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# ABORIGINAL TITLE IN THE COMMON LAW: A STONY PATH THROUGH FEUDAL DOCTRINE

GORDON I. BENNETT\*

## INTRODUCTION

Save perhaps in the United States, where assertions of tribal sovereignty are fast becoming the predominant concern of native Americans, the recognition and protection of land rights remain, for obvious reasons, the focal point of aboriginal movements almost everywhere. Each country, of course, has answered aboriginal claims after its own fashion. Divergent concepts of property law, infinite variations in indigenous culture and in the forms of aboriginal tenure, the history of conquest or settlement and the politics of land expansion: these and a host of other factors have prevented an even response to the advancement of native claims and have obscured the issues of general principle to which such claims give rise. Indeed, in many countries these issues have gone entirely by default; the physical isolation and political insignificance of native peoples, which have led so often in the past to their ruthless exploitation, have also encouraged successive governments to postpone the development of a clearly articulated policy on the ownership of aboriginal land.

The new radicalism of indigenous peoples, however, and the recent emergence on the international scene of a "Fourth World," seem almost certain to provoke a fresh spate of litigation in jurisdictions where native claims have never previously been advanced. In the absence of judicial precedents nearer home, courts confronted with such claims are likely to seek guidance from the Anglo-American and Commonwealth jurisprudence in which the underlying theories of aboriginal title were initially forged. Can the common law, which on many occasions hitherto has exerted a positive influence on civilian and mixed systems, once again show the resilience and versatility on which it has so long prided itself? The brief survey indicates that only the American courts have acquitted themselves with any distinction in this field, and that their brethren elsewhere have felt themselves far more constrained by the feudal yoke of the common law exported intact to the colonies and dominions. To the comparative lawyer, this in turn may suggest that membership of the common law clan is less important than the creation of a bold and politically sensitive judiciary,

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able and willing to discard the skeletons in its ancestral cupboard when they are shown to have outlived their purposes.

### I. POSSESSION AS THE ROOT OF NATIVE TITLE

Although both the content and methods of extinguishment of native title have long been the subject of controversy, the fundamental problems still revolve around the legal basis and origins of that title, and it is to this issue that the present article is addressed. Does title arise from the fact of immemorial possession *per se*, or must it receive executive or legislative recognition before the courts can act? On the latter view governments that have decided neither for nor against native title, because their tribal lands were previously thought to contain so little of commercial or economic interest that their ownership was never a live issue, may now deal with those lands, when programmes of national expansion or the discovery of mineral wealth lend them a new significance, as they would with vacant state property. And it is precisely at this juncture, of course, that governments are least likely to acknowledge gratuitously the existence of native title; that the indigenous inhabitants have hunted and roamed there since time immemorial will hardly be allowed to hinder programmes of economic development. Governments may license the exploitation of aboriginal lands by multi-national corporations and need not account to the inhabitants for the revenue thereby obtained. Worse, the native community will have no legal remedy against the unlicensed operator who often constitutes the most dangerous threat; without an official permit the private entrepreneur is a trespasser on native land, but, since the community is possessed of no title itself, it cannot sue in trespass or obtain an injunction to prevent further encroachments.

Aboriginals cannot assert a prescriptive title to their lands because the common law doctrine of prescription applies only to adverse possession. Since the aboriginal occupation of previously uninhabited territory necessarily lacks this quality of adversity, it cannot be traced to the presumed acquiescence of a previous owner which governs the whole law of prescription.<sup>1</sup> As a matter of simple justice, however, the proposition that immemorial possession gives the possessor a right to remain on the land, at least until that right is lawfully extinguished, appears self-evident. The notion that long occupation is to be deemed lawful, in the absence of proof to the contrary, is as ancient as the

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1. See *Dalton v. Angus & Co.*, 6 App. Cas. 740, 773-74 (1881) (per Fry, J.).

concept of property itself; indeed, the right to use that which one has created, possessed or occupied without wrongfully taking from another, is fundamental to any legal system. The rights of first occupants have been widely supported by moral philosophers (in particular, by the followers of Rousseau), and in their early development almost all legal systems acknowledged continuous use and occupation as the sole source of title. Other methods of acquisition later evolved, but possessory title remained a founding principle; so much so, that it was regarded by Roman jurists as a rule of natural law which was immune from challenge. With the advent of feudalism, which brought its own tortuous logic, the royal grant came to supersede simple possession as the root of title in many jurisdictions, but the common law continued to regard possession itself as proof of ownership.<sup>2</sup> The respect traditionally accorded to the fact of possession is reflected even in international law, where the principle of acquisition by occupation has always regulated the status of newly discovered territories.

First to argue for the application of these principles to native lands was the Spanish theologian Francisco de Vitoria, in *De Indis et de Jure Belli Relectiones*.<sup>3</sup> To those who claimed that the Indians were tainted with mortal sin and incapable of reason, Vitoria responded that all men, whatever their religion or creed, were entitled by virtue of their humanity to respect for their possessions; hence, "the barbarians in question cannot be barred from being true owners, alike in public and in private law, by reason of the sin of nonbelief or any other mortal sin, nor does such sin entitle Christians to seize their goods and lands."<sup>4</sup> Vitoria's theory received papal support from the Bull *Sublimis Deus* of 1537, in which Pope Paul III proclaimed:

[T]he said Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and legitimately, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and of no effect.<sup>5</sup>

2. G. CHESHIRE, *THE MODERN LAW OF REAL PROPERTY* 659 (10th ed. 1967).

3. F. VITORIA, *DE INDIS ET DE JURE BELLI RELECTIONES* § 1 ¶ 4-19 (E. Nys trans. 1917). Throughout this work, Vitoria makes clear his basic premise that the natives "in question were in peaceable occupation of their goods, both publicly and privately. Therefore, unless the contrary is shown, they must be treated as owners and not be disturbed in their possession unless cause be shown." *Id.* at 120.

4. *Id.* at 125.

5. Papal Bull *Sublimis Deus*, quoted in Cohen, *Original Indian Title*, 32 *MINN. L. REV.* 28, 45 (1947).

The Spanish Laws of the Indies (1594) contained provisions to a similar effect, and the Laws were clearly grounded in a belief that possession of itself demanded respect for the Indian title.<sup>6</sup>

## II. THE AMERICAN VIEW

This approach was shared by Spain's northern rivals,<sup>7</sup> and it became a guiding principle in the colonisation of North America. In the United States the federal government adopted from its inception the invariable practice of negotiating with the native Americans for the surrender of their lands,<sup>8</sup> and in all more than two million square miles of territory have been purchased from the Indian tribes.<sup>9</sup> Many transactions were concluded on terms grossly unfair to the Indians, but it was at least established beyond peradventure that their immemorial possession had given them a title to convey.

Where the executive led, the Supreme Court was not slow to follow. In *Johnson v. McIntosh*<sup>10</sup> and *Worcester v. Georgia*,<sup>11</sup> two landmark decisions that still constitute the *locus classicus* on the subject, Chief Justice Marshall referred to the principle evolved by the European powers in their settlement of America that "discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be

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6. The Laws commanded "that the farms and lands which may be granted to Spaniards be so granted without prejudice to the Indians; and that such as may have been granted to their prejudice and injury be restored to whoever they of right shall belong." F. COHEN, *THE LEGAL CONSCIENCE* 243 (1960).

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There was a widespread, indeed almost universal, practice, which by the time of the American Revolution was a respectable antiquity, of treating [*sic*] 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 that they were willing to take, but they never coerced a surrender of them . . . .' 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.

*Milirpum v. Nabalco Pty. Ltd.* [1971] 17 F.L.R. 141, 204 (Austl. Sup. Ct. N. Terr.); (per Blackburn, J.) (quoting 3 KENT'S COMMENTARIES 384 (1827)).

8. *See, e.g.,* *Cramer v. United States*, 261 U.S. 219 (1923), where the Supreme Court observed that "[u]nquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States." *Id.* at 227 (citations omitted).

9. F. COHEN, *supra* note 6, at 34.

10. 21 U.S. (8 Wheat.) 543 (1823).

11. 31 U.S. (6 Pet.) 515 (1832).

consummated by possession."<sup>12</sup> The Chief Justice added the vital caveat, however, that this principle could not

annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the possessor to sell.<sup>13</sup> [The original inhabitants] were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion.<sup>14</sup>

Central to Marshall's analysis was the assertion that aboriginal rights stem from ancient occupation *per se*, and are not dependent on a public grant or official acknowledgment. In the leading modern judgment, *United States v. Santa Fe Pacific Railroad Co.*,<sup>15</sup> Justice Douglas spelt this out in unequivocal terms:

Occupancy necessary to established aboriginal possession is a question of fact to be determined as any other question of fact. If it were established that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted territory occupied exclusively by the Walapais . . . then the Walapais had "Indian title" which, unless extinguished, survived the national grant of 1866 . . . .<sup>16</sup>

. . . .

Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action.<sup>17</sup>

This view is confirmed by a whole cluster of Supreme Court decisions and, most recently, by the Court of Claims in *Lipan Apache Tribe v. United States*,<sup>18</sup> where Judge Davis dispelled any lingering doubts:

Indian title based on aboriginal possession does not depend on sovereign recognition or affirmative acceptance for its survival. Once established in fact, it endures until extinguished or abandoned . . . .

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12. 21 U.S. (8 Wheat) at 573.

13. 31 U.S. (6 Pet.) at 544.

14. 21 U.S. (8 Wheat.) at 574.

15. 314 U.S. 339 (1941).

16. *Id.* at 345 (citing *Buttz v. Northern P.R.R.*, 119 U.S. 55 (1886)).

17. *Id.* at 347.

18. 180 Ct. Cl. 487 (1967).

The correct enquiry is, not whether the Republic of Texas accorded or granted the Indians any rights, but whether that sovereign extinguished their pre-existing occupancy rights.<sup>19</sup>

### III. THE COMMONWEALTH AUTHORITIES

Until 1924 the native American was an alien in his own country, and was denied the protection of the Bill of Rights. At least in theory, the aboriginal peoples of the British Empire were accorded more respect. After the Abolition of Slavery Act of 1833,<sup>20</sup> which was intended not only to end chattel slavery but to ensure that Black people should not be disadvantaged in law by their colour, aborigines throughout the Empire were not slaves but citizens. As such they were entitled to the full protection of the law. British courts might therefore have been expected to rival, if not surpass, the judicial support of Indian title in the United States. Such hopes have been sorely disappointed, however, for the English and Commonwealth judges have shown themselves curiously unwilling to exploit the adaptability of the common law to meet aboriginal needs. In *In re Southern Rhodesia*,<sup>21</sup> for example, the issue before the Judicial Committee of the Privy Committee was the ownership of large tracts of land in the de facto control of the British South Africa Company. Displaying an air of condescension all too prevalent at the time, Lord Sumner paid tribute to the "disinterested liberality of persons in this country"<sup>22</sup> which had secured for the court "the advantage of hearing the case for the natives who were themselves incapable of urging, and perhaps unconscious of possessing, any case at all";<sup>23</sup> and his Lordship went on to remark that:

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.<sup>24</sup>

But this is wholly to misconstrue the doctrine of native title. The purpose is not to translate indigenous customs into "transferable rights

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19. *Id.* at 492.

20. 1833, 3 & 4 Will. 4, c. 73.

21. [1919] A.C. 211 (P.C. 1918).

22. *Id.* at 232.

23. *Id.*

24. *Id.* at 233-34.

of property known to English law," but to accord proprietary status to the existing, aboriginal system of land holding. The American experience has shown that what matters is the fact of aboriginal occupation, and the courts ought not to go behind the native system in search of common law notions of property which communal native possession neither knows nor requires.<sup>25</sup>

True, Lord Sumner's heresy has not gone unchallenged in the Judicial Committee itself. Delivering judgment for a strong Committee (of which Lord Sumner was not a member) in *Tijani v. Secretary, Southern Nigeria*,<sup>26</sup> Viscount Haldane inveighed against "a tendency, operating at times unconsciously, to render [native] title conceptually in terms which are appropriate only to systems which have grown up under English law."<sup>27</sup> This warning has been echoed in other courts, not entirely without effect, and in *Oyekan v. Adele*,<sup>28</sup> Lord Denning roundly declared that on the compulsory acquisition of aboriginal lands "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."<sup>29</sup>

This confident prediction has not, however, been borne out by subsequent developments elsewhere in the Commonwealth. In particular there is *Millirrpum v. Nabalco Pty. Ltd.*,<sup>30</sup> which saw native claims litigated for the first time in the Australian courts. The case arose out of the fierce opposition of the Gove Peninsula Aborigines to the grant of a mineral lease to a bauxite conglomerate in Arnhem Land. In direct issue was the interpretation of the phrase "interest in land" contained in section 5(1) of the Lands Acquisition Act 1955-1966, relating to the compulsory purchase of land on just terms.<sup>31</sup> With admirable skill Mr. Justice Blackburn of the Supreme Court of the Northern Territory negotiated the pitfalls of the hearsay rules, to admit the evidence of anthropologists and the native testimony of statements made by deceased ancestors about the rights of various clans to particular areas of land.<sup>32</sup> From these materials emerged the picture

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25. *Cf.* *United States v. Seminole Indians*, 180 Ct. Cl. 375, 383-87 (1967) (United States Court of Claims recognised the native American concept of communal property and possession).

26. [1921] 2 A.C. 399 (P.C.) (Nigeria Sup. Ct.).

27. *Id.* at 403.

28. [1957] 1 W.L.R. 876 (P.C.) (W. Afr. Ct. App.).

29. *Id.* at 880.

30. [1971] 17 F.L.R. 141, 204 (Austl. Sup. Ct. N. Terr.).

31. Now the Lands Acquisition Act 1955-1973, 7 ACTS AUSTRAL. P. § 5 (1975).

32. [1971] 17 F.L.R. at 151-65.



of a subtle and elaborate system of social customs highly adapted to the local environment, in large measure free from the vagaries of personal whim or influence, and regarded as obligatory by all members of the clan. In short, there existed an effective system of law. But judicial habits die hard; evoking the ghost of Lord Sumner, Justice Blackburn held that the relationship of the native clans to the land under that system was not recognisable as a right of property and was not a "right, power or privilege over, or in connection with the land"<sup>33</sup> within the meaning of the definition of "interest" in the Act.

If the English and Commonwealth courts have been inconsistent in their recognition of aboriginal tenure as an effective form of land holding, even more equivocal has been their response to the contention that possession *per se* is a good root of title. In Canada, Indian claimants to some regions can invoke the Royal Proclamation of 1763, which reserves for the use of the several "Nations or Tribes of Indians with whom We are connected" all the lands not included within the limits of Quebec, East and West Florida, or the territory of the Hudson Bay Company.<sup>34</sup> But what of the lands outside these (still controversial) boundaries? In *St. Catherines Milling and Lumbering Co. v. The Queen*,<sup>35</sup> Mr. Justice Strong, of the Canadian Supreme Court declared:

[I]f there had been an entire absence of any written legislative act ordaining this rule as an express positive law, [*i.e.*, the Royal Proclamation], we ought, just as the United States courts have done, to hold that it nevertheless existed as a rule of the unwritten common law, which the courts were bound to enforce as such . . .<sup>36</sup>

Moreover, the Proclamation itself, by its assumption that prior to declaration the Crown had to obtain Indian lands by cession or purchase,<sup>37</sup> clearly recognised the pre-existing land rights of native peoples.

33. 7 ACTS AUSTRAL. P. § 5(1).

34. The Royal Proclamation of Oct. 7, 1763, *reprinted in* CAN. REV. STAT. app. II, No. 1, at 127 (1970).

35. [1887] 13 Can. S. Ct. 577.

36. *Id.* at 613.

37. CAN. REV. STAT. app. II, No. 1, at 127 (1970). Its preamble states:

[I]t is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, *not having been ceded to or purchased by Us, are reserved to them . . .*

*Id.* (emphasis added).

On appeal, however, the Privy Council apparently regarded the Proclamation as the sole source of aboriginal rights:

Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown.<sup>38</sup>

Although these remarks were clearly obiter, and have not deterred a number of Canadian judges from describing the Proclamation as merely declaratory of aboriginal rights founded on immemorial possession,<sup>39</sup> they have perpetuated uncertainty as to the precise status of native Canadians outside the geographic limits of the Proclamation itself.

In 1973 the Canadian Supreme Court was provided the opportunity at last to settle the weary controversy, but in a split decision the Court managed only to sow the seeds of further confusion. *Calder v. Attorney General of British Columbia*<sup>40</sup> arose out of an action brought by officers of the Nishga Indian Tribal Council for a declaration that their traditional rights in the Nash Valley of British Columbia had never been lawfully extinguished. The respondent Attorney General urged that, since the northern limit of the Province had not been determined until 1846, the Nishga bands had not lived under British protection in 1763, and were therefore outside the ambit of the Royal Proclamation.<sup>41</sup> In a masterly analysis, Justice Hall argued that even if this submission was upheld, it was in no way conclusive of the issue. Canadian aboriginal title, he maintained, did not depend on a grant of recognition by the discoverer but was in the nature of a "pre-existing right of possession."<sup>42</sup> In the absence of some positive indication that the Sovereign intended to extinguish that right, aboriginal title continued.<sup>43</sup> Two of Justice Hall's brethren concurred in this view, but at least another three remained uncon-

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38. *St. Catherines Milling & Lumber Co. v. The Queen*, [1888] 14 App. Cas. 46, 54 (P.C. 1889) (Can. Sup. Ct.).

39. *See, e.g.*, *Regina v. Koonungnak*, [1963] 45 W.W.R. 282, 302-03 (N.W.T.); *Regina v. White & Bob*, [1964] 52 W.W.R. 193, 211-18 (B.C.) (alternative holding per Norris, J.); *Regina v. Sikyea*, [1964] 43 D.L.R.2d 150, 152, *aff'd*, [1964] Can. S. Ct. 642.

40. [1973] 34 D.L.R.3d 145.

41. *Id.* at 153-54 (per Judson, J.)

42. *See id.* at 173-74, 190-210 (Hall, J., dissenting).

43. *Id.* at 208.

vinced.<sup>44</sup> These three justices did not find it necessary to determine the question; in their judgment it was enough to find that, whatever property right may once have existed, the several proclamations and ordinances of British Columbia pertaining to the disposition of Crown lands (albeit that they made no mention of the Indian tribes) revealed an intention to exercise absolute sovereignty over all the lands of the Province, and such exercise of sovereignty was irreconcilable with any conflicting interests including an alleged aboriginal title.<sup>45</sup>

This reasoning is not easy to follow, for native tenure is entirely consistent with the location of full sovereignty in the Crown. Far from challenging the fee of the Crown, the Nishgas readily conceded its ultimate title and asserted merely that they possessed a right of occupation against all the world except the Crown—which the Crown had not yet explicitly extinguished. That international sovereignty and land tenure are separate concepts is amply illustrated by the Louisiana Purchase from Napoleon for fifteen million dollars, and the subsequent payment of twenty times that sum to those Indians in the state who were willing to sell; or more recently, the nine hundred and sixty two million dollars settlement of native claims in Alaska, bought from Russia in 1867 for seven million pounds.<sup>46</sup>

The *Calder* Court was also divided on the correct procedure to be adopted in seeking a declaration of aboriginal title. The seventh member of the bench, Justice Pigeon, ultimately sided with those who ruled that in the absence of the Lieutenant-Governor's fiat the Court had no jurisdiction to grant such a declaration, and it was on this narrow ground that the Nishga claim was finally dismissed.<sup>47</sup> The Court could scarcely have contrived a less satisfactory result; presented with the first chance in eighty years to clarify an issue of vital concern to the Canadian Indian, it chose instead to retreat into a quagmire of colonial precedent which was incapable of yielding the definitive answer it sought.

Aboriginal aspirations have fared little better in Australia, as the *Nabalco*<sup>48</sup> case sadly illustrates. Blackburn's preliminary ruling on the relationship of the aborigines to their ancestral lands necessarily disposed of their claim, but the learned judge went on to review (in

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44. *Id.* at 148, 168, 223-26.

45. *Id.* at 167.

46. Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (1976).

47. [1973] 34 D.L.R.3d at 223-26.

48. *Milirrump v. Nabalco Pty. Ltd.*, [1971] 17 F.L.R. 141 (Austl. Sup. Ct. N. Terr.) (per Blackburn, J.).

a judgment of one hundred and forty-eight pages) the American, African, Indian, Canadian and New Zealand authorities. This massive survey led him to conclude that the doctrine of communal native title did not form, and had never formed, part of the law of Australia. On the contrary, "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."<sup>49</sup> Crucial to such a finding was the assertion that "the basis of title to land in all [settled or occupied] colonies, whatever their kind of government, was a grant from the Crown."<sup>50</sup> This flies in the face of not only the great weight of authority supportive of aboriginal title in the United States, but also the widespread Crown practice of purchasing land from native tribes<sup>51</sup> (why buy from those who have nothing to sell?). For Justice Blackburn, however, the native lands policy of colonial governments were to be explained (or explained away) in terms of political expediency rather than of legal right. Thus the *Nabalco* Court was driven to a conclusion which had as its inevitable but extraordinary consequence that at the precise moment when, on the 26th of January, 1788, Captain Arthur Phillip raised a flag on a shore in New South Wales, had a few muskets fired off and read a proclamation, aborigines living some two thousand miles away in Arnhem Land automatically forfeited entitlement to their lands.

#### IV. THE BLACKSTONE DOCTRINE

Why has the doctrine of aboriginal title received such shortshrift in the Commonwealth courts? A principal factor has been the constraints imposed by that curious distinction, first advanced in Blackstone's Commentaries and subsequently enshrined in *Campbell v.*

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49. *Id.* at 222 (quoting with approval *Calder v. Attorney-General*, [1970] 13 D.L.R.3d 64, 67 (B.C. Ct. App.) (per Davey, C.J.), *aff'd*, [1973] 34 D.L.R.3d 145.

50. [1971] 17 F.L.R. at 203.

51. *See, e.g.*, T. ELIAS, *BRITISH COLONIAL LAW* 233-34 (1962). It must be added, however, that Australia itself appears to have been one of the rare exceptions to this practice, for no part of the continent has ever been bought from the aborigines by the Crown. This policy may have arisen in part from the absence among the aborigines of even the simplest form of agriculture, signifying to the casual observer a complete lack of attachment to the land; and in part from the low population density and the lack of competition for the aborigines' allegiance by competing colonial powers. *See* Pittock, *Aboriginal Land Rights*, 2 *THE AUSTRALIAN EXPERIENCE* (Rausion ed. 1971-1972). In Papua and New Guinea, however, where similar considerations applied, the British Administration did nevertheless embark upon its usual policy of purchasing from the native class. The legal complications of that policy were examined in *Territory of Papua and New Guinea v. Guba*, [1973] 47 A.L.J.R. 621.

*Hall*,<sup>52</sup> between territories acquired by conquest or cession and those "desert and uncultivated" lands acquired simply by settlement.<sup>53</sup> In the former, the colony was to be regarded as already possessed of indigenous laws, and those were to remain in force until altered or extinguished by the conquering state. "[I]n conquered or ceded countries," wrote Blackstone, "the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain . . ."<sup>54</sup> This principle accords with the doctrine of acquired rights in international law,<sup>55</sup> and was adopted by the Judicial Committee in *In re Southern Rhodesia*.<sup>56</sup> Where the Committee conceded that once native rights were shown to belong to the category of rights of private property "upon a conquest it is to be presumed, in the absence of express confiscation or subsequent expropriatory legislation, that the conqueror has respected them and forborne to diminish or modify them."<sup>57</sup> Two years later, in *Tijani v. Secretary, Southern Nigeria*,<sup>58</sup> the Board considered the root of native title in a ceded territory and observed in a similar vein that:

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 of sovereignty is not to be presumed as meant to disturb the rights of private owners; and the general terms of a cession are prima facie to be construed accordingly.<sup>59</sup>

In relation to settled territories, however, Blackstone assumed that no legal system worthy of the description had existed prior to English settlement, and reasoned that the common law must therefore apply automatically on the foundation of that settlement.<sup>60</sup> (The words "desert" and "uncultivated" were Blackstone's own, and were taken to

52. 98 Eng. Rep. 1045, 1047-48 (K.B. 1774) (per Mansfield, J.).

53. 1 W. BLACKSTONE, COMMENTARIES \*107.

54. *Id.*

55. The doctrine of acquired rights holds that a change of sovereignty cannot deprive persons of "rights which have accrued under the regime of the old sovereign." D. O'CONNELL, THE LAW OF STATE SUCCESSION 267 (1956). For a detailed discussion of this doctrine see *id.* at 77-105. The doctrine has probably been most frequently invoked in the United States, where courts have held that private property rights in the territories acquired from France, Spain, Mexico, and Russia survived the transfer intact. See, e.g., *id.* at 79-85.

56. [1919] A.C. at 233-34.

57. *Id.* at 233.

58. [1921] 2 A.C. at 399.

59. *Id.* at 407.

60. 1 W. BLACKSTONE, *supra* note 53, at \*107.

include territories inhabited by so-called "primitive peoples").<sup>61</sup> It followed that preexisting indigenous rights might be cognisable in lands won by the sword or by treaty but not, since *ex hypothesi* aboriginal title did not form part of the common law of England, in territories acquired by discovery and settlement. Such lands were to be regarded as *terra incognita* where no sovereign claims arose prior to the white man's discovery, so that the doctrine of acquired rights was thought to be untenable there and the only source of title was a grant from the Crown. To hold otherwise would be to admit an allodial tenure wholly at odds with feudal doctrines which, although they had long since assumed a merely historical interest in their country of origin, were nevertheless shipped to the colonies as part of the common law package. The way was thus paved for the emergence of a proposition of truly startling arrogance: that not only did the civilised nations acquire sovereignty by their "discovery" of lands already peopled by indigenous inhabitants, but the right of those inhabitants to continue in possession of their ancestral homes must somehow receive executive or legislative recognition before it could be admitted to exist.

This theory was embraced by the Judicial Committee of the Privy Council in *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board*,<sup>62</sup> where it was observed that since Maori land was a settled colony, the preexisting rights of the natives were enforceable only to the extent that they had been acknowledged by the sovereign.<sup>63</sup> It has also plagued the Canadian judiciary in its treatment of native claims,<sup>64</sup> and was central to the *Nabalco* ruling that indigenous title was unknown in Australian law.<sup>65</sup> In future litigation Blackstone may deal further blows to the aboriginal cause in Guyana, Botswana and many of the Pacific Islands acquired by British settlement.

It may be debated whether the United States was acquired by conquest, cession or settlement. Blackstone himself placed the American plantations in the category of conquered or ceded colonies, "being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present inquire), or by treaties."<sup>66</sup> But as a matter of historical fact, those colonies

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61. *Id.*

62. [1941] A.C. 308 (P.C.) (N.Z. Ct. App.).

63. *Id.* at 324-25.

64. See text accompanying note 38 *supra*.

65. See note 48 & accompanying text *supra*.

66. 1 W. BLACKSTONE, *supra* note 53, at \*107-08.

which afterwards became the original States of the American Union (with the exception of New York) were acquired by peaceful occupation by settlers who found no rivals but the Indians, and against them rarely had to rely on military aggression. This accords with the views of Chief Justice Marshall, who clearly evolved his theory of Indian title on the footing that the European powers acquired sovereignty over the continent by discovery and settlement, not by the sword.<sup>67</sup> To his credit, however, the Chief Justice paid scant regard to the precise constitutional status of the new territory and effectively ignored the Blackstone doctrine. His successors have also invariably referred the origin of Indian title to a date anterior to the Revolution, and have uncovered no *a priori* concept of the common law demanding the extinction rather than recognition of aboriginal rights. In New Zealand, too, a country which was almost certainly acquired by settlement rather than cession, the judiciary has clearly based the recognition of Maori customary rights in land on common law principles.<sup>68</sup>

It is submitted that this is the better view, and that there is no reason in logic or principle why the constitutional category allotted (often fortuitously) to a particular territory should have any bearing on the existing rights enjoyed therein by the indigenous population. Unless extinguished or modified by specific legislative or executive provision, they should be presumed to remain as before. The Blackstone doctrine rests upon the fallacious assumption, long since eroded by modern anthropology, that aboriginal communities who do not happen to have been the victims of either conquest or treaty, are incapable of enjoying a proprietary relationship to the lands they have held since time immemorial.<sup>69</sup> It is also dependent upon a distinction

67. See 31 U.S. (6 Pet.) at 543-47.

68. See, e.g., Regina v. Symonds, [1847] N.Z. P.C. Cas. 387. The much cited dictum of Judge Chapman stressed:

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 domination 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.

*Id.* at 390.

69. This is not to deny that there are some indigenous groups, particularly those which practice varying degrees of nomadism, to whom the notion of exclusive proprietary rights remains an alien (and possibly unworkable) concept. Certain tribes may remain on the same site for much of the year, undertaking foraging expeditions into the surrounding territories at regular, even daily, intervals. Others may frequently move their camp itself, sometimes leaving a few of their number behind and sometimes completely abandoning the site. Hunters and gatherers move reasonably within fairly restricted areas and usually return at the same time of year to much the same locality,

between conquest or cession and settlement which in practice is frequently difficult to maintain, particularly where some regions in the one-time colony may have been "pacified" by military force while others were peacefully occupied side by side with the indigenous population; and it is a distinction which bears no factual relation whatever to the status of tribal communities inhabiting hitherto inaccessible regions of the modern state. In the latter circumstances, the doctrine is wholly inappropriate, as its application in *Nabalco* so vividly reveals: can a foothold on the east side of a sub-continent two thousand miles wide really be sufficient in English law, as it certainly would not be in international law,<sup>70</sup> to confer not only sovereignty but also title to the soil throughout a hinterland of nearly three million square miles? Above all, the doctrine pays insufficient heed to the vital rule that when the common law is transported overseas that law is to be applied subject to local circumstances. In consequence, English laws which are to be explained merely by English social or political conditions have no operation in a colony.<sup>71</sup> Although it was crucial to the rational development of new territories, the notion that all land titles must derive from a superior lord was neither designed nor intended to defeat the claims of groups who had inhabited those territories centuries prior to the establishment of sovereign rights. The common law's reluctance to countenance allodial title stemmed only from a

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but group membership is often flexible and considerable inter-group movement may result. In some instances exclusive territorial rights are maintained over those areas and the natural resources they contain; in others, there may simply be a known association between a particular group and a particular region, with no assertion of exclusive use. The nature and degree of the possession required to support aboriginal title, however, and indeed the content of that title itself, raises issues beyond the scope of the present article, which is merely concerned to show that the Blackstone doctrine is an unnecessary obstacle to the effective disposal of native claims.

70. International courts have, in the past, occasionally been prepared to accept that an intention to occupy the more remote areas of a territory, coupled with the actual possession and settlement of a coastal strip, may suffice to establish sovereignty over the whole territory. *See, e.g.,* Legal Status of Eastern Greenland, [1933] P.C.I.J., ser. A/B, No. 43. But by the end of the nineteenth century, Sir Humphrey Wadlock had observed, in discussing Britain's sovereignty dispute over the Falkland Islands, that international law had decisively rejected geographical doctrines as distinct legal roots of title and had made effective occupation the sole test of the establishment of title to new lands. Geographic proximity, together with other geographical considerations, is certainly relevant, but as a fact assisting the determination of the limits of an effective occupation, not as an independent source of title.

Wadlock, *Disputed Sovereignty in Falkland Islands Dependencies*, 25 BRIT. Y.B. INT'L L. 311, 342 (1948).

71. Blackstone himself made it clear that the colonists should "carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony . . . ." 1 W. BLACKSTONE, *supra* note 53, at \*107.



fear that sovereign powers might thereby be prejudiced, but the limited content attributed to native title in the United States and elsewhere has shown such fears to be groundless; for the title is typically conceived as a merely inalienable, personal and usufructuary right of occupancy falling far short of the white man's concept of ownership. It is a burden on the paramount title of the Sovereign upon whose continued goodwill it is dependent for its survival.<sup>72</sup>

Hence there is no intrinsic obstacle in the common law to the recognition of immemorial possession as a root of aboriginal title. But should that law fail to meet the challenge, might not Equity intervene in its time-honoured fashion to avoid the injustice which would otherwise result? Even if the state is regarded as the owner in fee simple of aboriginal lands, as a matter of practice it has almost invariably (in both the colonial and post-colonial eras) recognised a de facto right of occupancy in the original inhabitants.<sup>73</sup> (Municipal legislation in many countries is also replete with reference to native lands held "in trust" by the State.)<sup>74</sup> Moreover this policy of paternalism, distasteful although some of its aspects may now appear to aboriginals themselves, has long been incorporated into customary international law as the doctrine of guardianship.<sup>75</sup> In theory this principle of benevolence might therefore be elevated into a collective, constructive trust of the fee simple enforceable at the instance of its aboriginal beneficiaries. The courts have often sought to distinguish, however, between a trustee accounting to a beneficiary and the act of a sovereign state dispensing justice to its subjects. *Kinloch v. Secretary of State for India in Council*,<sup>76</sup> a case which concerned booty of war in the Indian Mutiny campaign, brought this distinction well to the fore. The leading speech in the House of Lords was delivered by Lord Chancellor Selborne, who offered the following observations in the course of his judgment:

Now the words "in trust for" are quite consistent with, and indeed are the proper manner of expressing, every species of trust—a trust not only as regards those matters which are the proper subjects for an equitable jurisdiction to administer, but as respects higher

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72. All of this became painfully apparent in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), where the Supreme Court denied any right of compensation for the appropriation of Indian lands held only by aboriginal title.

73. See T. ELIAS, *supra* note 51, at 223-35.

74. See, e.g., Aborigines Act No. 7 of 1969, Stat. N.S.W. § 7(1xb) (1969). See also note 82 *infra*.

75. See A. SNOW, *THE QUESTION OF ABORIGINES* 31-55 (1921). This work was prepared for the use of the United States delegation at the Versailles Conference.

76. 7 App. Cas. 619 (1882).

matters, such as might take place between the Crown and public officers discharging, under the directions of the Crown, duties or functions belonging to the prerogative and to the authority of the Crown. In the lower sense they are matters within the jurisdiction of, and to be administered by, the ordinary Courts of Equity; in the higher sense they are not.<sup>77</sup>

The disastrous consequences which may follow this classification into "higher" and "lower" trusts (a classification which is not to be found in any of the textbooks) are well illustrated by *Tito v. Waddell*,<sup>78</sup> a recent decision in the English Court of Chancery. Perhaps the most celebrated aboriginal litigation of recent years, the case gave rise to the longest trial in English legal history. It concerned Ocean Island, a small island in the Pacific whose inhabitants were known as the Banabams. Phosphate was discovered there in 1900 and in the same year the Island became a British settlement. During the decades that followed, vast quantities of the mineral were extracted under a series of agreements with the British Phosphate Commissioners which gave fixed royalties to the Banabams. Eventually these mining operations so devastated the Island that the entire population was forced to move to one of the neighbouring Fiji Islands. Evidence produced at the trial established that the Banabams had little knowledge of the value of phosphates or of the effect of inflation, and that in the negotiation of these vital agreements they received minimal help from British officialdom. As a result, claimed the Banabams, the rates of royalty payable under certain transactions had been less than the proper rates; and they alleged that in relation to those transactions the Crown had been subject to a trust or fiduciary duty for the benefit of the plaintiff Banabams or their predecessors. The Crown was therefore liable for the difference between the amounts actually paid by way of royalty and the amounts that ought to have been paid, a difference of several million pounds sterling.

Vice-Chancellor Megarry found that there had indeed been grave breaches of the governmental obligations owed to the Banabams. Even Counsel for the Crown conceded that one of the Ordinances under which royalties were fixed was "quite fearful," and the Vice-Chancellor could not "see how the omission to encourage the Banabams to get proper advice and assistance and to make haste slowly [in the negotiation of new royalties] can possibly be called good government or be proper discharge of the duties of trusteeship."<sup>79</sup> For the presiding

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77. *Id.* at 625-26.

78. [1977] 2 W.L.R. 496 (Eng. Ch.).

79. *Id.* at 515.

judge of the Chancery Division to criticise the conduct of the British Crown in this way is almost without precedent, and the Banabams must have thought that they were at last to taste the sweet fruits of victory.

However, their hopes were to be cruelly dashed by Megarry's ruling that there was nothing in the Ordinances, or in the various instruments or other documents relating to the administration of Ocean Island, which sufficed to show that the Crown had undertaken any enforceable trust or fiduciary obligation such as was alleged by the Banabams. In reaching this verdict he regarded the *Kinloch* doctrine of a "trust in the higher sense"<sup>80</sup> as of crucial importance, and held that "the determination whether an instrument has created a true trust or a trust in a higher sense is a matter of construction, looking at the whole of the instrument in question, its nature and effect, and, I think, its context."<sup>81</sup> Applying that approach to the case before him, Megarry decided that the obligations of the Crown to the Banabams had been governmental obligations throughout, and not fiduciary obligations enforceable in the courts, with the result that he found himself "powerless to give the Plaintiffs any relief in these matters."<sup>82</sup>

#### CONCLUSION

Should aboriginal title be by immemorial possession or contingent on official recognition? The dilemma has embarrassed the Common-

80. See text accompanying note 77 *supra*.

81. [1977] 2 W.L.R. at 597.

82. *Id.* at 616. Compare with the approach in *Te Teira Te Paea v. Te Roera Tareha*, [1902] A.C. 56 (P.C.) (N.Z. Ct. App.) where an agreement between the Maoris and the Government of New Zealand (later incorporated into the Mahaka and Waikare District Act of 1870) provided that various blocks of land in New Zealand should be allotted to various Maori claimants, and were to be "held in trust in the manner provided or as hereinafter to be provided by the General Assembly for native lands held under trust." Agreement on Waikare-Mohaka District, June 13, 1870, New Zealand-Maoris, *reprinted in id.* at 58. Despite the words of trust, the Judicial Committee of the Privy Council held that in the circumstances of the case a particular named Maori claimant took absolutely and free of any trusts. *Id.* at 72-73.

The most recent attempt by aborigines to enforce an equitable trust is *Director of Aboriginal and Islanders Advancement Corp. v. Peinkinna*, [1978] 1 A.C. — (P.C.) (Queensl. Sup. Ct.) as yet reported only in *The Times* (London), Jan. 28, 1978. There some reserve aborigines sought a declaration that the Director had acted in breach of an alleged public charitable trust for the benefit of aborigines resident on the reserve, in that he had entered into a mining agreement with a bauxite company under which he was to receive a share of the profits accruing from the bauxite extracted from the reserve, and was to hold that share on behalf of all Queensland aborigines whether or not they lived on the reserve itself. Once again, however, the Privy Council rejected the contention that the Director was bound by any such charitable trust as the plaintiffs alleged. *Id.*

wealth courts to an extent that their American counterparts must find unfathomable, and it remains to be seen which route will be followed in jurisdictions where the question has never previously been litigated. In the absence of a compelling legislative or executive extinguishment, these courts must be urged to accept the patent justice of the native claim and to place that claim on its only logical basis—that of simple, immemorial possession. Problems may well arise in establishing the necessary continuity of possession and delineating its physical boundaries, particularly among those groups that still practice a greater or lesser degree of nomadism. But in countries untrammelled by judicial precedents on aboriginal rights, the recognition and effective implementation of those rights will surely not prove an insuperable task if the spirit is willing; and it will be facilitated in many states by the ratification of the I.L.O. Indigenous and Tribal Populations Convention of 1957,<sup>83</sup> which now requires as a matter of international obligation the acknowledgement of the rights of indigenous peoples over their ancestral lands.<sup>84</sup> Indeed, to those courts inclined to favor the *Nabalco* doctrine an argument might well be addressed in Article 11 of the Convention, which declares that “[t]he right of ownership, collective or individual, of the members of the population concerned over the lands which these populations traditionally occupy shall be recognised.”<sup>85</sup> Not even the Australian judiciary has suggested that the allegedly prerequisite State or Crown grant must assume a particular form; on the contrary, Mr. Justice Blackburn appeared to concede in parts of his judgment that a grant might properly be inferred from a course of executive conduct. It is therefore submitted that in those countries whose government delegates voted in support of the Convention at the 1957 International Labour Conference, and whose national legislatures subsequently approved the ratification of the Convention, aboriginal litigants should be permitted to rely upon these actions as evidence of an implied grant which is admissible in the municipal courts. For many endangered communities, however, time is running short. For them the real question, perhaps, is whether judicial intervention will come too late to save the few traditional hunting grounds which remain from the ravenous appetites of bulldozers, pile-drivers and concrete mixers.

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83. Convention Concerning Integration of Indigenous Populations in Independent Countries, June 26, 1957, 328 U.N.T.S. 247.

84. *Id.* at 256-59.

85. *Id.* at 256.

