ABORIGINAL LAND CLAIMS AT COMMON LAW

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In November 1980, following the dispute at Noonkanbah, the then Premier of Western Australia, Sir Charles Court, declared:

> The land of Western Australia does not belong to the Aborigines. The idea that Aborigines, because of their having lived in this land before the days of white settlement, have some prior title to the land which gives them a perpetual right to demand tribute of all others who may inhibit it, is not consistent with any idea of fairness or common humanity. In fact, it is as crudely selfish and racist a notion as one can imagine. Nor is it an idea which has ever accorded with the law of this nation . . .[1]

The principle of law which the Premier purported to enunciate is, of course, that which was declared in *Milirrpum* v. *Nabalco*,[2] the Gove Land Rights Case, by the Northern Territory Supreme Court in 1970. The court declared that the doctrine of community native title did not and never had formed a part of the law of Australia.[3] That conclusion was at that time regarded by some commentators as erroneous and contrary to established common law authority.[4] Surprisingly the decision was not appealed. Subsequent decision have increased doubts as to the correctness of the principle declared in *Milirrpum*. Three judges of the Supreme Court of Canada went so far as to declare the proposition enunciated by Blackburn J. in *Milirrpum* to be "wholly wrong".[5] More recently the High Court of Australia unanimously recognized that the correctness of

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1 Letter to D.W. McLeod (Perth) 3 Nov. 1980.

2. (1970) 17 F L.R. 141 (S.C.) (henceforth cited as Milirrpum)

3. Id at 245. "Indian title", "Aboriginal title", Aboriginal "right of occupancy" are other terms applied to the concept.

4. Lester and Parker, 'Land Rights: The Australian Aborigines have lost a Legal Battle, But . . .' (1973) 11 *Alta.L R.* 189 J. Hookey. 'The Gove Land Rights Case: A judicial dispensation for the taking of Aboriginal Lands in Australia' (1973) 5 *Fed.L R* 85
J. Hookey. "Milirrpum and the Maoris: The Significance of the Maori Land Cases outside New Zealand" (1974) 3 *Otago L.Rev.* 63.

5.(1970) 34 D.L.R. (3d) 145, 218 per Hall J. (Laskin and Spence JJ. concurring) (S.C. Can.).

the decision in *Milirrpum* was an "arguable question if properly raised".[6]

It is suggested that a reconsideration of the notion of aboriginal title at common law in Australia is required. This paper will endeavour to examine the existence *and* application of such a doctrine in Australia. It will consider the extent to which such title could be said to be extant and how it might be proved.

The Existence of a Doctrine of Aboriginal Title at Common Law

Milirrpum v. *Nabalco*[7] rejected the existence of a doctrine of aboriginal title at common law in Australia. Blackburn J. was principally influenced by his examination of the law in the United States, Canada, India, Africa and New Zealand. The learned judge explained:

> The question whether English law, as applied to a settled colony, included, or now includes, a rule that communal native title where proved to exist must be recognized is one which can be answered only by an examination of what has happened in the laws of the various places where English law has been applied. I have examined carefully the laws of various jurisdictions which have been put before me in considerable detail by counsel in this case, and, as I have already shown, in my opinion no doctrine of communal native title has any place in any of them, except under express statutory provisions. I must inevitably therefore come to the conclusion that the doctrine does not form, and never has formed, part of the law of any part of Australia.[8]

Blackburn J. rejected a suggestion that the applicable law of Australia was to be found only in cases decided prior to 1788 and thereafter only in cases decided in Australia, England or by the Judicial Committee.[9] He rejected such a "rigid concept of the common law". The learned judge affirmed the approach that judicial decisions may be said to entail the exposition of "the earliest settled principles of our law" and that the common law cannot be fixed immutably at a particular point in time.[10] Such

6 Coe v. Commonwealth of Australia [1979] A L J R 403, per Gibbs, Askin JJ at 408, Jacob J at 411, Murphy J at 412 (H C).

7. Supra n.2

8. Id. at 244-245

9 Id at 208.

10 Id. at 208, quoting R. v Symonds (1847) N.Z.P C C 387; and see Cote, 'Reception of English Law', 15 *Alta L Rev* 29, 55-57, Cf. Priestley 'Communal Native Title and the Common Law' (1974) 6 *Fed L Rev* 150, 172 (Priestley was counsel for Nabalco)

of course, accords with the practice of judicial decision making throughout the common law world, including Australia. The learned judge appeared to consider the decision of the courts of the United States and Canada as particularly pertinent, as they were reached upon the understanding that the territory in question was acquired by settlement rather than conquest.[11] It is appropriate to re-examine the laws of the relevant jurisdictions with particular regard to the recent decisions of the United States and Canadian courts.

1. The United States

In the leading case of *Johnson* v. *McIntosh*[12] Chief Justice Marshall of the United States' Supreme Court explained the nature of the so-called Indian or aboriginal title:

> [T]he rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that *discovery* gave exclusive title to those who made it. While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves, and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.[13]

Chief Justice Marshall considered that the doctrine applied to territory acquired by "discovery". He explained:

> This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans necessarily gave to the nation making the discovery the role right acquiring the soil from the natives, and establishing settlements upon it.[14]

11 Id at 202, 223
12 (1823) 8 Wheat 543 (S C)
13 Id at 574
14 Id. at 573

The Chief Justice expressly distinguished the circumstances in which territory was acquired by conquest or cession from 'civilized peoples' observing that the "rights of the conquered to property should remainunimpaired".[15] The application of such principle to the aborigines of North America was rejected because "the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country was to leave the country a wilderness".[16] The acquisition of territory by 'discovery' might clearly also properly be termed acquisition by 'settlement'. Chief Justice Marshall regarded the United States as a territory acquired by 'settlement' with all the consequences that flowed therefrom.[17]

The Chief Justice delineated the incidents of aboriginal title: radical title in the Crown or Sovereign; a right of occupancy or usufruct; inalienable except by surrender to the Crown or Sovereign; extinguishable by the Crown or Sovereign.

The doctrine of aboriginal title was repeatedly affirmed by decisions of the Supreme Court.[18] In 1922 the Court made explicit "the fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive".[19] By 1941 the Court was able to declare in *United States* v. *Sante Fe Pacific Railroad*:

> Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States . . . This policy was first recognized in *Johnson* v. *McIntosh* and has been repeatedly reaffirmed . . . Indian right of occupancy is considered as sacred as the fee simple of whites.[20]

The Court emphatically denied "that a tribal claim to any particular lands must be based upon a treaty, statute or other formal government action".[21]

Recently (since the decision in the *Milirrpum* case) the Supreme Court of the United States has affirmed the established authority in *Oneida Indian Nation* v. *County of Oneida*.

15. Id at 589.
16. Id at 590.
17 Storey, *Commentaries on Constitution of United States* 5th ed. (1891) at 106-107.
18. See e.g Cherokee Nation v. Georgia (1831) 5 Pet. 1; Worcester v. Georgia (1832) 6 Pet. 515; United States v. Cook (1873) 86 U.S. 591.
19 Cramer v United States (1922) 261 U.S. 219.
20. (1941) 314 U.S. 339, at 345.
21 Id. at 347.

> It very early became accepted doctrine in their Court that although fee title to the lands occupied by Indians when the colonials arrived became vested in the Sovereign — first the discovering European nations and later the original states and the United States — a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the Sovereign, could be terminated only by Soverign act.[22]

Even more recently in *Naragansett Tribe* v. *Southern Rhode Island Land Development Corporation*[23] the United States' District Court (First Circuit) asserted that "Indian title arises from the ancestral dominion of land, and need not be solemnized in any treaty, statute or other formal government action".[24]

The wealth of authority recognizing aboriginal title at common law is so considerable as to render Blackburn J.'s assertion in *Milirrpum*[25] that the doctrine of community native title does not exist in the United States almost incomprehensible. Blackburn J. rejected early authority because it did not "affirm the principle that the Indian 'right of occupancy' was an interest which could be set up against the Sovereign, or against a grantee of the Sovereign, in the same manner as an interest arising under the ordinary law of real property".[26] He then purported to rely upon the reasoning of the Supreme Court in *Tee-Hit-Ton Indians* v. *United States*.[27] The Court there declared that the aboriginal title was "not a property right" but a "right of occupancy" which "creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law".[28] Such authority is not, of course, a 'denial' of aboriginal title but is rather an affirmation of long established principles applicable thereto. Blackburn J. misunderstood the nature of aboriginal title at common law. The doctrine has always recognized, in the words of the Supreme Court in the *Oneida Indian Nation* case,[29] that it was "good against all *but* the Sovereign". The "surprise"[30] expressed by Blackburn J. at the Court's affirmation of *Johnson* v. *McIntosh*[31] in the *Tee-Hit-Ton Indians Case*[32] is a product of his misunderstanding and not of any quixotic reasoning of the Supreme Court.

22. (1974) 414 U.S. 661 at 666 (White J).
23 (1976) 418 F.Supp 798.
24. Id. at 807
25. Supra n.2, at 218
26. Id. at 213.
27. (1955) 348 U.S. 272.
28 Id at 279-281.
29 Supra n 22.
30. Supra n 2, at 218
31 Supra n 12
32. Supra n.27.

The power of the Sovereign to extinguish aboriginal title does not of course, deny its existence. Chief Justice Marshall in *Johnson* v. *McIntosh*[33] declared that "[it] has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned."[34]

In *Edwardsen* v. *Morton*[35] it was observed that "until Congress has acted to extinguish Native title in land claimed on the basis of use and occupancy, any third parties coming onto the land without consent of those rightfully in possession are mere trespasses".[36]

And in the *Tee-Hit-Ton Indians Case*[37] the Supreme Court asserted the long established principle that aboriginal title "amounts to a right of occupancy which the Sovereign grants and protects against intrusion by third parties".[38] Aboriginal title has accordingly been effective against encroachments by homesteaders and railroad companies who would seek to ignore such title.[39] Most recently claims based on aboriginal title at common law have asserted the inability of the States to extinguish such title and its continued existence. The Supreme Court has described such claim as a "present right to possession".[40]

It remains to observe that upon acceptance of a doctrine of aboriginal title in the United States the explanation for the practice of treating with the Indians for the surrender of lands, the establishment of reserves, and the declaration of Indian country in the Royal Proclamation of 1763 are revealed as dictated by the common law and not as Blackburn J. awkwardly suggested, as "remarkable divergencies of policy from the law".[41] Divergencies of policy from law do not usually entail the expenditure of 800 million dollars, which was Cohen's estimate of the consideration paid by the United States to Indian tribes up to 1947.[42]

2. *Canada*

Canadian jurisprudence may properly be regarded as of particular relevance in ascertaining the common law applicable in Australia. The jurisprudence has assumed that the territory was acquired by 'discovery' or 'settlement' and has been subject to appeal to the Privy Council until recent years. Blackburn J. in *Milirrpum* appeared to pay particular regard to the Canadian decisions.

33. Supra n. 12.
34. Id. at 603.
35 (1973) 369 F Supp 1359
36 Id. at 1371.
37. (1955) 348 U S. 272
38 Id at 279.
39 Holden v. Joy (1872) 84 U S. 211 (17 Wall); Buttz v. Northern Pacific R R. (1886) 119 U.S 55, United States v Sante Fe Pacific R.R (1941) 314 U S 339.
40 Oneida Indian Nation, supra n.22, at 675,84 , Naragansett Tribe, supra n.23
41 Supra n 2, at 204
42 Cohen, 'Original Indian Title' (1947) 32 *Minn L Rev* 28, 36

The Judicial Committee of the Privy Council declared, in 1888, in *St. Catherine's Milling and Lumber Co.* v. *The Queen*[43] that the "tenure of the Indians was a personal and usufructuary right, dependant on the good-will of the Sovereign" and "that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title which became a plenum dominium whenever that tribe was surrendered or otherwise extinguished".[44] The Privy Council did not, however, indicate if the aboriginal title might arise independently of the Royal Proclaimation of 1763 which had reserved central and western regions of Canada as "Indian Country". The determination of whether aboriginal title might arise at common law in Canada remained to be clearly decided.

In *Calder* v. *Attorney-General of British Columbia*[45] the representative plaintiffs, being members of the Nishga Indian tribe, sought a declaration that the aboriginal title to their traditional lands had never been extinguished. The trial judge, Gould J., refused to determine whether aboriginal title arose at common law, preferring to conclude that even if such title had existed in the plaintiffs it had been extinguished in toto.[46] The Court of Appeal[47] unanimously concluded that only aboriginal title that had been "recognised" by prerogative or legislative act could be enforced. Aboriginal title did not arise at common law. Blackburn J. in *Milirrpum* regarded the decisions of the trial court and Court of Appeal of British Columbia in *Calder* as "weighty authority" and founded much of his analysis thereon. Presumably Blackburn J. would have regarded the decision of the Supreme Court of Canada in *Calder* as of similar significance. The decision of the Supreme Court of Canada[48] was handed down eighteen months after the decision in *Milirrpum*. It decisively rejected the conclusion of the Court of Appeal as to the existence of aboriginal title at common law. All six of the justices who examined the question determined that aboriginal title existed at common law irrespective of any formal recognition. After referring to *Johnson* v. *McIntosh* and *St. Catherine's Milling* Judson J. (Martland and Ritchie JJ. concurring) declared that the Royal Proclaimation of 1763 was not the exclusive source of title, and continued:

> Although I think it is clear that Indian title in British cannot owe its origin to the Proclaimation of 1763, the fact is that when the set-

43. (1888) 14 A.C. 46 (PC).
44. Id. at 55, per Lord Watson.
45. (1973) 34 D.L.R. (3d) 145 (S.C).
46 (1970) 8 D L.R (3d) 59, 82-83
47. (1971) 13 D.L.R. (3d) 64 at 67 per Davey C J at 76 per Tysoe JA, at 107 per MacLean JA (C A.).
48. Supra n. 45.

> tlors came, the Indians were there, organized in societies, and occupying the land as their forefathers had done for centuries. This is what Indians title means . . .[49]

Hall J. (Spence and Laskin JJ. concurring) relied upon *Johnson* v. *McIntosh* and *Cramer* v. *United States*[50] and concluded that "the aboriginal Indian title does not depend on treaty, executive order or legislative enactment".[51] He considered it necessary to comment on the judgment in *Milirrpum* and Blackburn J.'s "errors" in accepting "the proposition that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognised by the conqeror or discoverer". That proportion, Hall J. observed, "is wholly wrong as the mass of authorities previously cited, including *Johnson* v. *McIntosh* and *Campbell* v. *Hall*, establishes."[52]

The territory under consideration in *St. Catherine's Milling* and *Calder* has been regarded as acquired by settlement.[53] Such characterization of the mode of acquisition of the territory has not, however, been emphasized in the Canadian decisions. The Courts have preferred to rely upon the United States jurisprudence and ascribe aboriginal title to the fact of aboriginal occupancy in circumstances of European settlement. Only Hall J. in *Calder* felt compelled to distinguish the circumstances of territory acquired by conquest or cession. He did so for the purpose of explaining the inapplicability of the so-called "act of state cases" from India relied upon by the British Columbia Court of Appeal in *Calder* and Blackburn J. in *Milirrpum*:

> In all the cases referred to by the Court of Appeal the origin of the claim being asserted was a grant to the claimant from the previous Sovereign. In each case the claimants were asking the Court to give judicial recognition to that claim. In the present case the appellants are not claiming that the origin of their title was a grant from any

49. Id. at 152; Cf. Elliot, 'Baker Lake and the Concept of Aboriginal Title' (1980) *Os H L.J* 653, 655. Elliot adopts a curiously restrictive interpretration of Judson J's language in stating that the learned judge "was of the view that the case law did not necessarily preclude the existence of [aboriginal title at common law], but he did not go so far as to recognise it himself". The learned judge (at 156) *did* recognise the concept of aboriginal title at common law, but what he did not recognise, because on the facts and his view of the case it was unnecessary, was whether the plaintiffs had proved such title had at one time been possessed by them, at p 167 Elliot"s note on the Baker Lake Case omits any reference to Kanetewat v. James Bay Development Corp. Nov. 15, 1973 (Que S.C.), Nov. 20, 1974 (Que C.A) unreported and Re Paulette (1974) 42 D.L.R. (3d) 8, and (1976) 63 D.L.R (3d) 1, 45-46.
50 (1923) 261 U.S. 219.
51 Supra n 45, at 200.
52. Id. at 218.
53. See Cote, 'Reception of English Law' (1977) 15 *Atla.L Rev.* 29

previous Sovereign, nor are they asking this Court to enforce a treaty of cession between any previous Sovereign and the British Crown. The appellants are not challenging an Act of State — they are asking this Court to recognize that settlement of the north Pacific coast did not extinguish the aboriginal title of the Nishga people — a title which has its origin in antiquity — not a grant from a previous Sovereign.[54]

The significance of the judgments of the Supreme Court of Canada in *Calder* was soon recognised. In *Re Paulette and Registrar of Titles*[55] Morrow J. of the North West Territories Supreme Court observed:

> In the Calder case it would appear that both Mr. Justice Judson and Mr. Justice Hall in writing the two opposing judgments agree that even without the Royal Proclaimation of 1763 there can be such a legal concept as Indian title or aboriginal rights in Canadian law.[56]

In *Kanatewat* v. *James Bay Development Corp.*[57] the Quebec Superior Court issued an injunction upon the establishment of aboriginal title at common law, which the Quebec Court of Appeal dissolved only because of the extinguishment of such title by the Hudson Bay Company Charter of 1670.

And in *Hamlet of Baker Lake* v. *Minister of Indian Affairs and Northern Development*[58] Mahoney J. of the Federal Court declared that the judgments in *Calder* provide "solid authority for the general proposition that the law of Canada recognizes the existence of an aboriginal title independent of the Royal Proclaimation or any other prerogative Act or legislation. It arises at common law".[59] He concluded that a contrary argument in Canadian law with respect to a settled colony was "untenable" and observed with respect to the conclusion in *Milirrpum* "that is not the law of Canada".[60]

54. Supra n 45 at 211.
55. (1973) 42 D.L.R. (3d) 8 Moir J.A. of the province's Court of Appeal, the only judge of the Court to consider the matter, came to the same conclusion (1976) 63 D.L.R. (3d) 1 at 45-46.
56. Id. at 26-27
57. Supra n.49
58. (1980) 107 D.L R (3d) 513 (F.T D). A year previously Mahoney J. had issued an injunction restraining the issuance of mining tenements under federal mining laws upon the assertion of aboriginal title in the plaintiffs. The learned judge concluded that there was a "serious question to be tried" and observed: "The minerals if there, will remain, the caribou presently there, may not". (1978) 87 D.L.R. (3d) 342.
59. (1980) 107 D.L.R. (3d) 513, 541.
60. Id. at 542.

3. India and Africa: Territories acquired by cession or conquest

The relevance of decisions arising from the determination of aboriginal rights in territory acquired by cession or conquest to the determination of such rights in territory acquired by settlement is not immediately apparent. Blackburn J. in *Milirrpum* acknowledged their doubtful relevance. With respect to the decisions by the Judicial Committee upon consideration of African circumstances[61] he concluded that they did "not support the existence of a doctrine of communal native title nor the argument that in a settled colony, the Crown's land to recognize their [the native inhabitants'] communal right".[62] He recited, but determined to treat as obiter, the following remarks of Viscount Haldane in *Amodu Tijani* v. *Secretary, Southern Nigeria* relating to the cession of Sovereignty to the Crown:

> No doubt there was a cession to the British Crown, along with the Sovereignty, of the radical or ultimate title to the land in the new colony, but this cession appears to have been made on the footing that the rights of property of the inhabitants were to be fully respected. This principle is a usual one under British policy and law when such occupations take place . . . it is not admissible to conclude that the Crown is generally speaking entitled to the beneficial ownership of the land as having so passed to the Crown as to displace any presumptive title of the natives. A mere change in Sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of the cession are prima facie to be construed accordingly.[63]

Blackburn J. sought to confine *Amodu Tijani* to its 'facts' which he interpreted as merely an instance of statutory recognition of native rights.[64] He was unable to explain the remarks of Viscount Haldane.

It is suggested, however, that no difficulty is presented by the remarks of Viscount Haldane and none should have presented itself to Blackburn J. in considering the existence of a doctrine of aboriginal title. The remarks of Viscount Haldane in *Amodu Tijani* and the other African cases referred to merely indicate the application of the doctrine of the continuance of private rights upon a change of Sovereignty upon request or cession. In such circumstances there is no place or need for a "doctrine of com-

61. See in re Southern Rhodesia [1919] 2 A.C. 211, Amodu Tijani v. Secretary, Southern Nigeria [1921] 2 A.C. 399; Oyekan v. Adele [1957] 2 All E.R. 785.
62 Supra n.2, at 231, 233
63. [1921] 2 A.C. at 407.
64. Supra n.2, at 231.

munity native title at common law". Determination of claims to aboriginal land rights in a settled colony upon a common law doctrine of community native title and in a conquered colony upon the doctrine of the continuance of private rights may raise similar matters for consideration such as problems of proof and the determination of whether title was extinguished, but the rights of the claimants are founded upon distinct origins. It is to be observed that Blackburn J.'s attempt to distinguish *Amodu Tijani* on the facts as being merely an instance of statutory recognition of native rights is as awkward as it was unnecessary. The measure of compensation awarded by the Privy Council recognized and depended upon the *continuance* of native rights and the statutory provision required payment only where the land was "the property of a native community". As Viscount Haldane observed:

> [T]here is no evidence that this kind of usufructuary title of the community was disturbed in law, either when the Benin Kings conquered Lago or when the cession to the British Crown took place in 1861. The general words used in the treaty of cession are not in themselves to be construed as extinguishing native rights. The original native right was a communal right, and it must be presumed to have continued to exist until the contrary is established . . .[65]

Unlike his appraisal of the significance of the "African" cases, Blackburn J. attached considerable significance to that line of authority presented by the Indian 'act of state' cases,[66] particularly *Vajesingi Joravarsingi* v. *Secretary of State for India*.[67] He determined that the authorities 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."[68]

The learned judge suggested that dicta indicated that the proposition might also extend to settled colonies. He accordingly reasoned that the authorities suggested that aboriginal rights to land extant before conquest or settlement did not survive the establishment of another sovereign power, and thus there could be no doctrine of "communal native title" at common law. The exposition of the doctrine of aboriginal title at common law in *Johnson* v. *McIntosh* and *Calder* manifests the failings inherent

65 Supra n 63, at 410.

66. Secretary of State for India v. Kamachee Boye Sahaba (1859) 15 E.R 9, Secretary of State for India v. Bai Rajbai (1915) L.R. 42 Ind. App. 229 Vajesingi Joravarsingi v. Secretary of State for India (1924) L.R 51 Ind. App. 357; and Cook v. Sprigg (1899) A C. 572.

67. Supra n.66

68 Supra n.2, at 227.

in such reasoning and the irrelevance of the Indian 'act of state' cases. Hall J. (Spence and Laskin JJ. concurring) in *Calder* expressly distinguished that authority.[69] The doctrine of aboriginal title at common law sought to reconcile the establishment of initial sovereignty or "discovery" with the fact of occupation by indigenous people. It was not concerned with the "rights" of indigenous people under some prior sovereign. Decisions that determine the extent to which rights are continued upon a change of sovereignty are not relevant to the determination of aboriginal rights upon the assumed *initial* establishment of sovereignty, which, of course, explains why, as recognized but ignored by Blackburn J., "none of the Indian cases cited to me deals with communal native title".[70]

4. New Zealand

New Zealand is a territory that was acquired by settlement[71] by subjects of the Crown. The Maori were the indigenous population. In such circumstances the common law, as declared in the United States and Canada, would dictate the existence of the aboriginal title of the Maori. Such was affirmed in R. v. *Symonds*[72] in 1847, wherein Chapman J. declared the title of the Crown acquired by settlement and asserted:

> Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of the country, whatever may be their present clearer and still growing conception of their dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It follows from what has been said, that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive 'right', the Treaty of Waitangi confirmed by the Charter of the Colony, does not assert either in doctrine or in practice anything new and unsettled.[73]

Chapman J. relied on the principles declared in the United States jurisprudence in *Johnson* v. *McIntosh* and *Cherokee Nation* v. *Georgia*,[74]

69 Supra n 45, at 211
70. Supra n 2, at 227.
71 Wi Parata v. Bishop of Wellington (1877) 3 N.Z Jur (N S.) 72, at 77-78 See generally· Hookey, supra n 4; Lester and Parker, supra n.4
72 (1847) N.Z P.C C 387 (S C.)
73. Id at 390.
74 (1831) 5 Pet 1, 8 L Ed 25 (S.C).

which he described as "the principles of the common law".[75] Martin C.J., the other judge in the case, also cited the United States jurisprudence with approval.[76] The learned Chief Justice referred in support of the principle that "as the right of the native owner is withdrawn, the soil vests entirely in the Crown for the behalf of the nation"[77] to a decision of the Supreme Court of New South Wales, *Attorney General* v. *Brown*[78] which asserted the acquisition of title by the Crown upon discovery and settlement. The Chief Justice recognised aboriginal title as an incidental but essential aspect of the principle of acquisition of territory by settlement.

Aboriginal title at common law in New Zealand does not rest upon the authority of R. v. *Symonds* alone. In *Nireaha Tamaki* v. *Baker*[79] the Privy Council expressly approved the observation of Chapman J. as to the respect to which Native title was entitled and commented, upon referring to the United States decisions cited in the judgment, that "the judgments of Marshall Chief Justice are entitled to the greatest respect although not binding on a British Court".[80] The case itself involved the assertion of landrights under the *Native Lands Act*. More recently North J. in *Re: Ninety Mile Beach*[81] referred to the "classic judgement of Champan J. in that case [*R.* v. *Symonds*]" with apparent approval.[82]

A contrary understanding of the existence of aboriginal title at common law in New Zealand to that indicated above was adopted by Blackburn J. in *Milirrpum*:

> The doctrine of communal native title . . . never existed at common law in New Zealand; the recognition of Maori occupancy of tribal lands was at first a matter of practice put into effect by deliberate policy, and it was the same policy which made the detailed legislative provisions which now regulate the matter.[83]

Blackburn J. dismissed the reasoning of *R.* v. *Symonds* as mere obiter,[84] and in any event as representing an erroneous interpretation of the United States jurisprudence.[85] Obiter expressly approved by the Judical Committee is usually accorded more authority. It may properly

75 Supra n.72, at 390
76 Id at 393-394.
77 Id. at 395
78 (1847) 1 Legge 312, at 318 (N S.W Sup Ct)
79 (1901) N.Z P C C 371
80 Id at 384
81 [1963] N Z L.R 461 (C A)
82 Id at 468
83. Supra n 2, at 242
84 Id at 239
85. Id. at 237

be observed that to find a *ratio decidendi* declaring the existence of aboriginal title at common law may be impossible where such early governmental recognition was accorded as in the Treaty of Waitangi and the Native Land Acts. It has already been suggested that, rather than Chapman J. and Martin C.J. in *R.* v. *Symonds* committing errors, it is Blackburn J. who incorrectly understood the United States jurisprudence.

Blackburn J. preferred to rely upon New Zealand authority, necessarily obiter, that characterised the aboriginal title as connoting a moral or political but not a legal right.[86] The principal authority was *Wi Parata* v. *Bishop of Wellington* wherein Chief Justice Prendergast observed:

> [T]he supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity, must be the sole arbiter of its own justice. Its acts in this particular cannot be examined or called in question by any tribunal, because there exist no known principles whereon a regular adjudication can be based.[87]

The dicta was subsequently relied upon by counsel in *Nireaha Tamaki* v. *Baker* to assert that native title "depends on the grace and favour of the Crown declared in the Treaty of Waitangi" and that accordingly "there is no customary law of the Maoris of which the Courts of law can take cognizance"[88] The Privy Council gave such argument short shrift: "Their Lordships think that this argument goes too far, and that it is rather late in the day for such an argument to be addressed to a New Zealand Court."[89]

It is accordingly all the more surprising to record North J.'s observation in *Re: Ninety Mile Beach*,[90] after referring to *R.* v. *Symonds*, that:

> [I]n my opinion it necessarily follows that on the assumption of British sovereignty — apart from the Treaty of Waitangi — the rights of the Maoris to their tribal lands depended wholly on the grace and favour of Her Majesty Queen Victoria, who had an absolute right to disregard the Native title to any lands in New Zealand, whether above high-water mark or below high-water mark.[91]

86. Supra n. 2, at 241.
87. Supra n. 71, at 78.
88. Supra n. 79, at 382.
89. Id. at 382; also at 384
90. Supra n. 81.
91. Id. at 468

Gresson J.A. expressly adopted the discarded dicta of Chief Justice Prendergast in *Wi Parata*. The re-emergence of the vitality of the dicta is all the more quixotic insofar as it was phrased by North J. in the actual language of the argument as to "grace and favour" expressly rejected by the Privy Council.

It is suggested that upon a review of the above authorities the better conclusion is that supportive of the existence of aboriginal title at common law. The absence of definitive authority, in the form of a *ratio decidedi*, to that effect is to be expected where, as Blackburn J. recognized, "the ancestral claims of Maoris throught New Zealand to their land have been dealt with in accordance with the enactments." The provision for such claims under the Treaty of Waitangi and the implementing legislation is not, as he observed, "beside the point".[92] As a comment on current New Zealand law Blackburn J. may not be said to be in substantial error when he observed that "the doctrine of native title has application only under the special statutory provisions". But such a premise cannot support the conclusion that "the doctrine of communal native title . . . never existed at common law in New Zealand".[93]

5. Australia

It is suggested that Indian or aboriginal title is clearly established as a right enforceable at common law in United States and Canadian jurisprudence. As Blackburn J. acknowledged, it is those jurisdictions that are most relevant to the determination of the common law applicable in Australia. The cases decided by the Privy Council arising from India and Africa are not particularly appropriate for guidance insofar as they represent consideration of circumstances of acquisition of lands by cession or conquest. They do not, in any event, deny the existence of aboriginal title at common law. It is considered that although the jurisprudence developed in New Zealand is pertinent it affords limited guidance because the concept of aboriginal title at common law has been rendered less relevant by the Treaty of Waitangi and the *Native Lands Act*. The jurisprudence is, in any event, suggested to be supportive of such concept and R. v. *Symonds*[94] and *Niheaha Tamaki* v. *Baker*[95] provide

92. Supra n.2, at 242
93. Id. at 242. In Wallis v. Solicitor General (1903) N.Z.P.C.C. 2, 34 the Privy Council commented that in 1848 "the rights of the matives depended solely on the Treaty of Waitangi". The case was not apparently cited or argued in Milirrpum. It does not deny the existence of native title at common law prior to the Treaty but merely affirms that the Treaty had superceded the common law. A similar obiter comment in St. Catherin Milling v. The Queen (1888) 14 A.C. 46 with respect to the Royal Proclamation 1763 was considered by the Supreme Court of Canada in *Calder* so as not to exclude the existence of aboriginal title at common law.
94. Supra n.72.
95. Supra n.79.

remarkably strong declarations of the applicability of the concept and the aptness of the principles initially declared in *Johnson* v. *McIntosh.*[96] The conditions of the application of the concept declared in the jurisdictions of the United States, Canada and New Zealand are suggested to be met in Australia. The common law, as applied in Australia, it is suggested contains the doctrine of aboriginal title.

Counsel for Nabalco, in a subsequently published article,[97] has apparently sought to rely upon the principle that in a settled colony the rules of the common law are received only to the extent that they are suited to the circumstances of the colony, [98] and that aboriginal title was not suited to the circumstances of Australia. It is to be observed that any historical analysis of the development of Canada, the United States and New Zealand would find many similarities in the policies of protection and the setting apart of reserves for the indigenous peoples. Blackburn J. acknowledged the similarity of the development of mainland British Columbia as considered in *Calder* with the circumstances of the development of Australia. As in Australia no treaties or agreements respecting aboriginal title had ever been entered into with respect to the land of British Columbia claimed by the Nishga tribe. Indeed the contemporary provision of "land rights" in the Northern Territory and South Australia, and to a lesser extent in New South Wales and Victoria, suggest a belated recognition by the executive branch of the State and Commonwealth Governments of the suitability and applicability of the concept of aboriginal title at common law in Australia.

Australian decisions asserting the title of the Crown upon the establishment of sovereignty upon settlement were relied upon by Blackburn J. The learned judge stated that "none of them either expressly or impliedly refers to any doctrine of communal native title".[99] None of the cases raised any question or issue as to aboriginal title. The learned judge appeared to acknowledge the inconclusiveness of such authorities when being unable to meet objections to such relevance by counsel for the claimants other than by stating that they rested upon the assertion of a doctrine of aboriginal title which he had rejected. It is, of course, clear that jurisprudence in the United States (*Johnson* v. *McIntosh*), Canada (*St. Catherines Milling*) and New Zealand (*R.* v. *Symonds*) has long emphasized the co-existence of aboriginal title with the title of the Crown.

96 Supra n 12.
97. Priestley, supra n 10, at 173.
98. See Cote, supra n 10
99 Supra n.2, at 244-245

Historical material relating to the European settlement of Australia was considered in Blackburn J. to demonstrate an absence of governmental recognition of any aboriginal interest in the lands. He commented on the absence of "even a proposal for a system of native title" or the "creation or application of law relating to [aboriginal] title to land".[100] It is observed that the essence of the doctrine of aboriginal title at common law is the absence of the need for any such forms of governmental recognition of schemes. Aboriginal title at common law does not depend upon government action and its existence cannot be voided upon analyses of government policy. Such, of course, does not in any way deny the relevance of such considerations to the determination of whether aboriginal title has been extinguished. It is, however, suggested that the Australian jurisprudence should long ago have recognized that the primary question for analysis was not the existence of the concept of aboriginal title, but rather its proof and in what circumstances it might be considered extinguished.

Proof of Aboriginal Title

The requirements of proving aboriginal title at common law have largely been developed in United States and Canadian jurisprudence. The jurisprudence accruing in the United States after 1946 remains relevant despite its development under the *Indian Claims Commission Act.*[101] The Act established the Commission to hear claims, inter alia, "arising from the taking by the United States . . . of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant".[102] The Commission and the Court of Claims upon review, have purported to follow the principles developed at common law regarding proof of aboriginal title to determine original Indian "ownership or occupation".[103] The decisions arising from consideration of aboriginal entitlement to territory acquired by cession or conquest in India and Africa are not irrelevant, but attention should only be directed

100 Id. at 257,256

101 25 U.S C.S s 70; see (1946) *Publıc Law* 726.

102 Id at s.2

103 See Upper Chehalıs Tribe v. United States (1957), 155 F.Supp. 226 And e g. United States v Pueblo of San Ildefonso, 513 F.2d 1383.
And see Kaplan, 'Proof and Extinguishment of Aborıgınal Title to Indıan Lands' (1979) 41 A.L.R. Fed 425; Cf. Mahoney J. in Hamlet of Baker Lake v. Mınister of Indian Affaırs and Northern Development (1980) 107 D.L.R. (3d) 513, at 545 (F T O.) who observed that such decisıon should be "approached wıth consıderable caution". The apparently considered that the Commıssıon"s jurisdıctıon to hear "claims based upon fair and honorable dealıngs" undermıned the reliance of all decisions reached under the Indian Claims Commission Act. The decısions reached upon a consideration of the doctrıne of aborıginal tıtle have been heard under the head of jurısdiction respecting the "taking" of Indian lands not that regarding "faır and honorable dealings".

to them where clearly analogous issues are examined. Proof of aboriginal title at common law does not entail analogous questions, as examination of the oft-quoted dictum of Lord Sumner in *In re Southern Rhodesia* reveals:

> Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it with the substance of transferable rights of property as we know them.[104]

Such remarks were expressly directed to the argument 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".[105] The Privy Council considered, without so finding, that such rights were not possessed by members of the tribe in question where the "trustee" could not be made amenable "except by fear of force".[106] Aboriginal title is not concerned with the rights and duties inter se of members of a tribe under a prior sovereign and the remarks and inquiry of the Privy Council with respect thereto are not pertinent to the proof of such title at common law. As Mahoney J. declared in *Hamlet of Baker Lake* v *Minister of Indian Affairs and Northern Development* when considering how aboriginal occupancy might be proved:

> The value of early American decisions to a determination of the common law of Canada as it pertains to aboriginal rights is so well established in Canadian Courts, at all levels, as not now to require rationalization. With respect, the American decisions seem considerably more apposite than those Privy Council authorities which deal with aboriginal societies in Africa and Asia . . .[107]

1. *Occupancy by the tribe or group*

(a) The Jurisprudence: United States and Canada.

The requirements of proving aboriginal title at common law are dictated by the nature of the protection that the concept sought to confer upon the aboriginal population. Chief Justice Marshall explained in

104 (1919) A.C. 211 (P.C), at 233-234
105 Id at 233
106 Id. at 234.
107 Supra n 59, at 545.

Worcester v *State of Georgia*[108] that the principle of discovery "gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it . . . *but* could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man."[109] Aboriginal occupancy is the foundation of the concept and that which must be proved to establish aboriginal title. The United States Supreme Court elaborated in *United States* v *Sante Fe*:

> Occupancy necessary to establish aboriginal possession is a question of fact. If it were established as a fact that the land in question were, or were included in the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes) then the Walapais had "Indian title". . .[110]

The Court thereby recognized that the concept of aboriginal occupancy necessarily entailed the exclusion of "lands wandered over by many tribes" and the identification of an ascertainable group in occupancy. The requirements were recently restated in *United States* v *Pueblo of San Ildefonso*:

> In order for an Indian tribe to establish ownership of land by so-called Indian title, it must show that it used and occupied the land to the exclusion of other Indian groups. The ownership of land by a tribe is called in question where the historical record of the region indicates that it was inhabited, controlled or wandered over by many tribes or groups.[111]

In *Confederation of Tribes of Warm Springs Reservation of Oregon* v *United States*[112] the Court of Claims declared that lands might only be considered to be "wandered over by many tribes" where there was evidence that the various bands asserting aboriginal occupancy not only did not constitute a single political unit, but also that they were not an identifiable group or tribe in an ethnic or cultural sense. Inter alia, the Court considered the linguistic stock of the bands in question, the fact that there "was no feeling of strangeness among the sub-tribes, be it in their culinary

108 (1832) 6 Peters 515, 8 L.Ed 483 (S.C)
109. Id. at 544, at 495.
110 Supra n. 20, at 345.
111. (1975) 513 F.2d 1383, 41 A.L.R. Fed. 405, at 422
112. (1966) 177 Ct. Cl. 184. Also see Upper Chehalis Tribe v United States (1957) 140 Ct. Cl. 192, 155 F. Supp 226.

habits or their religious practices", their common allegiances, privileges and duties, that sub-tribe members had complete freedom in the economic utilization of any part of the collectively-claimed territory, that other tribes treated the various Indians collectively and not as members of sub-tribes, that experts had classified them as one tribe, that they were strongly united, except for political unity, and that they were culturally unified. Similarly in *Turtle Mountain Band* v *United States*[113] a cluster of bands denominated by the Court as "the American Pembina Chippewa group (full and mixed blood) including the sub-groups of the Turtle Mountain Band, the Pembian Band and the Little Shell Bank" was held to have shown aboriginal title to an area of approximately ten million acres. The regard for consideration of social, cultural and political facts were affirmed in that case by the inclusion of mixed blood members in the group on that basis.

The identification of a group with social, cultural or political elements in common has been described by the Court as "a method of analysis of exclusivity".[114] Only such a group may establish aboriginal occupancy.[115] As the cases indicate such a group may consist in a tribe, a cluster of bands, or some other identifiable group.

The United States Courts have not required that aboriginal occupancy extend only to areas where settlement[116] or intensive cultivation has taken place. As Mr Justice Baldwin declared in *Mitchel* v *United States*: "Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites . . .".[117]

Nor need the actual exclusion of other groups be shown if sole occupancy is established. In *Tinglit and Haida Indians of Alaska* v *United States*[118] the claimants established that they had used the claimed area for hunting, trapping and foraging and no other native people had pressed to move into the area. The Court concluded that the claimants "make intensive and exclusive use of their territory to the exclusion of other Indians" so as to establish Indian title to the land[119] . With respect to land not actually used for any productive purpose the Court observed that

113 (1976) 490 F.2d 935 (Ct. Cl).

114. Strong v. United States (1975) 518 F.2d 556, 561 (Ct. Cl).

115. Such a requirement does not require "the complete merger of two or more tribes" as a "prerequisite for claiming joint aboriginal title" and it is not necessary that "two or more tribes claiming joint aboriginal title must invariably show that have become for all purposes, a 'single land-owning entity'", United States v. Pueblo of San Ildefonso, supra n.111.

116. Spokane Tribe of Indians v. United States (1963) 163 Ct Cl. 58.

117. (1835) 9 Peters 711, at 746, see also United States v. Seminole Indians (1967) 180 Ct.Cl. 375.

118 (1959) 147 Ct.Cl. 315, 177 F.Supp 452.

119 Id. at 457.

"where the Indians have proved that they have used and occupied a definable area of land, the barren, inaccessible or useless areas encompassed within such overall tract and controlled and dominated by the owners of that surrounding land, as well as the barren mountain peaks recognized by all as the border of the area of land, have not been eliminated from the area of total ownership"[120] . It has been suggested that "general boundary lines of the occupied territory" should be shown but "absolute accuracy of location and extent of occupancy is not essential", and bearing in mind that it is "extremely difficult to establish facts after the lapse of time involved in matters of Indian litigation", a "common sense approach" should be taken.[121]

The Canadian decisions have developed similar criteria to those found in the United States jurisprudence. In the manner of Chief Justice Marshall in *Worcester*,[122] Judson J. declared in *Calder*:

> [T]he fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means . . .[123]

The reference to occupation by the indigenous people "organized in societies" is paralleled in the remarks of Hall J who said that "the Nishgas in fact are and were from time immemorial a *distinctive cultural entity* with concepts of ownership indigenous to their culture and capable of articulation under the common law"[124]

The plaintiffs were representatives of the Nishga tribe. The Nishga tribe was composed of four bands and had inhabited since time immemorial the territory in question, approximately 1,000 square miles, where they had hunted, fished and roamed.[125] The Supreme Court did not demand proof of exclusive possession beyond the fact of occupancy by the tribe.[126]

The criteria suggested by the Supreme Court in *Calder* have been followed in subsequent Canadian decisions. In *Re Paulette and Registrar of Titles*[127] .representatives of sixteen Indian bands sought to file a caveat with respect to 400,000 square miles of the North West Territory "by

120. Id at 460.
121. Upper Chehalis Tribe v. United States (1957) 140 Ct Cl.192, 155 F.Supp. 226, 228-229, and Snake or Piute Indians v. United States 125 Ct.Cl 241, 112 F Supp 543.
122 Supra n.17.
123. Supra n. 45, at 156.
124 Id. at 190, (emphasis added).
125. Id at 148-149.
126. Id. at 179-190 per Hall J ; 156 per Judson J.
127 (1974) 42 D.L.R. (3d) 8.

virtue of Aboriginal rights". All bands spoke variations in the Athapascan language or dialect. Each band comprised members of one of the groups described as Chippewayan, Dogrib, Slavey, Mountain, Bear Lake, Hare and Loucheux. The Court relied on the evidence that "the significant divisions" were represented by the bands. Morrow J. observed:

> The regional band is normally expected to be found living in relation to a particular resource area, which area may encompass drainage areas, and this regional band would know at what point on the perimeter of this area Indians of a different regional group might be encountered.
> While each regional band feels free to enter into another's region, and there did not appear to be any concept of trespass, such intrusions were always looked upon and treated as temporary."[128]

The Court relied on anthropological evidence that definable territories could be ascribed to the bands:

> [A]ny really knowledgeable Indian could tell you by the thousands of place names which places were in his territory, or in his group, and which ones were in the range of the neighbouring group. So, adult, informed persons would know by this welter of knowledge of the land. So, "we go here, we go there, we go some other place", and "that is where the so-and-so people go". "That is their country". And by that of course, there are territories recognized by the people themselves.[129]

The Court recited evidence explaining the nature of a 'regional band':

> They are significant because a regional group by defacto or definition exploits in the course of a year a region which contains sufficient resources to sustain it year after year and is also a group of sufficient size to sustain itself generation by generation by substantial inter-marriage with other members of the same group, given incest restrictions and restrictions of other kinds, so that it has, first of all, economic and ecological basis. They are people who, except in times of stress, can survive year after year and generation after generation, season through season, within that zone in which they

128 Id. at 121.
129. Id. at 22-23.

> have stations to which they may move by season, either as a large group or probably as smaller groups . . .[130]

Upon such an array of evidence the Court was able to conclude, in language taken directly from the judgments of the Supreme Court in *Calder*, that

> [t]he area embraced by the caveat has been used and occupied by an indigenous people, Athapascan speaking Indians, from time immemorial, that this land has been occupied by distinct groups of those same Indians, organized in societies and using the land as their forefathers had done for centuries, and that those persons who signed the caveat are chiefs representing the presenT-day descendants of these distinct Indian groups.[131]

Morrow J. went on to conclude that the caveators had established a prima facie case that their aboriginal title to the land had not been extinguished.

In 1979 the criteria were examined and applied in the circumstances of the Inuit (Eskimo) in the Federal Court in *Hamlet of Baker Lake* v *Minister of Indian Affairs and Northern Development*[132]. The plaintiffs consisted in the Hamlet of Baker Lake, the Baker Lake Hunters and Trappers Association and the Inuit Tapirisat of Canada, and individual Inuit who lived, hunted and fished in the area.[133] They asserted aboriginal title over an area including 78,000 square kilometres, "the Baker Lake area", in the eastern half of the North West Territory. No treaty has ever been signed with respect to the area or with the indigenous inhabitants of the region. The plaintiffs sought, inter alia, (a) an injunction restraining the issuance of mining tenements in the area and restraining the defendant mining companies from carrying out mining activities there; (b) a declaration that the lands are "subject to the aboriginal right and title of Inuit residing in or near that area to hunt or fish there; (c) a declaration that until Inuit aboriginal rights are *expressly* abrogated by Parliament, no-one is entitled to deal with the Baker Lake area in a manner inconsistent with Inuit aboriginal rights.

130. Id. at 22
131 Id at 23
132. Supra n. 59
133 Id at 559 The Court did not consider objections to the locus standi of the plaintiff because they were not raised in pleadings, but did observe "had they done so the status of the Trust Taparist of Canada to seek the declaratory relief in a representative capacity . . might well have been established". The Court, in any event, required full compliance with the requirements of proof of aboriginal title relating to occupancy by an appropriate group.

Mahoney J. relied upon the United States and Canadian jurisprudence and decided that, in order to establish an aboriginal title cognizable at common law the plaintiffs had to prove the following elements:

1. That they and their ancestors were members of an organized society.
2. That the organized society occupied the specific territory over which they assert the aboriginal title.
3. That the occupation was to the exclusion of other organized societies.[134]

The Court recited anthropological evidence as to the nature of the societies into which the Inuit were organized. The evidence referred to a "band-level society" amongst the Inuit and the absence of chiefs or states or nations and went on:

> Band level societies, generally, are societies which have quite a low population density. The people are nomadic and they tend to exploit a variety of resources in their areas, and tend to be generalists in terms of economic orientation, unless that's clearly impossible because of the restrictions on resources.
> They tend to be societies which have particular types of economic organization, social organization, and certain types of leadership, certain types of marriage patterns, and so on. We sometimes regard them as being very flexible. One of the reasons for this is that they have problems often of dealing with environments which perhaps from our agricultural basis would be seen to be somewhat marginal. It is not at all necessarily true that they are marginal to the people concerned, but these tend to be areas that geographers would call marginal lands. They don't usually support agriculture.
> The people in question then have a particular type of organization and culture and values which best suit them for living in that type of an environment and exploiting resources which often themselves are nomadic. This is one of the bases in these societies. I think the important thing is that we look for patterns. We are not just concerned to attach ourselves to say, as an anthropologist, one small camp, which might be five, six people, and from that obtain all that information about society which might encompass anything up to three, four hundred people. It may be even more. So, consequently we see the units as being units of a much larger coherent organized

134. Id. at 542.

> society and very much interacting, interdependent, mutually dependent on interaction with other units within the society.
> We can certainly recognize what we call bands, even though units of the bands might be small camps of twenty, thirty people. But, the band is an aggregation of these camps which forms a definite sense of community. This is one of the defining characteristics of a band. The people there. for a number of reasons — common language, dialect, having a common ideology or value system, having commonality in terms of the land they use and a degree of interaction which would be more frequent with people within their bands than people outside their bands — this all constitutes a very coherent society which anthropologists have no problem in identifying any more than the people have a problem knowing where the boundaries are.[135]

It appears that the Inuit of the Baker Lake region constitute a people which have also been termed the Caribou Eskimos.[136] Their manner of organization appears to closely parallel that of the Australian aborigine. Birket-Smith has observed with respect to the Inuit (Eskimo):

> We speak of Eskimo tribes; but in a political sense there are really no tribes. What is meant by this word is merely geographic groups which show a particularly close relationship in culture and language. Their purely geographic nature is also apparent from the very names, almost exactly corresponding to the English '-er'. When in the literature several of these 'tribes' are combined into bigger units such as the Netsilik group, the Copper Eskimos and so on, it corresponds to the fact that the Eskimos *outside* the particular group as a rule regard it as a unit.[137]

The Federal Court concluded that the Caribou Inuit satisfied the requirements of proof as to occupancy by a group demanded by United States and Canadian Jurisprudence:

> The fact is that the aboriginal Inuit had an organized society. It was not a society with very elaborate institutions but it was society organized to exploit the resources available on the barrens and essential to sustain human life there. That was about all they could do:

135. Id. at 536-537
136. Id at 520.
137. K. Birket-Smith, *Eskimos* (1971) 161

> hunt and fish and survive. The aboriginal title asserted here encompasses only the right to hunt and fish as their ancestors did . . . There were obviously great differences between the aboriginal societies of the Indians and the Inuit and decisions expressed in the context of Indian societies must be applied to the Inuit with those differences in mind. The absence of political structures like tribes was an inevitable consequence of the *modus vivendi* dictated by the Inuit's physical environment, the exigencies of survival dictated the sparse, but wide ranging nature of their occupation . . . The nature, extent or degree of the aborigines' physical presence on the land they occupied, required by the law as an essential element of their aboriginal title is to be determined in each case by a subjective test. To the extent human beings were capable of surviving on the barren lands, the Inuit were there; to the extent the barrens lent themselves to human occupation, the Inuit occupied them.[138]

The Court considered that occupation by a 'band-level society', in regard to which the use of the term 'tribe' might be inappropriate, afforded sufficient ground upon which to assert aboriginal title at common law.

The Court required, in accordance with *United States* v *Sante Fe*,[139] that the "occupation of the territory must have been to the exclusion of other organized societies".[140] The Court considered the evidence supported such a finding with respect to all but the South-West corner of the Baker Lake area. In recognizing such exclusive occupation the Court did not seek for instances of actual exclusion of other groups but recognized that as a matter of fact, as dictated by the physical environment, the Inuit were effectively the only group to occupy the area:

> [T]he Inuit appear to have occupied the barren lands without competiton except in the vicinity of the tree line. That, too, was a function of their physical environment. The pressures of other peoples, except from the fringes of the boreal forest, were non-existent and, thus, the Inuit were not confined in their occupation of the barrens in the same way Indian tribes may have confined each other elsewhere on the continent.[141]

138. Supra n 59, at 544-545
139. Supra n.20.
140. Supra n.59, at 544-545.
141. Id. at 544

The South-West corner of the Baker Lakes area was excluded from the Court's finding because the evidence indicated that at the date that England asserted sovereignty over the region, the Chipewayan Indians "wandered over" that area such that "the boundary between Inuit and Indian land traversed the south westerly portion of the Baker Lake area".[142]

In the result Mahoney J. concluded that aboriginal title to the greater part of the Baker Lake area, carrying with it the right freely to move about and hunt and fish over it, "vested at common law in the Inuit".[143]

Canadian jurisprudence may be said to require, quoting from *Re Paulette*,[144] that the "land has been occupied by distinct groups of those same Indians [or other aboriginal people], organized in societies". In *Calder*[145] a tribe of Indians, composed of four bands who lived by "hunting, fishing and roaming" over the land were held to have sufficiently occupied the land to establish aboriginal title at common law. In Re *Paulette*[146] and *Hamlet of Baker Lake*[147] occupation by "hunting fishing and roaming" by distinct clusters of camps of indigenous people, which might not readily be described as 'tribes' was considered to satisfy the criteria of the common law. The results and analyses are particularly pertinent to any consideration of a claim to aboriginal title in Australia.

(b) Proof of Occupancy by a Group in Australia

It is necessary to examine the anthropological literature to consider what group, if any, amongst Australian aborigines can be said to be in occupation of the land as a "distinct group" as demanded by common law. Any such examination affords, of course, merely a tentative indication. The evidence presented in a particular case will determine if the plaintiffs have satisfied the requirements of the common law. A major difficulty in the examination of the anthropological literature is the marked absence of regard for the facts needed to establish such a case. Anthropologists have focused upon relationships between aborigines and the smallest groups of local organization. Regard for the 'tribal' configuration or cluster of hunting and foraging groups has been downplayed. Another aspect of the difficulty of determining the facts of occupancy is the anthropological concern with ownership and rights and duties relating to land in aboriginal traditional law. The conclusions of anthropologists

142. Id. at 546.
143. Id. at 547.
144. Supra n.127 at 23.
145. Supra n.45.
146. Supra n.127.
147. Supra n.59.

as to "ownership" of land in aboriginal *traditional* law are essentially irrelevant.[148] The application of the common law demands the *facts* of occupancy and social, cultural, linguistic and political traits, not a statement of aboriginal traditional law.

Unfortunately it was the opinions of anthropologists as to ownership of land in aboriginal traditional law that were the foundation of the plaintiffs' case in *Milirrpum*.[149] The statement of claim asserted that "pursuant to the laws and customs of the aboriginal native inhabitants of the Northern Territory, each clan holds certain communal lands. The interest of each member of the clan in such communal lands is a proprietary interest and is a joint interest with each other member of the clan".

Professors Stammer and Berndt gave evidence for the plaintiffs in support of the statement of claim. They asserted that ownership of the land was vested in the clan and was based fundamentally on a spiritual relationship to the land. Today Berndt prefers to use the term "local descent group" in describing the "land owning" group in traditional law and describes it as follows:

> It does not refer simply to a 'group of people living in the same locality', a 'co-resident group' — although this may well be the case too. Rather, it points to a group of people bound to the same locality by ties of a more than transient kind — ties of descent and kinship, as well as of religion. In other words, its members are united by a common patrilineal descent, share a given site or constellation of sites, sacred or otherwise, and can trace their relationship genealogically. Its territory is defined not so much by boundaries marking it off from similar units, but by the actual sites which it claims. Ideally, this is inalienable; but members of other local descent groups are not debarred from entry, or from hunting game or collecting food within its precincts, although they may be denied access to a site where sacred objects are stored. This is the land-holding group linked by special spiritual and ritual ties . . .[150]

Blackburn J. concluded upon the aboriginal and anthropological evidence that each part of the subject land could be "attributed" and was

148 As in large part is the debate between Radcliffe-Browne, who would have ascribed ownership in traditional law to the 'horde' and those such as Hiatt and Berndt who would ascribe ownership to the 'local descent group'. The confusion in meaning of terms as used by anthropologists is exposed and discussed in K. Maddock, 'Anthropology, Law and the Definition of Australian Aboriginal Rights to Land' (1980), Institue of Folk Law, Faculty of Law, Catholic University, Nymegan, Netherlands

149. Supra n.2.

150. R. Berndt and C. Berndt, *World of First Australians* (1977) 40.

spiritually significant to a particular clan.[151] The learned judge recited Professor Berndt's "expressed agreement" with the following passage from a monograph by Warner entitled *Black Civilization*:

> The clan's so-called 'ownership' of the land has little of the economic about it. Friendly peoples wander over the food areas of others, and if their area happens to be poor in food production, possibly spend more of their lives on the territory of other clans than on their own. Exclusive use of the group's territory by the group is not a part of the Murngin idea of land 'ownership'.[152]

Upon such evidence a 'local descent group' or 'clan' can *not* be said to be in occupation of land in accord with the dictates of the common law. As Blackburn J. observed:

> It makes little sense to say that the clan has the right to use or enjoy the land. Its members have a right, and so do members of other clans, to use and enjoy the land of their own clan and other land also. The greatest extent to which it is true that the clan as such has the right to use and enjoy the clan territory is that the clan may, in a sense in which other clans may not (save with permission or under special rules), perform ritual ceremonies on the land . . .[153]

The conclusion appears consistent with the preponderance of anthropological literature. It may be that the group in occupation of the land coincides with the membership of the clan, but such would not be regarded by the common law as much more than coincidence. The concern of the common law is with the group in occupation, not with other social groups or relationships. The plaintiffs in *Milirrpum* did assert that a band was the economic arm of the clan but Blackburn J. found on the evidence that no such relationship was established[154] and did not consider whether the occupancy by the band or any other group might have met common law requirements.

The rejection of the 'local descent group' or 'clan' as a 'distinct group' in aboriginal occupancy of the land does not, of course, dictate that spiritual considerations are irrelevant. They may well be significant in determining if a group, sufficiently distinctive in social, cultural, linguistic, political or geographical traits, may be said to be in occupation of the

151 Supra n.2, at 171,180
152. Id. at 170.
153. Id at 272.
154. Id. at 168-171, 270.

land. For instance, it has been observed that the "horde (band) is the land occupying group" and generally moves "across the country, hunting and foraging traditionally within an undefined radius of the respective cult sites."[155] Such a regard for cult sites in the horde would indicate a degree of geographical distinctiveness, a factor to be considered amongst the complex of factors examined by the common law.

It remains to consider if other groupings of Australian aborigines may be regarded as 'distinct groups' in aboriginal occupation of the land. It almost comes as a shock[156] that Blackburn J. *expressly* left open such a possibility in *Milirrpum*:

> If the relationship of the Rirratjinga and the Gumatj to particular areas of land can not be shown to be some form of proprietary interest, then there is only one meaning left for the phrase "communal native title" in relation to the facts of this case, namely that all those aboriginals, irrespective of clan, who at any time are or were accustomed to be on the subject land for any purpose regarded by them as lawful, are the joint holders of the communal native title in the whole of the subject land. The action could, on this footing, have been brought by one representative plaintiff in respect of the whole of the subject land.[157]

Blackburn J. went no further because "this was certainly not the plaintiffs' case".[158]

A review of the literature suggests that 'tribes' or distinct groups approaching such description, may be identified as having been in aboriginal occupancy of the land. Elkin provides the following description:

> The Aborigines are divided into tribal groups of which there were in 1788 over 500. A tribe is a group of people related by actual or implied genealogy, who occupy and own a definite area of territory and hunt and gather food over it according to rules which control the behaviour or the smaller groups and families within the tribe. The tribal boundaries are usually fairly clearly defined by natural features; sometimes there is a kind of no-man's-land between two tribes, and occasionally it is difficult to know to which tribe certain

155 Supra n.150, at 43

156. A shock because of the curious mystique that has attached in Australian legal, anthropological and lay communities to the decision in Milirrpum. To the foreign observer it is surprising that a decision of a comparatively junior court should have been regarded as so significant as to almost foreclose further legal action.

157. Supra n.2, at 273.

158. Id. at 273.

> territory belongs, for the simple reason that it is of little value or interest, and so no-one cares.[159]

Tindale has observed that the members of tribes "are not strangers. They share a common bond of kinship and claim a common territory."[160] He considered that the tribe was at the "limit of political organization" and was the "largest consistently named and recognized unit known to aborigines". Tindale considered the "tribe" to be the "normally endogamous unit most commonly recognized in Australia generally known as occupying a given territory, speaking mutually intelligible dialects, having a common kinship system and sharing the performance of ceremonial rites of interest to them all."[161] Elkin and Berndt have termed the tribe a "territorial and linguistic group".[162] Meggit clearly regarded the Walbiri as a tribe and as a distinct group possessed of a territory to the exclusion of other aboriginal groups.[163] Tindale recently re-asserted the significance of tribes and tribal boundaries in an examination of the ecological bases of such divisions.[164] Such an examination is, of course, particularly helpful in explaining patterns of occupation of the land. Birdsell affirmed Tindale's conclusion in an analysis of gene frequencies in the Western Desert, concluding that "the Western Desert tribe is a breeding entity with territorial boundaries and contained behavioural patterns."[165]

The preponderance of anthropological literature appears to recognize a unit, usually known as a tribe, as a distinct group occupying a particular territory to the general exclusion of other such groups.

Berndt has suggested that the use of the "term [tribe] is not entirely applicable to any social unit found in the Western Desert".[166] He has described the 'widest functional significant social group' as follows:

> The significance of this wider unit rests primarily on the degree of interaction taking place among its members. Traditionally, those who occupy (not necessarily own) contiguous stretches of country would more probably be found coming together for seasonal meetings, and contacts between them would be stronger than with those further

159 A.P.Elkin, *Australian Aborigines* 4th ed. (1964) 56
160 N.B. Tindale, *Aboriginal Tribes of Australia* (1974) 30
161. Id. at 32
162. Elkin, supra n 159, at 59; Berndt, supra n 163, at 37
163 M J Meggitt, *Desert People* (1962) Ch. IV.
164. Tindale, 'Some Ecological Bases for Australian Tribal Boundaries' in N. Peterson (ed) *Tribes and Boundaries in Australia* (1976)
165 Birdsell, 'Realities and Transformation· the Tribes of the Western Desert of Australia' in Peterson, supra n 164
166 Berndt, 'Concept of the Tribe in Western Desert' in Hogbin and Hiatt (ed.) Readings in Australian and Pacific Anthropology (1966) 53

> away. But this nucleus, by no means fixed since wandering was the norm, would consist of members of different local groups, different hordes and different dialect units.[167]

Berndt considered that such a unit, "formed seasonally by members of a number of different hordes coming together for the purpose of performing certain sacred rites" might be termed a '*society*', "the main criteria being (a) sustained interaction between its members, (b) the possession of broadly common aims, (c) effective and consistent communication between them."[168] It is not clear that the structure of 'societies' as suggested by Berndt entails a rejection of the groupings generally described as 'tribes'. Peterson did not think so and, in reconciling the views, has suggested that the usage of the term 'tribe'

> refers to the fact that between the group formed by members of a band and the population of the whole continent there were one or more levels of regional grouping. Nowhere was the band a social isolate but everywhere was linked in various ways with its neighbors to form a cluster with some sense of collective identity often expressed in terms of possessing a language. Hence Birdsell refers to the tribe as a 'dialectal tribe' and hence also, the close correspondence between Tindale's tribal map and the linguistic map of Australia. In some areas larger regional population (clusters of tribes) appear to have shared a number of distinctive cultural features leading the early ethnographers to refer to nations as well . . .[169]

In 1981, in considering aboriginal land use, Berndt stated that "everyone within a recognized social-territorial range made use of the land within that range."[170] It appears that Berndt, in accordance with anthropological literature generally, would recognize as a 'distinct group' a grouping akin to that which is generally elsewhere called a 'tribe', although it might be termed a "cluster of bands" (Peterson) or a "society" (Berndt), in occupation of the land to the exclusion of other groups.

Berndt has emphasized the role of the band. He has declared that "the horde (band) is the land-occupying group, and the main hunting and food collecting unit."[171] He describes its functions as follows:

167. Id. at 54-55.
168. Id. at 54-55.
169. Peterson, supra n.164, at 1.
170. 'Some Personal Comments on Land Rights', A.I.A.S. Newsletter No. 16 (Sept. 1981) 7-8.
171. Supra n.150, at 43.

It is relatively self-sufficient and on the move for much of the year, either by itself or in conjunction with one or more others. When various seasonal foods, or fresh water supplies are concentrated in a particular area, people are likely to congregate there too. When food and water are more evenly distributed, for instance after widespread rains, people also scatter in small parties to take advantage of what the countryside has to offer. At ceremonial seasons a number of hordes come together."[172]

Berndt uses the expression "land-occupying group" to distinguish the horde from the "land-holding group" (the local descent group). It indicates to Berndt that the group used and sustained themselves from the land as a group — it does not however denote particular use of the land so that the group might be considered in exclusive occupation of the land. Anthropological literature suggests that the occupation of the land by the hordes was generally not to the exclusion of other groups.[173] The hordes would occupy the land in common with other hordes of the same tribe or society. Blackburn J. in *Milirrpum* concluded that "the bands moved freely about the subject land, and that no permission was required for a band to go anywhere".[174] Such a finding suggests that the band or horde could not assert aboriginal title at common law on that case. The conclusion that the anthropologists' perception of the "land occupying group" is not that of the common law is not surprising when it is considered that anthropologists in Australia have yet to address the distinct criteria laid down by the common law.[175] The literature is not decisive in suggesting that bands were generally not in exclusive occupation of an area of land. It may be in a particular case that the evidence suggested a finding that a band was in exclusive occupation of the land. Meggitt, for instance, describes the Walbiri tribe as consisting of four "communities" possessed of "permanent territorial boundaries" within which residents were "free to wander" to hunt and gather food.[176] It might accordingly be asserted that the "community" rather than the "tribe" was possessed of aboriginal title to the area of land. It appears that such asser-

172. Id. at 43.
173. Berndt, supra n.166 and A.I.A.S. Newsletter No. 16, supra n. 170, at 7-8. And see Maddock, *Australian Aborigines* (1972) 35.
174. Supra n.2, at 181.
175. Cf. role of anthropologists and their evidence in Calder v. Attorney-General of British Columbia (1973) 34 D.L.R. (3d) 145 (S.Ct.Can), Re Paulette (1974) 42 D.L.R. (3d) 8, Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development (1980) 107 D.L.R. (3d) 513. This commentary upon anthropological literature is offered somewhat tentatively, in the expectation that, insofar as the common law criteria are identified, anthropologists can provide more authoratative guidance.
176. Meggitt, supra n.163, at 44-51.

tion would fail if the evidence supported Meggitt's observation that "the residents of all countries also thought of themselves as members of the superordinate Walbiri tribe, which was distinct from all other tribes". In the case of the Walbiri the tribe would seem to be the "cluster group" recognized by the common law concept of aboriginal title.[177]

(c) Conclusion

Proof of aboriginal title at common law demands proof of occupation of land by a distinct aboriginal group. The occupation of the land must be so as to preclude the description of it as "land wandered over by many tribes". It does not entail proof of any concept such as trespass and proof of the mere fact of sole occupancy suffices. The group need not constitute a 'tribe' but must consist of an arrangement of persons which might be regarded as a distinct 'entity', 'society' or group. The distinctiveness of such a group may be ascertained by regard to social, cultural, linguistic, political or geographical traits. Anthropological literature suggests that a 'tribe' of aborigines, or the group generally described as such, may satisfy the requirements of proof of aboriginal title at common law. Tindale's maps and volume upon the "Aboriginal Tribes in Australia"[178] would be particularly helpful in any claim. The Canadian decisions in *Re Paulette*[179] and *Hamlet of Baker Lake* [180] concerned actions by Indian and Inuit groups whose manner of organization in the occupation and use of land resembled the Australian aborigine. The 'regional bands' found in those cases appear equivalent to the groups which are generally described as 'tribes' in the anthropological literature of the Australian aborigine.

It remains to comment that, of course, the grouping in which aboriginal title vests at common law depends upon the particular facts of the case. It may be that a group larger or smaller than the so-called 'tribe' is that which meets common law criteria. Moreover there is, of course, no objection to an application for a declaration of aboriginal title at common law being brought on behalf of several 'tribes' which constitute a 'social-cultural bloc' as in *Hamlet of Baker Lake* which was brought on behalf of the Caribou Inuit.

177. Interestingly the same conclusion was arrived at by the Walbiri themselves in making a joint claim before the Aboriginal Land Commissioner: Claim by Walpiri and Katangarurru-Kurintji Aug. 4, 1978 para. 22-23. The Commissioner acted upon such joint claim and recommended vesting the land in only two land trusts, two being recommended rather than one only for reasons of administrative efficiency (paras. 23, 240)

178 Tindale, supra n. 160.

179 Supra n.127.

180. Supra n 59

2. Aboriginal Occupancy 'for a long time'.

The nature of the aboriginal occupancy which must be shown in order to establish aboriginal title at common law indicates the nature of the relationship of the indigenous people to the land the common law is concerned to protect.

(a) United States

The United States Courts have required proof of occupancy in "accordance with the way of life, habits, customs and usages of the Indians who are its users and occupiers".[181] As Mr Justice Baldwin observed in *Mitchel* v *United States*[182], "Indian possession or occupation was considered with reference to their habits and modes of life."

The occupancy must have been established "for a long time".[183] Proof of occupancy from "time immemorial" has not been required.[184] It has been judicially recognized "that in the course of years, and especially during the early years of the United States, the use and occupancy of land by Indian tribes changed continuously".[185] As the Court of Claims has explained:

> The status of aboriginal ownership is not accorded to tribes at the very instance they first dominate a particular territory, but only after exclusive use and occupancy 'for a long time . . . The rights of aboriginal title must have time to take root, transforming a conquered province into domestic territory.[186]

The Court has accepted that proof of a period of fifty years of aboriginal occupancy might constitute a sufficiently "long time" to establish aboriginal title.[187] It has also indicated that such title might be established by proof of occupancy after the acquisition of United States sovereignty.[188]

181 Sac and Fox Tribe of Indians v. United States (1967) 179 Ct Cl.8, 383 F.2d 991 at 998, cert den 389 U S 900

182 (1835) 9 Pet 711, 745.

183 Alcea Band of Tillamooks v United States (1945) 59 F Supp 934, 965, 103 Ct Cl 495,557, affirmed (1980) 329 U S. 40.

184. Cf. Chief Justice Marshall in Worcester v State of Georgia (1832) 6 Peters 515, 544, 8 L.Ed 483, 495 who referred to the "rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man".

185 Supra n.181.

186 Sac and Fox Tribe of Indians v United States (1963) 315 F.2d 896, 905, 161 Ct Cl. 19, cert. den 375 U S. 921

187. Id.; United States v. Seminole Indians (1976) 180 Ct. Cl 375 Sac and Fox Tribe, supra n 181.

188. Id.

(b) Canada

In both *Re Paulette*[189] and *Hamlet of Baker Lake*[190] the evidence indicated that "the people have for the most part taken up living in the settlement, going out from there during the hunting, fishing and trapping season".[191] In neither case did the Court consider that the alteration of the mode of life was such as to deny aboriginal occupation of the land. Morrow J. in *Re Paulette* concluded that "the finds of old camp sites up through hostorical times to the present show that the present style or way of life, called the traditional way of life, hunting and fishing has not changed nor the areas and places favoured".[92] . And Mahoney J. in *Hamlet of Baker Lake* described the use of snowmobiles for hunting, trapping and fishing and declared that the change was of "no relevance"[193]

The Canadian jurisprudence, in the absence of the 'hard' cases encountered by the United States Courts, has not evolved clear directions as to the period of occupancy which must be shown. Judson J. in *Calder*[194] referred to the Indians "occupying the land as their forefathers had done for centuries."[195] Hall J. referred to occupation from "time immemorial"[196] . Morrow J. in *Re Paulette*[197] sought to satisfy both references by finding use and occupation "from time immemorial" and the use by the Indians of the land "as their forefathers had done for centuries"[198] . *In Hamlet of Baker Lake* [199] the defendant mining companies sought to deny that occupation had occured for a sufficient period of time to establish aboriginal title.[200] The Court relied on archaeological and historical evidence which indicated that the South-West portion of the area claimed was not in exclusive occupation of the Inuit till the late eighteenth century.[201] Mahoney J. accordingly excluded the area from the declaration which issued because it was "not exclusively occupied by Inuit on the advent of English sovereignty" (1610-1670).[202] Mahoney J. required "that the occupation was an established fact at the time sovereignty was asserted by England".[203]

189 Supra n 127 at 23
190. Supra n 59.
191. Supra n.127, at 4 and supra n 59, at 526-529
192. Id at 17
193. Supra n 59, at 527,544.
194 Supra n 45.
195 Id. at 156.
196 Id. at 190.
197 Supra n.127, at 23.
198. Id
199 Supra n 59
200. Id at 515.
201. Id at 521-524.
202 Id at 546.
203. Id at 524.

Mahoney J. did not indicate what period of occupancy would suffice to render occupation an "established fact". The archaeological and historical evidence before the learned judge indicated exclusive Inuit occupation of the remaining portion of the land.

(c) Australia

The opinion of Blackburn J. in *Milirrpum*[204] as to the period of occupation that must be shown in order to establish aboriginal title, as influenced by the manner in which the plaintiffs put their case, is indicated in the following passage:

> In the statement of claim the phrase "from time immemorial" is used, but perhaps somewhat unhappily; at any rate the technical connotations of that phrase in English had no relevance. It was an essential part of the plaintiffs' case that there had existed, from a time in the indefinite past, and in particular from 1788, not merely the same system of land ownership, but also the ownership by the Rirratjingu and the Gumutj of the very land to which they now respectively lay claim.[205]

In accordance with United States jurisprudence, Blackburn J. required proof of occupation from a "time in the indefinite past" rather than from "time immemorial". The learned judge required such proof "in particular" from the acquisition of English sovereignty, a requirement that concurs with that declared in *Hamlet of Baker Lake*. It is suggested that the requirement is not consistent with the concept of aboriginal title at common law. Aboriginal title is founded upon the facts of aboriginal occupancy as shown at the time it is asserted, not upon the time at which the common law was introduced upon the acquisition of sovereignty. It is suggested that the principles developed in the United States cases allowing the accrual of aboriginal title after the acquisition of sovereignty are to be preferred.

Blackburn J. did not decide what was the effect upon aboriginal title of recent changes occasioned by the establishment of government settlements and missions. Such changes in remote areas of Australia appear similar to those that have been considered in the two cases from the Canadian North, *Re Paulette* and *Hamlet of Baker Lake*. Those cases would suggest that the mere use of modern technology and the establishment of settlements does not deny aboriginal occupancy where the peo-

204. Supra n.2.
205 Id at 152.

ple continue to some extent to to live off the land by hunting, fishing and foraging.

The Extent to which Aboriginal Title at Common Law has been Extinguished or Abandoned in Australia.

It has long been recognised that the propriety or justice of the extinguishment of Aboriginal title, and whether it be done "by treaty" or "by the sword", "is not open to inquiry by the courts".[206] The courts may inquire however, into whether such title has been extinguished and the United States Supreme Court has observed that "an extinguishment cannot be lightly implied "and that a clear and plain indication" of the intent of Congress need be shown.[207] No private individual may extinguish aboriginal title,[208] and a sovereign power may only do so to the extent that such lies within its jurisdiction.[209]

1. United States Jurisprudence

The jurisprudence evolved in the United States has considered several circumstances present in any consideration of extinguishment in Australia. The courts have refused to find extinguishment of aboriginal title merely because lands have been opened up for settlement and made subject to disposition under public lands legislation.[210] In *United States* v. *Pueblo of San Ildefonso*[211] the Court of Claims held that such title was extinguished on a piece-meal basis as third persons entered the lands conveyed to them under the legislation. It was observed that "the process of surveying lands and performing other deeds [under public lands legislation] in anticipation of future white settlement does not itself affect Indian title . . . Nor is the bare expectation that lands will be settled sometime in the future sufficient to deprive Indian dwellers of their aboriginal rights".[212]

206. United States v. Sante Fe 314 U S 339, at 347, 86 L.Ed. 260, at 273-274; 41 *Am Jur.* 2d 'Indians' para 28; Beecher v. Wetherby [1877] 95 U S. 517, at 525, 24 L Ed. 440, at 441
207 United States v. Sante Fe, Supra n.206, at 352-354 See also United States v Ft. Sill Apache 202 Ct. Cl. 134, 480 F 2d 819 (1973); United States v. 5,677.94 acres of land (the Crow Case) 152 F Supp 861 (1957); Nicodemus v. Washington Power 264 F 2d 614 (1959)
208. Buttz v Northern Pacific Railroad (1886) 119 U S 55.
209 A State of the United States may not extinguish aboriginal title, even with respect to State-owned lands. Jurisdiction to extinguish aboriginal title in the United State is vested exclusively in the United States and in particular, in Congress. The exclusive power of Congress was derived by Marshall J in Worcester v Georgia 31 U.S. 6 Pet 515 (1832) from Article I s 8 of Constitution: "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes". See also Lipan Apache v United States 180 Ct. Cl. 487 (1967), Oneida Indian Nation v. County of Oneida 414 U S 661, 39 L Ed 2d 73 (1974), Narangarsett Tribe v Southern Rohde Island 418 F.Supp. 798, at 807 (1976).
210. Gila River v. United States 204 Ct Cl. 137, 494 F. 2d 1386 (1974), United States v. Pueblo of San Ildenfonso 206 Ct. Cl. 649, 513 F. 2d 1383, 41 A.L.R. Fed. 405 (1975)
211 Supra n.210.
212. Id. at 415.

Actual European settlement under public lands legislation may extinguish aboriginal title to adjacent areas depending upon the degree of incursion and the disruption of the aboriginal way of life.[213] In *Plamondon exrel Cowlitz Tribe* v. *United States*[214] title was held extinguished where the white settlers came greatly to outnumber the Indians and the "Indians intermingled with the whites and no longer maintained an independent existence" as formerly.[215] Grants of title under public lands legislation, of course, operate to extinguish aboriginal title.[216] Similarly the placement of lands in a "grazing district",[217] or in a forest reserve "for the purpose of conservation and recreation" and its "continuous use" thereafter for such purposes have been held to extinguish aboriginal title.[218] Such instances of extinguishment are suggested to indicate the limited operation of the reference in obiter dicta in *United States* v. *Sante Fe*[219] to extinguishment "by the exercise of complete dominion adverse to the right of occupancy". A "clear and plain indication" of intent to extinguish must entail an intention inconsistent with a continued right of occupancy.

Authorized forcible expulsion from lands subject to aboriginal title is effective to extinguish such title.[220] The Australian States may claim the benefit of such rule where the forcible removal of aborigines expelled them from their traditional lands. An important element of Australian aboriginal policy entailed the creation of reserves. United States jurisprudence has recently affirmed that "there is no Procustean rule that the creation of a reservation rigidly stamps out aboriginal rights"[221] with respect to other lands. Extinguishment was denied in *Gila River* v. *United States*[222] where the creation of the reservation was considered not to be intended to cut off "the Indians from the additional lands used for hunting, foraging and grazing". The acceptance of a reserve by the Indians as a quid pro quo for giving up claims to other lands has been held to extinguish aboriginal title.[223] Such is regarded as the "relinquishment" or "abandonment" of such lands. An analogous method of extinguishing

213. U.S. v. Pueblo of San Ildenfonso, supra n.210; Plamandon ex rel Cowlitz Tribe v. United States 199 Ct. Cl. 523, 467 F. 2d 935 (1972).
214. Id
215. Id. at 937.
216. Homestead grants in Marsh v Brooks, 55 U.S. 513 (1853), also United States v. Atlantic Richfield 435 F.Supp. 1009, at 1020 (1977)
217. United States v. Pueblo of San Ildenfonso, supra n.210.
218 Id.; see also United States v. Gemmill 535 F 2d 1145, at 1149 (1976).
219. Supra n.206, at 347.
220 United States v. Gemmill, supra n.218; Cf United States v. Sante Fe, supra n.206, at 355.
221. Gila River v. United States, Supra n.210; also United States v. Sante Fe, supra n.206, at 353.
222. Id. at 1390, 144.
223. United States v.Sante Fe, supra n.206; Turtle Mountain Band of Chipperwas v. United States 490 F. 2d 935, at 946. (Ct. Cl); Buttz v. Northern Pacific Railroad (1886) 119 U.S. 55.

aboriginal title consists in the voluntary cession of lands by treaty or agreement. It was recently observed that "a formal act of cession by a tribe, by treaty or otherwise, generates to determine the Indian title, and is the usual method in which such rights have been extinguished."[224]

2. Canadian Jurisprudence

The Canadian judiciary have sought to employ the critera afforded by the United States jurisprudence. In *Calder* Judson J. (Martland and Ritchie, JJ. concurring) concluded:

> 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 reserves of land set aside for Indian occupation.[225]

Justice Judson adopted the trial judge's opinion that nineteenth century public lands ordinances "reveal 'a unity of intention' to exercise, and the legislative exercising, of absolute sovereignty over all lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to "aboriginal title, otherwise known as the Indian title . . ."[226]

He supported his analysis by reference to contemporary government correspondence that observed that the Indian "claims have been held to have been fully satisfied by securing to each tribe, as the progress of settlement of the country seemed to require, the use of sufficient tracts of land, for their wants for agricultural and pastoral purpose."[227]

The Supreme Court of Canada in *Calder* split 3-3 upon whether the aboriginal title had been extinguished. Hall J. (Spence and Laskin JJ concurring) adopted[228] the criterion of a "clear and plain indication" of an intention to extinguish first declared in the *United States* v. *Sante Fe.*[229] The learned judge also asserted that "once aboriginal title is established, it is presumed to continue until the contrary is proved"[230] and accordingly "the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent."[231] His authority for the application of

224 Bennet County, South Dakota v. United States 394 F.2d 8
225 Supra n 45, at 167 (emphasis added).
226 Id at 216.
227. Id. at 226
228 Id at 210.
229 Supra n.20
230. Supra n.45, at 210.
231 Id. at 210

the latter proposition in Canada was *Amodu Tijani* v. *Secretary of Nigeria*[232] which is perhaps more properly confined to instances of acquisition of land by cession.

Hall J. concluded that the title of the Nishgas was not extinguished by the public lands ordinances. He observed, inter alia,[233] that infar-as the ordinances declared the fee of the Crown they merely stated "what was the actual situation under the common law and add nothing new or additional to the Crown's paramount title".[234] Hall J. also observed that no specific legislation providing that "Indian title to public lands in the Colony is hereby extinguished" was ever passed.[235]

The result in *Calder* was determined by the seventh member of the Court, Pigeon J., who did not consider the question of Indian title. Pigeon, Judson, Martland and Ritchie JJ. concurred in dismissing the appeal of the plaintiffs, thereby upholding the dismissal of the action, on the ground that the Court lacked jurisdiction in the absence of a fiat of the Lieutenant Governor of the Province.[236]

It was left to Mahoney J. in *Hamlet of Baker Lake*[237] to seek to reconcile the judgements of the Supreme Court of Canada in *Calder*. Upon an examination of the judgements he concluded:

> To say that the necessary result of legislation is adverse to any right of aboriginal occupancy is tantamount to saying that the legislator has expressed a clear and plain intention to extinguish that right of occupancy. Justices Hall and Judson were, I think, in agreement on the Law, if not its application in the particular circumstances.[238]

Mahoney J. rejected the requirement that such legislation must *expressly* extinguish aboriginal title in order to be effective, relying upon the authority of the numerous cases where legislation restricting Indian hunting and fishing rights had been held to be effective without such provision.[239]

The Court initially determined that the aboriginal title of the Inuit was not extinguished by the Hudson's Bay Company Charter of 1670. The Charter granted the company the "sole Trade and Commerce" of Rupert's land and declared the Company to be the "Lordes and Proprietors" of

232. Supra n.63, at 409-410.
233. It was also suggested that the ordinances would have been ultra vires to the extent that they extinguished Indian title
234. Supra n 45, at 214-215
235. Id. at 216.
236. Id. at 226
237. Supra n.59.
238. Id. at 552.
239. Id. at 551.

the territory. The Court considered that Company and governmental practice before, contemporaneously and subsequently suggested that the grant of title was "intended solely to define its ownership of the land in relation to the Crown, not to extinguish the aboriginal title".[240]

The Minister of Indian Affairs and Northern Development argued that the aboriginal title had been extinguished by the public lands legislation enacted from 1872 under which lands might be disposed of for agricultural, timber and mineral purposes. Mahoney J. rejected such argument with respect to the legislation in effect until 1908 as it expressly excluded "territory the Indian title to which shall not at the time, have been extinguished". In 1908 the exclusion was deleted from the legislation. The 1908 Act provided for the grant of lands to 'half-reeds' in satisfaction of claims "arising out of the extinguishment of the Indian title", to squatters upon such extinguishment, and authorized the withdrawal of lands from the operation of Act for the creation of Indian reserves. Mahoney J. considered that the 1908 Act did not extinguish the aboriginal title, rather, it "expressly contemplated extinguishment as a future event".[241]

In 1950 the *Territorial Lands Act* was enacted. It refers to the aboriginal inhabitants of the area only infar as the Governor in Council is empowered to establish aboriginal reserves or make grants to aboriginal people. The Act provides authority in the Governor in Council to dispose of territorial lands and to make regulations for such disposition, including the disposition of mineral rights, timber rights, the creation of reserves for public purposes, and the establishment of land management zones to protect "the ecological balance or physical characteristics of any area". Mahoney J. examined the debates in the Canadian Parliament and observed that "it is an historic fact, of which I am entitled to take judicial notice, that in enacting the Territorial Lands Act Parliament did not expressly direct its attention to the extinguishment of aboriginal title."[242]

The Court rejected the argument that the removal of the earlier express recognition of unextinguished "Indian title" is to be seen as an expression of its intention to extinguish aboriginal title. Observing that "the extinguishment of their aboriginal title was plainly not in Parliament's mind in 1950" and recognizing the harsh physical and climatic nature of the area the Court concluded that

240. Id. at 548. See also Kanatewat et al v. James Bay Development Corp. Nov. 15, 1973, Que S.Ct. (unreported); reversed Nov. 20, 1974, Que C.A. (unreported).
241. Supra n.59, at 553.
242. Id. at 554.

> dispositions of the sort and for the purposes that Parliament might reasonably have contemplated in the barren lands are not necessarily adverse to the aboriginal right of occupancy. Those which might prove adverse cannot reasonably be expected to involve any but an insignificant fraction of the entire territory.[243]

The aboriginal title was accordingly not considered extinguished by the federal legislation providing for the disposition of lands in the area. Judson's analysis of public land legislation in British Columbia in *Calder* was distinguished on the basis that the extinguishment of Indian title was "very much in mind" upon the issuance of such legislation and that it was "explicit in its purpose to open up the territory for settlement". Mahoney J. observed that in 1950 "the barren lands were not, for obvious [physical and climatic] reasons, being opened up for settlement."[244]

Whilst recognizing that aboriginal title had not been extinguished the Court did recognize that the actual disposition of lands in the area under the *Territorial Lands Act* and regulations would operate to abridge and infringe on that aboriginal title.[245] In particular the Court observed that the issuance of mining tenements under the authority was "no doubt" valid and "that, to the extent it does diminish the rights confirmed in an aboriginal title, it prevails".[246]

The evidence indicated that in the late 50's and the 60's the Inuit were encouraged to move to the settlement at Baker Lake. Many did not move but continued to carry on traditional hunting, fishing and trapping activities. Mahoney J. rejected any suggestion that the move to the settlement had terminated the aboriginal title.[247]

In the result the Court accordingly issued a declaration that the lands "are subject to the aboriginal right and title of the Inuit to hunt and fish thereon". The action was otherwise dismissed and an interim injunction issued in 1978 at the instance of the Hamlet of Baker Lake was dissolved.

3. The African cases

It has been already observed that the African cases are of doubtful relevance in so far as they concerned conquered or ceded territories.[248] The Privy Council in *Re Southern Rhodesia*[249] appear, however, to have

243. Id. at 557.
244 Id. at 556-557.
245 Id. at 556,557.
246. Id. at 557
247 Id. at 544.
248. A conclusion shared by Blackburn J. in Milirrpum, supra n.2, at 253.
249 Supra n.104.

considered a doctrine analogous to the extinguishment of aboriginal title in a settled territory, and the judgement has in subsequent cases been referred to on that basis.[250] In the instant case Orders in Council were promulgated in 1894 and 1898 authorising the British South Africa Company to administer territory acquired by conquest and to dispose of the lands on behalf of the Crown. The Board observed with respect to the assertion of the "private" native rights which existed prior to the conquest that

> the maintenance of their rights was fatally inconsistent with white settlement of the country, and yet white settlement was the object of the whole forward movement, pioneered by the company and controlled by the Crown, and that object was successfully accomplished, with the result that the aboriginal system gave place to another prescribed by the Order in Council. This fact makes further inquiry into the nature of the native rights unnecessary. If they were not in the nature of private rights, they were at the disposal of the Crown when Lobengula fled and his dominions were conquered; if they were, any actual disposition of them by the Crown upon a conquest, whether immediately in 1894 or four years later, would suffice to extinguish them as manifesting an intention expressly to exercise the right to do so.[251]

The judgement of the Board suggests that "actual disposition" of the lands by the Crown to the British South Africa Company effected the extinguishment of the pre-existing native rights. Upon such interpretation the judgement is consistent with United States jurisprudence, and the judgements of Hall J. in *Calder* and Mahoney J. in *Hamlet of Baker Lake*, which have suggested a general reluctance to regard public lands legislation as effective to extinguish aboriginal title and have required "actual disposition" of lands under recent legislation in order to find extinguishment of aboriginal title.

To the extent that the African cases are relevant to the consideration of the extinguishment of aboriginal title it is proper to refer to *Amodu Tijani* v. *Southern Nigeria*.[252] In that case Viscount Haldane declared that "[t]he original native right was a communal right, and it must be presumed to have continued to exist unless the contrary is established by the context or circumstances."[253] This dictum is in accord with an analysis

250 Milırrpum, supra n.2, at 253; Calder, supra n.45, at 161 per Judson J.
251. Supra n.104, at 234.
252. Supra n.63; referred to by Hall J. in Calder, supra n.45, at 208.
253. [1921] 2 A.C. 399, 410.

which recognizes a reluctance to regard aboriginal title as extinguished by general words of an instrument or legislation.

4. Australia

In Australia "the Constitution Acts of the States grant to their legislatures general legislative power".[254] Section 107 of the Commonwealth of Australia *Constitution Act* "preserves the legislative competence of State Parliaments in respect of any topic that is not exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliaments of the State".[255] Since the 1967 constitutional amendment the Parliament of the Commonwealth has been empowered to make laws with respect to "the people of any race for whom it is deemed necessary to make special laws" including aborigines.[256] Unlike in the United States and Canada concurrent jurisdiction resides in the States and the federal legislature with respect to the indigenous inhabitants. The States of Australia have powers which could be used to extinguish aboriginal title. The Commonwealth may, however, act to preclude State extinguishment of aboriginal title by virtue of the doctrine of Commonwealth paramountcy.[257] It is suggested, for example, that it would be properly within Commonwealth jurisdiction to enact legislation restraining any disposition of Crown lands in a State without Commonwealth concurrence until the aboriginal title thereto had been extinguished by agreement with the aboriginal inhabitants. No such legislation has, of course, been enacted. The potential for the exercise of the Commonwealth power adds increased significance to the determination of the area of land in Australia with respect to which aboriginal title may still be said to be extant.

United States and Canadian jurisprudence suggest criteria which are supported by the Privy Council consideration of African circumstances, which are applicable in Australia. The criteria demand that extinguishment be "not lightly implied" and consist in a "clear and plain indication" of the intent to extinguish or "the exercise of complete dominion adverse to the right of occupancy".

There is no legislation in Australia which could be said to have *expressly* extinguished aboriginal title. Accordingly legislation must be examined to determine if the appropriate intent can be implied.

It is not considered possible to maintain that the traditional forms of "native welfare" legislation in Australia of themselves extinguished

254. R.D Lumb. *Constitutions of the Australian States* (1963) at 76 and provisions cited therein.
255. R v. Phillips (1970) 44 A.L.J.R. 497, 505.
256. Constitution Act, s.51 (xxvi)
257. Id. at s.109.

aboriginal title.[258] As Blackburn J. stated, in *Milirrpum* the legislation did "not provide for the recognition of any communal title to land",[259] but nor did it provide for the extinguishment of such title. The legislation in all the States and the Territory embraced a policy of segregation and protection, to be achieved by the creation of reserves and the control of aboriginals thereon, and the provision of welfare and education. Aborigines continued, however, to occupy and use their traditional lands consistently with the legislation. United States jurisprudence has established that the mere creation of reserves is not enough to extinguish aboriginal title elsewhere especially where, as in many areas of Australia, it was not intended to deny the aborigines the use of their traditional lands for hunting and foraging.[260]

The creation of very large reserves in the more remote regions of Australia might be suggested to have extinguished the Aboriginal title, in adjacent areas. But a better explanation is that the creation of such reserves merely affirmed and protected the aboriginal title. It is suggested that the reasoning of the United States jurisprudence and of Hall J. in *Calder* is to be preferred to the explanation of Blackburn J. in *Milirrpum* that "[t]he creation of aboriginal reserves . . . implies the negation of communal native title, for they are set up at the will of the Government and in such places as the Government chooses".[261]

The doctrine of aboriginal title at common law has never supposed that such title could resist extinguishment "at the will of the Government". It is difficult to perceive how the mere absence of agreement by the aborigines to the creation of reserves entails the denial of aboriginal title by such creation. In appropriate circumstances the creation of reserves may entail the extinguishment of aboriginal title in adjacent areas, but such generally depends upon the agreement of the aborigines to cede title to such lands rather than the absence of agreement. Such is not, of course, to deny the extinguishment of aboriginal title where aborigines were forcibly expelled from their traditional lands and confined in reserves elsewhere without access to their traditional lands.

The creation of reserves was accompanied in some cases by the establishment of missions and government settlements. In *Milirrpum* a mission had been established in 1935 and thereafter according to Blackburn J. the aborigines lived off the land "for shorter periods, by way of change or recreation, rather than permanently".[262] The plaintiffs

258. No such legislation was enacted in Tasmania.
259 Supra n.2, at 259
260 Supra n.221, especially the Gila River Case.
261. Supra n.2, at 255.
262. Id. at 152.

asserted that aboriginal title continued in effect and the defendants did not challenge such argument. United States jurisprudence indicates that 'abandonment' or 'relinquishment' of aboriginal title to lands will not be found in such circumstances. Such conclusion is in accord with the result in *Hamlet of Baker Lake*[263] where similar circumstances to those prevailing amongst aborigines in Australia were under consideration. The judgements of Hall J. in *Calder* and Morrow J. in *Paulette* support such analysis.

In recent years legislation has been enacted which purported to pertain to "aboriginal land rights". In New South Wales,[264] Victoria[265] South Australia,[266] and Tasmania[267] legislation has provided a mechanism for the granting of title to aboriginal reserves to aboriginal groups. The legislation does not, however, confer a protected status upon the reserves very different from that already prevailing in the United States and Canada and accordingly no different result from that suggested above is demanded. The conferment of such protection cannot be said to operate to *extinguish* aboriginal title on *other* lands in the States. The grant of title pursuant to the legislation is, of course, effective to extinguish aboriginal title with respect to the land so granted. In Queensland[268] and Western Australia[269] the legislation with respect to reserve lands has to date undergone minimal substantive changes. In both States, title to reserve lands is in the Corwn of Minister of the Crown, and administration, and disposition of such lands is under Ministerial control. Any study of the powers of the Aboriginal Lands Trust under the *Aboriginal Affairs Planning Authority Act*[270] reveals them to be largely illusory. Such legislation, being little different from its precursors with respect to aboriginal reserves, cannot be said to extinguish aboriginal title to lands in the State. A different result may be dictated by the *Aboriginal Land Rights (Northern Territory) Act* 1976[271] and the *Pitjantjatjara Land Rights Act* 1981.[272] The Act pertaining to the Northern Territory provided for grants of title to aboriginal groups of reserve lands, and also of unalienated Crown lands successfully claimed before an Aboriginal Land Commissioner. It is suggested that the Act extinguished aboriginal title in the Northern Territory. The mechanism provided for claiming traditional lands before the

263 Supra n.59, at 544
264. Aborigines Amendment Act 1973 (Act No 35) (N S W).
265 Aboriginal Lands Act 1970 (Act No. 8044) (Vic)
266 Aboriginal Land Trust Act 1966 (Act No 87) (S A.)
267 Cape Barren Island Reserve Acts 1912 (Act No. 16) 1945 No 14 (Tas).
268. Aborigines Act 1971 (Act No 59) (Qld).
269 Aboriginal Affairs Planning Authority Act 1972 (Act No 24) (W.A)
270. Id
271 Act No 191 of 1976 (Cth).
272. Act No 20 of 1981 (S.A.)

Aboriginal Land Commissioner must be considered to have been intended to supplant proceedings at common law. The *Pitjantjatjara Land Rights Act* represents a different method of extinguishment of aboriginal title. It followed upon the first instance in Australia of an agreement by aborigines to give up claims to traditional lands in return for the grant of title to other lands.

The above analysis of the current legislation governing aboriginal lands and reserves in Australia does not determine if aboriginal title is extant on aboriginal reserves in Queensland and Western Australia. In every other State and Territory such title on aboriginal reserves has been extinguished as indicated above. It is suggested that aboriginal title is extant on reserve lands in Queensland and Western Australia and the governing legislation affirms such conclusions. The *Aborigines Act*[273] of Queensland defines a 'reserve' as "any land reserved and set apart by the Governor in Council for the benefit of Aborigines under the provision of the law relating to Crown lands".

The *Aboriginal Affairs Planning Authority Act*[274] of Western Australia is to like effect. In both States aboriginal reserves are accordingly expressly reserved for the use or benefit of aborigines. The management and control of such lands by the Crown does not abridge the right of occupancy under aboriginal title of the traditional inhabitants. As the Privy Council declared with respect to similar legislation in Quebec:

> While the language of the statute of 1850 undoubtedly imparts a legislative acknowledgement of a right inherent in the Indians to enjoy the lands appropriated to their use under the superintendence and management of the Commissioner of Indian Lands, their Lordships thank the contention of the Province to be well-founded to this extent, that the right recognized by the statute is a unufructuary right only and a personal right in the sense that it is in its nature inalienable except by surrender to the Crown.[275]

It is to be noted that the significance of the assertion of aboriginal title at common law upon reserves in Queensland and Western Australia is reduced by the possibility of asserting an analogous statutory interest under the legislation of these States.

A significant obstacle to any assertion of extent aboriginal title in Australia consists in the suggestion that the legislation regulating disposi-

273 Act No. 59 of 1971 (Qld).
274 Act No. 24 of 1972 (W A)
275. Attorney-General of Quebec v. Attorney General of Canada [1921] 1 A C. 401, 408 (P.C.).

tion of public lands and the settlement pursuant to such legislation provide a "clear and plain indication" of an intent to extinguish or "the exercise of complete dominion adverse to the right of occupancy". Blackburn J. in *Milirrpum* considered that "the entire history of land policy and legislation in New South Wales and in South Australia, and the corresponding history in the Northern Territory under the Commonwealth is similar in kind to the history which the judges found so cogent in Calder's case".[276] The learned judge appeared to agree with the conclusions of the trial judge and Court of Appeal in *Calder's Case* that such public lands legislation extinguished aboriginal title. The United States' decisions have rejected such analysis. More significantly Hall J. in the Supreme Court of Canada in *Calder* rejected the suggestion that such general legislation could extinguish aboriginal title throughout the jurisdiction. Judson J. only found such extinguishment upon reference to contemporary correspondence which explicitly declared the intent to extinguish. The harshness of the circumstances of many regions of Australia is not dissimilar from those considered in *Hamlet of Baker Lake*, and cannot be considered to have been intended to be opened up for settlement. Moreover, as in the *Baker Lake* case, there is no evidence that the legislatures had aboriginal title in mind in enacting such legislation. In the latter the public lands legislation was not held effective to extinguish the aboriginal title. It is suggested that a similar conclusion is appropriate in Australia. It is, of course, to be observed that similar legislation to that in effect in Australia was in effect throughout the United States and Canada and was not of itself regarded as extinguishing aboriginal title.

It is suggested that the better view, in accord with the United States, Canadian and "African" cases is that aboriginal title is extinguished by authorized[277] grants and settlement, not by the general legislation conferring such authority. Aboriginal title is, of course, extinguished by the grant in fee simple of the land pursuant to public lands legislation. No aboriginal title at common law may accordingly be asserted in much of the urban and Southern areas of Australia. Much of Australian territory consists in pastoral leases. Prima facie such a disposition would operate to extinguish aboriginal title infar as it declared an exclusive use inconsistent with the aboriginal right of occupancy. However, in several States, including South Australia, Western Australia, New South Wales and the Northern Territory, the leases have included a provision such as that referred to in *Milirrpum*:

276. Supra n.2, at 254.

277 A legal point presumed to be largely of historical interest only is that many of the early forcible expulsions and "battles" may well have been unauthorised and accordingly ineffective to extinguish aboriginal title. Subsequently such settlement and title has been sanctioned by dispositions and grants of the land in question.

> Reserving nevertheless and excepting out of the said demise to Her Majesty . . . for and on account of the present Aboriginal Inhabitants of the Province and their descendants . . . full and free right of ingress, egress and regress into upon and over the said Waste Lands of the Crown . . . and in and to the Springs and surface water thereon and to make and erect such wurlies and other dwellings as the said Aboriginal Natives have been heretofore accustomed to make and erect and to take and use for food birds and animals ferae naturae in such manner as they would have been entitled to if this demise had not been made.[278]

The clauses were introduced pursuant to instructions given to Governor Fitzroy of New South Wales in 1848 that pastoral leases were to "give the grantees only an exclusive right of pasturage for their cattle, and of cultivating such land as they may require" but that the leases were not intended "to deprive the natives of their former right to hunt over these Districts or to wander over them in search of subsistence, in the manner to which they have been heretofore accustomed, from the spontaneous produce of the soil, except over land actually cultivated or fenced in for that purpose". It is suggested that pastoral leases which contain such clauses cannot be regarded as extinguishing aboriginal title.

The continuance of aboriginal title upon other areas of land will depend upon the particular circumstances of the disposition and whether it declares a usage or title inconsistent with the aboriginal right of occupancy. The determination of aboriginal title to National Parks and forest reserves will, for example, require an examination of the governing legislation, the subsequent use of such land, and the extent to which aborigines are precluded from maintaining their traditional use of the land. In reaching such determination guidance might properly be sought in consideration of analogous questions in Australia before the Aboriginal Land Commissioner. The Commissioner has determined that land subject to a grazing licence constitutes "unalienated Crown land" for the purposes of the *Aboriginal Land Rights (Northern Territory) Act*.[279] A perhaps even more appropriate analogy is the determination of what constitutes "unoccupied Crown land" before the Canadian courts for the purposes of the *British North America Act* 1930. Indians are guaranteed the right to hunt, fish and trap for food upon such lands. The courts have determined, for example that game reserves[280] are "occupied" and forest reserves

278. Supra n.2, at 260
279 Supra n 271
280 R v. Smith (1935) 64 CCC 131, [1935] 3 D.L.R 703, [1935] 2 W.W.R. 443 (C A.)

[281] "unoccupied Crown lands". Land which has not been alienated by the Crown in any way may, of course, be properly regarded as land subject to aboriginal title.

Mining and petroleum legislation has provided for the issuance of various forms of tenement throughout most areas of Australia. The issuance of such tenements may be regarded as infringing upon aboriginal title. In *Milirrpum* Blackburn J. considered that the *Mining (Gove Peninsular Nabalco Agreement) Ordinance* 1968 operated "as an abrogation pro tanto of whatever the plaintiffs had".[282] The Ordinance provided for the grant of a special mineral lease, and special purpose leases for the establishment of a township and for purposes ancillary to the mining. The leases were duly granted. In *Hamlet of Baker Lake* prospecting permits had been issued in the subject area and exploration undertaken in accordance therewith. Mahoney J. concluded that such tenements were "valid" and, in language similar to that employed by Blackburn J., observed that "to the extent it does diminish the rights comprised in an aboriginal title, it prevails".[283]

> Neither Court considered it necessary to identify the incidents of aboriginal title. It is suggested that exploration mining and petroleum tenements do not generally extinguish aboriginal title as no inconsistency arises between such tenements and aboriginal title. The conferment of the right to conduct exploration activities does not generally preclude the maintenance of traditional forms of sustenance. To the extent the inconsistency arises, as for instance upon the drilling of an exploration well, aboriginal title is abrograted pro tanto. It is suggested that aboriginal title is only *extinguished* upon the grant of mining and petroleum leases which necessarily prevent the continuance of traditional forms of sustenance, for example, as in *Milirrpum*. Petroleum production leases may not present such inconsistency if no exclusive surface rights are conferred and minimal surface disruption is entailed in such production.

Conclusion

This article began with a quotation from a statement by the Former Premier of the State of Western Australia which sought to justify the policy of that State with respect to aboriginal land claims. It indicates the political

281 R. v Strongquill (1953) 105 CCC 262, [1953] 2 D L R 264 18 W W R. (N S) 247 (Sask C A.) and see R. v Sutherland (1981) 113 D L.R. (3d). 374 (S.C)
282 Supra. n 2, at 254, 292
283 Supra n.59, at 557

significance of the acceptance by Australian Courts of the common law notion of aboriginal title. Recognition at common law of original aboriginal title to Australia will require an adjustment to the justification of policy towards aborigines from that of merely "welfare" and "advancement" presently offered. The need for such adjustment may result in an implementation of amended policies providing greater regard for aboriginal land claims. Acceptance by the Australian courts of the common law concept of aboriginal title would also provide a significant symbolic declaration to the aboriginal people. It would indicate the legitimacy of the assertion of rights arising from the original occupation and possession of Australia.

The practical significance of the concept of aboriginal title would depend on proof of unextinguished title. Upon such proof being established the State or Commonwealth might abridge or extinguish the aboriginal title. In the United States and Canada no State or Province can extinguish aboriginal title. It has been considered that the indigenous people should be excluded from the jurisdiction of the local legislature in order that a proper balance of the interests of settlers, farmers and miners and of the indigenous people could be achieved. Such a distribution of jurisdiction has invariably resulted in the surrender of aboriginal title being sought by agreement of the aboriginal people. A recent instance in the United States was the Alaska settlement. More recently the James Bay Agreements were signed with respect to aboriginals in Northern Quebec. In the latter case the Province of Quebec had opposed any dealings with the Indian and Inuit people of the North. It was only upon the assertion of aboriginal title, which the Province was unable to extinguish, that the Province treated with the indigenous people towards the cession of such title to the land. The Federal government in Canada refused to contemplate any process of extinguishment of aboriginal title without the agreement of the indigenous population. The result of the *Calder* decision was the commencement of negotiations towards the cession of aboriginal title in British Columbia. In Australia the States and the Commonwealth have concurrent powers with respect to the aboriginal people. The significance of aboriginal title would be considerably accentuated if the Commonwealth acted to bar extinguishment without the consent of the tribe or group entitled thereto. Absent such restraint upon State powers, a State would still be required to consider the propriety and justice of extinguishment in the context of a judicial declaration of existing rights in the tribe or group. Established regard for property and rights would demand that different issues be addressed than in the past, including the need for agreement and/or compensation.

The consideration of the proof and extinguishment of aboriginal title

in Australia found in this article is necessarily general in nature. The application of the principles discussed will depend upon the facts of the particular case.[284] In recent cases in Canada a caveat was ordered to be filed with respect to 400,000 square miles of land, the subject of a proposed multi-billion dollar oil and gas pipeline,[285] injunctions issued against construction of the world's largest hydro-electric project[286] and against mining activities in the far North,[287] and a declaration issued asserting aboriginal title in a mining exploration area.[288] The injunctions were subsequently dissolved but the rights upon which they and the other orders which issued were founded led to negotiations towards the cession of aboriginal title. It is almost mystifying that similar actions have not been taken in Australia where such conflicts have arisen. It is suggested that the common law of Australia with respect to aboriginal title has been properly described above and would support such action. Aboriginal land claims may be brought at common law.

An incidental aspect of this study is the insight that it affords to the structure of the *Aboriginal Land Rights (Northern Territory) Act.* The Act is founded upon an anthropological concept of "traditional ownership", entailing especial regard for spiritual affiliations and sites.[289] Traditional owners are accorded special controls over the use of the land,[290] special benefits,[291] and any claim before the Aboriginal Land Commissioner must establish traditional ownership and seek to identify such owners.[292] Not all those entitled to the use or occupation of the land are traditional owners. The Act represents the codification of the argument as to 'local descent' group ownership that was rejected in *Milirrpum.* It is not my purpose to criticize such a concept but merelv to indicate the contrast it presents to the nature of rights to land of aboriginal peoples in the United States and Canada. In both those jurisdictions aboriginal lands or reserves are vested for the benefit of entire tribes or groups, and aboriginal con-

284. See Coe v. Commonwealth of Australia (1979) 53 A.L.J.R 403, 408 per Gibbs J.; Kruger and Manuel v The Queen (1978) S C.R 104, 109 (1977) 75 D.L.R (3d) 434, 437
285. Re Paulett (1974) 42 D L.R (3d) appeal allowed on ground that no caveat can be filed against unpatented Crown land (1977) 72 D.L.R (3d) 161
286. Kanatewat v. James Bay Development Corp. Nov. 5, 1973 (Que S.Ct.) appeal allowed on ground that the title extinguished by Hudson Bay Charter Nov. 22 1973 (Que Ca), and (1973) 41 D.L.R. (3d) 1 (S.Ct. Can) and Nov 15, 1974 (Que C.A.) unreported. A term of the James Bay Agreements was that the decision of the Court of Appeal of Quebec not be appealed to the Supreme Court of Canada.
287. Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development (1978) 87 D.L.R. (3d) 3 (F.T.D), injunction dissolved (1980) 107 D.L R. (3d) 513 (F.T D).
288. Hamlet of Baker Lake, supra n.59.
289. Any study of the Aboriginal Land Reports indicates the emphasis upon "spiritual considerations". The use and occupancy of the land has usually been proved so easily it is almost assumed.
290. Supra n 271, at ss.19(5), 48, 68(2).
291. Id. at 35(4).
292. Id. at s.50(i)(a)

trol is vested in the group or its governing body. Such is derived from the common law concept of aboriginal title, which as indicated above, vested title in the larger group or community not in a sub-group of individual traditional owners.

Individual tribe or group members are not accorded special rights except by the decision of the tribe or group as a whole or by virtue of exceptional legislation. Any regard to be accorded "traditional ownership" is determined by the tribe or group, which can accordingly decide to what extent such a concept should be perpetuated. Allowing the group to determine control over and rights in land is obviously more in accord with self-government or self-management than the specification of the internal structure of the group and the powers of the traditional owners. It is a curious result that an Act purporting to further 'aboriginal land rights', should introduce aspects of property rights which the common law and some anthropologists[293] would reject.

293 See Maddock, supra n.148, ch 6

THE PROBLEM OF EXCEPTION CLAUSES : A THEORY OF PERFORMANCE-RELATED RISKS

NYUK CHIN*

Introduction

The treatment of exception clauses is one of the most discussed subjects in Anglo-Australian contract law and continues to pose perplexing problems. The House of Lords in *Photo Production* v. *Securicor Transport* made some significant pronouncements on freedom of contract but failed to provide future courts with any more certain guidance to the problem of excessive exception clauses.[1] The controversy over the 'construction' of exception clauses and their 'juristic function' promises to continue (albeit on a different plane in the light of a more liberal view of freedom of contract).

It is submitted that we have not really come to grips with the crucial problem of exception clauses, namely, when is a performer under a contract liable for his own misperformance notwithstanding the presence of an exception clause *prima facie* exempting him from liability?

The purpose of this article is therefore to address this problem of exception clauses and show how in England and Australia, exception clauses can be sensibly and effectively controlled by a means already available in the common law. For in the cases, most of which involve the 'defunct' doctrine of fundamental breach, the courts have intuitively marked out various types of misperformance, mainly those within the control of the performer, for which liability cannot be excused by the incorporation of an exception clause. In other words even an exception clause does not always imply that a party has necessarily accepted all the risks of a contract, including those of misperformance which the clause attempts to cover. Fuller analysis of the cases shows a differentiated scale of misperformance against which a performer cannot protect himself if they are avoidable or culpable. These indicia of culpability bear only a vague resemblance to notions of moral reprehension or fault in tort law and form a basis for a theory of what will be called risks of avoidable misperformance, or more briefly, 'performance-related' risks.

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1. See e.g. Ogilvie, 'The Reception of Photo Production Ltd. v. Securicor Transport Ltd. in Canada: Nec Tamen Consumebatur' (1982) 27 *McGill L J.* 424.

Before sketching out the theory of performance-related risks, it is proposed to bring the crucial problem of exception clauses into sharper focus. To do so, we shall study a theme of conflict between a 'strict principle' and an 'adjustment principle' that underlies contract law and which defines the problem in a historical perspective. It is also necessary to reconsider in this article Professor Coote's theory of the juristic function of exception clauses. The theory that exception clauses define and limit rights and liabilities is not new. Nor is it now open to dispute. But recently, even the efficacy of legislative responses to exception clauses has been seriously doubted because they have allegedly failed to take into account the juristic function of exception clauses.[2] Thus any attempt to offer a means of dealing with exception clauses must confront Coote's theory. Part II accordingly shows more precisely the role of the juristic function. It will be argued that the importance of the juristic function has been overrated and that at the same time the context in which it has relevance has been inadequately considered.

In the pages that follow, legal history is combined with interpretative analysis to develop the theory of performance-related risks. It has often been necessary to refer to the detailed factual patterns of cases because the familiar elusive linguistic quality of the common law masks significant shifts in the case law. It is not the aim to consider in detail fine factual differences that determine the outcome of marginal cases but to develop a theory which will determine the legal margins of control of exception clauses.

A Theme of Conflict

In Anglo-Australian contract law, early notions of a severe breach developed independently of exception clauses. They were concerned with when a party might terminate or repudiate a contract, the general principle being that one cannot terminate or repudiate a contract except where there is either an express provision to this effect or the aggrieved party is discharged of his obligations since the other's breach of contract 'goes to the root of the contract', or amounts to the breach of an 'essential obligation' or of a 'condition' rather than a 'warranty'. Generally a breach was 'severe' if it resulted in the collapse of a bargain.

At first the aggrieved party was regarded as having assumed all risks unless otherwise specified. Courts kept strictly to the letter of the contract; they took their role to be that of upholding the express contract with total respect for the sanctity of terms. So in the old case of *Chandelor*

2. E.g. Palmer and Yates, 'The Future of the Unfair Contract Terms Act 1977' [1981] *Camb L.J.* 1080; Coote, 'Unfair Contract Terms Act 1977' (1978) 41 *Modern L.Rev.* 312.

v. *Lopus*,[3] caveat emptor was held to apply rigidly; the seller not having warranted his horse to be "good", there "is no cause of action". Similarly in *Paradine* v. *Jane*[4] the parties were left to anticipate and provide for the consequences of every contingency; otherwise they were bound according to the express terms of the contract, the court refusing to fill any gaps. It followed that unforeseen circumstances including *force majeure* which rendered a performance either substantially wanting to the buyer, or impossible, or highly onerous to the performer could not give a right to repudiate.

It was not appreciated that in the time lapse between the formation and the performance of a contract innumerable new circumstances can arise which the parties cannot really anticipate but which may seriously affect the pattern and extent of risks assumed by each party in the contractual relationship. Nor was it seen that while the parties could make a sufficiently 'certain' contract for the purposes of 'forming' or 'making' a bargain, so as to create a 'binding' bilateral relationship between them (if only to cut off the offeror's right to revoke his offer or promise), this did not suffice to answer the question of *what performance* was due from the promisor in the circumstances. To cope with these problems raised by the bilateral contract, the courts needed new devices to adapt a contract in the light of supervening realities. As Street has observed, the bilateral contract is "based solely upon consent" only in the sense that its obligatory force is contractual and is not founded on any other legal duty.[5]

One such regulatory device came with the introduction of the implied term. By means of an implied term, courts could write into a contract terms which the parties had not agreed on and so adjust their exchange positions. As Lord Ellenborough said in *Gardiner* v. *Gray*,[6] a landmark case, a purchaser cannot be supposed to buy goods to lay them on a dunghill. In other words, in spite of the sanctity of terms, the courts now began to recognise that an exchange by bargain could not or should not result in a total failure of consideration: that (putting this a little differently) the buyer must get something for his money.

Another (and for present purposes more important) regulatory device began with the seminal decision in *Boone* v. *Eyre*.[7] Here a buyer was held not entitled to refuse payment of the price for a plantation with a stock

3. (1603) Cro.Jac. 4, 79 E.R. 3.
4. (1647) Aleyn 26, 82 E.R. 897; Connor v. Spence, (1878) 4 V.L.R 243 at 259.
5. As were for example, the early real contract or simple debt before it. *The Foundations of Legal Liability* Vol II,(1966) chap.I-VI.
6. (1815) 4 Camp. 144, at 145, 171 E.R. 46 at 47.
7. (1779) 1 H.Bl. 273n., 2 W.Bl. 1312n., 126 E.R. 160n.

of negroes even though the seller had not fully complied with the express terms of the sale. The latter had already conveyed the estate but could not, contrary to his covenant, make complete title to all the negroes. The covenant was said to be one of minor importance. It went only to 'part' of the consideration: the buyer had received title to all but a few negroes. The misperformance did not disable the seller from his action. For "[if] this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action".[8]

Quite clearly, the court was striving for a reason to disallow the aggrieved buyer the benefit of default by the seller in this partly executed covenant.[9] The covenants, said the court, "are executed in part, and the defendant ought not to keep the estate because the plaintiff has not a title to a few negroes".[10] There was evidently no relation between the importance of the stipulation broken and the amount of benefit a party might have obtained up to the time of the breach. *Boone* v. *Eyre* was primarily concerned with the question of whether a buyer had to pay for a performance even if incomplete. But although the distinction between the whole and part of the consideration in *Boone* v. *Eyre* provided a flexible calculus as to when a buyer was entitled to refuse to perform his own contractual obligations it was not clear how great or small a 'part' had to be.[11]

In *Boone* v. *Eyre* itself the seller's lack of title in the few negroes could be said without particular difficulty to be only a 'part' of the consideration. If the breach might be adequately compensated by damages, Lord Mansfield had suggested, the breach did not go to the "whole of the consideration", hence the buyer could not repudiate, damages being adequate as a remedy. It was henceforth clear that some contractual terms might require less fulfilment than others and might be adjusted. The gravity of the breach relative to the part performed determined the buyer's right to refuse to perform; or, as it came to be generally said, if the seller had performed a "substantial part of the contract" the buyer could only recover damages.[12]

8. Id per Lord Mansfield
9. "[I]f, in the case of Boone v. Eyre, two or three negroes had been accepted, and the equity of redemption not conveyed, we do not apprehend that the plaintiff could have recovered, the whole stipulated price, and left the defendant to recover damages for the non-conveyance of it", per Pollock C.B. in Ellen v. Topp (1851) 6 Exch. 424 at 442, 155 E.R. 609 at 616.
10. Per Ashurst J. whose judgment is not reported but can be gleaned from Campbell v. Jones (1796) 6 T.R. 570, 101 E.R. 708 at 710.
11. In Bastin v. Bidwell (1880-81) 18 C.D. 238, Kay J. thought it was "not a very fortunate use of language to say 'where covenants go to the whole consideration on both sides', but the meaning is very clear "
12 Ellen v. Topp supra n.9 in per Pollock C.B. In Forman v. The Ship "Liddesdale" [1900] A.C. 190, it was said that there must be no material difference in kind between the work, so far as it was executed, and the work contracted for.