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Aboriginal Land Rights: Judicial Approaches in Perspective

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In *Cooper v Stuart*,[1] the Judicial Committee of the Privy Council held that the rule against perpetuities was inapplicable in 1823 to Crown grants of land in the Colony of New South Wales or to reservations in such grants. In the course of its decision, the Judicial Committee referred to the general doctrine relating to the introduction of English law in the Colony. In particular, it noted that there was

> "a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of 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".[2]

The Colony of New South Wales belonged to the latter class. In the case of such settled colonies, the British Crown, the Imperial Parliament or the local legislature could declare what parts of the common or statute law of England would have effect within the limits of the Colony, but when that was not done

> "the law of England must (subject to well-established exceptions) become from the outset the law of the Colony and be administered by its tribunals. In so far it is reasonably applicable to the circumstances of the Colony, the law of England must prevail, until it is abrogated or modified, either by ordinance or statute."[3]

Implicit in this judgment is the recognition by the Judicial Committee that sovereignty over New South Wales had been acquired by the British Crown. Indeed, all such exercises of law-making authority in or for the Colony from the time of (and prior to[4]) settlement in 1788 were premised on that fact.

In terms of the international law rules operating in the eighteenth century, acquisition of sovereignty by a nation over a territorial area could be effected in a number of ways. The initial title of the British Crown to Australia was dependent upon the discovery of the east coast and surrounding islands and the proclamation of sovereignty over the areas by Captain Cook in 1770.[5] In the interval between discovery and "penal" settlement, various Imperial Acts and Orders in Council were made as a preliminary to such settlement. Among them were the designation of New South Wales — part of the territory then known as New Holland — as a penal colony.[6] The title of the British Crown was confirmed by the actual settlement at Sydney Cove from 1788 onwards. Such title was consolidated in relation to the "hinterland" by subsequent exploration and settle-

1 (1889) 14 App Cas at 286.
2 Ibid, at 291.
3 Ibid.
4 Eg, the declaration of New South Wales in 1786 as a penal colony by Order in Council made under 24 Geo III, c 56.
5 See Cumbrae-Stewart, "Australian Boundaries" (1965) 5 *University of Queensland Law Journal* 1.
6 See n 4, ante.

ment. Other parts of the territory of New Holland lying outside the boundaries of New South Wales became subject to British sovereignty at later periods.[7]

In *Coe v Commonwealth of Australia*,[8] the High Court held that the validity of the British Crown's claim to sovereignty could not be disputed. Gibbs and Aickin JJ, following *Cooper v Stuart*, went further in holding that it was fundamental to the Australian legal system that the Australian Colonies became British possessions by settlement and not by conquest.[9] Jacobs J considered that the status of New South Wales was subject to argument, there being no actual *binding* decision of either the High Court or the Judicial Committee to the effect that they were settled colonies.[10] Murphy J, in referring to *Cooper v Stuart*, considered that the view expressed therein as to the status of New South Wales was not binding. He added that occupation was originally a legal means of peacefully acquiring sovereignty over territory otherwise than by cession or conquest. It was a cardinal condition of a valid occupation that territories should be terra nullius at the time of the act alleged to be the act of occupation. He considered that the territory inhabited by tribes or peoples having a social and political organisation could not be in the nature of terra nullius. He also rejected as binding the reasoning of Blackburn J in *Milirrpum v Nabalco Pty Ltd.*[11]

In *Milirrpum*,[12] Blackburn J, in referring to the doctrine of Blackstone[13] which was the basis for the formulation of the law as to settled and conquered or ceded colonies in *Cooper v Stuart*, stated:

> "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 there live uncivilised 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 were applicable to the Colony are immediately in force there upon its foundation. In those of the latter kind, the Colony already having laws of its own, that law remains in force until altered."[14]

In the view of Blackburn J, following the opinion of the American jurist Kent,[15] 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. He regarded *Cooper v Stuart* as binding authority for the proposition that New South Wales was a settled or peaceably occupied Colony. He therefore rejected any re-opening of the reasoning in *Cooper v Stuart* which might be based on evidence that New South Wales was a Colony which did have settled inhabitants or settled law.[16]

It is appropriate therefore to discuss the questions whether such reasoning is still valid, particularly in the light of recent decisions of the Canadian Supreme Court[17] on the land rights of indigenous populations.

1. Categories of Colonies

The distinction between categories of colonies in English law is

[7] Eg, Western Australia.
[8] (1979) 53 ALJR 403.
[9] Ibid, at 408, 412.
[10] Ibid, at 411.
[11] Ibid, at 412.
[12] (1970) 17 FLR 141.
[13] *Commentaries*, I, 107.
[14] (1970) 17 FLR 141 at 201.
[15] *Commentaries on American Law*, III, p 381.
[16] (1970) 17 FLR 141 at 202-203.
[17] *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145; *Guerin v The Queen* (1985) 13 DLR (4th) 321.

well established, so much so that it can be described as part of the common law which came into operation in New South Wales on settlement, and was applicable to the circumstances of the Colony of New South Wales in 1828.[18] What is uncertain is whether a particular colony falls within a particular category. The classification would seem to depend on historical events at the time of acquisition of the colony. In this respect, *Halsbury's Laws of England* states that the classification of colonies is "one of law and once made by practice or judicial decision will not be disturbed by historical research".[19] The authorities cited in *Halsbury* for this proposition are the decision of Blackburn J previously referred to; *R v Kojo Thompson*;[20] *Phillips v Eyre*;[21] and Roberts-Wray, *Commonwealth and Colonial Law*.[22] This statement of law must of course be read subject to the refinements of the doctrine of precedent based on the hierarchy of courts. A judicial decision given by a lower court in which the status of a particular colony is established would not bind a higher court. However, if practice has confirmed the status of a colony over a hundred years or more, that would be a factor of great significance if a higher court were asked to re-examine the matter and to review the non-binding decision of another court.

In defining the categories of colonies, it is necessary to concentrate on the statement of law by the Judicial Committee in *Cooper v Stuart* set out previously. In relation to settled colonies, it is obvious that the territory may be completely unoccupied before its settlement. However, it is also clear that settled colonies can comprise areas which have been occupied by a primitive people not under an organised system of government.

As to conquest and cession, these methods of acquisition of territory are linked. At the conclusion of hostilities, the "conquering" country might oblige the inhabitants or rulers of the "conquered" country to enter into an arrangement ceding rights of control or sovereignty over the latter's territory. This method of acquisition of territory is derived from an earlier stage of international law and relations in which force was not outlawed as a method of acquisition of territory. Indeed, the earlier history of mankind demonstrates an overwhelming use of force to acquire territory which continued into more recent periods. Conquest implies the subjugation of a people in a territorial area by use of force. Whether that territory is made a colony of the conquering nation depends upon whether the conquerer remains a belligerent occupier, relinquishes control, or proceeds to the annexation of the territory.[23] In British constitutional law a proclamation of annexation is not essential to constitute the Crown as owner of the territory. All that is sufficient is that an intention must be manifested to deal with the conquered lands as subject to Crown ownership.[24]

Whether a country has been conquered or has been settled may be a question of degree. In *Re Southern Rhodesia*, the status of Southern Rhodesia (now Zimbabwe) was under consideration by the Judicial Committee of the Privy Council. It appeared that from 1892 to 1894 King Lobengula attacked areas of that country with a large body of his tribesmen, the Matabele. These assaults were repelled by the British South Africa Company and Crown forces. The activity of expelling Lobengula from the country, which was subsequently

[18] *Australian Courts Act* 1828 (Imp), s 24.
[19] Vol 6, par 1017.
[20] (1944) 10 WACA 201.
[21] (1871) LR 6 QB 1 at 18.
[22] (1966), at pp 110-111.
[23] O'Connell, *International Law* (2nd ed, 1970), Vol 1, p 433.
[24] In *Re Southern Rhodesia* [1919] AC 211.

occupied by the British South Africa Company on behalf of the Crown was treated by the Judicial Committee as a conquest.[25]

Cession often occurs at the end of a war, although there are examples of voluntary cessions. In terms of international law, the advantage of cession is that it preserves the concept of a consensual relinquishment of sovereignty by the vanquished authority. *Halsbury* states that cession may be made by a civilised state, by tribal chiefs or by inhabitants and adds:

> "An annexation in the face of an organised society considered civilized will be treated as a case of cession (not settlement) even before or in the absence of cession by international formalities."[26]

O'Connell stated that:

> "it seems that the capacity to be a party to a treaty of cession is not the degree of civilization in question but whether or not the community concerned fulfils the conditions of territory, population and administration laid down by international law for the conducting of international transactions, and these conditions are by no means stringent."[27]

Thus cessions made by Indian princes of territory to the British Crown in the eighteenth century were valid transfers under both international law and British constitutional law. In the nineteenth century cessions of territory by native chiefs in Oceania were also regarded as valid cessions in international law. Thus, the northern island of New Zealand was ceded under the Treaty of Waitangi. In relation to that Treaty, Roberts-Wray commented:

> "Although some 500 chiefs were signatories, they included relatively few from the South Island, and a large number of those in the North Island did not sign. It appears that if parts of a colony were acquired by different means, the whole may assume the status of the earliest acquisition, at any rate if it was settled; but even if it can be maintained on that ground that the North Island was acquired by cession, the same conclusion would hardly be permissible as regard to the South Island."[28]

In relation to another group of islands in the Pacific Ocean — Fiji — it is clear that the country was ceded by local chiefs to Queen Victoria in 1874.[29]

There are what might be called hybrid situations. For example, in *Campbell v Hall*,[30] Lord Mansfield referred to the status of Jamaica which had originally been conquered by British forces. It appeared, however, that the original Spanish inhabitants had left the island which had then been "settled" by British subjects. This led the learned Judge to characterise it as a vacant island which had been planted or settled as an English Colony.[31] Reference has already been made to Southern Rhodesia which, after its conquest in 1894, had been settled by the British South Africa Company and became a part of Her Majesty's dominions in 1923 as a self-governing Colony.[32]

Into what category does Australia fall? We have seen that Blackburn J regarded *Cooper v Stuart* as establishing the status of New South Wales as a settled Colony. Insofar as the High Court is no longer bound by a Privy Council decision, it is open to the High

25 Ibid, at 221.
26 Vol 6, par 1019.
27 Op cit, at p 440. See also Starke, *Introduction to International Law* (9th ed, 1984), at p 155.
28 *Commonwealth and Colonial Law* (1966), p 102.
29 Ibid, at 899.
30 (1774) 1 Cowp 204; 98 ER 1045.
31 Ibid, at 212; 1049.
32 See *Commonwealth and Colonial Law* (1966), p 749.

Court to reinterpret that case. Long practice, however, would indicate that Australia has been treated as a settled and not as a conquered or ceded Colony. Obviously, the territory was not ceded because there were no Aboriginal leaders with sufficient authority over defined territory to make such a cession. As to conquest, the mode by which Australia was occupied has been described as peaceful annexation.[33] It is true that there were many incidents in which Aboriginal groups were subject to police and/or military action by the colonial authorities or by vigilante-type action by individual groups of settlers. As a matter of fact, however, those actions could not be classified as acts of conquest. Many of them occurred well after the time in which the actual settlement took place. They could not be accepted as a basis for categorising Australia as a conquered Colony. There would appear, therefore, to be no solid ground for reclassifying the status of Australia to that of a non-settled (ceded or conquered) Colony.

2. The Effect of Categorisation of a Colony: The Applicability of British Law in Settled Colonies

In *Cooper v Stuart* it was pointed out that, as a consequence of the classification of the Colony of New South Wales as a settled Colony, British law, including statute and common law, became applicable insofar as it was reasonably applicable to the circumstances of the Colony.

A basic principle of British law was that, on settlement, land vested in the Crown which became the fons et origo of land rights in the Colony.

The land which was not alienated by way of freehold grant or for a lesser term was designated as "wastelands of the Crown". There is no indication in the Australian cases that the radical title of the Crown to Australian land was subject to any usufructuary right on the part of the Aboriginal inhabitants.[34]

As to conquered and ceded colonies the following principle applied: the law in force — the lex fori — of the conquered or ceded country continued to apply until modified by legislative authority. This was stated by Lord Mansfield in *Campbell v Hall* to be a basic proposition.[35] Older cases cited in *Blackstone's Commentaries* support the view that British law did not automatically replace local law on cession or conquest of the territory.[36]

Many of the areas conquered by, or ceded to, Great Britain were previously under European rule. A system of civil law would have been in operation in those countries, and to replace the existing personal law or the law relating to real property under which rights had been acquired with the British system of law would have brought great inconvenience and injustice to the civilian population of those countries. However, the principle was not restricted to those areas previously under European rule. The principle was extended to the territories of India as well as to Africa and Oceania which were ruled by native princes or chiefs.

In *Freeman v Fairlie*,[37] James Stephen, Master in Chancery, noted certain anomalies in respect of the operation of this principle with respect to Indian territories. In the settlements formed by the East India Company in Bengal,

33 See Starke, op cit, at p 160, n 3.

34 See *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 439 et seq; *Randwick Corporation v Rutledge* (1959) 102 CLR 54 at 71; *Commonwealth of Australia v New South Wales* (1923) 33 CLR 1 at 28.

35 (1774) 1 Cowp 204 at 209-212; 98 ER 1045 at 1047-1049.

36 *Calvin's Case* (1608) 7 Co Rep 1(a); 77 ER 377; *Blankard v Galdy* (1693) 2 Salk 411; 91 ER 356.

37 (1823) 1 Moo Ind App 305; 18 ER 117.

"the acquired territory was not newly discovered or inhabited, but well-peopled, and by a civilised race, governed by long-established laws, to which they were much attached, and which it would have been highly inconvenient and dangerous immediately to change. On the other hand, those laws were so interwoven with, and dependent on, their religious institutions, as Mahomedans or Pagans, that a great part of them could not possibly be applied to the Government of a Christian people. Besides, there was, as appears from the Act of Parliament last mentioned, no uniform lex loci to regulate inheritance, successions, and other important subjects of legislation. But the two great classes of native inhabitants, Mahomedans and Gentoos, were governed, in such matter, by different laws, derived from their respective religious institutions. Some new course was to be taken in this peculiar case; and the course actually taken seems to have been, to treat the case, in a great measure, like that of a newly-discovered Country, for the government of the Company's servants, and other British or Christian settlers using the laws of the mother-country, as far as they were capable of being applied for that purpose, and leaving the Mahomedan and Gentoo inhabitants to their own laws and customs, but with some particular exceptions that were called for by commercial policy, or the convenience of mutual intercourse, and between the British settler and the natives, and which are found quite reconcilable with differences of religious faith: such, for instance, as leaving the interest of money unlimited by law." [38]

Therefore, in certain areas the rules relating to the adoption of British law in settled colonies were made applicable to British subjects in a conquered or ceded territory. In other territorial areas which were conquered or ceded, special provision was made by or under British authority for the application of appropriate laws which took account of the needs of the new settlers. In this particular context, a system of land law which might only be appropriate to the relations of a communally organised tribe would be continued while in relation to British settlers a régime of British real property law would be made applicable.

3. Effects of Classification of a Colony on Aboriginal Land Rights

(a) Conquered and Ceded Colonies

In various Privy Council cases, the effect of the classification of colonies on Aboriginal or native land rights has been discussed. In relation to conquered or ceded colonies the three major authorities are: *Amodu Tijani v The Secretary for Southern Rhodesia*; [39] *Oyekan v Adele* [40] and *Re Southern Rhodesia.* [41]

Amodu Tijani dealt with land in Lagos and the territory surrounding it. The Judicial Committee said that, as a result of the cession of that area to the British Crown by the former chiefs, the radical title had vested in the Crown but it was qualified by

"usufructuary rights of communities, rights which, as the outcome of deliberate policy, have been respected and recognised. Even when machinery has been established for defining as far as is

[38] Ibid, at 324-325; 127-128.
[39] [1921] 2 AC 399.
[40] [1957] 2 All ER 785.
[41] [1919] AC 211.

possible the rights of individuals by introducing Crown grants as evidence of title, such machinery has apparently not been directed to the modification of substantive rights, but rather to the definition of those already in existence and to the preservation of records of that existence."[42]

A mere change of sovereignty was not to be presumed to disturb rights of private owners, which rights continued.[43]

This reasoning was followed in *Oyekan v Adele*. The Judicial Committee stated that in order to ascertain what rights were retained by the inhabitants or passed to the Crown, British courts would look not to the treaty of cession but to the conduct of the British Crown. In determining what rights were recognised, the guiding principle would be that the courts would assume that the British Crown intended the rights of property of the inhabitants to be fully respected.[44]

Likewise, in *Re Southern Rhodesia* the Judicial Committee, in determining what rights if any were vested in the tribes of Southern Rhodesia (the Matabele and the Mashonas) stated that it was necessary to show that

> "the rights, whatever they exactly were, 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."[45]

Without deciding the question whether private rights of this nature had existed, the Judicial Committee held that in the end result they had been extinguished by the Crown manifesting an intention to deal with the land in a manner inconsistent with the existence of such a title.

The reference to private or individual rights must be understood in the wider context of the discussion of native title in these cases. In the *Amodu Tijani* case, the Privy Council referred to two features of native law. One was that there was no strict division between ownership or possession, the usual form of native title being that of a usufructuary right which was described as a qualification or burden on the radical title of the Sovereign. The second feature was that the title was ordinarily that of a community, that is, it was a communal native title, the community having the right to the common enjoyment or user, with customs under which its individual members were admitted to enjoyment and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession.[46] Reference was made in the various cases to a Report on Land Tenure in West Africa where the point was made that

> "the land belongs to the community, the village or the family but not to the individual, with members of the community, village or family having an equal right to the land, with the chief or headman of the community or village or head of the family having charge of the land for the use of the community".[47]

In *Sunmonu v Disu Raphael*,[48] it was pointed out by the Judicial Committee that the usufructuary right was really a communal right which extended to the whole family although it was possible for a

[42] [1921] 2 AC 399 at 404.
[43] Ibid, at 407.
[44] [1957] 2 All ER 785 at 788.
[45] [1919] AC 211 at 233.
[46] [1921] 2 AC 399 at 404.
[47] Ibid. See also *Osbadi v Dakolo* [1938] AC 667 at 668.
[48] [1927] AC 881.

special conveyancing procedure to be utilised to confer title on individuals.[49]

In *Re Southern Rhodesia* it would appear that the Judicial Committee in making a distinction between different tribes considered that certain types of communal title existing in a territory before a conquest by the Crown could not be given effect in a court of law.[50] In any case the reasoning of the Judicial Committee in the cases referred to indicated that any recognition of individual rights is mediated through a communal title; in other words there is no *direct* recognition of an individual native right apart from the communal title. It is the latter title which supports the granting or recognition within the native community of any individual rights.

Furthermore, the seeking of a judicial remedy for the enforcement of native rights to tribal land conferred by a treaty of cession depended on statutory recognition of the rights in the law of the particular colony. This was affirmed by the Judicial Committee in 1941 in *Hoani v Aotea District Maori Land Board.*[51] The reasoning in this case has been followed in the recent New Zealand Court of Appeal case of *New Zealand Maori Council v The Attorney-General.*[52]

(b) Settled Colonies

In *Milirrpum v Nabalco Pty Ltd* Blackburn J came to the conclusion that in settled colonies communal native title did not exist except by recognition. Such a recognition could take place by way of legislative or prerogative act or by a course of dealing of the Executive.[53]

In relation to Canada, the Royal Proclamation of 1763 has been regarded by the Canadian Courts and the Privy Council as a source of recognition of communal native title, this proclamation being traditionally regarded as having an effect of like nature to that of a statute. The Proclamation provided that possession was granted to certain Indian tribes of such lands as were reserved to them as their hunting grounds.[54] As Blackburn J put it:

> "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 Bay."[55]

In *St Catherine's Milling and Lumber Co v The Queen,*[56] the Judicial Committee, in relation to land within the limits of the Royal Proclamation, stated that the radical title was in the Crown. However, under that title there was a tenure of the Indian nations and tribes described as a "personal and usufructuary right, dependent upon the goodwill of the Sovereign".[57]

Likewise, in relation to New Zealand, the Judicial Committee in *Nireaha Tamaki v Baker*[58] held that, pursuant to legislation giving effect to the Treaty of Waitangi, the Maori tribes in New Zealand had acquired a communal native title in their lands. The existence of such title was also recognised in *New Zealand Maori Council v Attorney-General*[59] which concerned the interpretation of a section of a New Zealand statute which provided:

[49] Ibid, at 883-884.

[50] It appeared that the Judicial Committee regarded the rights of the Matabele people as approximating to the lower rather than to the higher limit: [1919] AC 211 at 233-234.

[51] [1941] AC 308.

[52] (1987) 6 NZAR 353 at 361 per Cooke P, and at 398-399 per Somers J.

[53] (1970) 17 FLR 141 at 223. However, Blackburn J was relying on the decision of the Court of Appeal of British Columbia for these propositions. See post as to later developments.

[54] As to the area covered by the Proclamation, see post.

[55] (1970) 17 FLR 141 at 206.

[56] (1889) 14 App Cas 46.

[57] Ibid, at 54.

[58] [1901] AC 561. See also *Reg v Symonds* [1847] NZPCC 387; *In re The Ninety Mile Beach* [1963] NZLR 461.

[59] (1987) 6 NZAR 353.

> "Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi."

This section was held to amount to a recognition of a special interest of the Maoris in their traditional tribal land.

However, there are two more recent Canadian cases, at least one of which appears to recognise the existence of communal native title at common law as distinct from statutory or executive recognition. *Calder v Attorney-General for British Columbia*[60] concerned the interests of the Nishga Tribe of British Columbia. On the question whether the tribal territory was within the area of the Royal Proclamation of 1763, the Supreme Court of Canada divided three to three. Judson, Markland and Ritchie JJ[61] held that the Proclamation did not apply to the lands historically occupied by the appellants, while Hall, Spence and Laskin JJ[62] held that the Proclamation was intended to apply to lands west of the Rocky Mountains and thus to individual land in British Columbia.

In the judgment of Judson J, there was a recognition that even though Indian title in British Columbia could not or did not owe its origin to the Royal Proclamation of 1763, the Indians there were organised in societies and occupying the land as their forefathers had done for centuries. If such title existed, it depended upon the goodwill of the Sovereign.[63] However, Judson J did not pause to consider the nature of the right but went on to find that the title had been lawfully extinguished by acts of the authorities prior to the entry of British Columbia into the Canadian Confederation in 1871.[64] On the other hand, Hall J considered that, at common law, Aboriginal rights to the possession and enjoyment of lands were recognised, and that the Nishga Indians therefore had such a right both under common law and under the Royal Proclamation (which he construed as extending to the lands in question). Hall J relied on certain American cases including *Johnson v M'Intosh*[65] as authority for the existence of such a right.[66]

In *Guerin v The Queen*[67] the Supreme Court of Canada was concerned with claims by the Musqueam Indian band in relation to reserve lands in British Columbia. In this case, Dickson J[68] considered that both Judson and Hall JJ in *Calder's* case

> "were in agreement that Aboriginal title existed in Canada (at least where it had not been extinguished by appropriate legislative action) independently of the Royal Proclamation of 1763".[69]

Dickson J stated that in recognising that the Proclamation was not the sole source of Indian title, the *Calder* decision went beyond the judgment of the Privy Council in *St Catherine's Milling and Lumber Co v The Queen*.[70]

The interest of the Musqueam band in the land was an interest in a reserve created under s 18(1) of the *Indian Act* (Can). It had previously also been an Indian reserve under Provincial legislation.

There is an abundance of United States judicial authority on "recognised" title, that is to say, an interest in a reservation created by treaty, Congressional act or executive order.[71] The American doctrine is that such an interest is more substantial than that of unrecognised Aboriginal title in traditional tribal lands.[72] On this point Dickson J appeared to depart from the American doctrine

[60] (1973) 34 DLR (3d) 145.

[61] Ibid, at 153 et seq.

[62] Ibid, at 204 et seq. It should be noted that the seventh Judge of the Court, Pigeon J did not discuss the substantive matters but concurred in the decision of Judson, Markland and Ritchie JJ that the action should be dismissed. Consequently the decision of Hall J is a dissenting one.

[63] (1973) 34 DLR (3d) 145 at 156.

[64] Ibid, at 167.

[65] (1823) 8 Wheaton 543; 21 US 240. However it should be pointed out that Chief Justice Marshall did not consider these rights as arising from municipal law but from the law of nature. See Lester, *Inuit Territorial Rights in the Canadian Northern Territories* (1984), p 8.

[66] 34 DLR (3d) 145 at 169 et seq.

[67] (1985) 13 DLR (4th) 321.

[68] With whom three other Judges concurred.

[69] (1985) 13 DLR (4th) 321 at 335.

[70] Ibid.

[71] See, for example, *Strong v The United States* (1975) 518 F 2d 556 at 563: "Where Congress has by treaty or statute conferred upon the Indians or acknowledged in them the right to permanently occupy land, then the Indians have a right of title to that land which has been variously referred to in court decisions as 'treaty title', 'reservation title', 'recognised title', and 'acknowledged title'."

[72] See *Tee-Hit-Ton Indians v United States* (1955) 348 US 272.

when he observed that the Indian interest in the land was the same in both cases, that is, whether the land was reserve or traditional tribal land.[73]

As to the nature of the Indian title, the various judges in *Guerin's* case considered that the nature of the interest which had been described as a "personal usufructuary interest" in the *St Catherine's Milling* case was more substantial than that expression might suggest: it had the character of a fiduciary interest. Dickson J described the interest as "not strictly speaking amounting to beneficial ownership", but it was something more than a "personal" right. It was a sui generis interest similar to a beneficial interest and the Crown was under a fiduciary obligation to respect that interest.[74]

In the New Zealand case of *The New Zealand Maori Council v Attorney-General and Ors*, several of the Judges characterised the interests of the Maoris under the Treaty of Waitangi as based on a partnership or relationship of trust.[75]

(c) Extinguishment

In *Calder v The Attorney-General of British Columbia*, Judson J held that sovereign acts of the Crown before the entry of British Columbia into Federation had extinguished any right of occupancy which the Nishga Tribe had. He stated:

> "In my opinion in the present case the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when by legislation it opened up such lands for settlement, subject to the reservation of land set aside for Indian occupation."[76]

On the other hand, Hall J considered that, once a title was established, it was presumed to continue, and that it could not be extinguished except by surrender to the Crown or by competent legislative authority and then only by specific legislation. Legislation opening up land for settlement was not specific within the meaning of this term so as to extinguish traditional title.[77] This reasoning seemed to have been adopted by Dickson J in *Guerin v The Queen*, where he approved the statement of law as to presumptive title to land of the native inhabitants by the Privy Council in *Amodu Tijani v The Secretary of Southern Rhodesia*.[78]

It has been pointed out earlier that *Guerin* dealt with what might be called reserve land or "recognised" Aboriginal title. The fact that the reserve was administered under the provisions of the *Indian Act* did not terminate the pre-existing interest which the Indian band had in the reserve.

4. Critique and Application to Australia

The Canadian cases proceed further than the cases in other jurisdictions in affirming the existence of communal native title at common law. In *Calder v The Attorney-General of British Columbia*, Hall J applied the doctrine of *Campbell v Hall*, ante, to the settled Colony of British Columbia. He pointed out that the fifth proposition affirmed by Lord Mansfield in that case — that the laws of a conquered colony continue in force until they are altered by the conqueror — applied a fortiori to lands which had become subject to British sovereignty by discovery or by declaration, that is, to settled

[73] (1985) 13 DLR (4th) 321 at 336-337.
[74] Ibid, at 339.
[75] See (1987) 6 NZAR at 371 (Cooke P), 400 (Somers J). The judgments in this case are discussed by Boast, "New Zealand Maori Council v Attorney General: The case of the century?" [1987] *New Zealand Law Journal* 240.
[76] (1973) 34 DLR (3d) 145 at 167.
[77] Ibid, at 208.
[78] (1985) 13 DLR (4th) 321 at 336. But see *Attorney-General for Ontario v Bear Island Foundation* (1984) 15 DLR (4th) 321 at 407 et seq.

colonies.[79] The opposing line of reasoning which was most effectively expounded by Davey CJBC in *Calder v The Attorney-General of British Columbia* (Supreme Court of British Columbia) was that Aboriginal rights could only be recognised in a settled colony if they were affirmed by a prerogative or legislative act; or a course of dealing had been proved from which they could be inferred.[80] This reasoning is similar to that adopted by Blackburn J in *Milirrpum v Nabalco Pty Ltd.*[81]

In *Calder v The Attorney-General of British Columbia*, Hall J had regard to Chief Justice Marshall's reference in *Johnson v M'Intosh*, ante, to *Campbell v Hall*. This suggested to Hall J that the common law of England and the common law of the United States were at one on this issue.[82] On the other hand, Davey CJ in *Calder v The Attorney-General of British Columbia*, in referring to the same reasoning, stated:

> "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."[83]

Reference has already been made to the statement of Dickson J in *Guerin v The Queen* that the interest of an Indian band in a reserve was the same as the interest of a band in traditional tribal lands. In both types of cases, the interest was defined as amounting to a fiduciary relationship.[84] This reasoning does not accord with the American cases where *recognised* title is placed on a much more "proprietary" basis than *unrecognised* title.[85]

As to extinguishment, the Canadian cases affirm the proposition that such legislation must be specific, that is to say, directed to the extinguishment of aboriginal title. However, in *Milirrpum*, Blackburn J considered that in a settled colony the 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 operated as an extinguishment of Aboriginal title.[86]

Therefore, in relation to Australia, certain basic questions appear to be appropriate for determination. In the first place, is the distinction made by Blackstone between settled and ceded or conquered colonies, which was a statement of British common law, and which was adopted by the Privy Council in *Cooper v Stuart*, still operative? Second, is the conclusion to be drawn from this distinction, that at *common law* Aboriginal land rights in a settled colony do not exist, still tenable? These two questions are intertwined. In this respect the practice of the colonial authorities in Australia does not appear to have supported the existence of a usufructuary right in the Aboriginal clans or tribes, much less a fiduciary relationship between Crown and these clans or tribes.[87]

More specifically, there is no legislation, treaty, or proclamation recognising such right. It is true that in some of the Royal Instructions to the Governors, a clause is to be found which enjoins the Governor to protect the Aboriginal inhabitants in their persons and "in the free enjoyment of their possessions".[88] Such instructions however could not be regarded as creating a legal duty cognisable by a court of law for the recognition of land rights, even if

[79] (1973) 34 DLR (3d) 145 at 199.
[80] (1970) 13 DLR (3d) 64 at 67.
[81] (1985) 17 FLR 141 at 223.
[82] (1973) 34 DLR (3d) 145 at 190 et seq.
[83] (1970) 13 DLR (3d) 64 at 67. But see *Hamlet of Baker Lake v Minister of Indian Affairs* (1979) 107 DLR (3d) 513 at 542. See also n 65, ante.
[84] (1985) 13 DLR (4th) 32 at 337, 339.
[85] See the text corresponding to n 72, ante.
[86] (1970) 17 FLR 141 at 223.
[87] Except possibly in the case of South Australia. See post.
[88] See, for example, *Royal Instructions to the Governor of Queensland* (Governor Bowen), 1860, Clause XXIII.

"possessions" were to be construed as including land, which is unlikely.[89]

However, in the Letters Patent constituting the Colony of South Australia (1836) there is a proviso to the effect 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 . . . ."

In *Milirrpum*, Blackburn J did not consider that this proviso amounted to recognition but exhibited a policy of benevolence on the part of the British Government.[90] However, the question must be regarded as an open one.

In relation to Australia generally, the practice of opening up particular lands for settlement, whether agricultural and pastoral, without recognising a usufructuary right on the part of the Aboriginals would appear to be inconsistent with the existence of any traditional Aboriginal right in those lands. Put in another way, such legislative or executive acts would appear to have extinguished any such right if it existed.[91]

Finally, the creation of Aboriginal reserves raises the question whether, if such Aboriginal title did exist, the effect of Crown lands legislation reserving lands for the use of Aborigines as well as for other public purposes was to recognise an Aboriginal title in reserve lands. In *Corporation of the Director of Aboriginal and Islanders Advancement v Peinkinna and Ors*,[92] the Judicial Committee considered the question whether Queensland legislation relating to reserves had created a trust between Aborigines and the Queensland Director of Aboriginal Advancement. The Judicial Committee did not make a decision on this matter but observed that *if* any trust enforceable in equity existed it would be a public charitable trust. If it was a public charitable trust, it was for the benefit of Aborigines or Islanders throughout the State (including those on the reserve) and not specifically for the benefit of Aboriginals residing on the particular reserve.[93]

The question whether Australian legislation — in this case the relevant provisions of the *Aboriginal Land Rights (Northern Territory) Act* 1976 — constituted a recognition of native title, recently came before the High Court in *Northern Land Council v Commonwealth of Australis*.[94]

In deciding to remit the particular proceedings concerned to another court, the Court observed:

> "It has often been pointed out that the categories of fiduciary relationship are not closed. See, for example, *Hospital Products Ltd v United States Surgical Corporation* ((1984) 156 CLR 41 at 68, 96); *Guerin v The Queen* ((1984) 13 DLR (4th) 321 at 341). Whether the nature of the relationship at common law between an identified group of Aboriginal people and the unalienated Crown lands, which they have used and occupied historically and still use and occupy, is such as to found a fiduciary relationship or a trust of some kind is a question of fundamental importance. . . ."[95]

[89] It is interesting to note that Clause XXII of the *Instructions to the Administrator of British New Guinea* in 1888 enjoined the Governor to protect the natives in the persons and in their free enjoyment of "*their land* and other possessions" [Emphasis added]. See *Administration of Papua New Guinea v Guba* (1973) 130 CLR 353 at 443 per Gibbs J.

[90] (1970) 17 FLR 141 at 281.

[91] But see Bartlett, "Aboriginal land claims at common law" (1983) 15 *University of Western Australian Law Review* 293 at 330.

[92] (1978) 52 ALJR 286.

[93] Ibid, at 291. Cf the judgment of Wilson J in *Guerin v The Queen* in relation to Canadian reserve legislation: (1985) 13 DLR (4th) 321 at 356-357. Queensland legislation has since been amended. See now *Land Act (Aboriginal and Islander Land Grants Amendment Act)* (1982), s 5, for amendments of definition of "deed of grant in trust" and "public purposes".

[94] (1987) 61 ALJR 616.

[95] Ibid, at 620.