

THE GOVE LAND RIGHTS CASE: A JUDICIAL DISPENSATION FOR THE TAKING OF ABORIGINAL LANDS IN AUSTRALIA?

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In 1971, Blackburn J., delivering a swingeing judgment in the Supreme Court of the Northern Territory, held that the members of three Arnhem Land clans had no legally recognizable rights in their ancestral lands, and thereby decided what was thought to be the first case brought by Australian aboriginals seeking legal recognition of their customary land rights.¹

British settlements were first established in Australia in 1788. Ever since, it is a notorious fact that aboriginals have been consistently deprived of their land by settlers, miners and governments. The surprising thing, therefore, to lawyers unfamiliar with the history of Australian race relations, is that aboriginal rights in land do not appear to have been asserted in the courts by aboriginal plaintiffs before the present proceedings began.² The absence of reported cases dealing specifically with the rights of Australian aboriginals in their lands is all the more exceptional in the light of the wide range of decisions on indigenous claims in other jurisdictions.³

Even though the primary finding against the plaintiff clansmen in *Milirrpum v. Nabalco Pty Ltd* was one of fact—making his Honour's exhaustive comments on the recognition of communal rights in land, and the other issues of law, essentially *obiter*—the novelty of the case, the significance of the issues, and the surprising failure of the unsuccessful plaintiffs to appeal to the High Court, combine to compel a critical analysis of the place of this decision in the history of land rights litigation in former British colonies and the few remaining dependent territories.

The plaintiffs in *Milirrpum v. Nabalco Pty Ltd* had apparently only felt compelled, or perhaps able, to assert what they believed to be their rights, comparatively recently. Although at various times since 1886, successive governments had purported to alienate in whole or in part the lands claimed by the plaintiffs, these alienations had not, it would seem,

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¹ *Milirrpum v. Nabalco Pty Ltd and The Commonwealth of Australia* (1971) 17 F.L.R. 141.

² *Id.*, 150, 199.

³ A number are discussed by Sir K. Roberts-Wray in *Commonwealth and Colonial Law* (1966) Chap. 14.

resulted in an alien occupation of the lands sufficiently adverse to the day to day interests of the plaintiffs to drive them into the courts. Indeed, for significant periods since the Commonwealth Government assumed control of the Northern Territory in 1911 the lands claimed either formed part of the Arnhem Land Reserve or were leased to friendly Missions.

However, in 1968, bauxite mining operations conducted by Nabalco Pty Ltd (the first defendants) and authorized by the Commonwealth Government (the second defendants) began on the Gove Peninsula. Probably, for the first time, the plaintiffs' possession of their lands was sufficiently invaded to make it impossible for them to stand idly by and at the same time remain secure in their traditional belief that the lands they claimed as their own were truly theirs. The time had come for them to assert rights in their own country, and it had come at a time when their cause had wide support, and when their struggle would be of significance to all black Australians. But, unfortunately, it was also a time when the judicial climate, in countries with indigenous minorities, was unfavourable to this type of claim.⁴

The plaintiffs sought declaratory relief, injunctions and damages, the key declaration asked for being that they were entitled to the occupation and enjoyment of the subject land free from interference. In addition, declarations were sought, firstly, that a Territory Ordinance, the Minerals (Acquisition) Ordinance 1953, was *ultra vires* and void insofar as it purported to acquire compulsorily bauxite ores and other minerals in the Northern Territory; and, secondly, that the Commonwealth had no interest in the lands concerned enabling it to alienate them validly. Thus, the plaintiffs had the task not only of proving their traditional rights to the Gove lands, but also of showing that these rights had not been effectively extinguished by legislation and grant, at least insofar as the rights concerned the minerals naturally present in their lands.

Theoretically, it would have been possible for the plaintiffs to have succeeded in obtaining judicial recognition of their traditional rights and yet for them to have ultimately failed; for the Court could have recognized that their title once existed, yet have held that it had been, at least in part, recently extinguished, say, by the legislation of 1953 acquiring Northern Territory minerals. Such a decision might have given some solace to the plaintiffs and considerable encouragement to would-be aboriginal litigants elsewhere. Further, it would have indirectly embarrassed the Commonwealth Government, which would be shown to have expropriated in recent times the plaintiffs' minerals without paying

⁴ *E.g.*, *Tee-Hit-Ton Indians v. United States* (1954) 348 U.S. 272; *In Re The Ninety-Mile Beach* [1963] N.Z.L.R. 461; *Calder v. Attorney-General of British Columbia* (1969) 8 D.L.R. (3d) 59, (1970) 13 D.L.R. (3d) 64.

compensation—in defiance of enlightened international opinion concerning the rights of racial minorities.

In the event, the plaintiffs failed on all the substantive issues in the case. The primary finding against them was one of fact: on the balance of probabilities, they had not shown that which they asserted, that their predecessors in 1788 had the same links to the same areas of land as they were claiming 180 years later.⁵ Having found against the plaintiffs on the facts, Blackburn J. went on to find against them on the law, making pronouncements, at the request of counsel for all parties, on the main issues argued.

Firstly, his Honour held that the type of title asserted by the plaintiffs was not recognized in Australia and had never been recognized.⁶ The plaintiffs had asserted a combination of individual and joint proprietary interests in the lands. His Honour categorized the nature of this complex combination of rights as “communal native title”.⁷ Now, the plaintiffs relied heavily on submissions that their rights were recognized at common law, for there was no statute explicitly referring to their lands and recognizing aboriginal rights to them.⁸ After considering cases from a variety of jurisdictions, his Honour’s finding was that the authorities did not support the proposition that the common law recognized “native” customary rights in land or, as he most frequently put it, the common law had no doctrine of communal native title.⁹ It was a necessary corollary of this essentially negative proposition for Blackburn J. to say that where “native” rights were recognized in the First and Second British Empires, it had been an express recognition by statute or executive policy.¹⁰

Blackburn J. then held that the plaintiffs, though possessing a recognizable system of customary law, were nevertheless governed by a legal system which, surprisingly, did not provide for any such proprietary interests in any part of the subject land.¹¹ The plaintiffs had asserted, in their pleadings, the existence of such proprietary interests.

As an alternative to the argument that their clients’ rights were recognized at common law, senior counsel for the plaintiffs ingeniously relied on the Letters Patent of 1836, which set up the colony of South Aus-

⁵ (1971) 17 F.L.R. 141, 198.

⁶ *Id.*, 244, 245.

⁷ *Id.*, 151, 198.

⁸ The Letters Patent of 19 February 1836, establishing the Province of South Australia, and made under statutory authority, were relied on by the plaintiffs, but do not expressly refer to the Northern Territory, which was not administered by South Australia until 1863.

⁹ (1971) 17 F.L.R. 141, 262.

¹⁰ *Ibid.*

¹¹ *Id.*, 273-274.

tralia, and which appeared to recognize aboriginal rights in land by proviso saving their rights to occupy and enjoy their lands. It was an essential step in this argument to show that this recognition was a constitutional guarantee which extended to the Northern Territory when South Australia took over its administration in 1863. Blackburn J. held that the Letters Patent never applied to the Northern Territory and, surprisingly, never provided a constitutional recognition of aboriginal rights in land even in South Australia; and, in any event, insofar as the Letters Patent originally limited the powers of the South Australia legislature, they had been subsequently repealed and replaced.¹²

Finally, Territory legislation acquiring minerals and validating the mineral leases granted to Nabalco Pty Ltd was held to be valid.¹³

The plaintiffs had been defeated on every substantive issue and did not appeal.

Though this attempt to assert aboriginal rights in an Australian court was novel, the main legal issue in the case was not. This issue was whether the common law which is introduced into settled Colonies on their establishment—recognizes existing “native” communal rights in land, despite their apparent un-Englishness. Though his finding was adverse to the plaintiffs, Blackburn J. did not attempt to limit the generality of this issue by saying that there were peculiarly local Australian rules of case law on this subject, distinct from the general body of the common law.¹⁴

1. Common Law Recognition of “Native” Land Rights

(a) North America

It is not surprising that the legal problems flowing from the arrival of British settlers and the introduction of common law real property principles into countries already populated by people with their own systems of land tenure were first tackled in depth in the courts of what had been the First British Empire in North America. A relatively coherent body of case law principles was developed by the end of the first half of the nineteenth century, to reconcile the respective interests of Indians, settlers and governments. The fundamental principle was that traditional Indian rights in land were recognized at common law.¹⁵ This is probably an instance of the common law applying existing international law rules; in this case, the already well established and well-exceptional proposition that *a change of sovereignty does not affect*

¹² *Id.*, 280-283.

¹³ *Id.*, 287, 292.

¹⁴ *Id.*, 207-208.

¹⁵ *Johnson and Graham's Lessee v. M'Intosh* (1823) 8 Wheaton 542, 574, 603; *Worcester v. State of Georgia* (1832) 6 Pet. 515, 544-545.

existing private rights.¹⁶ As early as the sixteenth century this principle had been considered to apply to non-Christian peoples in America.¹⁷ The Spanish international lawyer, de Victoria, had argued that the ethnic, cultural and religious differences of American Indians from Europeans were not such as to deprive the Indians of the rights they enjoyed as men by virtue of their common humanity.¹⁸

As the legal recognition of Indian rights in land did not depend on their conformity to English notions of proprietary rights, the American judges of this period do not seem to have found it necessary to make any detailed judicial analysis of American Indian land tenures. Indian land tenure systems were seen as constituting distinct patterns of rights not derived from the common law but recognized by it. As Baldwin J. put it in *Cherokee Nation v. State of Georgia*: "Indians have rights of occupancy to their lands as sacred as the fee-simple, absolute title of the whites".¹⁹ Nor were Indian rights seen as irreconcilable with or incompatible with English tenurial notions. In *Johnson v. M'Intosh*, Marshall C.J., talking of Indian title, said that "Such a right is no more incompatible with a seisin in fee than a lease for years, and might as effectually bar an ejectment."²⁰

This recognition of Indian title, while apparently not inconsistent with the policies of the United States Executive in the early nineteenth century, was clearly not dependent on these policies, it having been put as a proposition of law.²¹ Nor was it dependent on either the original constitutional status of the territory concerned²² or the express recognition by treaty of Indian rights in land.²³ As Marshall C.J. put it in *Worcester v. State of Georgia*:

¹⁶ D. P. O'Connell, *International Law* (2nd ed., 1970) Vol. 1, 377-8; *Worcester v. State of Georgia* (1832) 6 Pet. 515, 543-544.

¹⁷ Franciscus de Victoria (sometimes referred to as Vitoria), *De Indis* (1532) cit. J. P. Bate c.1913, Wildy & Sons Ltd, London; reprinted 1964, Oceana Inc., New York) Sect. I, 128, Sect. II, 138-148. L. K. Cohen (ed.), "The Legal Conscience" *Selected Papers of Felix S. Cohen* (New Haven, 1960) 289-292.

¹⁸ de Victoria, *op. cit.* Sect. I, 120-128.

¹⁹ (1831) 5 Pet. 1, 48.

²⁰ (1823) 8 Wheaton 543, 592.

²¹ *Worcester v. State of Georgia* (1832) 6 Pet. 515, 543-544; *Johnson v. M'Intosh* (1823) 8 Wheaton 543, 574.

²² Marshall C.J. considered that discovery perfected by occupation gave the Crown rights of pre-emption, not that recognition of Indian title flowed from these constitutional facts: *Johnson v. M'Intosh* (1823) 8 Wheaton 543, 587. In the same judgment there is ample evidence that by 1823 the constitutional rights of the State and Federal governments in North America depended partly on discovery perfected by occupation, and partly on conquest and cession. Recognition of Indian title was not regarded as dependent on either mode of acquisition: *id.*, 587, 591.

²³ In colonies acquired by settlement rather than by cession, Marshall C.J. considered that Indian rights survived the change of sovereignty, being qualified

It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors.²⁴

Marshall C.J. did not, however, say that European nations could not assert *sovereignty* in North America. In his earlier judgment in *Johnson v. M'Intosh* he noted that the sovereignty of European nations in North America ultimately depended on discovery perfected by occupation.²⁵ However, the establishment of this political sovereignty did not affect existing Indian rights, even though Marshall C.J. considered that the establishment of British sovereignty brought with it the notion of the radical title of the Crown, which title co-existed with Indian rights. Marshall C.J. concluded that:

This opinion conforms precisely to the principle which has been supposed to be recognized by all European governments, from the first settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.²⁶

Discovery, in his view, did not annul Indian rights, but it did give rights of pre-emption.

It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it.²⁷

It is clear that Marshall C.J. in *Johnson v. M'Intosh* did not consider that the recognition of Indian rights, following the original establishment of British sovereignty in Virginia, depended on the principle that existing laws are presumed to continue in force following a conquest and cession, until the conqueror chooses to alter them.²⁸ This would have been ridiculous, for British sovereignty was not established in Virginia in this way.²⁹ What a number of the nineteenth

primarily by the restriction on alienation inherent in the Crown's assertion of pre-emptive rights: *id.*, 573, 574; cf. *Cramer v. United States* (1922) 261 U.S. 219, 225, and *United States v. Shoshone Tribe* (1937) 304 U.S. 111, 116.

²⁴ (1832) 6 Pet. 515, 542-543.

²⁵ (1823) 8 Wheaton 543, 573.

²⁶ *Id.*, 592.

²⁷ *Worcester v. State of Georgia* (1832) 6 Pet. 515, 544.

²⁸ *Campbell v. Hall* (1774) 1 Cowp. 204, 209; 98 E.R. 1045, 1047.

²⁹ *Johnson v. M'Intosh* (1823) 8 Wheaton 543, 576-580; A. Stokes, *A View of the Constitution of the British Colonies in North America and the West Indies* (1783) (rep. 1969, London) 3-4.

century American cases are primarily concerned with, however, is not so much this fundamental principle of recognition of Indian title, as with attempts to reconcile Indian title with English tenurial principles, particularly the notion of the radical title of the Crown, and the associated doctrine that titles to land ultimately originate from a Crown grant.³⁰

One major problem was posed by competing Indian and Crown grants in favour of settlers. While insistence on the possession of Crown grants as proof of Indian title would have overreached the legal principle of recognition of Indian rights, the settlers, whose property rights originally depended primarily on the introduced common law, had somewhat weaker grounds for asserting recognition of titles not derived from Crown grants. Indeed, there were eminently sound reasons of judicial policy to insist that in the case of settlers, proprietary rights must depend on grants from the Crown. For only in this way could the Indians' rights be properly protected from settlers buying vast tracts of land for a few blankets and beads without government intervention. Thus, a recognition of the Indians' rights of unrestricted alienation might well have overreached the fundamental principle of recognition of their rights in property. However, it was a corollary of the insistence that settler titles be based on Crown grants that one of the normal incidents of rights in property, the right to alienate one's land permanently to whomsoever one pleases, was denied the North American Indians. This limitation on the right to alienate may depend more on statute than on the common law.³¹

Much of the famous judgment of Marshall C.J. in *Johnson v. M'Intosh* is devoted to a justification of this restraint on the Indians' right of alienation. In the closing passages of the judgment he concluded that:

It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of government extends to the complete ultimate title, charged with this right of possession, and to the exclusive power of acquiring that right.³²

This restraint on Indian rights of alienation did not mean that their rights were unenforceable at common law, or could be automatically extinguished by a Crown grant to a British settler.³³ The American

³⁰ *Johnson v. M'Intosh* (1823) 8 Wheaton 543; *Mitchel v. United States* (1835) 9 Pet. 711; *Cherokee Nation v. State of Georgia* (1831) 5 Pet. 1, 49.

³¹ E.g., *Johnson v. M'Intosh* (1823) 8 Wheaton 543, 585 indicates that the right of pre-emption depended on statute in Virginia after 1779; cf. *Wallis v. Solicitor-General for New Zealand* [1903] A.C. 173, 179.

³² (1823) 8 Wheaton 543, 603.

³³ *Cherokee Nation v. State of Georgia* (1831) 5 Pet. 1, 49.

solution to the problem of reconciling Indian title and overlapping Crown grants was to make the grantee's rights to the fee simple subject to the lawful extinction, by fair purchase, of Indian rights.³⁴ The problem of the conflict between Indian rights and those of grantees from the Crown prior to the extinction of the Indian title was thus avoided. No conflict existed, for the grantee's rights were subject to those of the Indians and could, theoretically, in a particular case amount to a bare fee simple, with full beneficial rights in the land remaining in the Indians.³⁵ A later solution to this problem was judicial recognition of the right of Indians exercising full beneficial ownership of land the subject of a Crown or government grant to avoid the grant on the basis that the government had no title to give.³⁶

It is true that these principles were expounded by the courts after the Revolution of 1776, but the Revolution does not appear to have displaced the common law in those jurisdictions where it was already applicable.³⁷ Nor did the Revolution restrain British colonial courts from following these principles which recognized "native" titles and reconciled them with introduced interests.

(b) *New Zealand*

In 1847 in the Supreme Court of New Zealand, in *The Queen v. Symonds*, Chapman J. was able to say:

The intercourse of civilized nations, and especially of Great Britain with the aboriginal Natives of America and other countries, during the last two centuries, has gradually led to the adoption and affirmation by the Colonial Courts of certain established principles of law applicable to such intercourse. Although these principles may at times have been lost sight of, yet animated by the humane spirit of modern times, our colonial Courts, and the Courts of such of the United States of America as have adopted the common law of England, have invariably affirmed and supported them; so that at this day, a line of judicial decision, the current of legal opinion, and above all, the settled practice of the colonial Governments, have concurred to clothe with certainty and precision what would otherwise have remained vague and unsettled. These principles are not the new creation or invention of the colonial Courts.³⁸

This decision did not involve a direct conflict between Maoris and the Crown, but a *scire facias* suit between two settlers, one relying on a purchase direct from Maoris, the other on a Crown grant. The Crown

³⁴ *Worcester v. State of Georgia* (1832) 6 Pet. 515, 544-546.

³⁵ *Johnson v. M'Intosh* (1823) 8 Wheaton 543, 574, 592; *Buttz v. Northern Pacific Railroad* (1886) 119 U.S. 55, 66; *United States v. Shoshone Tribe* (1937) 304 U.S. 111, 116.

³⁶ *Cramer v. United States* (1923) 261 U.S. 219.

³⁷ *Stokes, op. cit.* 30.

³⁸ (1847) N.Z.P.C.C. 387, 388.

grant was later in time. The Supreme Court found in favour of the holder of the Crown grant, applying the then familiar rule of the common law in its application to the colonies that as far as the rights of expatriate settlers were concerned, a Crown grant in proper form was the only lawful source of title.³⁹

However, the claimant by direct purchase from the Maoris failed not because the Maoris lacked rights in land recognized by the common law—from which would follow a conclusion along the lines that *nemo dat quod non habet*—but because he had no Crown grant in proper form. The reasoning of Chapman J. was that notwithstanding the recognition of Maori rights in land, by virtue of its “exclusive right of acquiring newly found or conquered territory” the Crown possessed a monopoly of extinguishing native titles, though the law required that this be done by “fair purchase”, with “the free consent of the native occupiers”.⁴⁰ The justification of this common law doctrine, which Chapman J. regarded as well settled in 1847, was to protect the exploitation of the local people in a newly established colony from being dispossessed of their lands by unscrupulous colonists purchasing the lands for a fraction of their real value. However, Chapman J. held that a purchase was good “as against the Native seller, but not against the Crown” on the analogy that

though discovery followed by occupation vests nothing in the subject, yet it is good against all the world except the Queen who takes.⁴¹

Chapman J. did not argue that Maori rights in land were recognized because New Zealand was a ceded colony.⁴² His judgment is silent as to the constitutional status of New Zealand. Insofar as he refers to the Treaty of Waitangi, it is to say that the common law requires recognition of Maori land rights quite independently of the words of the Treaty. Indeed, he put common law recognition of land rights as a rule applicable irrespective of the means by which British sovereignty was acquired. Recognition, in his argument, flowed from the adoption of the common law.⁴³ Therefore, as the common law applies in settled colonies, even if Chapman J. held the now unfashionable view that New Zealand was a ceded colony, the validity of his argument based on the common law recognition of Maori rights is not destroyed.⁴⁴

The view of Chapman J., expressed in 1847, that Maori title was “entitled to be respected” and could not “be extinguished (at least

³⁹ *Id.*, 388-389.

⁴⁰ *Id.*, 389-390.

⁴¹ *Id.*, 390.

⁴² *Cf. Milirrpum v. Nabalco Pty Ltd* (1971) 17 F.L.R. 141, 237.

⁴³ (1847) N.Z.P.C.C. 387, 388-390.

⁴⁴ *In Re The Ninety-Mile Beach* [1963] N.Z.L.R. 461, 467 *per* North J.

in times of peace) otherwise than by the free consent of the Native occupiers",⁴⁵ notwithstanding the Crown's pre-emptive rights, was cited with approval by the Judicial Committee in 1901 in *Nireaha Tamaki v. Baker*.⁴⁶ This approval is a significant endorsement of the principle of common law recognition of Maori title, because it followed a passage in which their Lordships concluded that, in the 1840s, the partial

legislative recognition of the rights confirmed and guaranteed by the Crown by the second article of the Treaty of Waitangi . . . would not of itself . . . be sufficient to create a right in the native occupiers cognizable in a Court of Law.⁴⁷

(c) *Africa*

In North America, New Zealand and the African and Pacific Islands colonies in the nineteenth century, statutory intervention and constitutional guarantees recognizing indigenous land rights tended to inhibit the consistent development and application of the established common law principles dealing with customary rights in land in British colonies.⁴⁸ Furthermore, English courts have on occasion been wary of following American common law precedents, even when there have been no English authorities to the contrary.⁴⁹ There was also an interval of almost a century's separate development of British colonial law, between the seminal judgments of Marshall C.J.⁵⁰ and the major Privy Council decisions on land rights in the British African colonies. And so it is all the more striking that prior to the decline and fall of the Second British Empire very similar common law principles of recognition to those developed in the American courts had been applied by the Privy Council in African appeals.

In *Amodu Tijani v. Secretary, Southern Nigeria*, Viscount Haldane, delivering the opinion of the Judicial Committee, said: "A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners".⁵¹ From this beginning he went on to

⁴⁵ (1847) N.Z.P.C.C. 387, 390.

⁴⁶ [1901] A.C. 561, 579.

⁴⁷ *Id.*, 567.

⁴⁸ North America: N. H. Mickenberg, "Aboriginal Rights in Canada and the United States" (1971) 9 *Osgoode Hall Law Journal* 119, 133-138; New Zealand: Native Rights Act, 1865 (29 Vict. No. 11), Native Lands Act, 1865 (29 Vict. No. 71); Africa: 11 Halsb. (2nd ed.) 130, 140, 179-80, 238 n(s), 239-40, 245-6; Pacific Islands: Sir K. Roberts-Wray, *Commonwealth and Colonial Law* (1966) 899, 901, 911.

⁴⁹ E.g., *Nireaha Tamaki v. Baker* [1901] A.C. 561, 580.

⁵⁰ *Johnson v. M'Intosh* (1823) 8 Wheaton 543; *Worcester v. State of Georgia* (1832) 6 Pet. 515.

⁵¹ [1921] 2 A.C. 399, 407.

conclude that the introduction of a system of Crown grants into Lagos subsequent to its cession to the Crown did not disturb existing rights in land, even though the change of sovereignty brought with it the assertion of the radical title of the Crown, which subsequently co-existed with rights derived from local law. The introduction of the theory of radical title was an incident in the change of sovereignty, but did not involve the assertion of the Crown's beneficial ownership of privately held lands.⁵² So the presumption of continuance of existing rights was thus sufficiently strong for it not to be disturbed by the introduction of English tenurial principles into the Colony. On another view their Lordships were applying the common law principle, derived from international law, that a change of sovereignty does not, of itself, disturb existing private rights.⁵³

In another Lagos appeal, *Oyekan v. Adele*⁵⁴ the Judicial Committee followed *Amodu Tijani's* case and stated that following the establishment of British colonial rule

The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected.⁵⁵

(d) *The relationship between colonial constitutional status and the recognition of local rights in land*

Now, in their application to Australia it may be thought possible to distinguish both of these cases on the basis that they dealt with ceded rather than settled colonies like New South Wales. However, this point does not seem to have disturbed the High Court when applying *Amodu Tijani's* case⁵⁶ to Papua in *Geita Sebea v. Territory of Papua*.⁵⁷ The application of the legal presumption of recognition of existing rights did not seem to depend in either case on the constitutional category into which the colony fell.

In *Amodu Tijani's* case, the general proposition was that "a mere change in sovereignty is not to be presumed as meant to disturb rights of private owners" and the particular conclusion flowing from this was that "the general terms of a cession are prima facie to be construed accordingly".⁵⁸ In other words, the presumption of recognition of local rights in land determined the interpretation of general terms in a particular cession; the presumption was not confined to ceded colonies.

⁵² *Id.*, 404, 407.

⁵³ *Id.*, 407.

⁵⁴ [1957] 2 All E.R. 785.

⁵⁵ *Id.*, 788.

⁵⁶ [1921] 2 A.C. 399.

⁵⁷ (1941) 67 C.L.R. 544, 552, 557: see Roberts-Wray, *op. cit.* 132-3.

⁵⁸ [1921] 2 A.C. 399, 407.

In *Oyekan v. Adele*,⁵⁹ Lord Denning, in delivering the opinion of the Judicial Committee, began with the proposition that the Treaty of Cession was an act of state whereby the Crown acquired sovereignty in Lagos. However, one did not look to the Treaty to ascertain the rights in land of the inhabitants of Lagos, for the Crown, possessing all the rights of a territorial sovereign in a ceded colony following the making of the Treaty, had "the power to recognise existing rights or extinguish them, or to create new ones".⁶⁰ It was only then that their Lordships introduced the presumption of recognition of existing rights in property.⁶¹

Accordingly, it is submitted that the nature of the act of state whereby British sovereignty is established is irrelevant, because one does not look to the events connected with annexation to determine the nature of rights existing after annexation. In municipal law, such rights clearly do not flow from the treaty of cession, if any, while the presumption of their recognition exists quite independently of such treaties. If this is so, then the source of the presumption, municipally, must be the common law, and the presumption must be applicable wherever the common law applies, irrespective of whether the constitutional status of the colony concerned is ceded or settled.

Apart from *Geita Sebea's* case,⁶² two other decisions on the law of settled colonies might be mentioned as giving some support to the proposition that the presumption of recognition of existing rights in land is not confined to ceded colonies. The first of these cases is *W/ Parata v. The Bishop of Wellington*,⁶³ decided by the New Zealand Supreme Court in 1877. Prendergast C.J., delivering the judgment of the Full Court, stated the now commonly held view that the Treaty of Waitangi was a nullity and that New Zealand was a settled colony.⁶⁴ The Treaty, of course, purported to recognize Maori customary land rights.⁶⁵ On this point Prendergast C.J. said:

So far as the proprietary rights of the natives are concerned, the so-called treaty merely affirms the rights and obligations which *jure gentium*, vested in and devolved upon the Crown under the circumstances of the case.⁶⁶

These obligations were "to respect native proprietary rights".⁶⁷

⁵⁹ [1957] 2 All E.R. 785.

⁶⁰ *Id.*, 788.

⁶¹ *Ibid.*

⁶² (1941) 67 C.L.R. 544.

⁶³ (1877) 3 N.Z. Jurist 72.

⁶⁴ *Id.*, 78.

⁶⁵ Art. 2. For a discussion of the Treaty see Roberts-Wray, *op. cit.* 101-103, 634-636.

⁶⁶ (1877) 3 N.Z. Jurist 72, 78.

⁶⁷ *Ibid.*

Although the Judicial Committee in *Nireaha Tamaki v. Baker*⁶⁸ disapproved of passages in the judgment in *Wi Parata's* case where it was said that there was no Maori customary law of which courts could take cognizance,⁶⁹ they approved the actual decision in that case,⁷⁰ and had no criticism of the formulation of the obligation to respect native proprietary rights. Indeed, the decision in *Nireaha Tamaki's* case goes much further than *Wi Parata v. The Bishop of Wellington*, by recognizing Maori land rights as legally enforceable interests.⁷¹

The other case referring to the presumption of recognition of existing rights in land in settled colonies is *Calder v. Attorney-General of British Columbia*.⁷² The basis of the decision of Davey C.J.B.C. was that the claimants had no conception of proprietary rights in land. However, his Honour clearly felt that systems of rights in land more approximate in type to English tenurial notions would invoke the presumption of recognition following the acquisition of the mainland of British Columbia by occupation.⁷³

Therefore it would seem that the common law has been interpreted in a number of jurisdictions as recognizing "native" land rights following the establishment of British sovereignty. In the American cases and the early New Zealand cases, it has been put as a substantive right; in the Lagos cases it has been applied more as a presumption of law. While this recognition is frequently buttressed by statute, it is not dependent on statutory recognition.⁷⁴ Nor must the "native" rights conform to English tenurial notions.⁷⁵

Nevertheless, the Judicial Committee, prior to the fall of the Second British Empire, failed to enunciate these common law principles of recognition in sufficiently general terms to make it impossible to avoid following them. Indeed, there are judgments of the Judicial Committee itself which are hard to reconcile with the principles of recognition already identified,⁷⁶ whilst the normal reluctance of that tribunal to be other than specific has not only inhibited the enunciation of general principles when such a course would have been eminently justified, but

⁶⁸ [1901] A.C. 561, 577.

⁶⁹ *Wi Parata's* case (1877) 3 N.Z. Jurist 72, 77, 79.

⁷⁰ [1901] A.C. 561, 579.

⁷¹ *Id.*, 577, 580.

⁷² (1970) 13 D.L.R. (3d) 64.

⁷³ *Id.*, 66-67.

⁷⁴ *Cramer v. United States* (1922) 261 U.S. 219, 229; and cases cited *supra*, nn. 15, 38.

⁷⁵ *Amodu Tijani v. Secretary, Southern Nigeria* [1921] 2 A.C. 399, 402-407; *Johnson v. M'Intosh* (1823) 8 Wheaton 543, 547-548, 574.

⁷⁶ *E.g.*, *Sobhuza II v. Miller* [1926] A.C. 518.

has also tended to encourage the practice of distinguishing relevant authorities from other jurisdictions on the ground that they come from other jurisdictions.⁷⁷

(e) *Recent trends in the case law from North America and New Zealand*

Significantly, when *Milirrpum v. Nabalco* was argued, the judicial tide, in countries settled by people of European stock, had turned against litigants belonging to ethnic minorities with similar claims to the Arnhemland claimants, in situations where these claims lacked statutory backing and authorization. The most recent authorities from the United States, New Zealand and Canada, relied on by Blackburn J., appeared to insist on the express statutory or treaty recognition of customary law rights as proprietary rights before they could be enforced in the courts.⁷⁸ These decisions were thus apparently against the plaintiffs' main submission that their rights were recognized and enforceable at common law, and made it easier to distinguish the earlier authorities on common law recognition from the same jurisdictions.

Of course, the most recent New Zealand and North American cases were decided in jurisdictions where there were systems, though incomplete systems, of express statutory and constitutional recognition of indigenous rights⁷⁹ (unlike the Northern Territory of Australia⁸⁰) and where specialist tribunals existed in which these rights could be asserted or investigated.⁸¹ However, this statutory recognition has proved a two-edged sword in North America and New Zealand, because it has permitted courts to ignore the fundamental common law principles of recognition, on which claimants whose rights do not depend on statute or other forms of express recognition must still rely, by leaving the way open for an *expressio unius est exclusio alterius* interpretation of the recognition statutes.⁸²

⁷⁷ E.g., *Nireaha Tamaki v. Baker* [1901] A.C. 561, 579-580.

⁷⁸ E.g., *Tee-Hit-Ton Indians v. United States* (1954) 348 U.S. 272, 279; *Calder v. Attorney-General of British Columbia* (1970) 13 D.L.R. (3d) 64, 67; relied on by Blackburn J., (1971) 17 F.L.R. 141, 217-218, 219-223, 242.

⁷⁹ *In Re The Ninety-Mile Beach* [1963] N.Z.L.R. 461, 477-478; G. A. Wilkinson, "Indian Tribal Claims before the Court of Claims" (1966) 55 *Georgetown Law Journal* 511; *Calder v. Attorney-General for British Columbia* (1971) 13 D.L.R. (3d) 64, 73-74; *St Catherine's Milling and Lumber Co. v. The Queen* (1888) 14 App. Cas. 46, 54-55.

⁸⁰ *Milirrpum v. Nabalco Pty Ltd* (1971) 17 F.L.R. 141, 259.

⁸¹ *In Re The Ninety-Mile Beach* [1963] N.Z.L.R. 461, 469-470; N. H. Mickenberg, "Aboriginal Rights in Canada and the United States" (1971) 9 *Osgoode Hall Law Journal* 119, 138-140.

⁸² E.g., *Tee-Hit-Ton Indians v. United States* (1954) 348 U.S. 272, 283-285; *Calder v. Attorney-General of British Columbia* (1970) 13 D.L.R. (3d) 64, 67; and see Mickenberg, *op. cit.* 137-138.

At the same time, the major decisions on common law recognition still stand. Even the majority decision of the Supreme Court of the United States in *Tee-Hit-Ton Indians v. United States*, insisting on express government recognition of Indian title as a condition for compensation claims under the Fifth Amendment,⁸³ purported to follow "the great case of *Johnson v. M'Intosh*".⁸⁴

These recent judgments requiring express statutory or constitutional recognition of indigenous rights in land did not confine their findings to this type of point. There were a number of other issues of law decided adversely to the various claimants which were also followed by Blackburn J. in *Milirrpum v. Nabalco*.

In the majority judgment in the *Tee-Hit-Ton* case—an Alaskan Indian claim decided in 1954—a spectre appeared that was partly semantic and partly racial. In the early nineteenth century judgments recognizing Indian tenurial patterns as systems distinct from, though recognized by, the common law, the terminological problem of describing the Indian tenures was sometimes met, or avoided, by describing Indian rights as rights of occupancy, possession, or the like.⁸⁵ Any detailed examination of the precise nature of the Indian customary land law was normally avoided. To have described Indian rights in the technical language of the English law of real property would, however, have been misleading, and particularly so, in judgments where it was sought to recognize Indian rights and at the same time to distinguish them from interests in fee simple.⁸⁶ Words like "occupancy" and "possession" have their own technical connotations in the English law of real property, particularly in juxtaposition with terms like "fee simple" and "proprietary". Given the exasperating inexactitude of the English language, it is not surprising that courts, in judgments generally adverse to indigenous land claims, have at times asserted that words like "occupancy" and "possession" refer to unenforceable rights, being outside the category of proprietary interests protected by the law.⁸⁷ In the *Tee-Hit-Ton* case, the Supreme Court of the United States was called upon to decide whether a statute providing for the government of Alaska (following its acquisition by treaty from Russia in 1867) gave legal recognition to Indian rights

⁸³ (1954) 348 U.S. 272, 285.

⁸⁴ *Id.*, 279.

⁸⁵ *Johnson v. M'Intosh* (1823) 8 Wheaton 543, 573, 603; *Worcester v. State of Georgia* (1832) 6 Pet. 515, 544.

⁸⁶ E.g., *Johnson v. M'Intosh* (1823) 8 Wheaton 543, 588.

⁸⁷ E.g., *Tee-Hit-Ton Indians v. United States* (1954) 348 U.S. 272, 279; *In re The Ninety-Mile Beach* [1963] N.Z.L.R. 461, 468, 476-477. But cf. *Nireaha Tamaki v. Baker* [1901] A.C. 561, 577-578.

in land within the compass of the Fifth Amendment.⁸⁸ The statute provided that:

The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use or occupation. . . .⁸⁹

The majority justices held:

That description means mere possession not specifically recognised as ownership by Congress. . . . This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.⁹⁰

Davey C.J.B.C., in *Calder v. Attorney-General of British Columbia*,⁹¹ decided on appeal in 1970, took a similar view in respect of a Nishga Indian claim. But he introduced a consideration redolent of the racial value judgments of late nineteenth century social anthropology by expressing the view that the Indians of the mainland of British Columbia

were undoubtedly at the time of settlement a very primitive people with few of the institutions of civilized society, and none at all of our notions of private property.⁹²

His Honour concluded that there was

no evidence to justify a conclusion that the aboriginal rights claimed by the successors of these primitive people are of a kind that it should be assumed the Crown recognized them when it acquired the mainland of British Columbia by occupation.⁹³

Davey C.J.B.C. relied on a passage from a 1918 judgment of the Privy Council, *In Re Southern Rhodesian Land*, where it was said in general terms that:

Some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised 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.⁹⁴

⁸⁸ Amendment V (1791): ". . . nor shall private property be taken for public use, without just compensation".

⁸⁹ 31 Stat. 321, § 27; cited (1954) 348 U.S. 272, 278.

⁹⁰ (1954) 348 U.S. 272, 279.

⁹¹ (1970) 13 D.L.R. (3d) 64.

⁹² *Id.*, 66.

⁹³ *Id.*, 66-67.

⁹⁴ (1918) 88 L.J.P.C. 1, 12.

But their Lordships in that case made no finding as to the precise nature of Matabele or Mashona rights in Southern Rhodesia. They found it unnecessary to do so. Following a period as a protectorate, Southern Rhodesia had been conquered by force of arms, and either of two situations then applied, each being fatal to the native claim. Either the British Crown, exercising its prerogative rights as a conqueror, had extinguished native rights—if they were private rights—by legislation; or, if they were vested solely in the former autocratic ruler, King Lobengula, they were at the disposal of the British Crown when, defeated, the King fled from his kingdom.⁹⁵ The Judicial Committee therefore did not envisage that there was a legal vacuum as to rights in Rhodesian lands prior to the British conquest.

The other main type of finding adverse to the claimants in recent cases has related to the extinction of aboriginal rights. Clearly, if these rights can be eliminated at the whim of the state, the question of their recognition is of little practical significance. In the *Tee-Hit-Ton* case the majority justices held that lands occupied under "original Indian title" gave rights of occupancy which might be "terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians".⁹⁶ This surprising finding was made in the course of following rather than, as might have been supposed, overruling, *Johnson v. M'Intosh*—an authority for the proposition that Indian rights can only be extinguished by fair purchase or conquest.⁹⁷

In *Calder's* case, the judge at first instance held that the adoption of a legislative policy of granting Indian lands to settlers, extinguished all Indian rights, including rights in lands not actually granted to settlers.⁹⁸ This view was upheld in the Supreme Court of British Columbia.⁹⁹ Tysoe J.A. went so far as to say that:

It is true, as the appellants have submitted, that nowhere can one find express words extinguishing Indian title but "actions speak louder than words" and in my opinion the policy of the Governor and the Executive Council of British Columbia and the execution of that policy was such that, if Indian title existed, extinguishment was effected by it.¹

The doctrine of recognition by policy,² rather than by law, is a slightly more respectable relative of the extinction by manifest policy

⁹⁵ *Id.*, 7, 12, 15-16.

⁹⁶ (1954) 348 U.S. 272, 279.

⁹⁷ (1823) 8 Wheaton 543, 588-591, 598, 603.

⁹⁸ (1969) 8 D.L.R. (3d) 59, 82.

⁹⁹ (1970) 13 D.L.R. (3d) 64, 69, 80, 95, 110.

¹ *Id.*, 95.

² *Milirrup v. Nabalco Pty Ltd* (1971) 17 F.L.R. 141, 209, 262.

theory. The former doctrine was enunciated in 1963 by North J. in the New Zealand Court of Appeal in *In Re The Ninety-Mile Beach*, when he said that on the assumption of British sovereignty

the rights of the Maoris to their tribal lands depended wholly on the grace and favour of Her Majesty Queen Victoria, who had an absolute right to disregard the Native title to any lands in New Zealand . . . But as we all know, the Crown did not act in a harsh way and from earliest times was careful to ensure the protection of Native interests and to fulfil the promises contained in the Treaty of Waitangi.³

This doctrine can be used in attempts to rebut the notion that "native" rights are enforceable in situations where actual recognition is indisputable.⁴

2. *Land Rights in Australia—Milirrpum v. Nabalco*

The judgment in *Milirrpum v. Nabalco Pty Ltd*⁵ continues the trend of the recent North American and New Zealand cases, adopting a number of the propositions contained in them. Indeed, it would have been surprising for a court of an Australian territory to have distinguished these persuasive authorities—as was, of course, technically possible—and to have reverted to the fundamentalist common law principles of recognition enunciated in the first half of the nineteenth century.

Like Davey C.J.B.C. in *Calder's* case,⁶ Blackburn J. held that the interests asserted were not proprietary⁷—notwithstanding his Honour's recognition of aboriginal customary law as a legal system.⁸ In making this finding, Blackburn J. adopted the "menagerie" view of aboriginal tenure, namely, that the plaintiffs "have a more cogent feeling of obligation to the land than of ownership of it".⁹ He considered that "it seems easier, on the evidence, to say that the clan belongs to the land than that the land belongs to the clan".¹⁰

And without expressly following the persuasive authority of the *Calder* case, Blackburn J. indicated his attraction to the strange doctrine of "extinction by manifest policy"¹¹ under which native titles can be extinguished by a policy of granting land and creating aboriginal reserves.¹²

³ [1963] N.Z.L.R. 461, 468.

⁴ E.g., *Tee-Hit-Ton Indians v. United States* (1954) 348 U.S. 272, 273-274, 291-292 (1971) 17 F.L.R. 141.

⁵ (1971) 17 F.L.R. 141.

⁶ (1970) 13 D.L.R. (3d) 64, 66-67.

⁷ (1971) 17 F.L.R. 141, 273-274.

⁸ *Id.*, 268.

⁹ (1971) 17 F.L.R. 141, 270; see Mickenberg, *op. cit. supra* n. 81.

¹⁰ (1971) 17 F.L.R. 141, 270-271.

¹¹ *Id.*, 223, 254-255.

¹² *Calder's* case (1970) 13 D.L.R. (3d) 64, 95.

Blackburn J. also favoured the view expressed in the recent North American cases that recognition of customary title has always flown from express enactment or executive policy.¹³ But, ultimately, his finding on the key issue was negative; not that the common law refused recognition to "communal native title" in a settled colony such as New South Wales, but that "the plaintiffs' contention must fail for want of authority to support it".¹⁴

It would seem that the plaintiffs lost on the key issue of common law recognition of their rights largely because they were considered to have something akin to an evidentiary burden of proof on this issue of law¹⁵ and failed to discharge it in a situation where the evidences of the common law were at least sufficiently neutral to make it impossible for the defendants to show that the common law actually denied such recognition.¹⁶

The plaintiffs would surely have done better had the problem been formulated in accordance with the principles adopted by the Privy Council in the African appeals; that is, as a first step, the presumption of recognition of existing rights in land, following a change of sovereignty.¹⁷ It would then have been for the defendants to show that this presumption of law had been rebutted in the case of the plaintiffs' lands. This might have been very difficult indeed, at least prior to the specific expropriation legislation of 1953 and 1968—assuming its validity¹⁸—as the authorities, it is submitted, insist on extinction by fair purchase or conquest, and frown on extinction by grant or mere policy.

3. *Milirrpum v. Nabalco and the Presumption of Recognition*

Even if one is inhibited from insisting that the principles of recognition applied by the Privy Council in the Lagos cases bound the Supreme Court of the Northern Territory in *Milirrpum v. Nabalco Pty Ltd*, one may still remain unconvinced by the reasoning of Blackburn J. in his attempt to distinguish these authorities. His Honour cited the passage in *Amodu Tijani's* case where their Lordships said that "A mere change in sovereignty is not to be presumed as meant to disturb the rights of private owners".¹⁹ He then went on to distinguish the decision on the

¹³ (1971) 17 F.L.R. 141, 262. His Honour's further reference to recognition by executive policy probably does not imply that such recognition, by itself, creates a legally enforceable obligation.

¹⁴ *Ibid.*

¹⁵ *Id.*, 159-161, 198, 250, 262.

¹⁶ *Id.*, 206-207, 244, 262.

¹⁷ *Amodu Tijani v. Secretary, Southern Nigeria* [1921] 2 A.C. 399, 407, 410; *Oyekan v. Adele* [1951] 2 All E.R. 785, 788.

¹⁸ Dependent largely on a distinction drawn in another unappealed Territory decision, *Kean v. The Commonwealth* (1963) 5 F.L.R. 432, between legislative and executive systems of acquisition: (1971) 17 F.L.R. 141, 283-292.

¹⁹ [1921] 2 A.C. 399, 407; cited at (1971) 17 F.L.R. 141, 230.

basis that "the native rights were recognized by statute".²⁰ The difficulty with this analysis is that the Judicial Committee did not say that customary rights in land in Lagos were recognized by statute, but went to considerable pains to show that this recognition rested on a non-statutory basis.²¹ Their view was that the Ordinance in the case dealt with compensation for compulsory acquisition of land for public purposes, rather than with the fundamental question of recognition of African title and the content of that title.²²

In the courts below it had been held that, at the time of the cession of Lagos to Queen Victoria, the King of Lagos was not only a political sovereign but under customary law was also the "real owner" of the land.²³ The next step in this argument—described by the Judicial Committee as one failing "to recognize the real character of the title to land occupied by a native community"²⁴—was to say that the cession by the King passed full proprietary rights in the lands of Lagos to the British Crown, as well as political sovereignty. The conclusion which followed was that the rights of the claimant Chief to the land in dispute were not so much proprietary as rights of control or management of the land which derived from his political functions, and that any compensation should be assessed on that basis.²⁵ Thus the effect of the earlier decision in *Amodu Tijani's* case was to deny compensation altogether to the community the Chief represented and to diminish substantially his personal rights to compensation.

Surely such a finding would have been impossible, even in the courts of Southern Nigeria in the colonial era, if there had been in existence a statute expressly recognizing African proprietary rights in land. The basis of the judgments in the Southern Nigerian courts was that African customary proprietary rights were not recognized. In any event, in upholding the appeal of the claimant Chief and recognizing communal rights in land in Lagos, the Judicial Committee enunciated general principles of recognition which did not depend on statute. After holding that communal customary rights had not been extinguished in favour of the local King prior to cession, their Lordships did not hold that, following this cession, these rights survived by force of statute. Rather, they held that they survived because these existing rights were presumed to continue following the change of sovereignty, and there was

²⁰ (1971) 17 F.L.R. 141, 231.

²¹ [1921] 2 A.C. 399, 404, 407, 410.

²² *Id.*, 401, 408.

²³ *Id.*, 409.

²⁴ *Ibid.*

²⁵ *Ibid.*

no evidence that this kind of usufructuary title of the community was disturbed in law, either when the Benin Kings conquered Lagos or when the cession to the British Crown took place in 1861.²⁶

Blackburn J. then considered another Lagos case, *Oyekan v. Adele*²⁷—already mentioned in this article as an authority on continuity of rights following the establishment of a British colony. He assailed the *obiter* in *Oyekan v. Adele* dealing generally with rights of compensation on compulsory acquisition, for public purposes, of land held under customary title,²⁸ and concluded that it was

impossible to believe that their Lordships were asserting that if the Crown compulsorily acquires land from natives in ceded territory, there will be in the native owners a common-law right, apart from anything granted by statute, to receive compensation.²⁹

Blackburn J. then went on to say that even if such a right to compensation did exist in a ceded colony such as Lagos, it had not been shown to extend to settled colonies such as New South Wales.

On the basis that “natives” dwelling in British territory are British subjects, it is submitted, with respect, that in the absence of comprehensive statutory provisions excluding the common law, they have a common law right to compensation for compulsory acquisition of their land. Where the Crown has a right to acquire land compulsorily by virtue of its prerogative it must pay for the privilege. Lord Pearce in *Nissan v. Attorney-General*, dealing with the seizure of property in Cyprus, said:

It is confusing to describe the aspect of the prerogative here in question as a right to take. It is a right to take and pay.³⁰

In the *Burmah Oil Company* case,³¹ the House of Lords decided that even in time of war or imminent danger to the state, there was no general prerogative right in Great Britain or its colonies to take or destroy private property without paying for it.³²

In any event, in distinguishing *Oyekan v. Adele*—essentially, on the basis of the *dicta* dealing with compensation on extinction of title by compulsory acquisition—his Honour does not appear to have dealt with the reasoning of the Judicial Committee on which the actual decision depended. This reasoning applied the presumption of recognition and continuance of existing customary rights in land following a change of

²⁶ *Id.*, 410.

²⁷ [1957] 2 All E.R. 785.

²⁸ *Id.*, 788.

²⁹ (1971) 17 F.L.R. 141, 233.

³⁰ [1970] A.C. 179, 227.

³¹ *Burmah Oil Co. Ltd v. Lord Advocate* [1965] A.C. 75.

³² *Id.*, 76, 102.

sovereignty, to the problem of whether a Crown grant of the royal palace to the former King (or Oba) after the cession of Lagos, was held by the King in his personal capacity free of native customary rights. The office of Oba, which was elective, remained of importance in the colonial period, and the litigation which finally led to the intervention of the Judicial Committee was concerned with the right of the newly elected Oba to occupy the palace according to local custom. This right was denied by the family of the former Oba, who claimed that the palace, by virtue of the Crown grant, passed to the heirs of the original grantee rather than to his successors in office, the latest of whom came from a different branch of the ruling family. The Judicial Committee held that though the public rights ceded to the British Crown in 1861 included the then Oba's right to the palace, and though, in 1870, the Crown granted it back to him, "the said King Docemo, his heirs, executors, administrators and assigns for ever", the grant was and had remained subject to existing customary rights.³³

In other words, the presumption of continuance of existing customary rights in land was not ousted by the Crown grant of the land. The strength of this presumption is reflected in the finding that the palace was public property which actually passed to the British Crown as part of the cession.³⁴ Of course, by the time *Oyekan v. Adele* had reached the Judicial Committee, a Lagos Ordinance of 1947³⁵ had confirmed the general application of the *Amodu Tijani* line of cases,³⁶ which had applied the presumption of continuance of existing customary rights in lands subsequent to their grant by the Crown. Still, it is clear that their Lordships in *Oyekan v. Adele* did not consider that this Ordinance made new law, at least insofar as private rights were concerned.³⁷ It is difficult to see how their decision would have differed in respect of rights in the palace had the Ordinance not been enacted.

It is submitted, therefore, that *Oyekan v. Adele* remains an authority on the continuance of customary rights in land following a change of sovereignty, notwithstanding the *dictum* of the Judicial Committee on rights of compensation on compulsory acquisition for public purposes, an issue which was then not directly before the Court. It has already been argued that the presumption of recognition applied in the Lagos cases, is not derived from the status of Lagos as a ceded colony.

4. *Milirrpum v. Nabalco and the Act of State Doctrine*

³³ [1957] 2 All E.R. 785, 789.

³⁴ *Ibid.*

³⁵ The Crown Grants (Township of Lagos) Ordinance, s. 3; discussed *id.*, 790.

³⁶ [1921] 2 A.C. 399, and *Sakariyawo Oshodi v. Moriamo Dakolo* [1930] A.C. 667.

³⁷ [1957] 2 All E.R. 785, 790.

Just as one may be unconvinced by the manner in which the Lagos cases were distinguished, similarly, the reasoning in *Milirrpum v Nabalco* seeking to apply a number of other Privy Council decisions on acts of state may also appear unconvincing. At the end of his discussion of the Lagos appeals, Blackburn J. said³⁸ that they were hard to reconcile with "either the statements of principle, or the actual decisions, in the Indian cases of *Bai Rajbai*,³⁹ *Vajesingji Joravarsingji*⁴⁰ and *Sardar Rustam Khan*⁴¹". Earlier he had considered some of the Indian act of state cases⁴² as well as an African appeal case, *Cook v. Sprigg*.⁴³ He felt they established that:

In a ceded or conquered territory a subject cannot in law resist the expropriation by the Crown of what under the previous sovereign was his property.⁴⁴

Blackburn J. was also attracted by *dicta* in the *Vajesingji* case⁴⁵ which suggested that this proposition applies in settled and occupied territory, as well as in ceded colonies.

His Honour related the act of state cases to the rule enunciated by both Blackstone and Lord Mansfield in the eighteenth century, that the laws of a conquered colony remain in force until altered by the conqueror, and concluded that

Blackstone's and Lord Mansfield's rule has to be qualified by saying that it does not apply to a dispute between the Crown and a subject.⁴⁶

At first sight it is difficult to perceive the immediate relevance of the act of state cases to the issue of whether the common law recognizes, or is presumed to recognize, existing customary rights in land on the establishment of a British colony. However, counsel for the defendant apparently had relied on the *Vajesingji dicta* previously mentioned,⁴⁷ while Blackburn J. began his consideration of these Indian cases in the belief that they might be relevant to the plaintiffs' contention that the doctrine of communal native title applied in ceded as well as in settled colonies.⁴⁸ His conclusion that the act of state decisions modified the

³⁸ (1971) 17 F.L.R. 141, 233.

³⁹ *Secretary of State for India v. Bai Rajbai* (1915) L.R. 42 Ind. App. 229.

⁴⁰ *Vajesingji Joravarsingji v. Secretary of State for India* (1924) L.R. 51 Ind. pp. 357.

⁴¹ *Secretary of State for India v. Sardar Rustam Khan* [1941] A.C. 356.

⁴² (1971) 17 F.L.R. 141, 224-227.

⁴³ [1899] A.C. 572.

⁴⁴ (1971) 17 F.L.R. 141, 227.

⁴⁵ (1924) L.R. 51 Ind. App. 357, 360.

⁴⁶ (1971) 17 F.L.R. 141, 225.

⁴⁷ *Id.*, 223, 226, 227.

⁴⁸ *Id.*, 223.

continuity of laws rule of *Campbell v. Hall*⁴⁹ shows his ultimate view of their relevance.⁵⁰

While it is not suggested that all the *dicta* in the act of state cases form a coherent doctrine, the label "act of state" is most meaningful when applied descriptively to certain exceptional acts of sovereign power performed by the executive, normally under the foreign affairs prerogative, such as treaty making and the annexation of territory.⁵¹ These acts are considered to be beyond the cognizance of the municipal courts.⁵² These courts, however, may inquire whether a particular transaction is an act of state or not; and, if the act is performed pursuant to a mistaken view of the powers of the executive under municipal law, the courts may intervene in appropriate cases.⁵³ The doctrine of act of state cannot be invoked merely to save an act which is *ultra vires* the municipal law.⁵⁴

Acts of state operate in the field of international, rather than municipal, law and thus cannot found a cause of action in the municipal courts. As Lord Denning said in the Court of Appeal in *Nissan v. Attorney-General*:

If anyone seeks to sue the British Government and has to rely on the treaty, annexation, or conquest to found his cause of action, he fails on the simple ground that it is an act of state not cognisable in the municipal courts.⁵⁵

The defence of act of state can also be pleaded successfully in a limited range of circumstances. Its normal effect is to prevent the enforcement of a right, rather than to deny its existence. Lord Pearson explained in his speech in *Nissan v. Attorney-General* that

an act of state must be something exceptional. Any ordinary governmental act is cognisable by an ordinary court of law (municipal not international): if a subject alleges that the government act was wrongful and claims damages or other relief in respect of it, his claim will be entertained and heard and determined by the court. An act of state is something not cognisable by the court: if a claim is made in respect of it, the court will have to ascertain the facts but if it then appears that the act complained of was an act of state the court must refuse to adjudicate upon the claim. In such a case the court does not come to any decision as to the legality of

⁴⁹ (1774) 1 Cowp. 204, 209; 98 E.R. 1045, 1047.

⁵⁰ (1971) 17 F.L.R. 141, 225.

⁵¹ *Salaman v. Secretary of State for India* [1906] 1 K.B. 613, 639-640; *Secretary of State in Council of India v. Kamachee Boye Sahaba* (1859) 7 Moore Ind. App. 476, 19 E.R. 388; *Nissan v. Attorney-General* [1970] A.C. 179, 216, 218, 231.

⁵² *Nissan's case* [1970] A.C. 179, 232.

⁵³ *Id.*, 231-232; *Salaman v. Secretary of State for India* [1906] 1 K.B. 613, 639-640; *Sprigg v. Sigcau* [1897] A.C. 238.

⁵⁴ *Sprigg v. Sigcau* [1897] A.C. 238, 246.

⁵⁵ [1967] 3 W.L.R. 1044, 1054.

illegality, or the rightness or wrongness, of the act complained of: the decision is that because it was an act of state the court has no jurisdiction to entertain a claim in respect of it. This is a very unusual situation and strong evidence is required to prove that it exists in a particular case.⁵⁶

The phrase "act of state", however, has at times been used loosely and unnecessarily, to label acts that are justified by municipal legislation, or even colonial and protectorate municipal legislation itself. Lord Morris of Borth-y-Gest contrasted the appropriate application of the phrase with such unnecessary usages of it when he said in *Nissan v.*

Attorney-General:

The phrase "act of state" can, therefore, be used either in reference to some apparently wrongful act in respect of which "act of state" may or may not be a defence: or the phrase may be used in reference to some entirely lawful act in respect of which someone who complains has no basis in law for a complaint and then the phrase is really not needed as a defence.⁵⁷

In two Indian appeals considered in some detail by Blackburn J.,⁵⁸ there apparently was no consideration of whether the common law recognizes existing tenures on a change of sovereignty. In each instance, following cession, existing rights were investigated, and leases granted to the predecessors in title of the respective claimants. Prior to each cession, the tenures of the predecessors of the respective claimants were not confined to private rights in land. The rights and duties associated with their tenures had public or governmental aspects as well, though it was difficult to draw a hard and fast line between the private and public aspects of these tenures. Following the respective cessions, the assumption of full responsibility for the administration of the ceded territories by the British Raj was manifestly incompatible with the continuance of the governmental aspects of the tenures concerned. So it was inevitable that they had to be modified, and this was done in each case by granting fresh leases to the predecessors in title of the respective claimants. Thereupon their rights were governed by these leases, and it was hopeless for the claimants to seek to rely, in subsequent litigation, on their view of their predecessor's rights prior to the cession. If one is tempted to refer to the grant of the leases as an act of state then it could only be in the second, and otiose, sense referred to by Lord Morris of Borth-y-Gest.

In the first of the two Indian Appeals, *Secretary of State for India v. Bai Rajbai*,⁵⁹ the rights of a class of absentee landlords, known as kas-

⁵⁶ [1970] A.C. 179, 237.

⁵⁷ *Id.*, 220-221.

⁵⁸ *Vajesingji's case* and *Bai Rajbai's case*; (1971) 17 F.L.R. 141, 225-227.

⁵⁹ (1915) L.R. 42 Ind. App. 229.

batis, had been deliberately modified following the cession of Ahmedabad to the British Crown in 1817. The litigation which finally reached the Judicial Committee did not begin until 1898, by which time the modifications in the kasbatis' tenure had been operative for at least seventy-five years. When the original action was brought, the kasbatis in question were holding as lessees from the Bombay government. Nevertheless, the Judicial Committee probably went too far in saying the kasbatis "could not carry in under the new regime the legal rights, if any, which they might have enjoyed under the old."⁶⁰ This statement should be confined to the public or governmental aspects of their rights under the former regime. In any event, the facts suggest that there was no legal vacuum in Ahmedabad following its cession, and that the absentee landlords enjoyed the old rights until their modification, or agreement, some years after the cession.⁶¹ Indeed, it is a pity that the Judicial Committee relied on an act of state authority, *Secretary of State for India v. Kamachee Boye Sahaba*,⁶² rather than on *Campbell v. Hall*.⁶³ *Kamachee Boye Sahaba* is distinguishable in that the assertion of British sovereignty and the seizure of property there, were either contemporaneous or parts of the same transaction. *Bai Rajbai's* case is closer to the situation envisaged by Lord Mansfield in *Campbell v. Hall*,⁶⁴ where the sovereign pauses before exercising his right to alter the laws of the ceded or conquered colony.

The other Indian case to which some detailed reference was made by Blackburn J. is *Vajesingji Joravarsingji v. Secretary of State for India*⁶⁵ which raises much the same points as *Bai Rajbai's* case, since the cession of the territory concerned also led to the redefining of certain rights in land, and the litigation in which the plaintiffs set up their rights under a former ruler did not come until some fifty-six years later.⁶⁶ The answer to their claim was that the Crown had exercised its power to redefine tenure in land in a ceded territory which was not merely a redefinition of private rights in land—assuming in the plaintiffs' favour the doubtful point that their version of their predecessor's rights was correct.

Although most of the act of state cases associated with the seizure of property following cession of territory seem to have come to the Judicial Committee from India, Blackburn J. felt⁶⁷ that the continuity of laws rule enunciated by Blackstone and Lord Mansfield was inapplicable to disputes between the Crown and its subjects, in view of the decision

⁶⁰ *Id.*, 237.

⁶¹ *Id.*, 233-234.

⁶² (1859) 7 Moore Ind. App. 476; 19 E.R. 388.

⁶³ (1774) 1 Cowp. 204; 98 E.R. 1045.

⁶⁴ (1774) 1 Cowp. 204, 209; 98 E.R. 1045, 1047.

⁶⁵ (1924) L.R. 51 Ind. App. 357.

⁶⁶ *Id.*, 358-359, 363-364.

⁶⁷ (1971) 17 F.L.R. 141, 225.

in an African appeal, *Cook v. Sprigg*.⁶⁸ So it is to this case we must turn. In *Cook v. Sprigg*, the Judicial Committee upheld the refusal of the Cape Colony government to recognize a vague concession granted by the ruler of Pondoland, prior to its cession to the British Crown.⁶⁹ It does not appear that the holder of the concession had gone into possession of the lands comprised in it, prior to the cession. Further, at first instance, it had been held that the purported grant had been invalid under the customary laws of independent Pondoland.⁷⁰

Cook v. Sprigg had only recently been examined by a strong House of Lords in *Nissan v. Attorney-General*,⁷¹ when *Milirrpum v. Nabalco Pty Ltd* was being argued. Lord Pearce pointed out that *Cook v. Sprigg* was one of those cases where the plaintiff failed because his cause of action was founded on an act of state. His Lordship considered that:

The cases show that when there has been annexation by the Crown as an act of state, that annexation cannot be used by a claimant as a foundation for a claim against the Crown on the basis that by the annexation it has inherited the liabilities or grants of its predecessor. In *Cook v. Sprigg*, the plaintiff as concessionaire of Pogoland [*sic*] was held to be barred by act of state from enforcing his concession against the defendant as Premier of South Africa which had annexed Pogoland [*sic*]. The plaintiff was a British subject but this point was not relied on and his wide and rather vague concessions had not been exercised.⁷²

It seems that Cook's rights were, at best, merely rights *in personam* against the former sovereign, and the annexation of Pondoland did not create new rights against the new sovereign. It may well be that if Cook had gone into lawful possession of the lands comprised in the concession, and had established proprietary rights *in rem* prior to British sovereignty being established, his property could not have been confiscated, at least not without proper compensation. As Lord Reid put it in the *Nissan* case:

A British subject cannot complain if the new sovereign alters the law of the annexed territory to his detriment, but he can, in my view, complain of a confiscation of his property which is not justified by any law. . . . And if Cook had been the owner of land in Pondoland I do not think that his land could have been confiscated.⁷³

If the view of *Cook v. Sprigg* taken by the House of Lords in the *Nissan* case is correct, then the opinion of Blackburn J. that

⁶⁸ [1899] A.C. 572.

⁶⁹ *Id.*, 578.

⁷⁰ *Id.*, 573, 577.

⁷¹ [1970] A.C. 179.

⁷² *Id.*, 226.

⁷³ *Id.*, 211.

after *Cook v. Sprigg* Blackstone's and Lord Mansfield's rule has to be qualified by saying that it does not apply to a dispute between the Crown and a subject . . .⁷⁴

would seem, with respect, to be *per incuriam*. *Cook v. Sprigg* deals with the general rule that, following a cession of territory, personal rights against the former ruler cannot be enforced against the Crown—even if the treaty of cession contains stipulations to the contrary.⁷⁵ This is because the municipal courts cannot take cognizance of the international law obligations contained in treaties; and an act of state such as a treaty cannot found a cause of action.⁷⁶ Similarly, an act of state is a procedural bar to the enforcement of rights, not a negation of their existence.⁷⁷ The proposition of Blackstone and Lord Mansfield,⁷⁸ on the other hand, deals with the continuity of laws following a cession or conquest, rather than with procedural bars to the enforcement of rights. Blackstone and Lord Mansfield were declaring a rule of English municipal law, while the act of state cases show that certain activities in the field of international relations are beyond the cognizance of British municipal courts and, as a result, cannot found causes of action municipally, though they can have the effect of preventing the enforcement of rights.

Does this also dispose of the *dictum* of Blackburn J. that

In a ceded or conquered territory a subject cannot in law resist the expropriation by the Crown of what under the previous sovereign was his property?⁷⁹

At the very least, this *dictum* seems inconsistent with the rule that the laws of the ceded colony remain in force until altered by the sovereign—assuming these laws, in a particular case, restrain the expropriation of the property of the subject, or allow it only in certain cases, and then coupled with fair compensation. If it can be said that the *dictum* of his Honour is confined to the proposition that rights in property are procedurally unenforceable as against the Crown when it expropriates, it is still, with respect, too wide. Normally, only when the expropriation is of an exceptional or cataclysmic nature—like the seizure of state property associated with the annexation of some Indian native states by the East India Company—can it be considered to fall within the category of an act of state.⁸⁰ In the normal course, if expropriation is not justified by the municipal law, the subject will have his redress.⁸¹

⁷⁴ (1971) 17 F.L.R. 141, 225.

⁷⁵ [1899] A.C. 572, 578.

⁷⁶ *Hoani Te Heuheu Tukino v. Aotea District Maori Land Board* [1941] A.C. 308, 324-325.

⁷⁷ D. P. O'Connell, *International Law* (2nd ed., 1970) Vol. I, 378.

⁷⁸ Discussed, (1971) 17 F.L.R. 141, 201.

⁷⁹ *Id.*, 227.

⁸⁰ *Salaman v. Secretary of State for India* [1906] 1 K.B. 613, 640.

⁸¹ *Nissan v. Attorney-General* [1970] A.C. 179, 211.

Lord Pearce, in *Nissan's* case, dealing with the rights of British subjects overseas, said:

It has long been one of the liberties of the subject that when a wrong is done to him by the executive he cannot be shut out from justice by the faceless plea of an act of state.⁸²

There is no general right of expropriation at common law, either in England or in its colonies. In certain limited circumstances the Crown may compulsorily acquire property, but this is "a right to take and pay".⁸³

Referring to a series of act of state cases including *Cook v. Sprigg*, Lord Reid, in his speech in *Nissan's* case, said that

none of these cases decides that when the Crown annexes territory it is entitled to confiscate the property of British subjects which is in that territory.⁸⁴

And, of course, on annexation, all the inhabitants of the territory concerned become *ipso facto* British subjects. It is submitted that it is settled law that following the assertion of British territorial sovereignty the Crown has only very limited powers under its common law prerogative to expropriate the lands of its subjects, and even then it must normally pay compensation.⁸⁵

The authorities do not show any general common law rights to expropriate the lands of the subject even in a ceded or conquered colony; nor do they suggest the Crown has a general immunity from redress for such seizures. It thus seems hardly necessary to deal with the *dictum* relied on by the defendant in *Milirrpum v. Nabalco Pty Ltd* that such a general right of expropriation extended also to settled colonies.⁸⁶ There is, it is submitted, no such right. It does seem an unwarranted exercise of the legal imagination to proceed further and say that somehow the rights of Arnhemlanders to their ancestral lands were extinguished as an act of state by the establishment, in 1788, of a penal settlement at Sydney Cove.

5. Conclusion

The judgment in *Milirrpum v. Nabalco* undoubtedly continues the trend of decisions in recent years on the land claims of ethnic minorities in former British colonies, where the majority population is of European

⁸² *Id.*, 224.

⁸³ *Id.*, 227.

⁸⁴ *Id.*, 210-211.

⁸⁵ *Burmah Oil Co. Ltd v. Lord Advocate* [1965] A.C. 75.

⁸⁶ (1971) 17 F.L.R. 141, 226-227.

stock. However, none of the recent decisions from these countries was binding on the Court. The decisions of the Judicial Committee were so binding, where relevant and applicable. It has been submitted that the treatment of a number of these Privy Council cases in the judgment in *Milirrpum v. Nabalco* is not entirely compelling on the fundamental issue of common law recognition of existing rights in land, on the establishment of a British colony. It may be thought that the plaintiffs might have fared rather better had they appealed.

In a discussion confined, in its essentials, to this one point of common law recognition it would be presumptuous to argue that the Arnheim-landers would have actually succeeded on appeal, since the issues in the case were not confined solely to the common law recognition of aboriginal rights, but extended, *inter alia*, to the question of whether any rights they did have in their minerals were extinguished by legislation. Nevertheless, given the novelty and significance of the case as the first major attempt by a group of Australian aborigines to assert peacefully, and through the courts, their rights to their ancestral lands, it can only be a matter of regret that they have not had the benefit of an examination of the difficult issues of law in the case by an appellate court. It would be unfortunate indeed if the failure in this first attempt at victory in the courts resulted in a general aboriginal disillusionment with this method of redress for their long standing land grievances.