the two policies,—that in respect to public schools and that in respect to the care of the Indians,—it would seem that we are called upon to uphold the rights of the Indians, which otherwise would be wholly lost without compensation, as against the claims of the state for which satisfaction in other directions has been provided.

For these reasons we are of opinion that the claim of Minnesota to these lands cannot be sustained, and *a decree will be entered in favor of the defendants dismissing the bill.*

Mr. Justice **Gray** did not hear the argument, and took no part in the decision of this case.

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*CARNEGIE STEEL COMPANY, Limited, [403]
Petitioner,
v.
CAMBRIA IRON COMPANY.

(See S. C. Reporter's ed. 403–487.)

Patents—process invention — construction

NOTE.—*On anticipation of patents*—see notes to Leggett v. Standard Oil Co. 37 L. ed. U. S.

Three quarters of a century ago, it was decided by the Supreme Court of New York that a record of a judgment rendered in the Circuit Court of the United States for the District of Massachusetts was admissible in evidence, it appearing that it was authenticated in the ordinary method practiced in the courts of that Commonwealth; and they placed their decision upon two grounds: (1) That the record was the record of a Federal Court. (2) That the Act of Congress requiring exemplification did not apply in such a case. *Jenkins* v. *Kinsley*, Col. & C. Cas., 136.

Viewed in the light of these authorities, to which many more might be added, we are all of the opinion with the Supreme Court of Connecticut, that it is not absolutely necessary that the record of a judgment should be authenticated in the mode prescribed by the Act of Congress referred to, to render the same admissible in the courts of the United States; that the District Court of the United States, even out of the State composing the district, is to be regarded as a domestic and not a foreign court, and that the records of such a court may be proved by the certificate of the clerk under the seal of the court, without the certificate of the judge that the attestation is in due form. *Adams* v. *Way*, 33 Conn., 419; *Michener* v. *Payson*, 13 Nat. Bk. Reg., 50; *Mason* v. *Lawrason*, 1 Cranch, C. C., 190.

Bankruptcy proceedings are, in all cases, deemed matters of record, and are to be carefully filed and numbered; but they are not required to be recorded at large. Short *memoranda* of the same shall be made in books provided for the purpose, and kept in the office of the clerk; and the provision is that the books shall be open to public inspection. Copies of such records, duly certified under the seal of the court, shall in all cases be *prima facie* evidence of the facts therein stated. 14 Stat. at L., 536.

Suffice it to say, that the records of the bankruptcy proceedings admitted in evidence by the court below were authenticated in exact conformity with the directions of the Bankrupt Act, and were, in the judgment of the court, properly admitted in evidence; which is all that need be said in response to the fifth exception.

Exceptions were also taken to the rulings of the court in refusing to instruct the jury as requested by the defendant, and to the instruction given to the jury; but it is not necessary to give those exceptions a separate examination, for the reasons that the material questions involved are substantially the same as those presented in the exceptions to the rulings of the court, already sufficiently considered. Even suppose the assignment of errors presents all the questions involved in the exceptions, still it is clear that there is no error in the record.

Judgment affirmed.

Cited—107 U. S., 10; 7 Sawy., 31.

FANNY BEECHER, EXRX. of LABAN S. BEECHER, Deceased, *Plff. in Err.*,

v.

DAVID WETHERBY ET AL.

(See S. C., 5 Otto, 517-527.)

School lands—title of State—Indian occupancy—sale of Indian lands.

1. By the Act of Congress, of Aug. 6, 1846, authorizing the People of the Territory of Wisconsin to organize a State Government, section 16 in every township, of the public lands in said State, which had not been sold or otherwise disposed of, was granted to said State for the use of schools.

2. No subsequent law authorizing a sale of public lands could be construed to embrace them. Although they were not specially excepted, they could not be diverted from their appropriation to the State.

3. The right to such land held by the Indians was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose.

4. The Act of Congress of Feb. 6, 1871, authorizing a sale of the townships occupied by the Stockbridge and Munsee Tribes, must be held to apply only to those portions which were outside of section 16.

[No. 81.]

Argued Nov. 7, 1877. Decided Nov. 19, 1877.

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin.

The case is stated by the court.

Mr. **Chas. W. Felker,** for plaintiff in error.

Messrs. W. P. Lynde, E. P. Finch and **Charles Barber,** for defendants in error.

Mr. Justice **Field** delivered the opinion of the court:

This was an action of replevin brought by the plaintiff to recover two million feet of pine saw-logs of the estimated value of $25,000, alleged to have been the property of the deceased, and to have been wrongfully detained from him by the defendants. The complaint was in the usual form in such cases, and the answer consisted of a general denial of its averments. The logs were cut by the defendants from the tract of land in Wisconsin which constitutes section sixteen (16), in township twenty-eight (28), range fourteen (14), in the County of Shawano, in that State. The plaintiff claimed to be the owner of the logs by virtue of sundry patents of the land from which they were cut, issued to him by the United States in October, 1872. The defendants asserted property in the logs under patents of the land issued to them by the State of Wisconsin in 1870. The question for determination, therefore, is: which of these two classes of patents, those of the United States or those of the State, transferred the title. The logs were cut in the winter of 1872 and 1873; they were, therefore, standing timber on the land when all the patents were issued, and as such constituted a portion of the realty. Although when severed from the soil the timber became personalty, the title to it remained unaffected. The owner of the land could equally, as before, claim its possession, and pursue it wherever it was carried.

The State asserted title to the land under the compact upon which she was admitted into the Union. The Act of Congress of August 6, 1846, 9 Stat. at L., 56, authorizing the People of the Territory of Wisconsin to organize a State Government, contained various propositions respecting grants of land to the new State, to be submitted for acceptance or rejection to the convention which was to assemble for the purpose of framing its Constitution. Some of the proposed grants were to be for the use of schools, some for the establishment and support of a university, some for the erection of public buildings, and some were to be of lands containing

salt springs. They were promised on condition that the convention should provide by a clause in the Constitution, or by an ordinance irrevocable without the consent of the United States, that the State would never interfere with the primary disposal of the soil within it by the United States, nor with any regulations Congress might find necessary for securing the title in such soil to *bona fide* purchasers; that no tax should be imposed on lands the property of the United States; and that in no case should non-resident proprietors be taxed higher than residents. And the Act provided that if the propositions were accepted by the convention, and ratified by an article in the Constitution, they should be obligatory on the United States. The first of these propositions was "That section numbered sixteen (16) in every township of the public lands in said State, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools."

The convention which subsequently assembled accepted the propositions, and ratified them by an article in the Constitution, embodying therein the provisions required by the Act of Congress as a condition of the grants. With that Constitution the State was admitted into the Union in May, 1848. 9 Stat. at L., 233. It was, therefore, an unalterable condition of the admission, obligatory upon the United States, that section sixteen (16) in every township of the public lands in the State, which had not been sold or otherwise disposed of, should be granted to the State for the use of schools. It matters not whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in future, or as operating to transfer the title to the State upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. In either case, the lands which might be embraced within those sections were appropriated to the State. They were withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of lands in Wisconsin could be construed to embrace them, although they were not specially excepted. All that afterwards remained for the United States to do with respect to them, and all that could be legally done under the compact, was to identify the sections by appropriate surveys; or, if any further assurance of title was required, to provide for the execution of proper instruments to transfer the naked fee, or to adopt such further legislation as would accomplish that result. They could not be diverted from their appropriation to the State.

In *Cooper* v. *Roberts*, reported in the 18th of How., 173 [59 U. S., XV., 338], this court gave construction to a similar clause in the compact upon which the State of Michigan was admitted into the Union, and held, after full consideration, that by it the State acquired such an interest in every section sixteen that her title became perfect so soon as the section in any township was designated by the survey. "We agree," said the court, "that, until the survey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But, when the political authorities have performed this duty, the compact has an object upon which it can attach, and if there is no legal impediment, the title of the State becomes a legal title. The *jus ad rem*, by the performance of that executive act, becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others." In this case, the township embracing the land in question was surveyed in October, 1852, and was subdivided into sections in May and June, 1854. With this identification of the section, the title of the State, upon the authority cited, became complete, unless there had been a sale or other disposition of the property by the United States previous to the compact with the State. No subsequent sale or other disposition, as already stated, could defeat the appropriation. The plaintiff contends that there had been a prior reservation of the land to the use of the Menomonee Tribe of Indians.

It is true that, for many years before Wisconsin became a State, that Tribe occupied various portions of her territory, and roamed over nearly the whole of it. In 1825, the United States undertook to settle by treaty the boundaries of lands claimed by different Tribes of Indians, as between themselves, and agreed to recognize the boundaries thus established, the tribes acknowledging the general controlling power of the United States, and disclaiming all dependence upon and connection with any other power. The land thus recognized as belonging to the Menomonee Tribe embraced the section in controversy in this case. Subsequently, in 1831, the same boundaries were again recognized. But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government. It was so ruled in *Johnson* v. *McIntosh*, 8 Wheat., 543, in 1823; and in *U. S.* v. *Cook*, 19 Wall., 591 [86 U. S., XXII., 210], in 1873. Other cases between those periods have affirmed the same doctrine. *Clark* v. *Smith*, 13 Pet., 195. See, also, *Jackson* v. *Hudson*, 3 Johns., 375; *Veeder* v. *Guppy*, 3 Wis., 502; and *Portage City* case, 8 Opin. Atty-Gen., pp. 262–264. In *U. S.* v. *Cook*, the United States maintained replevin for timber

cut and sold by Indians on land reserved to them, the court observing that the fee was in the United States, and only a right of occupancy in the Indians; that this was the title by which other Indians held their land, and that the authority of *Johnson* v. *McIntosh* on this point had never been doubted. But, added the court, "The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy. The possession, when abandoned by the Indians, attaches itself to the fee without further grant."

In the construction of grants supposed to embrace lands in the occupation of Indians, questions have arisen whether Congress intended to transfer the fee, or otherwise; but the power of the United States to make such transfer has in no instance been denied. In the present case, there can hardly be a doubt that Congress intended to vest in the State the fee to section sixteen in every township, subject, it is true, as in all other cases of grants of public lands, to the existing occupancy of the Indians so long as that occupancy should continue. The greater part of the State was, at the date of the compact, occupied by different Tribes, and the grant of sections in other portions would have been comparatively of little value. Congress undoubtedly expected that at no distant day the State would be settled by white people, and the semi-barbarous condition of the Indian Tribes would give place to the higher civilization of our race; and it contemplated by its benefactions to carry out in that State, as in other States, "its ancient and honored policy" of devoting the central section in every township for the education of the people. Accordingly, soon after the admission of the State into the Union, means were taken for the extinguishment of the Indian title. In less than eight months afterwards the principal Tribe, the Menomonees, by Treaty, ceded to the United States all their lands in Wisconsin, though permitted to remain on them for the period of two years, and until the President should give notice that they were wanted. 9 Stat. at L., 952.

It is true that subsequently, the Indians being unwilling to leave the State, the President permitted their temporary occupation of lands upon Wolf and Oconto Rivers, and in 1853 the State gave its assent to the occupation; and in May, 1854, 10 Stat. at L., 1064, the United States, by treaty, ceded to them certain lands for a permanent home, the Treaty taking effect upon its ratification in August of that year; and afterwards a portion of these lands was, by another Treaty, ceded to the Stockbridge and Munsee Tribes. But when the logs in suit were cut, those Tribes had removed from the land in controversy, and other sections had been set apart for their occupation.

The Act of Congress of February 6th, 1871, authorizing a sale of the townships occupied by the Stockbridge and Munsee Tribes, must, therefore, be held to apply only to those portions which were outside of sections sixteen. It will not be supposed that Congress intended to authorize a sale of land which it had previously disposed of. The appropriation of the sections to the State, as already stated, set them apart from the mass of public property which could be subjected to sale by its direction.

It follows that the plaintiff acquired no title, by his patents, to the land in question and, of course, no property in the timber cut from it.

Judgment affirmed.

Cited—1 McCrary, 244; 23 Kan., 24.

JOHN KNOTE, *Appt.*,

v.

UNITED STATES.

(See S. C., 5 Otto, 149-157.)

Amnesty Proclamation—President's pardon—implied contract by United States.

*1. The general pardon and amnesty granted by President Johnson, by Proclamation, on the 25th of December, 1868, do not entitle one receiving their benefits, to the proceeds of his property, previously condemned and sold under the Confiscation Act of 1862, after such proceeds have been paid into the Treasury of the United States.

2. Whilst a full pardon releases the offender from all disabilities imposed by the offense pardoned, and restores to him all his civil rights, it does not affect any rights which have vested in others directly, by the execution of the judgment for the offense, or which have been acquired by others whilst that judgment was in force. And if the proceeds of the property of the offender sold under the judgment have been paid into the Treasury, the right to them has so far become vested in the United States that they can only be recovered by him through an Act of Congress. Moneys once in the Treasury can only be withdrawn by an appropriation by law.

3. To constitute an implied contract with the United States for the payment of money upon which an action will lie in the Court of Claims, there must have been some consideration moving to the United States, or they must have received the money charged with a duty to pay it over; or the claimant must have had a lawful right to it when it was received, as in the case of money paid by mistake. No such implied contract with the United States arises with respect to moneys received into the Treasury as the proceeds of property forfeited and sold under the Confiscation Act of July 17, 1862.

[No. 92.]

Submitted Nov. 15, 1877. Decided Nov. 26, 1877.

APPEAL from the Court of Claims.

The case is stated by the court.

Messrs. **Thomas Jessup Miller** and **Linden Kent**, for appellant.

Mr. **S. F. Phillips**, *Solicitor-Gen.*, for appellees.

Mr. Justice **Field** delivered the opinion of the court:

The question presented for determination in this case is whether the general pardon and amnesty granted by President Johnson, by Proclamation, on the 25th of December, 1868, 15 Stat. at L., 711, will entitle one receiving their benefits to the proceeds of his property, previously condemned and sold under the Confiscation Act of 1862, 12 Stat. at L., 589, after such proceeds have been paid into the Treasury.

The petition of the claimant alleged that he was the owner of certain described personal property in West Virginia, which was seized and

*Head notes by *Mr. Justice* FIELD.

NOTE.—*Effect of pardons.* See *note* to Armstrong's Foundry v. U. S., 5 U. S., XVIII., 882.

[PRIVY COUNCIL.]

AMODU TIJANI . . . . . APPELLANT;

AND

THE SECRETARY, SOUTHERN NIGERIA RESPONDENT.

J. C.* 1921 July 11.

ON APPEAL FROM THE SUPREME COURT OF NIGERIA (SOUTHERN PROVINCE).

Nigeria—Lagos—Native Tenure of Land—White Cap Chiefs—Communal Land—Acquisition of Land by Government—Compensation—Public Lands Ordinance, 1903 (*No. 5 of* 1903, *Lagos*).

The radical title to land held by the White Cap Chiefs of Lagos is in the Crown, but a full usufructuary title vests in a chief on behalf of the community of which he is the head. That usufructuary title was not affected by the cession to the British Crown in 1861; the system of Crown grants must be regarded as having been introduced mainly, if not exclusively, for conveyancing purposes.

Upon the land held by a White Cap Chief being acquired for public purposes under the Public Lands Ordinance, 1903, the compensation is payable on the footing that the chief is transferring the land in full ownership (except so far as it is unoccupied); the compensation is to be distributed among the members of the community of which he is Chief according to the procedure provided by the Ordinance.

Observations with regard to the native tenure of land in West Africa, and as to "stool" lands.

Judgment of the Supreme Court reversed.

APPEAL by special leave from a judgment of the Supreme Court of Nigeria, Southern Province (January 4, 1918), affirming the judgment of Speed C.J.

The appellant was one of the Idejo White Cap Chiefs of Lagos. By a notice dated November 12, 1913, certain lands situated at Apapa were acquired by the Government of the colony under the Public Lands Ordinance (No. 5 of 1903) for public purposes. The appellant as head chief of the Oluwa family claimed compensation on the basis of ownership of the lands. On a summons taken out by the appellant under the Ordinance above named Speed C.J. held that the appellant was entitled to compensation on the basis of his having merely a right of control and management, not on the basis of absolute ownership. That decision was affirmed by

* *Present:* VISCOUNT HALDANE, LORD ATKINSON, and LORD PHILLIMORE.

J. C. 1921 — AMODU TIJANI v. SECRETARY, SOUTHERN NIGERIA.

the full Court (Speed C.J. and Ross, Webber, and Pennington JJ.)

The material facts appear from the judgment of the Judicial Committee.

Special leave to appeal was granted on June 25, 1918, leave being reserved to the respondent to object at the hearing of the appeal that there was no jurisdiction to grant leave to appeal.

1921. June 6, 7, 9, 21. *Hon. Sir William Finlay K.C.* and *J. A. Johnston* for the appellant.

Upjohn K.C. and *Vernon* for the respondent.

In the course of the argument reference was made to *Attorney-General of Southern Nigeria* v. *Holt*, both in the Supreme Court (1) and on appeal to the Board (2); *Oduntan Onisiwo* v. *Attorney-General of Southern Nigeria* (3); to the following unreported decisions in the colony, *Callamand* v. *Vaughan* (1878), *Ajon* v. *Efunde* (1892), *Ohuntan's Case* (1908), *Taiwo* v. *Odunsi Sarumi* (1913); and to *Secretary of State* v. *Kamachee Boye Sahaba* (4) and *Durga Prashad Singh* v. *Tribeni Singh.* (5) Also to the Public Lands Ordinance (No. 5 of 1903) and to earlier Ordinances—namely, No. 9 of 1863, No. 10 of 1864, No. 9 of 1865, and No. 9 of 1869—and to Historical Notices of Lagos by Rev. J. B. Woods (1880), Report of Land Tenure in West Africa by Rayner C.J. (1898), Notes of Evidence taken by the West African Lands Committee (1912–1914), and Irving's Titles to Lands in Nigeria (1916).

July 11. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. In this case the question raised is as to the basis for calculation of the compensation payable to the appellant, who claims for the taking by the Government of the colony of Southern Nigeria of certain land for public purposes. There was a preliminary point as to whether

(1) (1910) 2 Nig. L. R. 1.
(2) [1915] A. C. 599.
(3) (1912) 2 Nig. L. R. 77.
(4) (1859) 7 Moo. I. A. 476.
(5) (1918) L. R. 45 I. A. 275.

the terms of the Public Lands Ordinance of the colony do not make the decision of its Supreme Court on such a question final. As to this it is sufficient to say that the terms of the Ordinance did not preclude the exercise which has been made of the prerogative of the Crown to give special leave to bring this appeal.

The Public Lands Ordinance of 1903 of the colony provides that the Governor may take any lands required for public purposes for an estate in fee simple or for a less estate, on paying compensation to be agreed on or determined by the Supreme Court of the colony. The Governor is to give notice to all the persons interested in the land, or to the persons authorized by the Ordinance to sell and convey it. Where the land required is the property of a native community, the head chief of the community may sell and convey it in fee simple, any native law or custom to the contrary notwithstanding. There is to be no compensation for land unoccupied unless it is proved that, for at least six months during the ten years preceding any notice, certain kinds of beneficial use have been made of it. In other cases the Court is to assess the compensation according to the value at the time when the notice was served, inclusive of damage done by severance. Prima facie, the persons in possession, as if owners, are to be deemed entitled. Generally speaking, the Governor may pay the compensation in accordance with the direction of the Court, but where any consideration or compensation is paid to a head chief in respect of any land, the property of a native community, such consideration or compensation is to be distributed by him among the members of the community or applied or used for their benefit in such proportions and manner as the Native Council of the District in which the land is situated, determines with the sanction of the Governor.

The land in question is at Apapa, on the mainland and within the colony. The appellant is the head chief of the Oluwa family or community, and is one of the Idejos or landowning White Cap Chiefs of Lagos and the land is occupied by persons some of whom pay rent or tribute to him.

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Apart from any family or private land which the chief may possess or may have allotted to members of his own family, he has in a representative or official capacity control by custom over the tracts within his chieftaincy, including, as Speed C.J. points out in his judgment in this case, power of allotment and of exacting a small tribute or rent in acknowledgment of his position as head chief. But when in the present proceedings he claimed for the whole value of the land in question, as being land which he was empowered by the Ordinance to sell, the Chief Justice of the Supreme Court held that, although he had a right which must be recognized and paid for, this right was: "merely a seigneurial right giving the holder the ordinary rights of control and management of the land in accordance with the well-known principles of native law and custom, including the right to receive payment of the nominal rent or tribute payable by the occupiers, and that compensation should be calculated on that basis, and not on the basis of absolute ownership of the land." It does not appear clearly from the judgment of the Chief Justice whether he thought that the members of the community had any independent right to compensation, or whether the Crown was entitled to appropriate the land without more.

The appellant, on the other hand, contended that, although his claim was, as appears from the statement of his advocate, restricted to one in a representative capacity, it extended to the full value of the family property and community land vested in him as chief, for the latter of which he claimed to be entitled to be dealt with under the terms of the Ordinance in the capacity of representing his community and its full title of occupation.

The question which their Lordships have to decide is which of these views is the true one. In order to answer the question, it is necessary to consider, in the first place, the real character of the native title to the land.

Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution

is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence. Their Lordships have elsewhere explained principles of this kind in connection with the Indian title to reserve lands in Canada. (1) But the Indian title in Canada affords by no means the only illustration of the necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle. Even where an estate in fee is definitely recognized as the most comprehensive estate in land which the law recognizes, it does not follow that outside England it admits of being broken up. In Scotland a life estate imports no freehold title, but is simply in contemplation of Scottish law a burden on a right of full property that cannot be split up. In India much the same principle applies. The division of the fee into successive and independent incorporeal rights of property conceived as existing separately from the possession is unknown. In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of the title to land which must be borne in mind. The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community

(1) See 14 App. Cas. 46 and [1920] 1 A. C. 401.

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may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.

In the case of Lagos and the territory round it, the necessity of adopting this method of inquiry is evident. As the result of cession to the British Crown by former potentates, the radical title is now in the British Sovereign. But that title is throughout qualified by the usufructuary rights of communities, rights which, as the outcome of deliberate policy, have been respected and recognized. Even when machinery has been established for defining as far as is possible the rights of individuals by introducing Crown grants as evidence of title, such machinery has apparently not been directed to the modification of substantive rights, but rather to the definition of those already in existence and to the preservation of records of that existence.

In the instance of Lagos the character of the tenure of the land among the native communities is described by Rayner C.J. in the Report on Land Tenure in West Africa, which that learned judge made in 1898, in language which their Lordships think is substantially borne out by the preponderance of authority: "The next fact which it is important to bear in mind in order to understand the native land law is that the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. All the members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or

family. He has control of it, and any member who wants a piece of it to cultivate or build a house upon, goes to him for it. But the land so given still remains the property of the community or family. He cannot make any important disposition of the land without consulting the elders of the community or family, and their consent must in all cases be given before a grant can be made to a stranger. This is a pure native custom along the whole length of this coast, and wherever we find, as in Lagos, individual owners, this is again due to the introduction of English ideas. But the native idea still has a firm hold on the people, and in most cases, even in Lagos, land is held by the family. This is so even in cases of land purporting to be held under Crown grants and English conveyances. The original grantee may have held as an individual owner, but on his death all his family claim an interest, which is always recognized, and thus the land becomes again family land. My experience in Lagos leads me to the conclusion that except where land has been bought by the present owner there are very few natives who are individual owners of land."

Consideration of the various documents, records and decisions, which have been brought before them in the course of the argument at the Bar, has led their Lordships to the conclusion that the view expressed by Rayner C.J. in the language just cited is substantially the true one. They therefore interpret para. 6 of the Public Lands Ordinance of 1903, which says that where lands required for public purposes are the property of a native community, "the Head Chief of such community may sell and convey the same for an estate in fee simple," as meaning that the chief may transfer the title of the community. It follows that it is for the whole of what he so transfers that compensation has to be made. This is borne out by paras. 25 and 26, which provide for distribution of such compensation under the direction of the Native Council of the District, with the sanction of the Governor.

The history of the relations of the chiefs to the British Crown in Lagos and the vicinity bears out this conclusion.

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About the beginning of the eighteenth century the Island of Lagos was held by a chief called Olofin. He had parcelled out the island and part of the adjoining mainland among some sixteen subordinate chiefs, called "Whitecap" in recognition of their dominion over the portions parcelled out to them. About 1790 Lagos was successfully invaded by the neighbouring Benins. They did not remain in occupation, but left a representative as ruler whose title was the "Eleko." The successive Elekos in the end became the Kings of Lagos, although for a long time they acknowledged the sovereignty of the King of the Benins, and paid tribute to him. The Benins appear to have interfered but little with the customs and arrangements in the island. About the year 1850 payment of tribute was refused, and the King of Lagos asserted his independence. At this period Lagos had become a centre of the slave trade, and this trade centre the British Government determined to suppress. A Protectorate was at first established, and a little later it was decided to take possession of the island. The then king was named Docemo. In 1861 he made a treaty of cession by which he ceded to the British Crown the port and island of Lagos with all the rights, profits, territories and appurtenances thereto belonging. In 1862 the ceded territories were erected into a separate British Government, with the title "Settlement of Lagos." In 1874 this became part of the Gold Coast. In 1886 Lagos was again made a separate colony, and finally, in 1906, it became part of the colony of Southern Nigeria.

In 1862 a debate took place in the House of Commons which is instructive as showing the interpretation by the British Government of the footing on which it had really entered. The slave trade was to be suppressed, but Docemo was not to be maltreated. He was to have a revenue settled on and secured to him. The real possessors of the land were considered to be, not the native kings, but the White Cap Chiefs. The apprehension of these chiefs that they were to be turned out had been set at rest, so it was stated. The object was to suppress the slave trade, and to introduce

orderly conditions. Such, in substance, was the announcement of policy to the House of Commons by the Under Secretary for Foreign Affairs, and the contemporary despatches and records confirm it and point to its having been carried out. The chiefs were stated, in a despatch from the then Consul, to have been satisfied that the cession would render their private property more valuable to them. No doubt there was a cession to the British Crown, along with the sovereignty, of the radical or ultimate title to the land, in the new colony, but this cession appears to have been made on the footing that the rights of property of the inhabitants were to be fully respected. This principle is a usual one under British policy and law when such occupations take place. The general words of the cession are construed as having related primarily to sovereign rights only. What has been stated appears to have been the view taken by the Judicial Committee in a recent case, *Attorney-General of Southern Nigeria* v. *Holt* (1), and their Lordships agree with that view. Where the cession passed any proprietary rights they were rights which the ceding king possessed beneficially and free from the usufructuary qualification of his title in favour of his subjects.

In the light afforded by the narrative, it is not admissible to conclude that the Crown is generally speaking entitled to the beneficial ownership of the land as having so passed to the Crown as to displace any presumptive title of the natives. In the case of *Oduntan Onisiwo* v. *Attorney-General of Southern Nigeria* (2), decided by the Supreme Court of the colony in 1912, Osborne C.J. laid down as regards the effect of the cession of 1861, that he was of opinion that "the ownership rights of private landowners, including the families of the Idejos, were left entirely unimpaired, and as freely exercisable after the Cession as before." In this view their Lordships concur. A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are prima facie to be construed accordingly. The introduction of the system of Crown

(1) [1915] A. C. 599. (2) 2 Nig. L. R. 77.

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grants which was made subsequently must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing. No doubt questions of difficulty may arise in individual instances as to the effect in law of the terms of particular documents. But when the broad question is raised as to what is meant by the provision in the Public Lands Ordinance of 1903, that where the lands to be taken are the property of a native community, the head chief may sell and convey it, the answer must be that he is to convey a full native title of usufruct, and that adequate compensation for what is so conveyed must be awarded for distribution among the members of the community entitled, for apportionment as the Native Council of the District, with the sanction of the Governor, may determine. The chief is only the agent through whom the transaction is to take place, and he is to be dealt with as representing not only his own but the other interests affected.

Their Lordships now turn to the judgments of Speed C.J. in the two Courts below. The reasons given in these judgments were in effect adopted by the full Court, and they are conveniently stated in what was said by the Chief Justice himself, in the Court of first instance. He defined the question raised to be "whether the Oluwa has any rights over or title to the land in question for which compensation is payable, and if so upon what basis such compensation should be fixed." His answer was that the only right or title of the chief was a "seigneurial right giving the holder the ordinary rights of control and management of the land, in accordance with the well-known principles of native law and custom, including the right to receive payment of the nominal rent or tribute payable by the occupiers, and that compensation should be calculated on that basis and not on the basis of absolute ownership." The reasons given by Speed C.J. for coming to this conclusion were as follows: According to the Benin law the King is the sovereign owner of the land, and as the territory was conquered by the Benins it follows that during the conquest the King of Benin was the

real owner, the control exercised by the chiefs under his "Eleko" or representative being exercised as part of the machinery of government and not in virtue of ownership. It might be that for a considerable period prior to 1850 the control of the King of Benin had been relaxed until it became little more than a formal and nominal overlordship, and that in this period there had been a tendency on the part of the minor chiefs to arrogate to themselves powers to which constitutionally they had no claim, including independent powers of control and management. But the effect of the cession of 1861 was that, even according to the then strict native law, all the rights over the land, including sovereign ownership, passed to the British Crown. He finds that what was recognized by the British Government was simply the title of the chiefs to exercise a kind of control over considerable tracts of land, including the right to allot such lands to members of their family and others for the purposes of cultivation, and to receive a nominal rent or tribute as an acknowledgment of "seigneurial" right. Strict native law would not have supported this claim, but it was made and acquiesced in, although there were certain Crown grants which appear to have ignored it. There was thus no title to absolute ownership in the chiefs, and, so far as the judgment in the *Onisiwo Case* (already referred to), was inconsistent with this view, it was based on a confusion between family and chieftaincy property. It was true that in yet another case in 1907, which came before the full Court, the Government had paid compensation on the basis of absolute ownership, but in that case the Government had not raised the question of title, and the decision consequently could not be regarded as authoritative.

Their Lordships think that the learned Chief Justice in the judgment thus summarised, which virtually excludes the legal reality of the community usufruct, has failed to recognize the real character of the title to land occupied by a native community. That title, as they have pointed out, is prima facie based, not on such individual ownership as English law has made familiar, but on a communal usufructuary

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occupation, which may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference. In their opinion there is no evidence that this kind of usufructuary title of the community was disturbed in law, either when the Benin Kings conquered Lagos or when the cession to the British Crown took place in 1861. The general words used in the treaty of cession are not in themselves to be construed as extinguishing subject rights. The original native right was a communal right, and it must be presumed to have continued to exist unless the contrary is established by the context or circumstances. There is, in their Lordships' opinion, no evidence which points to its having been at any time seriously disturbed or even questioned. Under these conditions they are unable to take the view adopted by the Chief Justice and the full Court.

Nor do their Lordships think that there has been made out any distinction between "stool" and communal lands, which affects the principle to be applied in estimating the basis on which compensation must be made. The Crown is under no obligation to pay any one for unoccupied lands as defined. It will have to pay the chief for family lands to which he is individually entitled when taken. There may be other portions of the land under his control which he has validly allotted to strangers or possibly even to members of his own clan or community. If he is properly deriving tribute or rent from these allotments, he will have to be compensated for the loss of it, and if the allottees have had valid titles conferred on them, they must also be compensated. Their Lordships doubt whether any really definite distinction is connoted by the expression "stool lands." It probably means little more than lands which the chief holds in his representative or constitutional capacity, as distinguished from land which he and his own family hold individually. But in any event the point makes little difference for practical purposes. In the case of land belonging to the community, but as to which no rent or tribute is payable to the chief, it does not appear that the latter is entitled to be

compensated otherwise than in his representative capacity under the Ordinance of 1903. It is the members of his community who are in usufructuary occupation or in an equivalent position on whose behalf he is making the claim. The whole matter will have to be the subject of a proper inquiry directed to ascertaining whose the real interests are and what their values are.

Their Lordships will accordingly humbly advise His Majesty that the judgment of the Courts below should be reversed, and that declarations should be made: (1.) That the appellant, for the purposes of the Public Lands Ordinance No. 5 of 1903 is entitled to claim compensation on the footing that he is transferring to the Governor the land in question in full ownership, excepting in so far as such land is unoccupied, along with his own title to receive rent or tribute; (2.) That the consideration or compensation awarded is to be distributed, under the direction of the Native Council of the District with the sanction of the Governor, among the members of the community represented by the appellant as its head chief in such proportions and in such manner as such Council, with the sanction of the Governor, may determine. The case will go back to the Supreme Court of Nigeria (Southern Provinces) to secure that effect is given to these declarations. The appellant is entitled to his costs of this appeal and of the appeal to the full Court, and in any event to such costs of the original hearing as have been occasioned by the question raised by the respondent as to his title. The other costs will be dealt with by the Supreme Court in accordance with the provisions of the Ordinance.

Solicitor for appellant: *E. F. Hunt.*
Solicitors for respondent: *Burchells.*

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by active steps on to the plaintiff's land. It is the river—the "common enemy"—which first floods the fourteen acres and then carries away the flood; and the injury to the plaintiff is not increased, but is probably diminished, by the fact that the fourteen acres are left open and unembanked. There is, in fact, neither injuria nor damnum proved under this head. This contention, therefore, also fails.

For the above reasons their Lordships are of opinion that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Collyer-Bristow & Co.*

Solicitors for respondents: *Mackrell, Maton, Godlee & Quincey.*

[PRIVY COUNCIL.]

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ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC AND OTHERS. . } APPELLANTS;

AND

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA AND ANOTHER . . . . . } RESPONDENTS.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC.

*Canada (Quebec)—Lands appropriated to Indians—Dominion or Provincial Title—*13 *&* 14 *Vict. Can.), c.* 42, *ss.* 1, 2—*British North America Act,* 1867 (30 *&* 31 *Vict. c.* 3), *s.* 109—*Sale of Crown Property by Sheriff—Title of Purchaser—Code of Civil Procedure, arts.* 399, 2213.

The title to lands in the Province of Quebec appropriated for the use of Indians, pursuant to 14 & 15 Vict. (Can.), c. 106, and surrendered to the Crown in 1852, passed to the Province under s. 109 of the B. N. A. Act. 1867. The effect of 13 & 14 Vict. (Can.), c. 42, was not to give the Indians an equitable estate in the lands; the title remained in the Crown, the Commissioner for Indian Lands being given such an interest

* *Present:* VISCOUNT HALDANE, VISCOUNT CAVE, LORD DUNEDIN, and MR. JUSTICE DUFF.

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as to enable him to exercise the powers of management committed to him by that statute.

St. Catherine's Milling and Lumber Co. v. *The Queen* (1888) 14 App. Cas. 46 followed and applied.

Arts. 399 and 2213 of the Code of Civil Procedure of Quebec have not the effect of conferring upon the purchasers at a sheriff's sale a title to Crown property which has not been alienated by the Crown.

Commissaire d'Ecole v. *Price* (1895) 1 Rev. de Jur. 122 approved.

Judgment of the Court of King's Bench reversed.

APPEAL from a judgment (November 7, 1917) of the Court of King's Bench for Quebec, Appeal Side, affirming a judgment of the Superior Court.

The main question in the appeal was whether the title to lands in the Province of Quebec appropriated in 1853 for the use of Indians under 14 & 15 Vict. (Can.), c. 106, and surrendered to the Crown in 1882, was in the Crown in the right of the Dominion or in the right of the Province of Quebec.

The question arose in an action brought in the Superior Court by the second party appellant, the Star Chrome Mining Co., Ld., against the second respondent, Dame Thompson. The Attorneys-General for the Dominion and for the Province intervened in the action.

There was a subsidiary question—namely, whether respondent Dame Thompson's title was in any case validated by the fact that she had purchased the property upon a sale in execution by the sheriff.

The facts of the case and the material enactments appear from the judgment.

The trial judge (Lafontaine J.) dismissed the action and the intervention of the Attorney-General for the Province. On appeal the Court of King's Bench, Appeal Side (Cross, Carroll, Pelletier, and Roy JJ.; Lavergne J. dissenting), affirmed the decision of the trial judge.

July 29, 30, 1920. *Geoffrion K.C.* (*Lanctot K.C.* and *G. Lawrence* with him) for the appellant, the Attorney-General for Quebec. The lands reserved for Indians in the Province of Quebec became the property of the Province at confederation by virtue of s. 109 of the British North America Act,

1867; they were lands vested in the Crown at confederation subject to "an interest other than that of the Province" within the meaning of that section. The present case is not distinguishable from *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1), in which it was held that lands reserved for Indians in Ontario vested in that Province. The Acts of the Parliament of Canada as to Indian reserves in Lower Canada—namely, 13 & 14 Vict. c. 42 and 14 & 15 Vict. c. 106—granted no rights other than usufructuary rights to the Indians. The Dominion of Canada had power to accept a surrender to the Crown of the Indians' rights, but had no power to take away from the Province the property in the lands assigned to the Province by the British North America Act. [Reference was made also to *Ontario Mining Co.* v. *Seybold* (2), *Attorney-General for Canada* v. *Attorney-General for Ontario* (3), and *Dominion of Canada* v. *Province of Ontario.* (4)]

St. Germain K.C. for the appellant company.

Sir John Simon K.C. and *Newcombe K.C.* (*James Wylie* with them) for the respondent, the Attorney-General for Canada. This case is distinguishable from *St. Catherine's Milling and Lumber Co.* v. *The Queen.* (1) As a result of 13 & 14 Vict. (Can.), c. 42, and 14 & 15 Vict. (Can.), c. 106, the position before and at the time of the passing of the British North America Act, 1867, was that lands reserved for Indians in Lower Canada were vested in the Commissioner on behalf of the Indians, and were not vested in the Crown. The Commissioner had all the rights of ownership, including a power of sale conditional upon the consent of the Indians The Acts of the Parliament of Canada relative to Indian reserves in Upper Canada contained no similar provisions. Sect. 26 of 31 Vict. (Dom.), c. 42, provided that thenceforth the land should vest in the Crown; it therefore cannot be said that it vested earlier. As the effect of ss. 12, 65, and 130 of the British North America Act, 1867, the Commissioner became a Dominion official, and under s. 91, head 24 ("Indians, and land reserved for Indians"), the Dominion Legislature had

(1) 14 App. Cas. 46.
(2) [1903] A. C. 73.
(3) [1898] A. C. 700.
(4) [1910] A. C. 637.

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exclusive power to pass laws relative to the sale of the lands, and the application of the proceeds, as was done by 31 Vict. c. 42. The surrender in 1882, unlike that in the *St. Catherine's Case* (1), was merely for the purpose of sale and for the purchase of other lands. Upon the surrender the lands became the unencumbered property of the Dominion with a full right of disposition, subject only to the obligation to apply the proceeds in the manner provided by the terms of the surrender.

St. Jacques K.C. for the respondent, Dame Thompson.

Geoffrion K.C. in reply. The title of the Indians in Quebec was no higher than the title under the proclamation of October 7, 1763, under which the lands were merely "set apart for the use of the Indians." Under s. 3 of 13 & 14 Vict. (Can.), c. 42, there was no restriction in the power of the Governor to deal with the lands; the Commissioner was merely a servant of the Government. If any transferable right was granted to the Indians, it was merely the right of use; there was no right to convert the lands into money. If the title of the Indians in Quebec was the same as in Ontario, the Dominion Government could not arrive at a different result in Quebec by dealing with the lands differently.

Nov. 23. The judgment of their Lordships was delivered by

MR. JUSTICE DUFF. By an order of the Governor of the late Province of Canada in Council, of August 9, 1853, pursuant to a statute of that Province (14 & 15 Vict. c. 106), the provisions of which are hereinafter explained, certain lands, including those whose title is in question on this appeal —namely, lots 6, 7 and 8, in the thirteenth range of the township of Coleraine in the county of Megantic—were appropriated for the benefit of the Indian tribes of Lower Canada, those particularly mentioned being set apart for the tribe called the Abenakis of Becancour. By an instrument of surrender of February 14, 1882, which was accepted by an order of the Governor-General of Canada in Council of April 3, 1882, this tribe surrendered (inter alia) the lots

(1) 14 App. Cas. 46.

above specified to Her Majesty the Queen; and on July 2, 1887, the Dominion Government professed to grant them by letters patent to Cyrice Tetu, of Montreal, whose interest in them passed on his death to Dame Caroline Tetu.

On April 10, 1893, the lands in question, having been seized in execution by the sheriff of the district of Arthabaska, under a judgment against Dame Caroline Tetu, were sold by the sheriff to one Joseph Lamarche, whose title was eventually acquired by the respondent Dame Rosalie Thompson. The appellants, the Star Chrome Mining Co., Ld., having purchased the property from the respondent Dame Rosalie Thompson, in February, 1907, the company took proceedings against the vendor, claiming rescission of the sale and demanding repayment of the purchase money with damages, on the ground that the property was in the Crown in the right of the Province of Quebec, and that the vendor was consequently without title at the time of the sale.

The action of the appellants having come on for trial on June 4, 1909, the trial was adjourned, and on June 29, 1912. an order was made suggesting that the Dominion Government and the Government of Quebec should intervene for the purpose of determining the controversy touching the authority of the Dominion Government to dispose of the lands in question on behalf of the Crown. On October 2, 1914, the appellant, the Attorney-General of Quebec, intervened, claiming by his intervention that the grant to Cyrice Tetu, of July 2, 1887, was null and void, on the ground that the lands which the grant professed to dispose of were the property of the Crown in the right of Quebec; and on October 7, 1914, the respondent, the Attorney-General of Canada, met the intervention of the Attorney-General of Quebec by a contestation in which he maintained the validity of the grant to Cyrice Tetu. On May 7, 1917, the Superior Court pronounced judgment rejecting the intervention of the Attorney-General of Quebec, and the appeal from this judgment was dismissed by the Court of King's Bench on November 20, 1917, Lavergne J. dissenting.

The first question which arises concerns the effect of the

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deed of surrender of April 3, 1882—whether, that is to say, as a result of the surrender, the title to the lands affected by it became vested in the Crown in right of the Dominion, or, on the contrary, the title, freed from the burden of the Indian interest, passed to the Province under s. 109 of the British North America Act.

The claim of Quebec is based upon the contention that at the date of Confederation the radical title in these lands was vested in the Crown, subject to an interest held in trust for the benefit of the Indians, which, in the words used by Lord Watson, in delivering judgment in *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1), was only "a personal and usufructuary right dependent upon the goodwill of the Sovereign." On behalf of the Dominion it is contended that the title, both legal and beneficial, was held in trust for the Indians.

In virtue of the enactment of s. 91, head 24, of the British North America Act, by which exclusive authority to legislate in respect of lands reserved for Indians is vested in the Dominion Parliament, it is not disputed that that Parliament would have full authority to legislate in respect of the disposition of the Indian title, which, according to the Dominion's contention, would be the full beneficial title. On the other hand, if the view advanced by the Province touching the nature of the Indian title be accepted, then it follows from the principle laid down by the decision of this Board in *St. Catherine's Milling and Lumber Co.* v. *The Queen* (supra) (1) that upon the surrender in 1882 of the Indian interest the title to the lands affected by the surrender became vested in the Crown in right of the Province, freed from the burden of that interest.

The answer to the question raised by this controversy primarily depends upon the true construction of two statutes passed by the Legislature of the Province of Canada in 1850 and 1851 (13 & 14 Vict. c. 42 and 14 & 15 Vict. c. 106). The last-mentioned statute is entitled, "An Act to authorise the setting apart of lands for the use of certain Indian tribes in

(1) 14 App. Cas. 46, 54.

Lower Canada," and, after reciting that it is expedient to set apart certain lands for such "use," it enacts that tracts not exceeding 230,000 acres may, under the authority of Orders in Council, be described, surveyed and set out by the Commissioner of Crown Lands, and that "such tracts of land shall be and are hereby respectively set apart and appropriated to and for the use of the several Indian tribes in Lower Canada, for which they shall be respectively directed to be set apart . . . . and the said tracts of land shall accordingly, by virtue of this Act . . . . be vested in and managed by the Commissioner of Indian Lands for Lower Canada, under" the statute first mentioned, 13 & 14 Vict. c. 42.

This statute (13 & 14 Vict. c. 42) is entitled "An Act for the better protection of the lands and property of the Indians in Lower Canada," and, following upon a recital that it is expedient to make better provision in respect of "lands appropriated to the use of Indians in Lower Canada," enacts (by s. 1) as follows: "That it shall be lawful for the Governor to appoint from time to time a Commissioner of Indian Lands for Lower Canada, in whom and in whose successors by the name aforesaid, all lands or property in Lower Canada which are or shall be set apart or appropriated to or for the use of any tribe or body of Indians, shall be and are hereby vested, in trust for such tribe or body, and who shall be held in law to be in the occupation and possession of any lands in Lower Canada actually occupied or possessed by any such tribe or body in common, or by any chief or member thereof or other party for the use or benefit of such tribe or body, and shall be entitled to receive and recover the rents, issues and profits of such lands and property, and shall and may, in and by the name aforesaid, but subject to the provisions hereinafter made, exercise and defend all or any of the rights lawfully appertaining to the proprietor, possessor or occupant of such land or property." And by s. 3: "That the said Commissioner shall have full power to concede or lease or charge any such land or property as aforesaid and to receive or recover the rents, issues and profits thereof as any lawful proprietor, possessor or occupant thereof might do, but shall

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be subject in all things to the instructions he may from time to time receive from the Governor, and shall be personally responsible to the Crown for all his acts, and more especially for any act done contrary to such instructions, and shall account for all moneys received by him, and apply and pay over the same in such manner, at such times, and to such person or officer, as shall be appointed by the Governor, and shall report from time to time on all matters relative to this office in such manner and form, and give such security, as the Governor shall direct and require; and all moneys and movable property received by him or in his possession as Commissioner, if not duly accounted for, applied and paid over as aforesaid, or if not delivered by any person having been such Commissioner to his successor in office, may be recovered by the Crown or by such successor, in any Court having civil jurisdiction to the amount or value, from the person having been such Commissioner and his sureties, jointly and severally."

The rival views which have been advanced before their Lordships touching the construction of these enactments have already been indicated.

In support of the Dominion claim it is urged that, as regards lands "appropriated" under the Act of 1851, the words "shall be and are hereby vested in trust for" the Indians, create a beneficial estate in such lands, which by force of the statute is held for the Indians, and which could not lawfully be devoted to any purpose other than the purposes of the trust, and indeed is equivalent to the beneficial ownership.

While the language of the statute of 1850 undoubtedly imports a legislative acknowledgment of a right inherent in the Indians to enjoy the lands appropriated to their use under the superintendence and management of the Commissioner of Indian Lands, their Lordships think the contention of the Province to be well founded to this extent, that the right recognized by the statute is a usufructuary right only and a personal right in the sense that it is in its nature inalienable except by surrender to the Crown.

By s. 3 the Commissioner is not only accountable for his

acts, but is subject to the direction of the Governor in all matters relating to the trust; the intent of the statute appears to be, in other words, that the rights and powers committed to him are not committed to him as the delegate of the Legislature, but as the officer who for convenience of administration is appointed to represent the Crown for the purpose of managing the property for the benefit of the Indians. If this be the correct view, then, whatever be the nature or quantum of the Commissioner's interest, it is held by him in his capacity of officer of the Crown and his title is still the title of the Crown; and this, it may be observed, is apparently the view upon which the Dominion Government proceeded in accepting the surrender of 1882, the lands surrendered being treated (and their Lordships think rightly treated) for the purposes of that transaction as a "Reserve" within the meaning of the Act of 1882—in other words, as lands "the legal title" to which still remained in the Crown (s. 2, sub-s. 6). It is not unimportant, however, to notice that the term "vest" is of elastic import; and a declaration that lands are "vested" in a public body for public purposes may pass only such powers of control and management and such proprietary interest as may be necessary to enable that body to discharge its public functions effectively: *Tunbridge Wells Corporation* v. *Baird* (1), an interest which may become devested when these functions are transferred to another body. In their Lordships' opinion, the words quoted from s. 1 are not inconsistent with an intention that the Commissioner should possess such limited interest only as might be necessary to enable him effectually to execute the powers and duties of control and management, of suing and being sued, committed to him by the Act.

In the judgment of this Board in the *St. Catherine's Milling Co.'s Case* (2), already referred to, it was laid down, speaking of Crown lands burdened with the Indian interest arising under the Proclamation of 1763, as follows: "The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded

(1) [1896] A. C. 434. (2) 14 App. Cas. 46, 55, 58.

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territory was, at the time of the union, land vested in the Crown, subject to 'an interest other than that of the Province in the same,' within the meaning of s. 109; and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed." And their Lordships said: "It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished."

The language of the statutes of 1850 and 1851 must, therefore, be examined in light of the circumstances of the time and of the objects of the legislation as declared by the enactments themselves, for the purpose of ascertaining whether or not the Crown retained in lands appropriated for the use of an Indian tribe a "paramount title" upon which the Indian interest was a mere "burden" in the sense in which these phrases are used in these passages.

The object of the Act of 1850, as declared in the recitals already quoted, is to make better provision for preventing encroachments upon the lands appropriated to the use of Indian tribes and for the defence of their rights and privileges, language which does not point to an intention of enlarging or in any way altering the quality of the interest conferred upon the Indians by the instrument of appropriation or other source of title; and the view that the Act was passed for the purpose of affording legal protection for the Indians in the enjoyment of property occupied by them or appropriated to their use, and of securing a legal status for benefits to be enjoyed by them, receives some support from the circumstance that the operation of the Act appears to extend to lands occupied by Indian tribes in that part of Quebec which, not being within the boundaries of the Province as laid down in the Proclamation of 1763, was, subject to the pronouncements of that Proclamation in relation to the rights of the Indians, a region in which the Indian title was still in 1850, to quote the words of Lord Watson, "a personal and

usufructuary right dependent upon the good-will of the Sovereign." It should be noted also that the Act of 1851, under which the lands in question were set apart, is plainly an Act passed with the object of setting lands apart "for the use" of Indian tribes, and that by the same Act the powers of the Commissioner of Indian Lands under the Act of 1850 are referred to as "powers of management."

Their Lordships do not find it necessary to enter upon a consideration of the precise effect of the words of s. 3, investing the Commissioner with power to "concede," "lease" or "charge" lands or property affected by the statute. It is sufficient to say that, having regard to the recitals of the same statute and the language of the Act of 1851 just referred to, as well as to the policy of successive administrations in the matter of Indian affairs which, to cite the judgment of the Board in the *St. Catherine's Milling Co.'s Case* (1) had been "all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract, duly ratified at a meeting of their chiefs or head men convened for the purpose," their Lordships think these words ought not to be construed as giving the Commissioner authority to convert the Indian interest into money by sale or to dispose of the land freed from the burden of the Indian interest, except after a surrender of that interest to the Crown.

It results from these considerations, in their Lordships' opinion, that the effect of the Act of 1850 is not to create an equitable estate in lands set apart for an Indian tribe of which the Commissioner is made the recipient for the benefit of the Indians, but that the title remains in the Crown and that the Commissioner is given such an interest as will enable him to exercise the powers of management and administration committed to him by the statute.

The Dominion Government had, of course, full authority to accept the surrender on behalf of the Crown from the

(1) 14 App. Cas. 46.

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Indians, but, to quote once more the judgment of the Board in the *St. Catherine's Milling Co.'s Case* (1), it had "neither authority nor power to take away from Quebec the interest which had been assigned to that Province by the Imperial statute of 1867." The effect of the surrender would have been otherwise if the view, which no doubt was the view upon which the Dominion Government acted, had prevailed—namely, that the beneficial title in the lands was by the Act of 1850 vested in the Commissioner of Indian Lands as trustee for the Indians, with authority, subject to the superintendence of the Crown, to convert the Indian interest into money for the benefit of the Indians. As already indicated, in their Lordships' opinion, that is a view of the Act of 1850 which cannot be sustained.

One further point remains. On behalf of the respondent Dame Rosalie Thompson it is contended that her title is validated by reason of the adjudication of the sheriff's sale. Their Lordships concur in the view which prevailed in *Les Commissaires d'Ecoles de Saint Alexis* v. *Price* (2), that arts. 399 and 2213 of the Code of Civil Procedure have not the effect of conferring upon the purchaser at a sheriff's sale a title to Crown property which has not been alienated by the Crown.

The appeal should, therefore, be allowed and the action remitted to the Superior Court to give judgment against the respondent Dame Rosalie Thompson for the amount of the purchase money and of the damages which, if any, she shall be found liable to pay to the appellants, the Star Chrome Mining Co., and their Lordships will humbly advise His Majesty accordingly.

The respondent Dame Rosalie Thompson will pay the costs of the Star Chrome Mining Co. here and in the Courts below. There will be no order as to the costs of other parties.

Solicitors for appellants: *Blake & Redden.*

Solicitors for respondents: *Charles Russell & Co.; Witham Roskell, Munster & Weld.*

(1) 14 App. Cas. 54. (2) 1 Rev. de Jur. 122.

THE KING v. BONHOMME. CAN.

Exchequer Court of Canada, Audette, J. May 3, 1917. Ex. C.

PUBLIC LANDS (§ I C—15)—CONSTRUCTION OF CROWN GRANT.

A Crown grant must be construed most strictly against the grantee and most beneficially for the Crown so that nothing will pass to the grantee but by clear and express words.

Statement. Information of intrusion to have St. Nicholas Island declared part of Indian Reserve.

Paul St. Germain, K.C., for plaintiff; *F. L. Beique*, K.C., for defendant Daoust; *Chas. Lanctot*, K.C., and *N. A. Belcourt*, K.C., for Attorney-General of Quebec.

Audette, J. AUDETTE, J.:—This is an information of intrusion exhibited by the Attorney-General, whereby it is claimed that the Island of St. Nicholas, situate in navigable waters on the River St. Lawrence, in Lake St. Louis, be declared a portion of the Caughnawaga Indian Reserve; that the possession of the island be given the Indians, and that the defendant be condemned to pay the plaintiff the sum of $1,000 for the issues and profits of the said island from June 1, 1907, till possession of the same shall have been given the said plaintiff.

The Province of Quebec, on the other hand, claiming and assuming the ownership of the said Island of St. Nicholas, sold the same for the sum of $400 on December 19, 1906, to the said Dame Rachel Daoust, wife of the said Philorum Bonhomme, as appears by the Crown grant filed herein as exhibit No. 3.

The action was originally taken only as against the defendant Philorum Bonhomme, who by his plea declared the island had not been sold to him but to his wife, and asked that the action as against him be dismissed with costs. His wife, Dame Rachel Daoust, was subsequently added a party defendant. The said Philorum Bonhomme has, since the institution of the action, departed this life, as appears by the certificate of burial filed as ex. No. 4.

The defendant Daoust's grantor, the Province of Quebec, who had sold this Island of St. Nicholas to her, with covenant, intervened in the present case and took (*faitet cause*) upon itself the defence of the said defendant Daoust as her warrantor.

The Crown, in the right of the Federal Government, as having the management, charge and direction of Indian Affairs in Canada, claims the ownership of St. Nicholas Island as forming part of the

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Seigniory of Sault Saint Louis, as conceded by the King of France to the Jesuits for the Indians on May 29, 1680, and under the augmentation thereto by the further concession of October 31, 1680, by Louis de Buade, Comte de Frontenac, Governor and Lieutenant-General for His Majesty in Canada.

By the first concession, bearing date May 29, 1680, a copy of which is filed herein as ex. No. 1, a certain parcel of land is so granted, together with *deux isles, islets et battures*—two islands, islets and flats which are situate in front thereof.

It is proved and admitted that St. Nicholas Island is not opposite this first concession and among the islands therein mentioned.

Then by the second concession, bearing date October 31, 1680, a certain piece and parcel of land, immediately adjoining the first concession to the west, is further granted, but without any mention in this latter grant of any island, islet or flats. The Island St. Nicholas is opposite the second concession.

Therefore this St. Nicholas Island obviously did not pass to the Jesuits under the last mentioned concession, unless expressly included in the same in terms specific and unmistakable. No proprietary rights in the said island passed without a specific grant to that effect.

Truly, as I have said in *Leamy* v. *The King*, 15 Can. Ex. 189, 23 D.L.R. 249; 54 Can. S.C.R. 143, 33 D.L.R. 237, it would be a singular irony of law if the rights to this island could thus be taken away or disposed of by such a grant which is absolutely silent in respect thereto. This Island of St. Nicholas did not under either of these two grants pass out of the hands of the King to the Jesuits for the Indians, and there is no evidence that this island was vested in the plaintiff before Confederation, or taken in any other manner within the scope of s. 91, s.s. 24 of the B.N.A. Act, and the Crown as representing the Federal Government has no title thereto, and the land is vested in the Crown, as representing the Province of Quebec. *Wyatt* v. *Attorney-General*, [1911] A.C. 489, *Leamy* v. *The King, supra; Bouillon* v. *The King*, 31 D.L.R. 1.

The trite maxim and rule of law for guidance in the construction of a Crown grant is well and clearly defined and laid down in Chitty's Prerogatives of the Crown, p. 391-2, in the following words:—

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In ordinary cases between subject and subject, the principle is, that the grant shall be construed, if the meaning be doubtful, most strongly against the grantor, who is presumed to use the most cautious words for his own advantage and security, but in the case of the King, whose grants chiefly flow from his royal bounty and grace, the rule is otherwise; and Crown grants have at all times been *construed most favourably for the King*, where a fair doubt exists as to the real meaning of the instrument. . . . Because general words in the King's grant never extend to a grant of things which belong to the King by virtue of his prerogative, for such ought to be expressly mentioned. In other words, if under a general name a grant comprehends things of a royal and of a base nature, the base only shall pass.

Approaching the construction of the second grant with the help of the rule above laid down, it must be found that in the absence of a special grant especially expressed and clearly formulated, the Island of St. Nicholas obviously did not pass.

Had it been the intention by the second concession to grant the island opposite the lands mentioned in the same, the same unambiguous course followed in the first concession would have been resorted to, and the island would have been mentioned in the grant.

A Crown grant must be construed most strictly against the grantee and most beneficially for the Crown so that nothing will pass to the grantee but by clear and express words. The method of construction above stated seeming, as judicially remarked, *per* Pollock, C.B., *East Archipelago Co.* v. *Reg.*, 2 E. & B. 856 at 906, 7; 1 E. & B. 310, to exclude the application of either of the legal maxims, *expressio facit cessare tacitum* or *expresio unius est exclusio alterius*. That which the Crown has not granted by express, clear and unambiguous terms, the subject has no right to claim under a grant, Broom's Legal Maxims (8th ed.) pp. 463-464.

The plaintiff endeavouring to shew title by possession called a number of Indians who were heard as witnesses to prove possession by them, shewing that the Indians of the Caughnawaga Reserve had always considered St. Nicholas Island as part of the reserve. The evidence discloses that some of the Indians residing on the reserve had at times a small shack and had sown patches of potatoes and corn on the island, and it is contended they thereby acquired title by possession (arts. 2211 et seq., C.C. Que.). This contention must be dismissed from consideration, because possession of ungranted land by roaming Indians could

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not remove the fee from the hands of the Crown. There cannot be any ownership of any territory acquired by possession or prescription by Indians because *les uns possèdent pour les autres*. *Corinthe* v. *Séminaire de St. Sulpice*, 5 D.L.R. 263, 21 Que. K.B. 316; [1912] A.C. 872. And I further find that no help could be found in favour of the plaintiff, in respect of the title to the said island in the Royal Proclamation of 1763, as mentioned at p. 70, Houston Const. Doc. of Canada, because the lands therein referred to as reserved for the Indians are outside of Quebec, and the territory in question herein. In fact, they are lands outside the four distinct and separate governments, styled respectively Quebec, East Florida, West Florida, and Grenada (14 App. Cas. 46 at 53-4). Moreover, the Indians have not and never had any title to the public domain.

These contentions have also been considered in the *St. Catherine's Milling & Lumber Co.* v. *The Queen*, 13 Can. S.C.R. 577; 14 App. Cas. 46. The Crown had all along proprietary right on these lands upon which the Indian title might have been a burden, but which never amounted to a fee. And while not desirous of repeating here what was so clearly stated in the *St. Catherine's* case in respect of the Indian title, yet I wish to draw attention to the fact that it was decided beyond cavil in that case, that only lands *specifically* set "apart and reserved for the use of the Indians are lands reserved for Indians within the meaning of sec. 91, item 24, of the B.N.A. Act." See also *Attorney-General* v. *Giroux*, 53 Can. S.C.R. 172, 30 D.L.R. 123. The Island of St. Nicholas never fell within the term "Lands reserved for Indians," and therefore never came within the operation of the B.N.A. Act, sec. 91 (24).

The Island of St. Nicholas, as part of the lands belonging to the Province of Quebec, at the Union, passed to the Province of Quebec, at Confederation, under the provisions of s. 109 of the B.N.A. Act, 1867, the rights retained to the federal power under secs. 108 and 117 being always safeguarded. Therefore the plaintiff has no fee in the island, and the Province of Quebec had obviously the right to grant the same to the defendant Daoust, as it did.

It is not without some sentiment of regret that I feel bound to find against this alleged Indian title, and I trust that the

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Indians, the wards of the State, will realize and understand there never existed any title giving them St. Nicholas Island. The fact that they were not prevented from frequenting it (and some of the white men as appears by the evidence did also from time to time visit the island) was indeed perhaps more referable to the grace, bounty and benevolence of the Crown, as represented by the Province of Quebec, and cannot now constitute an acknowledgment of an erroneous and unfounded right or title to the island.

There will be judgment dismissiing the action with costs against the plaintiff on all issues. *Action dismissed.*

BIGRAS v. TASSE.

ONT.

S. C.

Ontario Supreme Court, Appellate Division, Meredith, C.J.C.P., Riddell, Lennox and Rose, JJ. October 12, 1917.

FIRES (§ I—1)—HIGHWAY—LIABILITY OF FOREMAN FOR ACTS OF SUBORDINATES.

The foreman of a gang of workmen engaged in building a government road, who authorizes a subordinate to kindle a fire on the road for the purpose of making tea for the gang, is liable, even though the starting of the fire was not an unlawful act, for injury to adjoining property through the negligent failure of the workmen to extinguish the fire after the tea was made.

Statement.

AN appeal by the defendant from the judgment of the Judge of the District Court of the District of Sudbury, after trial of the action without a jury, in favour of the plaintiff, for the recovery of $217 damages with costs.

The action was brought to recover damages for the loss of a house, barn, and other property of the plaintiff, destroyed by fire. The plaintiff alleged that the fire which destroyed his property had spread to his land from a fire negligently set in a highway by order of the defendant.

The defendant was the foreman of a gang of workmen engaged in building a road for the Government of Ontario. He employed one Arthur Richer as a labourer, and Richer's son, Thomas, as "water-boy." The boy lighted a fire on the roadway in order to make tea for the workers. The fire spread, reached the buildings of the plaintiff, and destroyed them.

Harcourt Ferguson, for appellant; *T. M. Mulligan*, for plaintiff, respondent,

Meredith, C.J.C.P.

MEREDITH, C.J.C.P.:—I find it difficult to understand how it can be contended reasonably that the Crown was concerned in any of the matters out of which this action has arisen.