A Question of Title: Has the Common Law been Misapplied to Dispossess the Aboriginals?

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For true it is that neither fraud nor might can make a title where there wanteth right.[1]

The colonization of Australia by the British has been legally justified by assumptions which, until recently, were thought by the colonizers to be self-evident. The received view has always been that the Aboriginals were devoid of any form of sovereignty at the time the British Crown decided to annex the territory inhabited by them to its dominions.[2] It was therefore believed to be unnecessary for sovereignty to be acquired from the Aboriginals by conquest or cession. The Crown could ignore their presence and simply annex Australia by settlement, an original mode of acquisition appropriate for unoccupied territories. In *Cooper* v *Stuart*, the leading authority on the issue, Lord Watson put it like this:

> There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class.[3]

Yet Aboriginal people were there at the time, living in stable societies governed by elaborate systems of rules and customs which were 'highly adapted to the country in which [they] led their lives . . . and . . . remarkably free from the vagaries of personal whim or influence.'[4] Though Western European concepts of sovereignty were no doubt unknown to them, they lived in factually self-governing communities which were independent of any foreign power. The assumption of the Crown and courts of English law that the Aboriginals were devoid of sovereignty is rooted in a European view of the world which probably would have been incomprehensible to the Aboriginals. It involves a

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1 Unknown poet quoted anonymously in *Altham's Case* (1610) 8 Co R 150b, 153b; 77 ER 701, 707.

2 Eg, see *R* v *Murrell* (1836) 1 Legge 72, 73.

3 (1889) 14 App Cas 286, 291. See also *Macdonald* v *Levy* (1833) 1 Legge 39, 45; *Milirrpum* v *Nabalco Pty Ltd* (1971) 17 FLR 141, 242–244; *New South Wales* v *Commonwealth of Australia* (1975) 135 CLR 337, 368; *R* v *Wedge* [1976] 1 NSWLR 581, 582–84. For a recent discussion, see Lumb, 'Aboriginal Land Rights: Judicial Approaches in Perspective' (1988) 62 ALJ 273.

4 Blackburn J, in *Milirrpum* v *Nabalco Pty Ltd* (1971) 17 FLR 141, 267 (referring to the Rirratjingu, Gumatj and Djapu clans inhabiting the Gove Peninsula in the Northern Territory). In *Coe* v *Commonwealth of Australia* (1979) 53 ALJR 403, 412, Murphy J (dissenting) said: 'There is a wealth of historical material to support the claim that the aboriginal people . . . had a complex social and political organization [and] that their laws were settled and of great antiquity'.

denial of the existence of a valid Aboriginal perspective, and is thus characteristic of the self-serving ethnocentricity upon which colonialism is based.

Given that the classification of Australia as settled rests on the assumption that the Aboriginals were not sovereign, one can understand efforts which have been made to reclassify Australia as conquered. However, in addition to validating the claim of Aboriginal communities that they were politically autonomous prior to colonization, reclassification has sometimes been seen as a means for advancing the cause of land claims.[5] The view that land claims have a better chance of succeeding in conquered territories is apparently based on the well-established rule of British colonial law that, in conquests, local laws continue until repealed or replaced by the Crown or Parliament, unlike settlements, where English law applies from the moment the Crown acquires sovereignty.[6] In a conquest, pre-existing land rights arising under local law are thus presumed to continue unless seized into the Crown's hands by act of state during the course of the conquest or subsequently extinguished by legislation.[7] However, in a settlement it does not follow from the fact that English law is received automatically that pre-existing land rights do not continue. The reception rule contains an important qualification, namely that English law is received only to the extent that it is applicable to the circumstances of the new colony.[8] One relevant circumstance would be the presence of pre-existing land rights held under a local system of law.[9] Moreover, in England the common law has accommodated real property rights held by virtue of local custom,[10] and English law has been applied to the same effect in settled colonies such as the Gold Coast (now part of Ghana), Sierra Leone,

[5] Eg, see reference to argument of plaintiffs' counsel in *Milirrpum* v *Nabalco Pty Ltd* (1971) 17 FLR 141, 243–4. See also *Coe* v *Commonwealth of Australia* (1979) 53 ALJR 403; D C Hodgson, 'Aboriginal Australians and the World Court I — Sovereignty by Conquest' [1985] NZLJ 33.

[6] See *Blankard* v *Galdy* (1693) Holt KB 341; 90 ER 1089; *PC Memorandum* (1722) 2 P Wms 75; 24 ER 646; *Macdonald* v *Levy* (1833) 1 Legge 39, 45; *Buchanan* v *The Commonwealth* (1913) 16 CLR 315, 333–4.

[7] See *Re Southern Rhodesia* [1919] AC 211, 233; *Amodu Tijani* v *The Secretary, Southern Nigeria* [1921] 2 AC 399, esp 407; *Bakare Ajakaiye* v *Lieutenant-Governor, Southern Provinces* [1929] AC 679; and discussion in K McNeil, *Common Law Aboriginal Title* (Oxford, Clarendon Press, 1989), 161–79.

[8] See *R* v *Farrell* (1831) 1 Legge 5, esp 9–11, 16–20; *Whicker* v *Hume* (1858) 7 HCL 124, at 150–53, 160–61, 166; 11 ER 50, 60–62, 65, 67; *Cooper* v *Stuart* (1889) 14 App Cas 286, 291–292.

[9] In settled parts of Canada, the Supreme Court has recognized the pre-existing rights of the aboriginal peoples based on their occupation and use of their traditional lands: see *Calder* v *A-G of British Columbia* [1973] SCR 313, esp 328, 375–6; *Guerin* v *The Queen* [1984] 2 SCR 335, 376–9; *Roberts* v *Canada* [1989] 1 SCR 322, 340. However, the relationship between these rights and customary law has not been clarified by Canadian courts: see McNeil, supra fn7, 274–89.

[10] Eg, although the common law did not permit freehold interests in land to be left by will, this was permissible by local custom, particularly in boroughs: see Simpson, *A History of the Land Law* (2nd ed, 1986) 138–9. The descent of lands was also subject to the customs of borough English and gavelkind: ibid, 20–21. Moreover, local custom occasionally allows for special rights over land: see *Mercer* v *Denne* [1904] 2 Ch 534, affirmed [1905] 2 Ch 538, where fishermen inhabiting a parish were held to have a customary right to dry their nets on privately-owned lands near the sea.

Pitcairn Island, British New Guinea (now part of Papua New Guinea) and Ocean Island.[11]

So reclassifying Australia as conquered probably would not enhance the cause of land rights claimed on the basis of customary Aboriginal law. If such rights existed they should have continued regardless of whether Australia was conquered or settled.[12] On this point Mr Justice Blackburn's conclusion in *Milirrpum* v *Nabalco Pty Ltd*[13] that customary rights to land in a settlement are unenforceable against the Crown unless recognized by legislative or executive act is unsupported by the weight of authority in other jurisdictions and should not be followed.[14]

But not only would reclassification of Australia not confer any particular advantage on Aboriginal land claimants — it might actually harm them. The reason for this is that even if Aboriginal claimants cannot establish a customary law title,[15] the common law itself should provide them with a title to lands occupied by their ancestors when the Crown acquired sovereignty, a title which probably would not be available if Australia was conquered because the common law would not have been received at that time. This suggestion involves a total rejection of the standard assumption that, at the moment Australia was settled, English law gave the Crown fee simple title to all lands in the territory. This assumption was judicially reaffirmed by Blackburn J in the *Milirrpum* case, where he commented on earlier Australian decisions dealing with the issue of the Crown's original title to land:

> They all affirm the principle, fundamental to the English law of real property, that the Crown is the source of title to all land; that no subject can own land allodially, but only an estate or interest in it which he holds mediately or immediately of the Crown. On the foundation of New South Wales, therefore, and of South Australia, every square inch of territory in the colony became the property of the Crown. All titles, rights, and interests

[11] See K McNeil, supra fn 7, pp 179–91.

[12] Accord Hookey, 'Settlement and Sovereignty', in P Hanks and B Keon-Cohen, (eds) *Aborigines and the Law* (Sydney, George Allen & Unwin, 1984), 1–18.

[13] (1971) 17 FLR 141, 198–262, esp 223, 244.

[14] Scholarly opinion is almost unanimous in its denunciation of Blackburn on this issue: see generally J Hookey, 'The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?' (1972) 5 *FL Rev* 85; Lester and Parker, 'Land Rights: The Australian Aborigines Have Lost a Legal Battle, But . . .' (1973) 11 Alta L Rev 189; B Hocking, 'Does Aboriginal Law Now Run in Australia?' (1979) 10 *FL Rev* 161; Slattery, 'The Land Rights of Indigenous Canadian Peoples' (D Phil thesis, Oxford, 1979), ch 2; Lester, 'The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument' (D Jur thesis, York University, Ontario, 1981), esp pt 4; Bartlett, 'Aboriginal Land Claims at Common Law' (1983) 15 *UWAL Rev* 293; McHugh, 'The Aboriginal Rights of the New Zealand Maori at Common Law' (Ph D thesis, Cambridge, 1987), esp ch 6. Compare L J Priestley, 'Communal Native Title and the Common Law: Further Thoughts on the Gove Land Rights Case' (1974) 6 *FL Rev* 150.

[15] At common law, custom is a matter of fact which cannot be taken account of judicially until proved: see *R* v *Monkey* (1861) 1 W & W (CL) 40, 41; *Angu* v *Attah* (1916) PC Gold Coast 1874–1928 43, 44; *Re Bed of Wanganui River* [1955] NZLR 419, 432. In the *Milirrpum* case the plaintiffs did establish the existence of a customary system of law, but they failed to convince Blackburn J that their customary relationship to the land was proprietary in nature: (1971) 17 FLR 141, 267–74.

> whatever in land which existed thereafter in subjects of the Crown were the direct consequence of some grant from the Crown.[16]

Blackburn J thus seems to have thought that the system of tenures, which was received in Australia along with the rest of the applicable common law at the time of settlement, gave the Crown title to all land, regardless of the Aboriginal presence. In other words, the common law itself dispossessed the Aboriginals. Considering that the Aboriginal people had been living in Australia and using land in their own ways for thousands of years, this is a startling conclusion. It offends common sense and is manifestly unjust. But it is also wrong as a matter of law because, as this article will demonstrate, it involves a misunderstanding of the effect of the application of the tenurial system. Blackburn J nonetheless thought that strong and even binding authorities compelled him to reach this conclusion. It is therefore necessary to start with a re-examination of these authorities.

THE PRE-*MILIRRPUM* AUSTRALIAN AUTHORITIES

The earliest decision referred to by Blackburn J on the issue of the Crown's original title to land in Australia was *The King* v *Steel*,[17] involving an information of intrusion laid in 1834 to recover land in Sydney which the Crown had leased to the defendant's predecessors in title for a term which had expired twenty-seven years before. The jurors returned a verdict for the Crown. No doubt one reason for this was that they had been told by Chief Justice Forbes that the defendant, having derived his title and received possession by lease from the Crown, was estopped in law from denying the Crown's title.[18] But in his address to them, Forbes had also made some sweeping remarks on the Crown's title to land in New South Wales generally:

> By the laws of England, the King, in virtue of his crown, is the possessor of all the unappropriated lands of the Kingdom; and all his subjects are presumed to hold their lands, by original grant from the Crown. The same law applies to this Colony. It is a matter of history that New South Wales was taken possession of, in the name of the King of Great Britain, about fifty-five years ago.... The right of the soil, and of all lands in the Colony, became vested immediately upon its settlement, in His Majesty, in right of his crown, and as the representative of the British Nation.[19]

Forbes CJ thus seems to have regarded possession as the source of the Crown's title to the territory of New South Wales. However, acquisition of title to territory (ie, sovereignty) does not necessarily involve acquisition of title to land.[20] With respect to lands within the colony, Chief Justice Forbes's conclusion that the Crown acquired both possession of, and title to, them

[16] (1971) 17 FLR 141, 245.
[17] (1834) 1 Legge 65.
[18] Id, 69.
[19] Id, 68–9.
[20] See *A-G* v *Nissan* [1970] AC 179, 210–11; Roberts-Wray, *Commonwealth and Colonial Law* (1966), 99, 625–36.

appears to have been based on the assumption that they were unappropriated when the colony was settled. In one sense, the word 'unappropriated' means unpossessed.[21] This raises the question: If Aboriginals had been in actual possession (ie, occupation) of lands in the territory at the time of settlement, would those lands have been unappropriated? If appropriated by Aboriginals, could the Crown have acquired title to them by virtue of its acquisition of title to the territory? Would the English law rule that subjects are presumed to hold their lands by original grant from the Crown have applied in those circumstances, and if so, to what effect? These questions were not addressed by Forbes CJ, no doubt because he was not confronted with the issue of Aboriginal occupation. But these sorts of questions should have been considered in the *Milirrpum* case, and need to be kept in mind when examining the Australian authorities upon which Blackburn J relied in that case.

In *Hatfield* v *Alford*,[22] decided by the New South Wales Supreme Court in 1846, the plaintiff was in possession of certain land by virtue of a lease from the defendant when a third party claimed the land under a Crown grant. One issue was the validity of the grant, which depended on whether the Crown had title at the time it was issued. The court held that the Crown did have title, apparently without proof to that effect. According to Chief Justice Stephen, no evidence was required that the Crown was the legal owner of all land in the colony at the time of settlement in 1788, because judicial notice is taken of the fact. The Crown, he continued, must therefore be presumed to have had title when the grant was made, in the absence of evidence, or suggestion, of a previous grant.[23] Dickinson J said that 'the King, at the time of the grant . . ., never had been out of possession of that land, which, in common with the whole territory, had vested originally in the Crown by discovery and occupancy of part in the name of the whole'.[24] Once again, the Supreme Court made no mention of the presence of the Aboriginals, apparently assuming that New South Wales had been vacant in so far as possession of land was concerned. That assumption permitted Dickinson J to conclude that the Crown's occupancy of a part of the colony extended to all lands within the colony's boundaries. However, the rule that occupation of part of a tract of land extends to the whole does not apply to parts actually occupied by somebody else.[25] Thus, if any lands within New South Wales were occupied by Abor-

[21] Underground water is unappropriated prior to being taken possession of, eg, by sinking a well and bringing it to the surface: *Ballard* v *Tomlinson* (1885) 29 Ch D 115. Re appropriation of surface water by occupation and use, see *Mason* v *Hill* (1833) 5 B & Ad 1; 110 ER 692; *Cook* v *City of Vancouver* (1912) 17 BCR 477, affirmed [1914] AC 1077. In *Re Levy* (1924) 26 OWN 300, 301–302, Riddell J said that property, including land, can be appropriated by exercising dominion over it 'to the extent and for the purpose of making it subserve one's own proper use and pleasure'.

[22] (1846) 1 Legge 330.

[23] Id, 336. See also 337, where Stephen CJ said that all land titles in New South Wales are derived from the Crown. However, he apparently did not have the Aboriginals in mind, for at 338 he said that the 'colonists . . . hold lands under the Crown only, granted at intervals. . .'.

[24] Id, 345.

[25] *Earle* v *Walker* (1971) 22 DLR (3d) 284, 287. This is evident from the many cases involving dispossession of part of a manor or other unit of land: eg, see *Asher* v *Whitlock* (1865) LR 1 QB 1.

iginals when the colony was established, one must ask whether those lands would have been available for occupancy by the Crown.[26]

This brings us to *Attorney-General* v *Brown*,[27] probably the most important case respecting the Crown's original title to land in Australia. There the existence of this title was directly challenged by counsel and firmly upheld by a unanimous decision of the New South Wales Supreme Court. The action was commenced in 1846 by an information of intrusion, whereby the Attorney-General alleged that the defendant had intruded on coal veins and mines lawfully in the Crown's possession. The coal in question was located under land which the Crown had granted in 1840 to one Dumaresq, who then leased the land to the defendant. The Crown grant contained a reservation of, *inter alia*, 'all mines . . . of coals'.[28] Defence counsel argued, in part, that the Crown had neither title to nor possession of the mines, for the Crown can take land only by matter of record, which in these circumstances necessitated 'an 'office' found, or some equivalent proceeding'.[29] He 'maintained that there was a material difference between *dominion*, or the right of sovereignty over the soil and country, which were unquestionably in the Crown, and the *possession* or the *title to the possession* in or of that soil, with power to grant the same at her discretion, which title he broadly denied'.[30] In other words, defence counsel 'boldly asserted, and endeavoured to . . . [show], that the Crown has not and never had any property in the waste lands of the Colony'.[31]

The judgment of the court in favour of the Crown was delivered by Chief Justice Stephen. On the issue of the Crown's title, he stated the court's opinion to be

> . . . that the waste lands of this Colony are, and ever have been, from the time of its first settlement in 1788, in the Crown; that they are, and ever have been, from that date (in point of legal intendment), without office found, in the Sovereign's possession; and that, as his or her property, they have been and may now be effectually granted to subjects of the Crown.[32]

In support of these conclusions, Stephen CJ gave two related, but apparently separate, reasons.

First, he said that

> [t]he territory of New South Wales, and eventually the whole of the vast island of which it forms a part, have been taken possession of by British

[26] At common law, of course, once the Crown is in possession of lands, it (unlike other landholders) cannot be dispossessed: *Lee* v *Norris* (1594) Cro Eliz 331; 78 ER 581; *Tuthill* v *Rogers* (1844) 1 J & La T 36, 67, 77; *Commonwealth of Australia* v *Anderson* (1960) 105 CLR 303, 312, 314, 318–24. But the issue here is whether the Crown acquired possession of all lands in Australia in the first place, given the Aboriginal presence.

[27] (1847) 1 Legge 312. For another discussion of this case, see Lester, supra fn14, 276–83.

[28] (1847) 1 Legge 312, 313.

[29] Id, 316.

[30] Id, 314.

[31] Id, 316.

[32] Ibid.

> subjects in the name of the Sovereign. They belong, therefore, to the British Crown.[33]

The Crown's title, not only to the territory, but to all waste lands within it, was therefore acquired by occupancy. Moreover, unlike in England, where the Crown's original title to lands as '*universal occupant*' is generally a fiction, adopted for the purposes of the feudal system,

> ... in a newly-discovered country, settled by British subjects, the occupancy of the Crown with respect to the waste lands of that country, is no fiction. If, in one sense, those lands be the patrimony of the nation, the Sovereign is the representative, and the executive authority of the nation, the 'moral personality' (as Vattel calls him, *Law of Nations*, book 1, chap 4), by whom the nation acts, and in whom for such purposes its power resides. Here is a property, depending for its support on no feudal notions or principle.[34]

Secondly, Stephen CJ thought that the same result could be arrived at 'by the adaption of the feudal fiction',[35] which, as a part of the system of tenures, was brought by the settlers to New South Wales, along with so much of the rest of the common law as was consistent with local conditions. In other words, when applied in the colonies, the fiction of original Crown ownership operated to vest the property in waste lands in the Sovereign.[36]

Having concluded that the Crown was originally entitled to the waste lands, Stephen CJ summarily dismissed the argument that an office or other record of the Crown's title was necessary. He pointed out that, in all instances where it had been said that the Crown can take lands only by record, the taking had been from a subject. Moreover, in some cases where the Crown's title was notorious, as where the Crown had seized lands of an alien *ratione guerre*, no record was required. 'The idea', he said, 'that he [the King] cannot acquire lands in a newly settled country, by discovery, and the settlement of his subjects therein (facts which must be always notorious, and speedily a matter of history), but must resort to the form of an 'office' to give him title, appears to us scarcely to admit of serious refutation'.[37] On this point Stephen CJ was undoubtedly correct, for no record of the Crown's title is required where that title is original,[38] as the Crown's title to waste lands in New South Wales would have been. But the question of how the Crown acquired this original title needs to be looked at more closely.

In English law, an original title to property which is unowned and unoccupied can be acquired by taking possession of it, ie, by occupancy.[39] In the case of settlements, the Crown's territorial title was acquired in this way, by British

[33] Id, 317.
[34] Id, 318.
[35] Id, 324.
[36] Id, 318.
[37] Id, 320.
[38] Examples within the realm are the foreshore and territorial seabed: see K McNeil, supra fn 7, 105.
[39] See *Holden* v *Smallbrooke* (1668) Vaugh 187; 124 ER 1030; Blackstone, *Commentaries on the Laws of England* (16th ed, 1825), vol II, 3–9, 258, 400–401.

subjects taking possession of the territories on behalf of the Crown.[40] According to British colonial law, inhabited as well as uninhabited territories could be acquired in this fashion, provided the Crown acted as though the inhabitants lacked sovereign status.[41] The territorial unit was available for acquisition by occupancy because the Crown treated it as unowned and unoccupied by a sovereign.[42] Moreover, any lands within the settlement which were unowned and unoccupied would have been acquired at the same time, since the Crown's occupancy of the territory as a whole would have extended to them.[43] As Stephen CJ concluded, the Crown would therefore have had title to waste lands in New South Wales by way of occupancy.

In light of this conclusion that the Crown had an actual title by occupancy, there was no need to resort to the feudal fiction. The fiction that the Crown once owned all the lands in England, some of which it then granted to subjects, was a device invented by common law jurists to justify the feudal concept of the Crown's paramount lordship over lands held by subjects.[44] The fiction was deemed necessary because many lands in fact had never been owned by the Crown, and had not been acquired by subjects by grant. Moreover, like any fiction, it would apply only to give effect to the purpose for which it was invented.[45] To apply it to lands which the Crown was actually entitled to by occupancy, and which were unclaimed by subjects, would make no sense. In that situation, not only would the Crown's title have a factual basis, but the system of tenures itself would be inapplicable, since no tenurial relationship, between the Crown as lord and subjects as tenants, would exist.

Chief Justice Stephen's use of the feudal fiction as an additional reason for holding the Crown to have title to waste lands was therefore both unnecessary and inappropriate. Perhaps he perceived this himself, for in *Doe d Wilson* v *Terry*, decided two years later, he said:

> In England, as we observed in the case of the *Attorney-General* v *Brown*, the title of the Sovereign to land is a fiction; or, where the Crown really owns land, the property is enjoyed as that of a subject is, and by a title which admits of proof by documentary and other evidence. Here, the title of the

[40] See *Geary* v *Barecroft* (1667) 1 Sid 346; 82 ER 1148; *R* v *Kough* (1819) 1 Nfld LR 172, 174; *The 'Fama'* (1804) 5 C Rob 106, 114–16; 165 ER 714, 717.

[41] The Crown's discretionary power to proceed as it wishes in annexing colonies is derived from its broad prerogative over foreign affairs: see K McNeil, supra fn 7, 111, 131.

[42] Acquisition of sovereignty, by whatever means the Crown chooses, is an act of state, the validity of which cannot be questioned in the courts: *Cook* v *Sprigg* [1899] AC 572, 578; *Vajesingji Joravarsingji* v *Secretary of State for India* (1924) LR 51 IA 357, 360; *Coe* v *Commonwealth of Australia* (1979) 53 ALJR 403, per Gibbs J 408. See also *R* v *Kent Justices* [1967] 1 All ER 560, 564; *Post Office* v *Estuary Radio Ltd* [1968] 2 QB 740, 753.

[43] See *Falkland Islands Co* v *The Queen* (1864) 2 Moo PC (NS) 266, 15 ER 902, for the application of this principle to an uninhabited territory.

[44] See Anon, *Considerations on the Law of Forfeitures, for High Treason* (4th ed, 1775), 64–65; Blackstone, supra fn 39, vol II, 51; cf *A-G of Ontario* v *Mercer* (1883) 8 App Cas 767, 771–2.

[45] On this limitation on the use of fictions, see *Morris* v *Pugh* (1761) 3 Burr 1241; 97 ER 811; *Mostyn* v *Fabrigas* (1775) 1 Cowp 161, 177; 98 ER 1021, 1030; *Lyttleton* v *Cross* (1824) 3 B & C 317, 325–6; 107 ER 751, 754–5.

> Crown as universal occupant is a reality, and there is no proof of it required, or admissible.[46]

This statement followed a distinction Stephen CJ drew between 'newly discovered and unpeopled territories' (a description which apparently applied to New South Wales), and 'a populated and long-settled country' (England).[47] In the former, he said, lands are 'unoccupied and waste, until granted by the Crown to some individual, willing to reclaim them from a state of nature', whereas in the latter most lands 'have for centuries been owned and cultivated by its [the Crown's] subjects'.[48]

Stephen CJ thus seems to have regarded all lands in New South Wales as unoccupied and waste, perhaps because they had been uncultivated and, presumably, unowned. Hence, they were available for acquisition by occupancy by the Crown. In the judgments we have considered, Stephen CJ mentioned aboriginals only once, in a context which does not appear to have been intended to include the indigenous inhabitants of Australia. The reference is in *Attorney-General* v *Brown*, in a passage in which Stephen CJ rejected a contention that land titles in the colony were allodial.[49] This contention, he said, was answered by the conclusion he had already reached that the Crown had title to lands. With respect to 'allodium', Stephen CJ observed that '[w]hether the term implies a property acquired by lot, or a conquest, or one left in the occupation of the ancient owners, (that is, of the aboriginal inhabitants, see *Steph. Com.* title Tenures, and the authorities there cited,) it equally rejects the supposition of a title, in or from the Sovereign'.[50] As an examination of *Stephen's Commentaries* reveals, the aboriginal inhabitants referred to were those left in occupation of their lands by the 'barbarians' at the time they invaded the Roman Empire.[51] Apparently Chief Justice Stephen did not direct his mind to the question of the relationship of Australian Aboriginals to land.

The opinion of the New South Wales Supreme Court that the Crown had original title to all lands in the colony has been affirmed by the High Court of Australia.

Williams v *Attorney-General for New South Wales*,[52] decided in 1913, involved a dispute over whether the Government of New South Wales could discontinue the use of Government House in Sydney as the residence for the Sovereign's representative. One issue to be decided was whether the lands on which that building stood were 'waste lands of [or 'belonging to'] the Crown', over which management, control and legislative powers had been conferred on the legislature of the colony by the *Constitution Act* 1855.[53] The High Court Justices who dealt with this issue decided in favour of the New South Wales

[46] (1849) 1 Legge 505, 508–9 (footnote omitted).
[47] Id, 508.
[48] Ibid.
[49] (1847) 1 Legge 312, 323–4.
[50] Id, 324.
[51] J H Stephen, *New Commentaries on the Laws of England* (1st ed, London, Butterworth, 1841), vol I, 160–2.
[52] (1913) 16 CLR 404.
[53] 18 & 19 Vic c 54 (UK) s2, sch 1 para 43.

Government. Chief Justice Barton, after describing New South Wales as 'a territory which the Crown has acquired by possession',[54] said this:

> Waste lands of the Crown, where not otherwise defined, are simply, I think, such of the lands of which the Crown became the absolute owner on taking possession of this country as the Crown had not made the subject of any proprietary right on the part of any citizen.[55]

This would seem to confirm the conclusion reached above that the Crown's title to the colony, and to at least some lands within it, had been acquired by occupancy. But the Chief Justice did not specify the extent of such lands, nor did he mention possible claims by Aboriginals.

Isaacs J, however, after coming to a conclusion similar to that of the Chief Justice on the meaning of waste lands of the Crown, had more to say on the Crown's title to colonial land generally:

> It has always been a fixed principle of English law that the Crown is the proprietor of all land for which no subject can show a title. When Colonies were acquired this feudal principle extended to the lands oversea. The mere fact that men discovered and settled upon the new territory gave them no title to the soil. It belonged to the Crown until the Crown chose to grant it. Professor *Jenks*, in his *History of the Australasian Colonies*, at p. 59, observes that this purely technical and antiquarian fiction settled a question of the first magnitude.
>
> There was, as he says, 'no Statute, no struggle, no heated debate. The Crown quietly assumed the ownership of Australian land.' I should add, this doctrine received very practical application when the Crown, by Governor Bourke's proclamation, approved by the Colonial Office, refused to recognize Batman's treaty with the native chiefs in 1835, and notified that persons found in possession of the lands would be treated as trespassers and intruders. So we start with the unquestionable position that, when Governor Phillip received his first Commission from King George III on 12th October 1786, the whole of the lands of Australia were already in law the *property* of the King of England.[56]

Isaacs J thus relied on the feudal fiction rather than on occupancy as the basis of the Crown's title to lands. But we have seen that the fiction would be inapplicable where lands that were unowned and unoccupied were concerned, because, as Barton CJ said, the Crown would have become absolute owner of them upon taking possession of the colony, and so no tenurial relations would have existed respecting them. The fiction is applicable only where lands are

[54] (1913) 16 CLR 404, 427.

[55] Id, 428.

[56] Id, 439. Mr Justice Isaacs's views were to some extent approved in *New South Wales* v *Commonwealth of Australia* (1975) 135 CLR 337, a post-*Milirrpum* case involving a dispute between the Commonwealth and the Australian States over the territorial sea and continental shelf, by Stephen J 438–9 (footnotes omitted): 'That originally the waste lands in the colonies were owned by the British Crown is not in doubt. Such ownership may perhaps be regarded as springing from a prerogative right, proprietary in nature. . . . On the other hand that ownership may be described as a consequence of the feudal principle which, on first settlement in Australia, was 'extended to the lands oversea', so that all colonial land belonged 'to the Crown until the Crown chose to grant it' (per Isaacs J in *Williams' Case*). In either event the consequence is the same, the lands of Australia became the property of the King of England (*Attorney-General* v. *Brown*).'

already held by subjects, and prior Crown ownership and grants need to be postulated to explain why those lands are held of the Crown.

Mr Justice Isaacs's treatment of this matter is open to other criticisms as well. For one thing, one may wonder (as Blackburn J did in the *Milirrpum* case[57]) how the Crown acquired title to land before Governor Phillip even took possession of the territory in 1788. More importantly, Isaacs J was simply wrong when he said '[i]t has always been a fixed principle of English law that the Crown is the proprietor of all land for which no subject can show a title'.[58] The existence of such a principle was expressly denied by the House of Lords in *Bristow* v *Cormican*, where Lord Blackburn said it is so far from being the case that the Crown is entitled by the prerogative to such land that,

> . . . in the only instance in which no one could shew a title, I mean that of an estate granted to one for the life of another, where the grantee died leaving the *cestui que vie*, the law cast the freehold on the first occupant of the land. It was never thought that the Crown was entitled in such a case.[59]

To Lord Blackburn's example of occupancy of a vacant *pur autre vie* estate might be added that of a title acquired by adverse possession. In the event that a landholder's title is extinguished by statutory limitation in England, the adverse possessor acquires a valid title, not by statutory conveyance, but simply by being in possession of land to which no one else can show a better right.[60] For the Crown to succeed in claiming such land for itself, it would have to prove that it has a title, for, as Lord Davey said in *Nireaha Tamaki* v *Baker*, '[i]n a constitutional country the assertion of title by the Attorney-General in a Court of Justice can be treated as pleading only, and requires to be supported by evidence'.[61]

Unlike Barton CJ, Isaacs J did refer to the Aboriginals and may have implicitly denied them any title to lands when he said that Governor Bourke's proclamation refusing to recognize Batman's 1835 treaty with them was an example of the practical application of the doctrine which gave ownership of all Australian lands to the Crown. However, Batman was a private individual who had no authority from the Crown to purchase lands from the Aboriginals.[62] His 'treaty' may have been invalid because any title the Aboriginals had was regarded as inalienable other than to the Crown, and not because the Aboriginals had nothing to sell.[63] Moreover, even if Isaacs J did intend to deny

[57] (1971) 17 FLR 141, 246.

[58] (1913) 16 CLR 404, 439 (supra, text at fn 56).

[59] (1878) 3 App Cas 641, 667 (footnote omitted); and see per Lord Cairns at 652–3, Lord Hatherley at 658.

[60] *Tichborne* v *Weir* (1892) 67 LT 735; *In re Atkinson and Horsell's Contract* [1912] 2 Ch 1, 9, 17; *Fairweather* v *St Marylebone Pty* [1963] AC 510, esp 535.

[61] [1901] AC 561, 576. Accord *Wallis* v *Solicitor-General for New Zealand* [1903] AC 173, 188.

[62] On the Batman dealings, see Bonwick, *Port Phillip Settlement* (1883), chs 14–15; B Hocking, 'Native Land Rights' (LLM thesis, Monash University, 1970), 167–174.

[63] Case law from some common law jurisdictions contains a rule that the title of aboriginal people to their traditional lands cannot be purchased by anyone except the Crown: *Johnson* v *M'Intosh*, 8 Wheat 543 (1823); *The Queen* v *Symonds* (1847) [1840–1932] NZPCC 387; *Guerin* v *The Queen* [1984] 2 SCR 335, esp 382; and discussion in McNeil,

that the Aboriginals had land rights, his remark to that effect was *obiter*, unsupported by authority or analysis, and unconcurred in by other members of the court.

A second High Court decision mentioned by Blackburn J in the *Milirrpum* case, in support of his conclusion that the Crown acquired title to all lands in Australia the moment it acquired sovereignty, is *Council of the Municipality of Randwick* v *Rutledge*.[64] The question to be decided was whether Randwick Racecourse was 'a public reserve', and therefore exempt from rating under the *New South Wales Local Government Act* 1919.[65] In construing these words to exclude the racecourse, Windeyer J, whose judgment was concurred in by the majority of the court, referred to the history of Crown lands legislation in New South Wales. He introduced this historical analysis with the following observations:

> On the first settlement of New South Wales (then comprising the whole of eastern Australia), all the land in the colony became in law vested in the Crown. The early Governors had express powers under their commissions to make grants of land. The principles of English real property law, with socage tenure as the basis, were introduced into the colony from the beginning — all lands of the territory lying in the grant of the Crown, and until granted forming a royal demesne. . .. And when in 1847 a bold argument, which then had a political flavour, challenged the right of the Crown, that was to say of the Home Government, to dispose of land in the colony, it was as a legal proposition firmly and finally disposed of by Sir *Alfred Stephen* C.J.: *The Attorney-General* v. *Brown*.[66]

Although Windeyer J did not specify how the Crown acquired its title to all the lands in the colony, he apparently approved of Stephen CJ's treatment of the matter in *Brown's* case, where, we have seen, the Chief Justice relied primarily on occupancy. Like Stephen J, however, he does not seem to have considered whether the Aboriginals had valid claims.

To sum up, there is a long line of authority that the Crown acquired absolute title to all lands in the Australian colonies at the time they were settled. Underlying this conclusion is a common assumption that the lands were vacant, ie, unowned and unoccupied. As such, they were available for Crown acquisition by occupancy. Since the judges who decided the pre-*Milirrpum* cases we have examined must have been aware of the presence of Aboriginals, one can only conclude that they regarded those people as non-owners and non-occupiers. However, the question of whether Aboriginals were owners or occupiers at the time sovereignty was acquired is clearly a factual matter, requiring proof.[67] Since no evidence to that effect appears to have been before

supra fn 7, 221–35. Cf Blackburn J's comments on the Batman treaty in *Milirrpum* v *Nabalco Pty Ltd* (1971) 17 FLR 141, 257.

[64] (1959) 102 CLR 54.

[65] S 132(1)(c).

[66] (1959) 102 CLR 54, 71 (footnote omitted).

[67] Aboriginal ownership would depend on customary law, which must be proved: supra fn15. Occupation of land is equally a matter of fact (*Halsbury's Laws of England* [4th ed, 1985], vol XLV, para 1394), which can be proved by showing acts of use or control on or in relation to the land: eg, see *Jones* v *Williams* (1837) 2 M & W 326; 150 ER 781; *West*

the courts in any of these cases, it is perhaps not surprising that the judges disregarded the Aboriginal presence, particularly in view of the scarcity of archaeological and anthropological material on Aboriginal culture available when most of these cases were decided.[68] Moreover, because Aboriginal ownership and occupation are matters of fact, negative findings — and *a fortiori* unexpressed assumptions — regarding those matters would not be binding in subsequent court cases.[69]

In the *Milirrpum* case, Blackburn J therefore should not have regarded the cases discussed above as binding upon him in this respect. Unlike the judges in those cases, he was presented with extensive evidence of the relationship of specific groups of Aboriginals to defined areas of land. The question of whether those groups owned the claimed lands by virtue of customary law titles predating the Crown's acquisition of sovereignty was directly before him. As we have seen, he did decide that question, denying the plaintiffs' customary law claims, which simply reinforced the conclusion he had already reached that the Crown had title regardless. But, at the same time, he apparently accepted that Aboriginals had been present on the claimed lands in 1788, and there was no doubt that the plaintiffs were there when the action was brought. So the question we are now going to address is this: Assuming that Aboriginals were in occupation of specific lands at the time the Crown acquired sovereignty, what juridical effect, if any, would that have had? More specifically, would the Crown have acquired absolute title to those lands as it did to vacant lands, and if not, what respective interests would the Crown and the Aboriginal occupiers have had? Finally, we shall consider the relevance of our conclusions on these matters to non-statutory Aboriginal land claims today.

THE LEGAL EFFECT OF ABORIGINAL OCCUPATION

For the purposes of this discussion, we are going to assume that Aboriginals were in occupation of some lands at the time Australia was settled.[70] As stated above, this is a factual matter, depending on historical, anthropological and other kinds of evidence which cannot be presented here. It may be remarked, however, that occupation is relative, depending on all the circumstances, including the nature and location of the land, and the conditions of life, habits

Bank Estates Ltd v *Arthur* [1967] 1 AC 665; *Powell* v *McFarlane* (1977) 38 P & CR 452.

[68] There was, however, ample information on Aboriginal land use available in the form of observations by European settlers and explorers: see H Reynolds, *The Law of the Land* (Ringwood, Vic, Penguin, 1987), esp ch 1–3.

[69] '[D]ecisions on questions of fact do not constitute a precedent': Cross, *Precedent in English Law* (3rd ed, 1977), 221. Accord *Halsbury's Laws of England* (4th ed, 1979), vol XXVI, para 575.

[70] The issue of occupation of land by aboriginal peoples generally is discussed in McNeil, supra fn 7, 196–204. Support for the conclusion that Aboriginals were in occupation of lands in Australia in 1788 can be found in H Reynolds, supra fn 68, esp chs. 1, 3.

and ideas of the people living there.[71] On this basis, nomadic hunters and gatherers have been found to be in occupation of lands in the United States and Canada.[72] Moreover, even in England, fishing in bodies of water and hunting on land are evidence of occupation.[73] Thus, it is clearly not necessary for lands to be cultivated, fenced, built on or the like to be occupied.[74]

In English law, persons who are in occupation of land are presumed to have title.[75] This presumption is rebuttable by adverse claimants who can show better titles in themselves, but cannot be rebutted by proving that the occupiers have no title apart from their occupation.[76] The rule is that those who claim lands occupied by others can recover only on the strength of their own title, not on the weakness of that of the occupiers.[77] For much the same reason, occupiers of land are protected by law against trespassers, regardless of whether the occupiers have a valid title.[78] As against those who cannot show a better right, occupation of itself is a sufficient title.[79]

Regarding the interest to which occupiers are entitled, it is presumed to be a fee simple estate, for occupation is prima facie evidence of seisin in fee.[80] This presumption can be rebutted by showing that they have lesser interests,[81] or no interests at all. To show the latter, it would not suffice to prove they did not acquire the fee by conveyance or other lawful means, for those whose occupation is wrongful have the fee in most cases.[82] Rather, it would have to be established that the fee (or, in certain exceptional circumstances, a lesser interest) is in someone else.[83]

[71] *Lord Advocate* v *Lord Lovat* (1880) 5 App Cas 273, 288; *Kirby* v *Cowderoy* [1912] AC 599, 603; *Cadija Umma* v *S Don Manis Appu* [1939] AC 136, 141–2.

[72] See *Mitchel* v *US*, 9 Pet 711 (1835), 746; *US* v *Santa Fe Pacific Railroad*, 314 US 339 (1941), 345; *Baker Lake* v *Minister of Indian Affairs* [1980] 1 FC 518, esp 561.

[73] *Curzon* v *Lomax* (1803) 5 Esp 60; 170 ER 737; *Harper* v *Charlesworth* (1825) 4 B & C 574, 583–4; 107 ER 1174, 1177–8; *Red House Farms (Thorndon) Ltd* v *Catchpole* (1977) 244 EG 295.

[74] *Wuta-Ofei* v *Danquah* [1961] 3 All ER 596, 600.

[75] See *Doe d Draper* v *Lawley* (1834) 3 N & M 331; *Doe d Smith and Payne* v *Webber* (1834) 1 AD & E 119; 110 ER 1152; *Whale* v *Hitchcock* (1876) 34 LT 136; *Wheeler* v *Baldwin* (1934) 52 CLR 609, esp 621–2; *Allen* v *Roughley* (1955) 94 CLR 98, 136–41.

[76] Were this not so, adverse possessors would be unable to acquire irrebuttable titles, for as we have seen their titles are derived from their actual possession rather than from statutory conveyance: supra, text at fn 60.

[77] *Roe d Haldane and Urry* v *Harvey* (1769) 4 Burr 2484, 2487–8; 98 ER 302, 304–5; *Goodtitle d Parker* v *Baldwin* (1809) 11 East 488, 495; 103 ER 1092, 1095; *Danford* v *McAnulty* (1883) 8 App Cas 456, 460–1, 462, 464–5; *Oxford Meat Co* v *McDonald* [1963] 63 SR (NSW) 423, 425, 427.

[78] *Graham* v *Peat* (1801) 1 East 244; 102 ER 95; *Catteris* v *Cowper* (1812) 4 Taunt 547; 128 ER 444; *Corporation of Hastings* v *Ivall* (1874) 19 LR Eq 558.

[79] *The King* v *Bishop of Worcester* (1669) Vaugh 53, 58, 60; 124 ER 967, 969, 970; *Asher* v *Whitlock* (1865) LR 1 QB 1; *Rosenberg* v *Cook* (1881) 8 QB 162, 165; *Mussammat Sundar* v *Mussammat Parbati* (1889) LR 16 IA 186, 193; *Perry* v *Clissold* [1907] AC 73, 79.

[80] *Peaceable d Uncle* v *Watson* (1811) 4 Taunt 16; 128 ER 232; *Doe d Carter* v *Barnard* (1849) 13 QB 945, 953; 116 ER 1524, 1527; *Asher* v *Whitlock* (1865) 1 QB 1, 6.

[81] *Doe d Hall* v *Penfold* (1838) 8 Car & P 536, 537; 173 ER 607, 608. Eg, an occupier might be shown to be seised for life, or to have come to the land under a lease.

[82] See *Elvis* v *The Archbishop of York* (1619) Hob 316, 323; 80 ER 458, 465; *Asher* v *Whitlock* (1865) LR 1 QB 1, 6; cf *Rosenberg* v *Cook* (1881) 8 QB 162, 165.

[83] Eg, see *Doe d Crisp* v *Barber* (1788) 2 TR 749; 100 ER 403; *Harper* v *Charlesworth* (1825) 4 B & C 574; 107 ER 1174.

These fundamental rules of real property law have been applied in Australia as part of the English law which the settlers brought with them.[84] Unless some valid reason can be found for this not to have happened, they should therefore have applied to give Aboriginals prima facie title in fee simple to any lands occupied by them at the time of settlement.[85] However, this presumptive fee simple title could be rebutted by the Crown or its grantee, if shown that the lands became Crown lands at that time.[86]

This takes us back to our discussion of the pre-*Milirrpum* decisions, on the basis of which, and as a matter of legal principle, we concluded that the Crown acquired absolute title to vacant lands in Australia by occupancy. So would the Crown have acquired title by the same means to lands occupied by Aboriginals? The answer is definitely no, for the simple reason that lands have to be both unowned and unoccupied to be available for acquisition by occupancy.[87] The Crown's occupancy of the territory as a whole would not have extended to lands occupied by Aboriginals, no more than occupancy of a manor left vacant by the death of a *pur autre vie* lord would have extended to lands held by tenants of the manor. In such a case, the occupant of the manor would have become lord of the tenants and their lands, and therefore would have been entitled to the services owed by them.[88] In much the same way, though on a higher plane, the Crown would have acquired a paramount lordship over the Aboriginals and their lands, and would have been entitled to their allegiance as new subjects.[89] Though no lordship would have existed (customary law aside) prior to colonization, the effect of applying the system of tenures in these circumstances would have been to create such a lordship in the Crown, since by English law subjects cannot own land allodially, but only an estate or interest held mediately or immediately of the Crown.[90]

[84] *Doe d Devine* v *Wilson* (1855) 10 Moo PC 502, 523–4; 14 ER 581, 589; *Perry* v *Clissold* [1907] AC 73; *Wheeler* v *Baldwin* (1934) 52 CLR 609, 621–2, 632–3; *Allen* v *Roughley* (1955) 94 CLR 98; *Oxford Meat Co* v *McDonald* [1963] SR (NSW) 423.

[85] Note that English law has been generally applied to Aboriginals, even in circumstances where this would seem inappropriate: see MC Kriewaldt, 'The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia' (1960) 5 *UWAL Rev* 1; Australia Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (1986), vol I, esp ch 4.

[86] See *Doe d Devine* v *Wilson* (1855) 10 Moo PC 502, 523–4; 14 ER 581, 589; *Emmerson* v *Maddison* [1906] AC 569, 575.

[87] See *Holden* v *Smallbrooke* (1668) Vaugh 187, 191–2; 124 ER 1030, 1033. At Vaugh 189, 124 ER 1031, it is written: 'Two or more cannot, at the same time, have severally plenary possession, that is, occupancy, of the same thing; therefore none can have right to that by reason of possession, whereof another is already possess'd, for then there would be two plenary possessors severally of the same thing at the same time, which is impossible.'

[88] Id, Vaugh 190, 196; 124 ER 1032, 1035. Nor would it matter if some of those tenants were in fact wrongdoers, for the lord of a manor has no special right to lands of his tenants which happen to be held by disseisors: see YB 9 Hen VII 24, pl 11, where it was said that a disseisee could enter upon a lord who claimed by escheat the lands held by the disseisor.

[89] By British colonial law the inhabitants of a newly-acquired territory become subjects of the Crown at the moment of acquisition: *Calvin's Case* (1608) 7 Co Rep 1a, 6a; 77 ER 377, 384; *Campbell* v *Hall* (1774) Lofft 655, 741; 98 ER 848, 895; *Calder* v *A-G of British Columbia* [1973] SCR 313, 388–9; *R* v *Wedge* [1976] 1 NSWLR 581, 585.

[90] *Case of Tanistry* (1608) Davis 28, 40–1; 80 ER 516, 528; *Witrong* v *Blany* (1674) 3 Keble 401, 402; 84 ER 789, 789; and discussion in McNeil, supra fn 7, 79–80, 216–221. Note,

In the *Milirrpum* case, however, Blackburn J viewed the system of tenures as excluding the possibility, at common law, of any title in the Aboriginals. He reasoned that since it is a fundamental principle of English law that the Crown is the source of title to all land, the land titles of subjects in Australia must all be the direct consequence of Crown grants.[91] This conclusion ignores both the purpose for which original Crown ownership was postulated in England, and the fictional nature of the explanation for the universality of feudal tenure. As explained above, the notion that the Crown originally owned all the lands in England is generally a fiction, invented not to deprive subjects of their landholdings, but to assure the Crown of its paramount lordship. In fact, many (if not most) land titles in England were never derived from Crown grants. A fictitious title in the Crown, and along with it fictitious grants to landholding subjects, was fabricated to explain why the Crown has a lordship in those circumstances.[92] Application of this two-fold fiction to lands occupied by Aboriginals at the time the Crown acquired sovereignty in Australia must lead to the same result — the Crown would be deemed to have owned the lands, and then to have granted them to the Aboriginals. The fiction, because it postulates grants as well as original Crown ownership, supports Aboriginal land claims, rather than negating them as Blackburn J thought. The view that Aboriginal occupiers must have actual grants to have valid titles as against the Crown is therefore incorrect. As in England, perfectly valid titles can exist where grants were in fact never made. Applying the feudal fiction in those circumstances simply provides a justifiable basis for the Crown's lordship over those lands.

Where lands occupied by Aboriginals were concerned, then, the effect of the colonization of Australia and reception of English law would have been to create a presumption of title to fee simple estates in the Aboriginal occupiers. The Crown would not have acquired title to those lands by occupancy, for the Aboriginal presence would have excluded that possibility.[93] Nor would the application of the system of tenures have given the Crown title. Since the effect of applying that system and the fiction associated with it would have been to assure the Crown of its paramount lordship, the Aboriginal occupiers would have held their fee simple estates as tenants of the Crown. The Crown would have been entitled to the benefits of its lordship, but it would have had

however, that the application of the system of tenures may be excluded by local custom: see *Smith* v *Lerwick Harbour Trustees* (1903) (5th) 5 SC 680; *Lord Advocate* v *Balfour* [1907] SC 1360.

91 Supra, text at fn 16.

92 See McNeil, supra fn 7, 80–85. Note that the foreshore and territorial seabed are treated differently, because they are generally unoccupied by subjects, and because the public has special rights respecting them: Id, 103–105.

93 The reason why the Aboriginal presence did not also prevent the acquisition of territorial sovereignty by settlement is that the Crown has prerogative power to annex territories to its dominions by act of state: see supra, fn 41–2 and text. But once annexation had taken place, the Crown could not seize lands occupied by Aboriginals because the common law does not allow the Crown to commit acts of state within its own dominions: *Entick* v *Carrington* (1765) 19 St Tr 1029; *Walker* v *Baird* [1892] AC 491; *Johnstone* v *Pedlar* [1921] 2 AC 262; *A-G* v *Nissan* [1970] AC 179.

no claim to the lands themselves,[94] and would have been unable to make a valid grant of them or of any interest in them,[95] as long as the Aboriginals continued to hold their fee simple estates.

ABORIGINAL LAND CLAIMS TODAY

Up to this point, our discussion has centred on the respective claims of the Crown and Aboriginal occupiers at the time the Australian colonies were settled. We shall now briefly relate our conclusions concerning these matters to present-day non-statutory land claims.

Assuming that Aboriginals were in occupation of specific lands at the time the Crown acquired sovereignty, the presumptive fee simple titles which they would have had as a result can be claimed by their descendants. However, if in the meantime those lands have been adversely occupied (by settlers, for example) for the statutory limitation period, those claims may be barred in law. Moreover, proving linkage between present-day Aboriginal claimants and their alleged predecessors may be extremely difficult; in fact, one reason why the Aboriginal plaintiffs in the *Milirrpum* case lost was that they were unable to establish a sufficient connection between themselves and the Aboriginals who had been present on the claimed lands in 1788.[96] Not only is identification of occupiers — whether individuals or groups — especially problematic at this distance in time, but shifting memberships and the disappearance of some groups and creation of others can present serious complications.[97]

Some of these problems can be avoided if the Aboriginals who claim title are presently in occupation of the lands claimed by them. In that situation, they can rely on their own occupation and the common law presumption that occupiers of land have title to fee simple estates. Moreover, as against trespassers and adverse claimants who cannot show a better right in themselves, we have seen that occupation itself is a sufficient title. As long as the Aboriginals are in occupation, there is no need for them to take their claim to court. Since they already have the lands, all they need do is defend their occupation against anyone who interferes with it or attempts to take the lands from them.

[94] If the Crown had laid an information of intrusion against Aboriginal occupiers, relying on the procedural advantages which that special action gave to it, the Aboriginals could have answered by showing that the Crown had never been in possession, in the absence of which there could have been no intrusion: see McNeil, supra fn 7, 98–103, 219.

[95] Where the Crown attempts to grant land concerning which it has neither possession nor title, the grant is void, and anyone who enters under it is a wrongdoer: *Viner's Abridgment* (2nd ed, London, Robinson, 1791–4), title 'Disseisin' (D) 19, marginal note; *Comyns' Digest* (5th ed, New York, Collins & Hannay, 1822), title 'Seisin' (F1). Note, however, that not being bound by *Quia Emptores* (1290) 18 Edw I (Eng), the Crown could subinfeudate, which is one way of interpreting the colonial charters in North America: see McNeil, supra fn 7, 235–41.

[96] (1971) 17 FLR 141, 183–98. Note that Canadian courts have been less strict in this regard: see *Baker Lake* v *Minister of Indian Affairs* [1980] 1 FC 518; *Simon* v *R* [1985] 2 SCR 387, 407–8.

[97] On the further issue, which cannot be discussed here, of how unincorporated groups with shifting memberships can hold title to land, see McNeil, supra fn 7, 211–15.

However, should the Aboriginals be faced with serious, prolonged, or repeated interference with their occupation, they may be obliged to go to court. In that event, the appropriate action for them to bring would be trespass. They should not ask for a declaration of title, for that is unnecessary and would involve problems of proof of the kind referred to above. In an action of trespass, they could rely on their occupation, and force the defendant to prove justification by showing some right or title which made the interference lawful.[98]

An alleged trespasser who claims under a Crown grant would obviously set up the grant as evidence of a superior title and hence of a right to enter. But where the Aboriginals were in occupation when it was issued, the grant would be of little value unless shown that the Crown had title at the time.[99] The defendant, however, instead of having to lead evidence to prove the Crown's title, would be able to rely on the pre-*Milirrpum* decisions which held that judicial notice could be taken of the Crown's title to lands that were unappropriated or waste at the time the Australian colonies were settled. The onus would thus be on the Aboriginal plaintiffs to show that the lands occupied by them were not unappropriated or waste at that time, which could be done by proving that the lands were either owned by customary law or occupied.

Our concern here is with occupation rather than customary law title. If it was established that Aboriginals were in occupation of the lands when the Crown acquired sovereignty, then, according to the common law principles outlined above, the Crown's interest in those lands would have been limited to a lordship over them. A Crown claim to the lands themselves would have to be proved by showing that the lands had escheated or had otherwise been acquired by the Crown. Failing that, the Crown, and hence its grantee, would be without a title, and so the interference of the grantee with the plaintiffs' occupation would be an actionable trespass. It would not be necessary for the plaintiffs to prove linkage between themselves and the Aboriginals who were in occupation at the time of colonization, for if the Crown's alleged title was rebutted by showing that the lands were not unappropriated or waste at that time, the plaintiffs would be able to rely on their present occupation.

However, proving Aboriginal occupation of specific lands at the time of colonization may itself be a formidable task.[100] Though the matter cannot be pursued in detail here, there may nonetheless be a way to lessen the burden. As a rule judges are very reluctant to disturb long-standing occupation of land. Where someone has been in continuous, unchallenged occupation for many

[98] P F P Higgins, *Elements of Torts in Australia* (1st ed, Sydney, Butterworths, 1970), 114; *Clerk & Lindsell on Torts* (15th ed, London, Sweet & Maxwell, 1982), ss 22–11, 22–26; *Halsbury's Laws of England* (4th ed, 1985), vol XLV, paras 1394–5, 1405–8.

[99] See *Bristow* v *Cormican* (1878) 3 App Cas 641; *Johnston* v *O'Neill* [1911] AC 552.

[100] An equivalent burden has, however, been met in at least one Canadian case: see *Baker Lake* v *Minister of Indian Affairs* [1980] 1 FC 518, 562–3, where the Inuit plaintiffs established that their ancestors had been in exclusive occupation of lands when the Crown asserted sovereignty over their territory, which happened probably no earlier than 1610 and no later than 1670.

years, they will generally do whatever they can to maintain the status quo.[101] One device used by them in these circumstances is the presumption of a lost grant,[102] applied by some judges even in face of evidence that no grant had ever been made.[103] The suggestion made here is not that the presumption of a lost grant be applied to Aboriginal occupiers (though that may be an option worth considering), but that long, undisturbed occupation down to the present-day be taken as evidence that the same lands were occupied by Aboriginals at the time of colonization. The onus of proof in these circumstances is not unlike the onus on persons in England who allege the existence of a custom since time immemorial, ie, since 1189. In that situation the law, aware of the virtual impossibility of ever meeting such an onerous burden, presumes the custom to have existed since time immemorial if proved to have existed during the period of living memory, provided its antiquity and continuity are not contradicted.[104] For the same reason, proof of Aboriginal occupation as far back as anyone can remember should raise a rebuttable presumption that the lands were occupied when the Crown acquired sovereignty.[105]

Aboriginals who are still in undisturbed occupation of lands are therefore advised not to initiate court action, unless necessary to protect their occupation against trespassers. In the meantime, there are steps that might be taken to strengthen their legal claim to those lands. In the first place, to prevent valuable evidence from being lost they could record information respecting the group's traditional social organization, the known length of their connection with the land, the ways in which the land has been used and the area occupied.[106] This information could then be used to make their occu-

[101] In *Attorney-General* v *Lord Hotham* (1823) Turn & R 209, 218, 37 ER 1077, 1081, the Master of the Rolls observed: 'Very high judges have said they would presume any thing in favour of a long enjoyment and uninterrupted possession.' Accord *Rogers* v *Brooks* (1783) 1 TR 431 n(a); 99 ER 1179 n(a); *Roe d Johnson* v *Ireland* (1809) 11 East 280, 284; 103 ER 1011, 1013.

[102] Eg, *Bedle* v *Beard* (1607) 12 Co R 4b; 77 ER 1288; *Goodtitle d Parker* v *Baldwin* (1809) 11 East 488; 103 ER 1092; *Doe d Devine* v *Wilson* (1855) 10 Moo PC 502, 527; 14 ER 581, 591.

[103] *White* v *McLean* (1890) 24 SALR 97, 101; *Tehidy Minerals* v *Norman* [1971] 2 QB 528, 552.

[104] *Bastard* v *Smith* (1837) 2 M & Rob 129, 136; 174 ER 238, 240; *Hammerton* v *Honey* (1876) 24 WR 603; *Mercer* v *Denne* [1904] 2 Ch 534, 555–6. For application of this rule in a colonial context to establish a customary law right to a reef, see *Hanasiki* v *Symes* (Judicial Commissioner, Solomon Islands, 17 August 1951, unreported decision of Charles J) in B Hocking, supra fn 62, 254. The rule has been applied in Canada as well in the context of customary adoption: *Re Kitchooalik and Tucktoo* (1972) 28 DLR (3d) 483, 488.

[105] In *Cariño* v *Insular Government of the Philippine Islands*, 212 US 449 (1909), a successful land claim based on Igorot custom and long occupation, Holmes J, delivering the unanimous judgment of the United States Supreme Court, said at 460: '... every presumption is and ought to be against the Government in a case like the present. It might, perhaps, be proper and sufficient to say that when, as far back as testimony or memory goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the same way from before the Spanish conquest, and never to have been public land.'

[106] Anthropologists, historians or other experts could be asked to record the information, as has been done in parts of Canada: eg, see Brice-Bennett, ed, *Our Footprints Are Everywhere: Inuit Land Use and Occupancy in Labrador* (1977); H Brody, *Maps and Dreams: Indians and the British Columbia Frontier* (2nd ed, London, Norman & Woodhouse,

pation known to the world. Everyone in the community could participate in this activity, which might take many forms, from pursuing traditional hunting and gathering patterns to posting signs in appropriate locations. A particularly important action would be to inform strangers who intrude on the land that they are trespassing, and to either give them permission to stay or ask them to leave. In these ways, and by as many other peaceful acts in relation to the land as can be thought of, the group would be creating their own evidence of occupation. By treating the land as theirs, they would be strengthening their right to it. As long as their occupation is not challenged, or seriously interfered with, they need do no more. But if they do have to go to court, they will be able to reply on the occupation which their own acts have established.

1983); Elias, 'Rights and Research: The Role of the Social Sciences in the Legal and Political Resolution of Land Claims and Questions of Aboriginal Rights' [1989] 1 CNLR 1.