Milirrpum v Nabalco Pty Ltd (Gove Land Rights Case)

Jump to:	» Headnote » Judgment » Footnotes
Court:	Supreme Court of the Northern Territory
Judges:	Blackburn J
Judgment Date:	27/4/1971
Jurisdiction:	Australia (Northern Territory)
Citations:	17 FLR 141 [1972-73] ALR 65
Legal Representatives:	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.

Headnote

Supreme Court of Northern Territory

Milirrpum and Others v. Nabalco Pty. Ltd. and The Commonwealth of Australia

25-29 May 1970;
1-5 June 1970,
8-10 June 1970
Darwin
7-10 September 1970,
14-18 September 1970,
21-25 September 1970,
28 September 1970;
1 October 1970,
27-30 October 1970;
2-6 November 1970,
9-13 November 1970,
16-20 November 1970,
23-25 November 1970
Canberra
27 April 1971
Alice Springs

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 1910-1949 , s 9 — Lands Acquisition Act 1906-1916 — Minerals (Acquisition) Ordinance 1953 (NT)
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 (NT), 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 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* (NT) 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* (NT) 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 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* (NT), 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 FLR 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* (NT) 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 ALJR 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 FLR 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.

Judgment

Cur. adv. vult.

On 27th April, 1971, judgment was delivered.

The following is a Table of Contents of the reasons for judgment:

Heading	*Page*
Introduction	146

Heading	*Page*
A short account and history of the subject land	146
The nature of the proceedings	149
The admissibility of the plaintiffs' evidence	151
The expert evidence	159
The aboriginals' social organization	165
The clan	172
The land claimed by each clan	176
The permissive use of land	181
The antiquity of the present links between the clans and the land	183
The doctrine of communal native title	198
Principles applied to the acquisition of colonial territory	200
The application of English law in the overseas possessions of the Crown	201
Colonial policy with regard to native lands in North America	204
The common law before and after 1788	206
American cases since the Revolution	209
Canadian cases	218
Indian cases	223
African cases	227
The law in New Zealand	234
The Australian authorities	242
The Australian historical material	252
Conclusions on the doctrine of communal native title	262
Was the clans' relationship to the land a recognizable and a proprietary interest?	262
The proviso to the Letters Patent of 1836	274
The effect of the Lands Acquisition Act and Ordinances	283
The independent validity of the Mining (Gove Peninsula Nabalco Agreement) Ordinance	290
Conclusion	293
Map of Gove Peninsula	294

The following judgment was delivered:

April 27.

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 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 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;
> (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, 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 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's 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. 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 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 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 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 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 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 ‘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. 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, 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 give 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 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 helived 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.

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 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 moiety, 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 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 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 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 Drimmie 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 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, 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 agreement 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 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 t me 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 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:

> “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 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 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 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 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.

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 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 over-reached 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.

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 particular 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).

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". 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. 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 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 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 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 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.

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 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 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?

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 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 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 after-wards became British Columbia. The second argument for the plaintiffs was based upon the judgment of Marshall C.J. in Johnson 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 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, 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 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 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 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 antecession 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 antecession rights is beside the point, save so far as it can be shown 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."

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 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. 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. 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 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.

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 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 commonplace. 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* .

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 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 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.

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.

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 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 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.

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 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 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 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 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 England. 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)] ."

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.

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, 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 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 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 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.

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 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 … ”. 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 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.

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 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 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 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 … 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 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 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 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, 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 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".

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 noninterference 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 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.

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 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 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 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* (SA) and the existing *Constitution Act, 1934-1969* (SA). Furthermore, the *Commonwealth of Australia Constitution Act, 1900* (UK), 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 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:

> “4U. 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 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 4U 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 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 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 ("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 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 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.

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.

Reported by A.J.L.

Footnotes

(1) (1822) 11 Price 162, at p. 180; 147 ER 434, at p. 440.
(2) (1850) 15 QB 791 ;; 117 ER 657 .
(3) (1916) Gold Coast Privy Council Judgments (1874-1928) 43.
(4) (1960) 103 CLR 486, at p. 503.
(5) (1968) 67 DLR (2d) 619 .
* See p. 294.
(6) (1823) 8 Wheaton 543, at p. 573.
(7) (1823) 8 Wheaton 543 .
(8) (1847) N.Z.P.C.C. 387.
(9) (1774) 20 State Tr. 239 ;; 98 ER 1045 .
(10) (1608) 7 Co. Rep. la, at p. 17; 77 ER 377 .
(11) (1774) 20 State Tr. 239 ;; 98 ER 1045 .
(12) (1750) 1 Ves. Sen. 444 ;; 27 ER 1132 .
(13) (1888) 14 App. Cas. 46 .
(14) (1774) 20 State Tr. 239 ;; 98 ER 1045 .
(15) (1847) N.Z.P.C.C. 387.
(16) (1774) 20 State Tr. 239 ;; 98 ER 1045 .
(17) (1955) 348 US 272 .
(18) (1791) 1 Kentucky Reports 77.
(19) (1808) 3 Am. Dec. 500 ;; 3 Johns. 375 .
(20) (1823) 11 Am. Dec. 351 ;; 20 Johns. 693 .
(21) (1809) 6 Cranch 87 C.
(22) (1888) 14 App. Cas. 46 .
(23) (1823) 8 Wheaton 543 .
(24) (1831) 5 Pet. 1 .
(25) (1832) 6 Pet. 515 .
(26) (1835) 9 Pet. 711 .
(27) (1946) 329 US 40 .
(28) (1955) 348 US 272 .
(29) (1946) 329 US 40 .
(30) (1823) 8 Wheaton 543 .
(31) (1888) 14 App. Cas. 46 .
(32) (1969) 8 DLR (3d) 59 .
(33) (1823) 8 Wheaton 543 .
(34) (1955) 348 US 272 .
* See now (1970) 13 DLR (3d) 64 .
(35) (1823) 8 Wheaton 543 .
(36) (1832) 6 Pet. 515 .
(37) (1955) 348 US 272 .
(38) (1774) Lofft 655, at p. 741; 98 ER 1045, at p. 1047.
(39) [1899] AC 572 .
(40) (1859) 13 Moo. PC 22 ;; 15 ER 9 .

(41) (1915) L.R. 42 Ind. App. 229 .
(42) (1924) L.R. 51 Ind. App. 357 .
(43) [1941] AC 356 .
(44) [1899] AC 572 .
(45) [1919] AC 211 .
(46) [1921] 2 AC 399 .
(47) (1924) L.R. 51 Ind. App. 357 .
(48) [1957] 1 WLR 876 ;; [1957] 2 All ER 785 .
(49) [1957] 1 W.L.R., at p. 880; [1957] 2 All E.R., at p. 788.
(50) [1921] 2 AC 399 .
(51) (1924) L.R. 51 Ind. App. 357 .
(52) (1969) 8 DLR (3d) 59 ; affirmed (1970) 13 DLR (3d) 64 .
(53) (1877) 3 N.Z. Jur. (N.S.) 72, at pp. 77-78.
(54) [1901] AC 561 .
(55) (1847) N.Z.P.C.C. 387.
(56) (1831) 5 Pet. 1 .
(57) (1832) 6 Pet. 515 .
(58) (1955) 348 US 272 .
(59) (1877) 3 N.Z. Jur. (N.S.), at p. 81.
(60) [1899] AC 572 .
(61) (1924) L.R. 51 Ind. App. 357 .
(62) (1809) 6 Cranch 87 C.
(63) (1791) 1 Kentucky Reports 77.
(64) (1877) 3 N.Z. Jur. (N.S.) 72.
(65) (1847) N.Z.P.C.C. 387.
(66) (1823) 8 Wheaton 543 .
(67) [1901] AC 561 .
(68) [1963] NZLR 461, at p. 468.
(69) (1889) 14 App. Cas. 286 .
(70) (1774) 20 State Tr. 239 ;; Lofft 655 ; 98 ER 1045 .
(71) (1890) 24 SALR 97 .
(72) [1921] SASR 364, at p. 369.
(73) (1913) 16 CLR 404 .
(74) (1959) 102 CLR 54 .
(75) (1847) Legge 312; 2 S.C.R. (N.S.W.) App. 30.
(76) (1913) 16 CLR 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.
(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.
(85) (1889) 14 App. Cas. 286 .
(86) (1969) 8 DLR (3d) 59 ; affirmed (1970) 13 DLR (3d) 64 .
(87) (1941) 67 CLR 544 .
(88) [1921] 2 AC 399 .
(89) (1847) Legge 312; 2 S.C.R. (N.S.W.) App. 30.
(90) (1913) 16 CLR 404 .
(91) (1959) 102 CLR 54 .
(92) (1809) 6 Cranch 87 C.
(93) (1847) N.Z.P.C.C. 387.
(94) (1888) 14 App. Cas. 46 .
(95) [1919] AC 211 .
(96) (1969) 8 DLR (3d) 59 ; affirmed (1970) 13 DLR (3d) 64 .
(97) (1836) Legge 72.
(98) (1888) 14 App. Cas. 46 .

(99) [1919] AC 211 .
(1) [1921] 2 AC 399 .
(2) [1919] AC 211 .
(3) [1921] 2 AC 399, at pp. 402-403.
(4) [1920] AC 508, at p. 526.
(5) [1910] P 57, at p. 125.
(6) (1829) 9 B. & C 750, at p. 752; 109 ER 278, at p. 279.
(7) [1895] AC 328, at p. 338.
(8) (1963) 5 FLR 432 .
(9) (1923) 33 CLR 1, at p. 55.
(10) (1963) 5 FLR 160, at p. 170.
(11) [1920] AC 508 .
(12) (1963) 5 FLR 432 .
(13) (1969) 44 ALJR 25 .
(14) (1849) 3 Ex. 670, at p. 685; 154 ER 1014, at p. 1021.
(15) (1969) 43 ALJR 247 .
(16) (1969) 44 ALJR 25 .
(17) (1963) 5 FLR 432 .
(18) (1923) 8 Wheaton 543 .
(19) (1847) N.Z.P.C.C. 387.