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Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title

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BRIAN SLATTERY

ANCESTRAL LANDS, ALIEN LAWS:
JUDICIAL PERSPECTIVES ON ABORIGINAL TITLE

University of Saskatchewan
Native Law Centre

Studies in Aboriginal Rights
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1. INTRODUCTION

The histories of Canada, the United States, New Zealand and Australia, despite considerable differences, have certain common features. These countries were originally inhabited solely by aboriginal peoples organized in relatively small-scale societies. At various stages, Great Britain asserted sovereignty over these territories, and proceeded to introduce European settlers and to establish novel legal and political institutions. Over time, the settlers grew to outnumber the native people, and the new British-derived institutions assumed a position of dominance. English law was generally introduced. Much of the land originally held by native peoples passed into settler hands, by processes ranging from peaceful agreement to forcible dispossession. In recent times, all of these countries have witnessed a resurgence of native political and cultural activity. All are confronted with a number of complex and inter-related legal problems concerning native people, problems inherited from colonial times. Among these, the issue of aboriginal title is perhaps the most significant.

The question is this. When the British Crown claimed sovereignty over a territory and introduced new laws and legal institutions, what impact did this have on the land rights held by aboriginal peoples? Were those rights nullified, or did they survive in a form cognizable by Crown courts? The issue is complicated by the fact that at least three distinct legal systems may be involved: the law of the incoming sovereign, native customary law, and international law.

In Canada, the subject has recently assumed particular prominence. The *Constitution Act* of 1982 recognizes and affirms the "existing aboriginal and treaty rights of the aboriginal peoples of Canada." Yet its meaning and effect are controversial. The term "aboriginal rights" is not defined, and the qualifying word "existing" is susceptible of varying interpretations.

My aim here is to explore the principal ways in which North American and Commonwealth courts have traditionally approached the question of aboriginal land rights. At least five distinct attitudes may be noted. I will call them: a) the doctrine of a legal vacuum; b) the doctrine of radical discontinuity; c) the doctrine of continuity; d) the doctrine of common law dispossession; and e) the doctrine of aboriginal title. These doctrines are

\[\text{Section 35(1).}\]
hardly of equal weight, either in terms of their intrinsic merits or of the authority with which they have been advanced. Several, indeed, are more in the nature of judicial flights of fancy than doctrines of real substance. Others were developed primarily to deal with situations arising in India and Africa, and are of uncertain relevance in North American and Antipodean settings.

I propose, therefore, to discuss the first four doctrines only briefly. The remainder of the paper will be devoted to the doctrine of aboriginal title, which represents the most significant judicial attempt made so far to assess the legal effects on native land rights of the advent of Europeans in North America, and, by extension, in New Zealand and Australia.

II. THE DOCTRINE OF A LEGAL VACUUM

This theory holds that a territory inhabited by so-called “primitive peoples” was legally equivalent to a desert land, what is termed *terra nullius*. The native inhabitants were mere wanderers over the surface of the land, possessing neither sovereignty nor permanent rights of any sort to the territories they occupied. On this view, while indigenous peoples may have constituted a practical obstacle to European penetration, they posed no more of a legal hindrance than did the wild animals of the forests and plains. Their countries were supposedly open to European appropriation by such methods as discovery, symbolic acts, or occupation, — modes of acquisition suited to vacant territories —, without any need to obtain the consent of the inhabitants, or even to conquer them. Territories acquired in this manner would presumably be governed exclusively by laws introduced by the incoming European sovereign, who would be vested automatically with complete title to the soil and unqualified powers of disposition. The land rights, customary laws and governmental structures of the native peoples would have no legal existence, except where expressly recognized by the new sovereign.

This remarkable doctrine is enunciated in the Nova Scotia case of *Rex v. Syliboy*, decided in 1928. Justice Patterson affirmed:

... the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia has passed to Great Britain not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.

It is not easy for us today to give much credence to this view. When Europeans first came to America and the Antipodes, they encountered numerous bodies of indigenous peoples, occupying definite territories to the exclusion of other groups, factually independent, sovereign within their borders, and vested with their own customary laws and political systems. As Justice Judson of the Supreme Court of Canada recently noted, “the 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."

However the doctrine of a legal vacuum does not confine itself to modern viewpoints. In its most developed form it contends, not that we would be justified today in ignoring the territorial rights of indigenous peoples, but that as a matter of historical fact the colonial powers did precisely this. However repugnant colonial attitudes may appear to the modern observer (it is argued), a court is obliged to take them into account in determining the legal impact of European rule upon native peoples at the relevant historical period.

A detailed appraisal of the historical accuracy of these views cannot be given here. Suffice it to say that they seem sustainable only on a highly selective view of the historical evidence. In North America, for example, European state practice was diverse and contradictory regarding such matters as the status of Indian nations and their territories, the efficacy of discovery and symbolic acts of appropriation, the nature of treaties concluded with Indians, the position of Indian customary laws, and so on. While European sovereigns often made extravagant territorial claims on their own accounts, they usually proved more circumspect when it came to appraising the claims of rival powers, and they often adopted yet another posture in direct dealings with Indian nations. While a certain amount of evidence supports the contention that European sovereigns viewed North America as terra nullius and treated its native inhabitants as lacking any corporate legal existence or land rights, there is a considerable body of historical data inconsistent with this view. Any proper assessment must take both bodies of evidence into account.

A few examples may be cited. Blackstone, in his Commentaries on the Laws of England, divides colonial territories into two categories, depending in effect on whether or not they were terra nullius when the Crown entered. If they were vacant, then they could be acquired by mere occupancy; if they were already populated, they could only be gained by conquest or cession. His words are as follows:

Plantations, or colonies in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties.

There is a certain ambiguity in this passage. At first sight, the author might seem to suggest that a territory, although populated, could be regarded as vacant if it were not cultivated by the inhabitants, but used primarily for pastoral purposes, or for hunting, fishing and gathering. The argument could then be made that the hunting territories of American Indians were "desert" and open to occupation by settlers. However Blackstone goes on to dispell this impression, stating that the American plantations were principally of the conquered and ceded variety "being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present enquire) or by treaties." The American colonies were not gained by mere occupancy, for the simple reason that they were for the most part already supplied with inhabitants.

Blackstone elaborates on this point in a subsequent chapter of the Commentaries where he discusses the origins of the institution of property. After a period of primitive communality, he writes, mankind reached a stage where it became an acknowledged right for a person to occupy any lands not already occupied by others. "Upon the same principle," he declares,

was founded the right of migration, of sending colonies to find out new habitations, when the mother-country was overcharged with inhabitants; which was practised as well by the Phænicians and Greeks, as the Germans, Scythians, and other northern people. And, so long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seizing on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to christianity,


4 Ibid., at 105. It seems clear that Blackstone included in this statement the populous colonies on the American continent, and not merely the island colonies of the Caribbean. Certainly a later American editor understands him in this sense; see William Blackstone, Commentaries on the Laws of England, ed. by St. George Tucker (Philadelphia: Birch and Small, 1803), Vol. I, Appendix, 381-84. The suggestion that Blackstone had the Caribbean colonies in mind was made in Milirump v. Nabulco Pty. Ltd. (1971), 17 F.L.R. 141 at 202 (Aust. N.T.S.C.), but this view seems to have no historical or textual basis.
deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind." It was not legitimate, then, to seize populated territories merely because their inhabitants had different customs and religions. Such countries could not be deemed "vacant" and open to occupation.

The issue arose in a concrete form following the Treaty of Paris (1763), in which France and Spain ceded to Britain their claims to extensive American territories. At that period there was considerable pressure from the old British colonies along the Atlantic seaboard to settle the lands west of the Appalachians, which were held by the Indians. The British Crown could have maintained that such lands, being for the most part un­cultivated, were open to European occupancy without consideration of In­dian title. However the Crown did not adopt this view. On 7 October 1763, a Royal Proclamation was issued containing extensive provisions regarding Indian lands. The preamble to this part recites that it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds...

The Proclamation, then, treats Indian nations as protected peoples under the Crown's overall sovereignty, and presupposes that they retain rights to unceded lands in their possession. It goes on to lay down detailed provisions protecting Indian lands from encroachment and fraudulent pur­chases. In particular it forbids colonial Governors to grant away un­surrendered Indian lands and prohibits settlement on them. Private purchases of Indian lands are outlawed, and a system of public purchases is substituted.

The Proclamation's provisions were reinforced by Royal Instructions sent that same year to the Governors of the new colonies of Quebec, East Florida, and West Florida. The Instructions for Quebec (which are virtually identical with those issued for the Floridas) recite that the province "is in part inhabited and possessed by several nations and tribes of Indians, with whom it is both necessary and expedient to cultivate and maintain a strict friendship and good correspondence, so that they may be induced by degrees not only to be good neighbours to our subjects but likewise themselves to become good subjects to us...". The Governor of Quebec should appoint persons "to assemble and treat with the said Indians, promising and assuring them of protection and friendship on our part...". The Instructions also require the Governor to determine the number, nature and disposition of the Indian tribes "and the rules and constitutions by which they are governed or regulated". The document goes on to state: "you are upon no account to molest or disturb them [the Indian tribes] in the possession of such parts of the said province as they at present occupy or possess..."

Many other examples of this type could be cited. The few given here may serve to counter the notion that European powers uniformly dealt with North American lands as if they were vacant, ignoring the presence of the aboriginal peoples.

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7 Blackstone, supra, note 5, 1st ed., II, 7; spelling modernized.
9 For detailed analysis of the Proclamation's provisions, see Slattery, Land Rights of Indigenous Canadian Peoples, supra, note 4, at 191-349.
III. THE DOCTRINE OF RADICAL DISCONTINUITY

This theory, unlike the first, does not necessarily maintain that native peoples possessed no rights to their lands prior to European rule. It holds that, in British law, whenever the Crown acquires a new overseas territory, be it by conquest, cession, or peaceful settlement, the land rights of the local people are automatically terminated. The Crown obtains a complete title to the soil and absolute powers of disposal. There is a radical discontinuity between the situation prior to the Crown’s coming and that prevailing afterwards. Whatever land rights the native inhabitants enjoy under the new regime must trace their origin to some official act of the incoming sovereign.

Authority for this proposition derives mainly from dicta in several Privy Council decisions concerning India. A striking example is found in Vajesingji Joravarsingji v. Secretary of State for India in Council, where Lord Dunedin said:

... when a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing.

It seems doubtful whether this can be taken as a correct statement of the law, at least in this bald form. There is a basic difference between recognizing that the Crown may lawfully appropriate privately-held property when a new territory is acquired, and asserting that all private land rights are automatically nullified without any Crown action at all. The decisions which appear to espouse a doctrine of radical discontinuity can, I think, be explained on another basis: at the time the particular territories in question were acquired, the Crown explicitly elected to review local property rights, and proceeded to modify or terminate some of these. This is very different from the situation where the Crown is content to let the existing situation stand without acting one way or the other, or where it implicitly accepts existing property rights in its dealings with the local inhabitants.

In any case, it is difficult to see how the proposed doctrine could be carried out in a thoroughgoing way. Can it seriously be maintained that at the instant of acquisition the total population of a country become squatters in their own dwellings, and trespassers in their own gardens? The result is so drastic that it seems implausible that it should occur by the silent and automatic operation of the law alone, without definite state action.

For discussion and references see Slattery, Land Rights of Indigenous Canadian Peoples, supra, note 4, at 45-62.

(1924), L.R. 51 Ind. App. 357 at 360 (P.C.).

IV. THE DOCTRINE OF CONTINUITY

A more sophisticated view of the law can be found in a series of Privy Council decisions originating mainly from Africa that adopt a principle of presumptive continuity. This doctrine distinguishes between sovereignty and private property rights and holds that the Crown's acquisition of sovereignty over a new territory does not automatically entail the confiscation of all private property. Rather the presumption is to the contrary. Although the Crown initially holds the power to terminate local property rights as an act of state, if it elects not to exercise that power, then local rights are presumed to survive intact, subject to any modifications necessarily flowing from the change of sovereignty proper. This doctrine posits a measure of legal continuity between the old regime and the new, in the absence of official acts to the contrary.

The principle of continuity was adopted by the Privy Council in *Oyekan v. Adele,* where Lord Denning summarized the effect of the Crown's acquisition of sovereignty over a newly ceded territory in the following manner:

The effect . . . is to give to the British Crown sovereign power to make laws and to enforce them, and, therefore, the power to recognize existing rights or extinguish them, or to create new ones. In order to ascertain what rights pass to the Crown or are retained by the inhabitants, the courts of law look . . . to the conduct of the British Crown. It has been laid down by their Lordships' Board that "Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of his predecessors avail him nothing." . . . In inquiring, however, what rights are recognised, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected.

This doctrine suggests that, absent contrary acts, the original land rights of native peoples survived the process whereby the Crown gained control over their territories. Its application in the North American context was accepted by Justice Hall of the Supreme Court of Canada in *Calder v. Attorney-General of British Columbia,* where he stated:

The appellants [officers of the Nishga Indian Tribal Council] rely on the presumption that the British Crown intended to respect native rights; therefore, when the Nishga people came under British sovereignty . . . they were entitled to assert, as a legal right, their Indian title. It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation.
V. THE DOCTRINE OF COMMON LAW DISPOSSESSION

The theory of discontinuity occasionally assumes a somewhat different form. This doctrine holds that in instances where English law is introduced into a newly-acquired territory the local inhabitants are automatically deprived of their existing land rights. This is thought to come about, not because of the change of sovereignty itself (which is the theory considered above), but because of the application of English law. The reasoning is as follows. It is a fundamental principle of English law that the King is the original proprietor and lord paramount of all lands within the realm, and the sole source of title to the soil. The courts will only recognize private land titles which can be shown to derive, directly or indirectly, from a Crown grant. The local inhabitants of a newly-acquired territory normally cannot show this, as their titles stem from ancient possession or other sources predating the advent of the Crown. Therefore, the doctrine contends, their rights cannot be recognized in the courts of the new sovereign.

This viewpoint was expressed in the Australian case of *Milirrpum v. Nabacel Pty. Ltd.*, where Blackburn J. refers to “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 alodially, but only an estate or interest in it which he holds mediately or immediately of the Crown.” He goes on to conclude: “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 whatever in land which existed thereafter in subjects of the Crown were the direct consequence of some grant from the Crown.” Native Australian peoples were therefore automatically deprived of their ancestral lands.

The argument rests on the premise that when English law replaces a local legal system all rights held under the former system which do not conform to English law automatically cease. The land rights of the local inhabitants are said to be void, not because the Crown has nullified them, but simply because they do not satisfy the requirements of English property law. The premise, once stated in a general form, appears highly questionable. It can hardly be true, for example, that marriages validly contracted under the old local law would be automatically dissolved for failure to conform to the new English rules governing place of marriage, parental consent, number of witnesses, and so on. To take a case closer to home, it cannot easily be imagined that a person who had inherited lands under local law prior to the changeover would now find himself disinherited in favour of a third party by the retroactive operation of English rules of succession. These examples concern rights which in their *origins* fail to satisfy the requirements of English law. Similar considerations govern rights whose character and incidents are unknown to the English system. Would a contract of a type not recognized in English law (moral questions apart) be nullified upon the changeover? Again, would a right to movable property whose incidents are foreign to English concepts be rescinded *ipso facto*?

The true rule is that where English law is introduced into a territory the new system does not operate retroactively so as to nullify private rights held under the former legal regime, at least if they do not present morally offensive features. The requirements of English law concerning the creation and transfer of rights operate only for the future. It seems to follow that private land rights held under local law will not be invalidated by the introduction of English law, even though such rights may not conform, in character or origins, to the new system. There is scope, then, for the courts to recognize land rights held by local inhabitants which stem, not from a Crown grant, but from sources pre-dating the introduction of English common law.

The issue arose in Quebec following the publication of the Royal Proclamation of October 1763. This provided, among other things, that the inhabitants of the newly-acquired province might confide in the Crown’s protection “for the Enjoyment of the Benefit of the Laws of Our Realm of England”, and that courts of justice would be erected to determine all causes, both criminal and civil, “according to Law and Equity, and as near as may be agreeable to the Laws of England”. The potential impact of this provision upon the French inhabitants caused widespread consternation in the province, and led eventually to the restoration of French law in civil matters in the Quebec Act of 1774. What is interesting for our purposes is the fact that the law officers of the Imperial Crown, called in at various points to express their views on the effects of the Proclamation’s provisions, agreed that they should not be read as altering local property rights held under French law.

The Attorney-General and Solicitor-General of England, Yorke and De Grey, referred in their report of 1766 to the alarm and disorder engendered in Quebec by certain interpretations put upon the Royal Proclamation of 1763.

As if it were his Royal Intentions . . . at once to abolish all the usages and Customs of Canada, with the rough hand of a Conqueror rather than with the true Spirit of a Lawful Sovereign, and not so much to extend the protection and Benefit of his English Laws to His new subjects, by securing their Lives, Libertys and propertys with more certainty than in former

times, as to impose new, unnecessary and arbitrary Rules, especially in the
Titles to Land, and in the modes of Descent Alienation and Settlement,
which tend to confound and subvert rights, instead of supporting them.
The law officers went on to advise that in all actions relating to land it
would be oppressive to disturb without much deliberation the prevailing
French custom, for “to introduce at one Stroke the English Law of Real
Estates ... must occasion infinite confusion and Injustice”. They thought
it might therefore be appropriate for the Governor of Quebec to issue an
explanatory proclamation quieting the minds of the populace as to the true
meaning of the Royal Proclamation of 1763 regarding local customs and
usages, “more especially in Titles of Land and Cases of Real property.”

A subsequent Attorney-General of England, Edward Thurlow, con­
curred with this view in a report on Quebec composed in 1773. He wrote:

The Canadians seem to have been strictly entitled by the jus gentium
to their property, as they possessed it upon the capitulation and treaty of
peace, together with all its qualities and incidents, by tenure or otherwise,
and also to their personal liberty; for both which they were to expect your
Majesty's gracious protection.

It seems a necessary consequence that all those laws by which that
property was created, defined, and secured must be continued to them. To
introduce any other, as Mr. Yorke and Mr. De Grey emphatically ex­
pressed it, tend to confound and subvert rights instead of supporting
them.19

Rather than holding that English law nullified existing property rights,
the law officers reasoned that the continued presence of those rights
softened the impact of English law, which took effect subject to them and
not the contrary.

A similar attitude was exhibited by Justice Monk of the Quebec
Superior Court in the celebrated case of Connolly v. Woolrich,20 where he
considered the effect of English and French law on the rights and customs
of Indian peoples in the Hudson’s Bay Company Territories and the old
North-West. Justice Monk was willing to assume, for purposes of argu­
ment, that the first European inhabitants in these areas carried with them
the law of their parent state as their birthright. However, he pointed out
that they took only so much of that law as was applicable to the condition

of an infant colony. “For the artificial refinements and distinctions incident
to the property of a great and commercial people, ... and a multitude of
other provisions, were neither necessary nor convenient for them, and
therefore not in force.” In the Canadian North-West, the first settlers en­
countered numerous and powerful Indian tribes, who had long been in
possession of the country.

Now, as I said before, even admitting, for the sake of argument, the ex­
istence ... of the common law of France, and that of England, at these
two trading posts or establishments respectively, yet, will it be contended
that the territorial rights, political organization such as it was, or the laws
and usages of the Indian tribes, were abrogated — that they ceased to exist
when these two European nations began to trade with the aboriginal oc­
cupants? In my opinion, it is beyond controversy that they did not — that
so far from being abolished, they were left in full force, and were not even
modified in the slightest degree in regard to the civil rights of the natives.

Nevertheless, where English law is introduced into a country inhabited
by aboriginal peoples and becomes the dominant legal system, it becomes
necessary to harmonize native land rights with the common law in some
way. A number of questions arise. What rights and powers does the Crown
hold regarding native lands? Does it possess some sort of underlying title?
Can it grant away lands held by the aboriginal peoples, and what is the legal
effect of such grants? Other issues arise regarding the relative rights of
settlers and native peoples. Are settlers free to occupy native lands? Can
they purchase them from the native owners and obtain good title? A
number of questions also exist regarding the rights of native peoples
themselves. What is the legal scope of their title? Does it extend to all
beneficial uses of the land? Is it tied to traditional uses? How does abo­
rial title pass from one generation to the next, and from one native
group to another? Finally, in what ways may aboriginal title properly be ex­
tinguished? The need to answer these and other related questions has given
rise to a distinct body of judicial principles known as the doctrine of
aboriginal title.

This doctrine has sprung not simply from the necessity of fitting
aboriginal land rights into the common law scheme, but also from the need
to make some legal sense of the often contradictory historical patterns of
Crown practice regarding aboriginal peoples, particularly in North
America. From an early date, far-reaching and often ill-defined claims were
advanced by the British Crown to American territories, prior to any actual
control being achieved, or the territories even being explored. These claims
originally had little or no basis in fact. They were not recognized by the in­
digenous nations and bands actually occupying the regions claimed. They
often conflicted with equally extravagant claims advanced by rival Euro­
pean powers. They were of questionable legitimacy under international law.
In most cases, the Crown gained control of territories claimed only after a
considerable lapse of time, as much as three centuries in certain instances.
During the intervening period, there was a good deal of conflicting practice,
which defies easy summary. On the one hand the Crown granted Charters

18 Adam Shortt and Arthur G. Doughty, eds. Documents Relating to the Constitu­
tional History of Canada, 1759-1791, 2nd ed. (Ottawa: King's Printer, 1918), I,
251 at 252, 255, 256; dated 14 April 1766.
19 Ibid., I, 437 at 443; dated 22 January 1773. See also the Report of the Solicitor-
General, Alex Wedderburn, of 6 December 1772, ibid., I, 424 at 430; and the
Report of the Advocate-General, James Marriott, published in 1774, ibid., I, 445
at 454, 471-72.
20 (1867), 11 L.C. Jur., 197 at 204-05 (Que. S.C.); also reported at 17 R.J.R.Q. 75.
The decision was upheld on appeal sub nom. Johnstone v. Connolly (1869), 17
covering vast territories to various proprietary and corporate bodies, with no explicit reservation for Indian rights, at a time when most of the lands were under Indian occupation. On the other hand the Crown generally, if not always, sought to maintain friendly relations with the Indian nations bordering on the settled areas, and often attempted to prevent intrusion on Indian lands. At the same time it entered into numerous treaties with native peoples, which frequently attributed to them a quasi-autonomous status, as protected nations or allies of the Crown. Finally, in most British colonies Indian lands were purchased by the government prior to being granted out, and private purchases of such lands were prohibited. How can these facts be reconciled? The effort to do so leads to the doctrine of aboriginal title, which we will now consider.

A large number of cases might be invoked in any comprehensive discussion of this doctrine. My aim here is more modest: to examine in detail several early decisions which first expounded the doctrine of aboriginal land rights in a developed form, and which have had a substantial influence on subsequent case-law in the United States and Commonwealth countries. The cases to be reviewed are two decisions of the United States Supreme Court handed down in the early nineteenth century, and a decision of the New Zealand Supreme Court of slightly later vintage. I will examine the American decisions first.

VI. THE DOCTRINE OF ABORIGINAL TITLE

JOHNSON v. M'INTOSH

John Marshall was Chief Justice of the United States Supreme Court when it decided the cases of Johnson and Graham's Lessee v. M'Intosh (1823) and Worcester v. State of Georgia (1832). Chief Justice Marshall wrote the majority decisions in both cases and brought to his task an intimate knowledge of early American history and a familiarity with the question of Indian title. His reasoning in Worcester follows general lines established in the earlier case, with certain significant differences. It will be convenient here to focus on the Johnson case, referring to Worcester for clarification and amplification.

In Johnson v. M'Intosh, the plaintiffs laid claim to certain lands in the state of Illinois. They asserted title under conveyances made to private individuals by the chiefs of the Illinois and Piankeshaw Indians in 1773 and 1775. At the period of purchase, the lands fell within the asserted boundaries of the British colony of Virginia, which claimed jurisdiction over extensive western areas under its original Crown Charters, claims later surrendered to the United States government after the American Revolution.

8 Wheaton 543 (U.S.S.C.); 6 Peters 515 (U.S.S.C.).


Useful discussions of these cases can be found in Howard R. Berman, "The Concept of Aboriginal Rights in the Early Legal History of the United States" (1978), 27 Buffalo Law Review 637, and J. Youngblood Henderson, "Unraveling the Riddle of Aboriginal Title" (1977), 5 American Indian Law Review 75.

For a review of these transactions, see Lawrence H. Gipson, The British Empire before the American Revolution (New York: Alfred A. Knopf, 1936-70), XI, 489-91.
The same Indian peoples subsequently ceded the lands in question by public treaty to the American government, which in turn granted them to the defendant. The question was whether the plaintiff’s title, acquired directly from the Indians, prevailed over the defendant’s title, derived from the United States government. This in turn raised the question of the relationship between Indian title and the English-derived land system in force in the American colonies, later the United States.

The court’s decision is best appreciated in the light of the arguments advanced by counsel, which I now turn to.

A. The Submissions of Counsel

Leading off, the plaintiffs attempted to short-circuit any discussion of the nature of Indian title. They contended that nearly all American lands were held under Indian purchases, public and private. In the case at hand, both the plaintiffs’ predecessors and later the United States had secured Indian cessions of the disputed lands. Therefore both parties ultimately claimed by virtue of the same root of title. The only question was whether private individuals were competent to make such purchases.

While it was thus unnecessary and speculative to discuss what sort of title the Indians held to their lands, the plaintiffs ventured the opinion that “their title by occupancy is to be respected, as much as that of an individual, obtained by the same right, in a civilized state”. The fact that Indians held lands in common did not impair the strength of their title by occupancy. The plaintiffs referred to the Treaties of Utrecht and Aix la Chapelle as recognizing a right of soil in the Indians. At Utrecht in 1713, Britain and France agreed on the following Article:

The inhabitants of Canada and other subjects of France shall hereafter give no molestation to the Five Nations or cantons of Indians subject to the dominion of Great Britain [i.e. the Iroquois nations], or to the other nations of America who are friends of the British Crown. In like manner, the subjects of Great Britain shall behave peaceably towards native Americans who are subjects or friends of France: and both groups shall enjoy full liberty of going and coming on account of trade.

This stipulation was confirmed in 1748 by the Treaty of Aix la Chapelle as part of a general renewal of the Utrecht provisions.

While the Treaty does not recognize Indian land rights in explicit terms, it prohibits efforts on either side to dispossess Indians connected with the other party, which presumes Indian entitlement to their territories. The Treaty also distinguishes between Indians who are European subjects and those who are merely allies, thus apparently attributing an independent status to the latter.

The plaintiffs went on to cite the remarks made by Chief Justice Marshall in the Supreme Court decision in Fletcher v. Peck (1810), where, speaking for the majority, he said:

It was doubted whether a state can be seized in fee of lands, subject to the Indian title, and whether a decision that they were seized in fee, might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title.

The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seizin in fee on the part of the state.

The court recognizes Indian title as a legal right forming a burden on the underlying fee of the state; as such, it is entitled to respect by the courts until extinguished. Marshall does not indicate whether that title might validly be alienated to a private individual.

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21 The following discussion is based on the abbreviated account of counsel’s arguments found in the law reports. Unfortunately no complete version of the pleadings of counsel appears to have survived, as an inquiry to the United States Supreme Court Library has confirmed. I am indebted to Prof. Balfour J. Halévy, Librarian of the Osgoode Hall Law School, for his generous assistance on this point.

22 Ibid., at 562-63.

23 Ibid., at 563.


26 6 Cranch 87 at 142-43 (U.S.S.C.).
It is a matter of interest that Justice Johnson, in a strong separate opinion in the same case, denied that a state could be seized in fee simple of lands subject to Indian title. The right of the state in such an instance was "nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors within certain defined limits." This amounted to a mere pre-emptive right to acquire the fee simply by purchase when the Indian proprietors were willing to sell. It may be noted that Johnson's view, while favourable to Indian title, was distinctly inamicable to the plaintiffs' claim, because it attributed to the government an exclusive power to extinguish Indian title, and thus implicitly ruled out private purchases.

Counsel also referred to the decision of the New York Supreme Court in *Jackson v. Wood* (1810), where Chancellor Kent observed: "It is a fact too notorious to admit of discussion or to require proof, that the Oneida Indians still reside within this state, as a distinct and independent tribe, and upon lands which they have never alienated, but hold and enjoy as the original proprietors of the soil." This conclusion was not affected by the fact, which Kent noted, that "indians generally hold their lands in common, and do not know of individual property in land."

Having mounted these authorities favouring the existence of Indian title, the plaintiffs proceeded to argue that this title could be transferred to private individuals, in the absence of any legislation to the contrary. At the time the conveyances in question were executed, they contended, there were no valid enactments in Virginia forbidding such transactions. Therefore the conveyances were good. To sustain this point, the plaintiffs had to distinguish several specific pieces of legislation, notably the Royal Proclamation of 1763 and a Virginia statute of 1779. Their detailed submissions on this subject will be considered later.

In reply, the defendants presented a comprehensive range of arguments, which attempt to cover all possible sources of law on the subject, including the law of nations, natural law, Indian custom, British colonial law, English land law, Virginia statutes, and Crown legislation.

Invoking the law of nations, the defendants asserted that "the uniform understanding and practice of European nations, and the settled law, as laid down by the tribunals of civilized states, deny the right of the Indians to be considered as independent communities, having a permanent property in the soil, capable of alienation to private individuals." The Indians, it was asserted, remained in a state of nature, and had never been admitted into the society of nations. Indeed the whole theory of European title to lands in America rested upon the hypothesis that the Indians had no right of soil as sovereign, independent states. "Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives." This argument, it may be noted, is similar to the doctrine of a legal vacuum, discussed earlier.

The defendants also presented a parallel argument based on natural law. By the law of nature, it was contended, the amount of land we can acquire by occupancy is limited by our capacity to use it to supply our wants. We cannot exclude other people from lands which they need and which we ourselves cannot use. "Upon this principle the North American Indians could have acquired no proprietary interest in the vast tracts of territory which they wandered over; and their right to the lands on which they hunted could not be considered as superior to that which is acquired to the sea by fishing in it. The use in the one case, as well as the other, is not exclusive." In brief, the lands occupied by the Indians were not used by them in such a manner as to prevent their being appropriated by a people of cultivators.

This argument, it may be noted, combines two distinct lines of thought. The first asserts that we cannot arrogate for ourselves more land than we actually need and make use of. This point, even if valid, is not particularly telling against Indian title as such, because there could be no doubt that the Indians made use of at least part of the land they claimed, and depended upon it for sustenance. At most the principle might be employed to narrow the bounds of Indian territories, not to eliminate them entirely. The second line of argument appears to assert something quite different, namely that cultivators of the soil are entitled to oust those who use the land only for hunting and gathering. This proposition raises age-old and highly contentious questions about the relative rights of farmers, herders, hunters and miners. Although one might agree in the abstract that it is desirable that land should be put to its most productive use, it seems extreme to conclude that people who use land to less than its full potential thereby forfeit any title to it.

The defendants went on to present an alternative argument designed to meet these sorts of objections. They were prepared to accept, for the sake of argument, that the Indian nations constituted independent states and as such held title to their territories. But if this were true, contended the defendants, it followed that when the plaintiffs purchased land from the Indians, they took their title as Indian subjects and according to Indian concepts of property. But the Indians never had any idea of individual property in land. Further, the lands conveyed to the plaintiffs were never severed

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31 Ibid., at 147.
32 7 Johnson's Reports 290 at 295 (N.Y.S.C.).
33 8 Wheaton 543 at 567.
34 Ibid., at 567.
35 Ibid., at 569-70.
36 Ibid., at 570.
37 Of course as a matter of fact many North American Indian peoples practiced agriculture as well.
from Indian dominion, "because the grantees could not take the sovereignty and eminent domain to themselves." Therefore, the defendants imply, the plaintiffs could stand in no higher a position than ordinary members of the tribe, whose particular rights to use tribal lands were extinguished by the general cession made to the United States.

A fourth argument presented by the defendants draws upon both British colonial law and English common law as received by the colonists by Royal Charters, which were crown grants. The title to the Crown to American territories, they contended, passed to the colonists by Royal Charters, which were absolute grants of the soil. It was a "first principle in colonial law that all titles must be derived from the crown." By "colonial law", counsel seemingly means the basic set of legal principles governing the colonies and their relations with the Crown. The reasoning is that the royal practice of granting Charters to American lands presupposed a legal principle preventing private individuals from obtaining lands in the colonies on their own account. The same conclusion is reached by a slightly different route. Counsel noted that in most of the colonies it was accepted that the settlers brought with them the rights and duties of Englishmen, and particularly the laws of property, so far as these were suitable. English property law enshrined the principle that title to land derives exclusively from the Crown. Therefore the plaintiffs could not derive title from the Indians.

The argument, we may remark, recalls the doctrine of common law dispossession considered earlier. Here, however, it is employed not so much to deny land rights to the Indians as to negate the right of a settler to purchase land from the Indians, a point which has more merit. If indeed the settlers are governed by English property law, as distinct from the Indians who hold land on a different basis, then it arguably follows that settlers can obtain title to property only by virtue of Crown grant.

Defendants also cited various pieces of legislation. As early as 1662, a Virginia Act forbade private land purchases from the Indians. This statute, defendant observed, had apparently never been repealed. A Virginia Act of 1779 states that no person has or ever had a right to purchase lands within the limits of Virginia from any Indian nation except on the public account, and that all such private purchases, past and future, are utterly void. The latter statute, it may be remarked, post-dated the two purchases in question here, which took place in 1773 and 1775. However the Act purports to govern past as well as future transactions.

On this point, counsel for the other side contended that the Act of 1779 could not affect rights already existing at the time of passage, invoking the Virginia constitution and general principles. Moreover the Act was apparently repealed in 1794, not having been included in the revision of that year. The repeal, they argued, reinstated any rights affected by the Act. As for the legislation of 1662, the plaintiffs asserted that the old Virginia Acts governing Indian purchases had all been repealed before the relevant period.

The defendants went on to refer to the Royal Proclamation of 1763 which explicitly prohibited private persons from making any purchases of Indian lands in the American colonies. Counsel for the other side contended that the Proclamation was invalid in this respect, arguing that the Crown had no prerogative power to legislate for a colony once a local legislative assembly existed, as had long been the case in Virginia. Since the Proclamation was a prerogative act and not an Act of Parliament, it was void in Virginia. The authority cited was the famous English decision in Campbell v. Hall (1774). Lord Mansfield held there that when the Crown acquired a territory by conquest or cession, it initially could legislate for the country under the prerogative, apart from Parliament; however this power was lost once a local assembly was granted to the colony. The defendants countered this reasoning with a pair of alternative arguments. The territory in question was acquired by the Crown either under the Treaty of Paris in 1763, or at an earlier period when Virginia was founded. On the first premise, the Indian inhabitants of the territory fell under the Crown's sovereignty in 1763, as the inhabitants of a conquered and ceded country, and so, under the rule in Campbell v. Hall, the Crown could legislate for them under the prerogative. Insofar as the Proclamation restricted the right of Indians to sell their lands to settlers, it was valid because the Indians (if not the settlers) could be viewed as a conquered people. In the alternative, if the area in question was not gained by cession in 1763 but had always been part of the colony of Virginia, then the Proclamation was a valid exercise of the royal power to prescribe the limits within which grants of land and

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38 8 Wheaton 543 at 568.
39 Ibid., at 570.
40 Ibid., at 570-71.
41 The statute cited appears to be Act 138 of the session for 1661-62, entitled "Concerning Indians". This provides that for the future no Indian king or other shall upon any pretence alienate or sell, nor any Englishman purchase, any tract of land justly claimed or actually possessed by any Indians, on pain of nullity: text in William W. Hening, ed., The Statutes at Large: Being a Collection of All the Laws of Virginia from ... the Year 1619 (Facsimile reprint, Charlottesville, Va.: University Press of Virginia, 1969; derived from 1st and 2nd eds., various places and publishers, 1819-23), II, 138 at 139.
42 8 Wheaton 543 at 569; the 1779 statute is given at 565, note 5.
43 Ibid., at 565-66. Unfortunately no references are given for the supposed repealing legislation.
44 Ibid., at 571.
46 1 Cowp. 204; 98 E.R. 1045 (K.B.).
47 8 Wheaton 543 at 571.
settlements could be made in a colony. This power entailed the authority to control private purchases of Indian lands.48

B. The Decision

Chief Justice Marshall, delivering the unanimous opinion of the Supreme Court, rejected the plaintiff’s claim to derive title from the Indians. Three distinct grounds were given for the decision. It was said, firstly, that the uniform practice of both Great Britain and the United States, its successor, rested on the premise that the state had the exclusive power to grant title to lands in America. Such title was subject to the Indian right of occupancy; but the Indian right was extinguishable only by surrender to the state, and could not be transferred to private individuals. The second ground was somewhat different. It held that whatever rights the plaintiffs acquired from the Indians were held under Indian protection and subject to their laws. If the Indians chose to annul those rights, no American court could interfere. The fact that the Indians ceded the lands in question to the United States without any reservation of the plaintiffs’ rights indicated that they considered those rights invalid. The final reason given by the court was that private purchases of Indian lands were prohibited by the Royal Proclamation of 1763, which was still in force when the transfers took place.

1. The argument from uniform state practice

Marshall begins by stating that the basic issue is whether the Indians have the power to give to private individuals a title to land sustainable in American courts.49 He emphasizes that the question is at root one of American law, rather than natural law or international law. Title to lands depends “entirely on the law of the nation in which they lie”. A court, he affirms, is bound to follow not simply those principles of abstract justice which God has impressed on man’s mind and which regulate the rights of civilized nations, but also and more particularly those rules “which our own government has adopted in the particular case, and given us as the rule for our decision”.50 Marshall acknowledges here a certain tension between domestic American law and principles of natural law and international law, and leaves no doubt as to which must prevail in American courts in case of conflict. This order of precedence is clearly indicated in a later passage, where Marshall observes that, however much a restriction on alienation of Indian lands “may be opposed to natural right, and to the usages of civilized nations”, yet if it is indispensable to the system under which the country has been settled, it “certainly cannot be rejected by courts of justice”.51 Elsewhere he remarks:

We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.52

The Chief Justice thus downplays the relevance of defendants’ submissions on these points, and evidently makes every reservation as to their correctness in point of principle.

The governing law, then, is that of the United States. Marshall holds, however, that American law on this subject is founded on the law enforced by Great Britain in its American colonies prior to the Revolution. This in turn he characterizes as consonant with the rules originally recognized among European colonial powers as governing their behaviour in the New World. He thus begins his analysis with an historical survey of the practice of the major European powers, and then proceeds with an examination of British and finally American practice regarding Indian lands.

From the early days of American discovery and exploration, relates Marshall, the great states of Europe were driven by a thirst for new territories. In order to avoid conflicting settlements and consequent war, it was necessary for them to establish a principle which all should acknowledge as the law by which the right of acquisition should be regulated as among themselves. The principle which they adopted was this. Discovery of a country gave title against all other European governments, which title might be perfected by possession. The discovering nation had the exclusive right of acquiring the soil from the native peoples and establishing settlements. No other European state might interfere.53

This principle, Marshall indicates, was not part of the universal law of nations. It applied only among European states subscribing to it, so as to regulate their rights inter se. It could not in itself affect the rights of the native occupants of America. As Marshall explains in Worcester v. Georgia,

it was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either asaboriginal occupants, or as occupants by virtue of a discovery made before the memory of man.54

48 For a detailed consideration of the validity of the Royal Proclamation of 1763, see Slattery, Land Rights of Indigenous Canadian Peoples, supra, note 4, at 283-302.
49 8 Wheaton 543 at 572.
50 Ibid.
51 Ibid., at 591-92.
52 Ibid., at 588.
53 Ibid., at 573.
54 6 Peters 515 at 544.
The Chief Justice was aware of the difficulty of applying the principle of discovery to lands which were already inhabited, and for that reason denies it the stature of a universal law among nations. He puts the matter this way:

"It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors." 15

The significance of the principle of discovery, in Marshall's view, is the exclusivity of the rights which it conferred, the fact that the discovering European state had sole rights, as among European powers, of entering into relations with the natives of the country discovered, and of acquiring land from them. He seems to imply that this exclusive right of acquisition operated not only as against other European states but also as against the subjects of the discovering state, so that the Crown or government alone could purchase Indian title, and not private individuals — a point of obvious relevance to the issue before the court.

It is important to note that according to the Chief Justice the principle of discovery said nothing as to how the incoming European state should deal with the native inhabitants. How far the Indians were to retain their original independence, governmental structures, customary laws and land rights would depend on the links actually established between a European state and particular Indian nations. "Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves". 16 It follows that the nature of such relationships might be expected to vary somewhat from European state to European state, and perhaps from one Indian nation to another.

Nevertheless Marshall hazards a generalization about European state practice as a whole, which is worth quoting at length:

In the establishment of these relations, the 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. 17

The crucial proposition to note here, if we are to understand Marshall's argument, is that the European powers generally claimed the right to grant lands within the territories discovered, even while the Indians were in factual possession, and before any cession or surrender had been secured from them. Such grants, he states, were thought to convey title subject to an Indian right of occupancy.

Marshall contends that the history of North America proves the universal recognition of these principles among the colonizing states, and he goes on to review the state practice of Spain, Portugal, France, Holland, England and the United States. The evidence adduced regarding the first four countries is meagre, and it appears that Marshall draws mainly on British practice in America, as reaffirmed and carried forward by the United States. 19 This observation applies less, perhaps, to the principle of discovery, which rests upon the supposed unanimous recognition of European colonial powers, than to the legal relations established between an incoming European sovereign and native Americans. It seems fair to say that the Chief Justice's analysis of the latter subject is based largely on his interpretation of British and United States law and practice, and owes little to evidence drawn from the Spanish, Portuguese, Dutch and French colonies.

Marshall reviews some of the major American charters issued by the British Crown, ranging from the Commission granted to the Cabots in 1496 to the Carolina Charters of the 1660's. He draws from this survey the conclusion that the whole country has, in stages, been granted by the Crown while still in the possession of the Indians. The grants, he notes, generally purport to convey not only the right of dominion but also the soil itself. In all of the areas affected, the land was at the time of grant occupied by Indians. Yet almost every land title within those areas derives in some manner from the original Crown grants. It has never been objected, Marshall observes, that title as well as possession was in the Indians, and that the Crown grants passed nothing on that account. The various Charters cannot be considered mere nullities. 19

Under the treaty which concluded the Revolutionary War, Marshall continues, the governmental powers and title to the soil formerly vested in Britain passed to the United States. It has not hitherto been doubted that either the United States or the individual states had a clear title to all the lands within the territories transferred, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right was vested.

15 Ibid., at 542-43.
16 Ibid., at 573.
17 Ibid., at 574.
18 Ibid., at 574-87.
19 Ibid., at 579-80.
in the government. The Chief Justice reviews certain historical evidence supporting this observation and concludes that the United States maintains, as did the colonial powers, "that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise".

Marshall now comes to the nub of his argument. The validity of the land titles conferred by the British Crown and its successor, the United States, had never been questioned in the courts. The power to grant title has been exercised uniformly over territory in Indian possession. "The existence of this power", he concludes, "must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. ... All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy; and recognized the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians."

The Chief Justice holds in effect that the notion that private parties can acquire title by direct purchase from the Indians is irreconcilable with the uniform claims of the British Crown and the United States to exclusive powers of disposition over American lands. These powers rest on the principle that, so far as settlers are concerned, the Crown is the sole source of title, and, so far as Indians are concerned, the Crown alone can extinguish their right of occupancy. On either count, the claim of the plaintiffs fails.

2. The argument from Indian jurisdiction

We will now consider a second and quite distinct line of reasoning which is advanced by the court. Marshall frames this argument as follows:

The title of the crown, whatever it might be, could be acquired only by a conveyance from the crown. If an individual might extinguish the Indian title for his own benefit, or, in other words, might purchase it, he could acquire only that title. Admitting their [the Indians'] power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from their will; and, if they choose to resume it, and make a different disposition of the land, the courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. If they

annul the grant, we know of no tribunal which can revise and set aside the proceeding.

In the present instance, relates Marshall, war broke out between the United States and the Indian nations after the private conveyances had been effected. Treaties were later concluded whereby the Indians ceded their entire country to the United States without any reservation of the plaintiffs' title. The absence of such a reservation, coupled with the fact that the Indians had continued to use the deeded lands in common with their other lands, suggests that the Indians did not consider the conveyances valid.

The question arises how far this argument is compatible with Marshall's first argument, or intended to be. On one view the two arguments are logically inconsistent, and are presented as alternatives. The first argument treats the Crown as ultimate sovereign and owner of the soil, with the Indians holding a right of occupancy. The second, by contrast, accords the Indians an autonomous or quasi-independent status and recognizes their sovereign ability to dispose of their lands according to their own laws.

Despite these differences, it appears the arguments can be reconciled. The court in effect recognizes that the situation under consideration is governed simultaneously by two distinct legal regimes, Anglo-American and Indian. The first argument approaches the question from within the context of Anglo-American law. It maintains that the land system operating in settler communities rests on the premise that the Crown is the sole source of title, so that settlers are incapable of deriving from the Indians a title to land recognizable in American law. However, this reasoning does not extend to the Indians, whose title to the soil by occupancy, and whose transactions inter se are not affected. Enter the second argument, which looks to the Indian side of the matter. It holds that the rules in force in settler communities do not directly apply to Indian peoples living independent lives in their own territories under their own laws. Just as an Indian nation may presumably confer exclusive land rights on particular members of the group (if the laws of the nation allow this), so also it is conceivable that an Indian nation might grant land to individual outsiders. In such a case, maintains the court, the outsider assimilates himself with the Indians, and holds his lands subject to their authority and under their laws. If the Indians subsequently surrender their lands to the government so as to extinguish not only the collective title of the group itself, but also any particular rights held by group members, then the rights of the outsider are nullified as well, for he stands in no higher a position than any other member of the group.

28 Doctrine of Aboriginal Title (Johnson v. M'Intosh)

29 The Decision

60 Ibid., at 584-85.
61 Ibid., at 587.
62 Ibid., at 588.
63 Ibid., at 593.
64 Ibid., at 593-94.
3. The argument from the Royal Proclamation of 1763

The final reason given by the court for rejecting the plaintiff's claim is the most straightforward of the three presented. As seen earlier, in October 1763 the British Crown issued a Proclamation governing its North American dominions, which among other things reserves certain lands west of the Atlantic watershed for Indian use, and explicitly prohibits private persons from purchasing Indian lands. The Proclamation applied to the lands in dispute and was still in force in 1773 and 1775 when the purchases were effected. If it was valid and binding, then those purchases were void. The plaintiffs sought to avoid this conclusion by contending that the Crown did not have the power, in its prerogative, to forbid such transactions. Marshall rejected this argument and upheld the Proclamation.

He notes firstly that under British constitutional law all vacant lands within the realm are vested in the Crown, which has the power to grant them under the royal prerogative. This same principle was applied in America, with the difference that while title was admitted to lie with the Crown, the Indians were recognized to hold rights of occupancy. "The lands, then, to which this proclamation referred, were lands which the King had a right to grant, or to reserve for the Indians."65

The second justification furnished for the Proclamation has considerable theoretical interest. The British Crown, notes Marshall, holds extensive prerogative powers under the constitution regarding political relations with foreign nations, notably the authority to make war and peace and to conclude treaties. He refers to the anomalous situation of the American Indians, "necessarily considered in some respects, as a dependent, and in some respects as a distinct people, occupying a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies ...".66 In short, the Indians were in some respects subject nations (at least in theory), and in other respects sovereign or quasi-sovereign entities. To the extent that the Indians preserved their distinct status, implies Marshall, the Crown retained toward them certain of the powers held vis-à-vis foreign nations, in particular the power to secure Indian friendship by restraining the encroachment of whites on their lands. The Crown's authority to do this, affirms the court, was never denied by the colonies, and the Proclamation's provisions are valid as an exercise of that authority.67

C. The Legal Character and Scope of Indian Title

What then is the precise legal nature of the Indian right of occupancy, in particular its relationship to the underlying title vested in the Crown? From various references it may be inferred that Marshall envisions four stages in the evolution of the Crown's rights to Indian lands. The initial stage existed prior to the European discovery of North America, when the various Indian nations and bands were sovereign and independent units with their own laws and political structures, possessing full dominion over the lands which they occupied. Marshall does not subscribe to the theory that North America, upon European discovery, was terra nullius, land belonging to no one. As he states in [Worcester v. Georgia]:

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.68

He remarks that it is difficult to understand how the inhabitants of Europe could have had rightful original claims of dominion over the inhabitants of America or the lands they occupied, intimating that both dominion and title were, in the pre-European era at least, vested in native Americans.

The second stage arises, according to Marshall, upon the European voyages of discovery and exploration. Under a principle quickly adopted by the major European powers, the state first discovering a country held exclusive rights against other European states to enter into relations with the native inhabitants of the country, and to gain the soil by whatever means were appropriate. This right of discovery was held against other European states but not the Indian peoples, who had not subscribed to it, and whose rights were in no way affected. Acting under the right of discovery, the British Crown and the other colonizing powers issued Charters conferring governmental rights and title to the soil to various groups and individuals, prior to actual possession being taken of the lands in question, and while those lands were still held by independent Indian groups. The Charters had force as between the Crown and its grantees, and conferred rights enforceable in British courts against other British subjects. They also took effect, in theory, vis-à-vis other European states (at least to the extent that they were backed by a right of discovery), but no method for securing enforcement existed beyond diplomatic negotiations or war. Marshall appears to think that the Charters had no effect as regards the Indians at this stage, because the Crown could grant no more than it possessed, and thus far it held only a right of discovery good against other European nations.

This situation changed as the Crown, its agents and grantees, gradually gained a measure of control over Indian nations encountered in the course

65 Ibid., at 596.
66 Ibid.
67 Ibid., at 596-97.
68 6 Peters 515 at 542.
of settlement and trade. This control was secured by force of arms or treaty, and Indian peoples generally became dependent nations living under the Crown's overall sovereignty. This third stage in the process gave the Crown what Marshall describes as a "complete ultimate title" to the soil, subject to an Indian right of possession which the Crown alone could acquire. The Crown's title originated, on Marshall's view, with the right of discovery, but at that point it was held exclusively vis-a-vis other European states; the title became operative against Indian nations only when they became subject to the Crown's overall sovereignty.

What, then, is the legal character of Indian land rights at stage three? Clearly native title is capable of coexisting with the ultimate title of the Crown, upon which it forms a burden. Moreover it is a title cognizable by the courts, that is a "legal" right, and not one dependent merely on policy or considerations of justice. The Indians, affirms Marshall, 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; nevertheless their power to dispose of it freely was now limited to a right of alienation to the Crown. Earlier, in Fletcher v. Peck (1810), the Chief Justice had stated that the Indian title "is certainly to be respected by all courts, until it be legitimately extinguished", but is "not such as to be absolutely repugnant to seizin in fee on the part of the state"; nevertheless their power to dispose of it freely was now limited to a right of alienation to the Crown. Marshall notes that under the law of nations a weaker power does not necessarily surrender its right of self-government by taking the protection of a stronger state, and he cites Vattel on the point. The status of Indian nations within the United States can be described, states Marshall in a related case, as that of "domestic dependent nations". While retaining internal autonomy, they are considered both by the United States and by foreign states as being "so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility".

The fourth and final stage in the process occurs when the Indians' right of occupancy is extinguished in favour of the state. This may occur, according to Marshall, either by surrender under treaty or by forcible confiscation and eviction in the course of war. The Chief Justice expresses differing views as to which mode predominated in the past. In Johnson v. M'Intosh, he suggests that "frequent and bloody wars" and the inexorable advancement of white settlement forced the Indians to retreat into the interior and abandon their original lands, which were then parcelled out by the sovereign power. His assessment seems to change somewhat in Worcester v. Georgia, where he affirms that the King purchased the lands of the Indians,

Marshall discusses the overall position of Indian nations in stage three at several points in Worcester v. Georgia. He states, in a famous passage, that the Indian nations had always been viewed as "distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial", with the exception of the imposed restriction against relations with any European nation other than the first discoverer. He asserts that history furnishes no example, from the time of first settlement, of any attempt on the Crown's part to interfere with the internal affairs of the Indians, except to keep out the agents of foreign powers.

The typical Indian group in contact with the British, nevertheless, became over time dependent on the Crown for the supply of necessary goods, and for protection from lawless intrusions into its country. These and other factors operated so as to bind that nation to the Crown as "a dependent ally, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character". Marshall notes that under the law of nations a weaker power does not necessarily surrender its right of self-government by taking the protection of a stronger state, and he cites Vattel on the point. The status of Indian nations within the United States can be described, states Marshall in a related case, as that of "domestic dependent nations". While retaining internal autonomy, they are considered both by the United States and by foreign states as being "so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility".

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when they were willing to sell, at a price they were willing to accept, "but never coerced a surrender of them". Allowing for overstatement in each instance, it seems fair to say that the Chief Justice envisaged both processes as occurring at different times and places. The result in either case is similar. The lands are freed of the Indian interest, which passes to the Crown or its grantees.

We may now return to the series of questions posed earlier regarding the impact of the Crown's acquisition of sovereignty upon aboriginal title, and the effects of the introduction of English land law. How does Marshall go about reconciling Indian land rights with the feudal hierarchy envisaged by English law? The scheme envisaged by the Chief Justice as operating at stage three is as follows. The Crown is recognized as feudal lord of Indian lands, and holder of the ultimate title. So long as Indian title exists, the Crown's title is very limited in scope. Clearly, it entails an exclusive power to extinguish Indian title by purchase or cession. Marshall also recognizes that the Crown has the power to grant lands which are burdened by aboriginal title. In this case, however, the Crown grants no more than it possesses itself, namely the ultimate fee subject to the Indian right of occupancy. So the grantee takes subject to native title, and only obtains rights of use and occupancy when that title is extinguished. The Indians' right of occupancy imports full rights to use and exploit the resources of the soil, the right "to use it according to their own discretion," although their power to alienate it to non-natives is now limited to a right of cession to the Crown. The right of occupancy is not limited to "traditional" uses of the land. There would be no apparent obstacle to a band of hunters turning to farming, to raising cattle, or indeed to engaging in mining or lumbering. The point is that the Crown's underlying title imports no beneficial rights of use unless or until the Indian title is extinguished. Aboriginal title is thus a uniform title, which does not vary from people to people.

If Indian lands cannot be sold to private individuals in the settler community, the question arises whether they can be transferred among native groups themselves, whether by formal transactions, or by informal processes involving the migration of peoples and the merging and splitting of bands. Chief Justice Marshall does not specifically address this question. The logic of his argument suggests, however, that the exclusive right of the Crown to extinguish Indian title is a right held as against other European states and their subjects, as well as incoming settlers, subjects of the Crown. It does not affect the fluid indigenous scheme of things, or limit the possibility of lands passing from one native group to another. The question of which Indian nation held title to a given area would not normally arise until land surrenders are taken, in which case the Indian group actually in possession would prima facie be accepted as the title-holder, regardless of whether their possession was from "time immemorial" or the result of more recent events. Any other view would appear to render the surrender process unworkable.

D. The Legal Basis of the Theory

One point emerges clearly from the judgment. The principles which the court lays down derive largely from British law, and in particular from that branch of the common law which governs the relations between Great Britain and its overseas possessions and provides the basic constitutional framework for the colonies, — what is known as "colonial law". The legal status of Indian lands is determined by reference to Crown and governmental practice in the American colonies, practice which is perceived to reflect certain underlying legal principles. These principles are of a general character and thus would apply prima facie to all British colonies in North America, including those now forming part of Canada. They might also apply to British colonies in other parts of the world where similar conditions prevailed, such as the colonies in New Zealand and Australia.

It has been suggested, to the contrary, that the law applied by Chief Justice Marshall is not English common law or colonial law, but rather the law of Virginia as it had developed from the time of the first English settlement. Virginia law, it is argued, although perhaps originally based on the common law, evolved in a distinctive manner, notably in its treatment of Indian land rights. On this interpretation, the rules set out in Johnson v. McIntosh would not necessarily apply to other British colonies, even in North America, much less farther afield.

The main difficulty with this view is that it derives little support from the judgment itself. The court makes only brief references to Virginia law, and then only to illustrate the general legal norms governing Indian lands throughout British territories. Those norms are not presented as deriving their universality from a purely accidental coincidence between the laws of each particular American colony. Rather they are thought to apply as a matter of principle in all the American colonies, except to the extent that they have been modified by competent authority in any individual colony.

This point is illustrated by the court's remarks regarding a Virginia Act of 1779, considered earlier, which declares that the government has an exclusive right of pre-emption over Indian lands, and provides that private

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89 Priestley, supra, note 22, at 172.
purchases are void. Marshall observes that the Act "may safely be considered as a unequivocal affirmation, on the part of Virginia, of the broad principle which had always been maintained that the exclusive right to purchase from the Indians residing in the government". This "broad principle" is thought to apply in the absence of particular legislation to the contrary. Its source, I suggest, is colonial law.

One must take care not to confuse colonial law, which is a body of largely common law principles applying to British colonies generally, with the substantive common law received in a particular colony. Colonial law takes effect as regards a colony regardless of whether English common law is ever introduced there. Thus it applied both to the colony of Quebec, where French law was retained in most matters, and to the colony of Massachusetts, where English common law was received.

The tendency to confound colonial law with the common law received in a given colony is illustrated by an argument considered in the Australian case of Milirrpum v. Nabalco Pty. Ltd. (1971). The argument holds that it was impossible for a common law doctrine recognizing native title to exist in the colony of New South Wales, because in 1788, when the common law was received there, no such doctrine could have existed in England, as there were no aboriginals in England to whom it could apply. If this approach were correct, it would be equally impossible for English common law to harbour rules governing the status of colonies, because there were no colonies within England to which they could apply. Such reasoning, or course, ignores the fact that a distinct branch of the common law developed from at least the seventeenth century onwards which governed the basic position of British overseas possessions and their inhabitants, law derived principally from the practice of the Crown, as recognized by judicial decision. It is this body of law which the court in Johnson v. M'Intosh applies.

E. Critique

The doctrine elaborated by Chief Justice Marshall represents perhaps the most sustained and convincing judicial effort yet made to explain what happened when the disparate legal worlds of Europe and aboriginal America met and clashed. In its grasp of the issues, sense of history, and relative sensitivity to the Indian outlook, the doctrine has few rivals. This is not to say it is exempt from criticism.

The principle of discovery is a case in point. The Chief Justice asserts that European colonizing powers agreed at an early stage that the first state to discover an area of the New World had the exclusive right to appropriate it. Modern historical scholars have been less certain on this point. It is known, for example, that both François I of France and Elizabeth I of England threw cold water on the contention that discovery conferred exclusive rights in the New World; such a principle was perceived as unduly favourable to the pioneers in the field, Spain and Portugal. While it is true that the diplomatic armories of most European colonial powers were stocked with voyages of discovery (genuine or apocryphal) for use as cannon fodder in backing American claims, it is more difficult to find instances where a discovery by one state was recognized by rival powers as sufficient to bar them from the field. In other words, it remains doubtful how far European colonial powers subscribed to the principle of discovery when it was seen to operate against them, rather than in their favour.

Even accepting, for the sake of argument, that some such principle was admitted among European states, it is unclear whether the principle necessarily ruled out purchases of Indian lands by private individuals. There is a distinction between the acquisition of territorial title in the international law sense, and the purchase of private title to lands. Even if we suppose that a discovering state gained an exclusive right against other European states to appropriate the region discovered and thereby gain territorial title, it does not necessarily follow that a subject of the discovering sovereign could not purchase private title from the native peoples and hold it under the sovereignty of the incoming monarch. Clearly a subject could not, under the principle, obtain international title to any portion of the discovered territory and set himself up as an independent potentate. But why could he not secure a private title? The answer must lie, not in the principle of discovery, but in the domestic law of the European state concerned. If that law stipulates that the sovereign is the sole source of private title for subjects settling in colonial acquisitions, then private purchases from native peoples are ruled out. Otherwise they would appear to be permissible.

98 See text above at note 42.
99 8 Wheaton 543 at 585.
101 It is unclear from the judgment how far the court endorses this argument.
102 See the detailed review in Slattery, Land Rights of Indigenous Canadian Peoples, supra, note 4, at 10-62.
These reflections reinforce the view that Marshall’s theory rests ultimately upon his understanding of British colonial law and practice, as inherited and reaffirmed by the United States. His first argument, in particular, boils down to the proposition that, from the time of the early Charters, the British Crown consistently claimed the exclusive power to deal with Indian lands over which it asserted sovereignty, and sole authority to extinguish Indian title by purchase or (in the case of war) by forcible appropriation. This claim, assuming that it was lawful under British law, unmistakably ruled out private purchases of Indian lands as a source of title maintainable against the Crown. So far as non-Indian subjects were concerned, the Crown was the exclusive source of title.

I have emphasized here the degree to which Chief Justice Marshall draws upon original British practice in America. As such, his theory transcends its immediate American context, as an exposition of the earliest principles of British colonial law governing relations between the Crown and aboriginal peoples. The theory has considerable significance for Canada, and also for such Commonwealth nations as New Zealand and Australia.

It is interesting, therefore, to compare Marshall’s view of aboriginal title with a doctrine expounded at a slightly later period in the fledgling colony of New Zealand, which was confronted with problems similar to those arising in America.

VII. THE DOCTRINE OF ABORIGINAL TITLE (R. v. SYMONDS)

The Queen (on the prosecution of C. H. McIntosh) v. Symonds is a case decided by the Supreme Court of New Zealand in 1847, during the early days of the colony. The claimant, McIntosh, petitioned the court to annul a Crown grant made to the defendant, Symonds, asserting prior title to the same land by purchase from the Maori people, the original inhabitants of the islands. McIntosh had bought the land after securing from the colonial Governor a certificate waiving in his favour the Crown’s exclusive right of pre-emption regarding native lands. The court ruled unanimously against McIntosh, holding that a private purchase of Maori land could not give title, and that the Governor’s certificate did not validate the purchase. Two opinions were written in the case, one by Justice Chapman, the other by Chief Justice Martin. I will review them separately.

A. Chapman’s Opinion

Justice Chapman bases his judgment on the law and practice of Great Britain and its colonial offshoots, including the United States. He explains this in a significant passage:

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

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are in part deduced from those higher principles, from charters made in conformity with them, acquiesced in even down to the charter of our own Colony; and from the letter of treaties with Native tribes, wherein those principles have been asserted and acted upon.\(^9\)

Chapman affirms here that relations between the Crown and the native inhabitants of British colonies are governed, at least partially, by principles of law, and not merely by policy and expediency. Those principles form part of a larger set of rules governing the colonies, which derive in turn from basic precepts of the common law proper and the established colonial practice of the Crown, as recognized and affirmed by the courts.

It is a fundamental maxim of the common law, argues Chapman, that the King is the original proprietor of all lands within the realm and the sole source of private title. This principle has been imported into all the colonies settled by Britain. Colonial courts have invariably held, subject to rules of prescription, that they can only give effect to titles deriving from the Crown, verified by letters patent. It seems to follow from the same basic maxim, continues Chapman, that no British subject can acquire new lands for himself. Any acquisition of territory by a subject, whether by conquest, discovery, occupation, or purchase from native tribes, operates to the benefit of the Crown, and confers no rights on the subject. In short, Chapman concludes, the Crown enjoys the exclusive right of acquiring new territory and extinguishing the title of the native inhabitants. It follows that the title asserted by the claimant is void, as founded upon a purchase from the King, not defined by law, and in particular by the rule that the Crown is the exclusive source of title. Consequently, they could only be extinguished by Crown grant, not by purchase directly from the native people. Before native lands entered the governmental land system and became available for disposal by the Crown, native title had first to be extinguished, normally by voluntary cession. The resulting duality of land tenure systems is reflected in Chapman's remark that private purchases by Europeans of native lands are not in fact absolutely null and void. "If care be taken to purchase off the true owners, and to get in all outstanding claims, the purchases are good as against the Native seller, but not against the Crown."\(^10\)

Justice Chapman does not attempt to characterize precisely the nature of the Crown's interest in unsurrendered native lands. He canvases various possibilities, ranging from a full seisin in fee held by the Crown against everyone except the natives, to a mere right of pre-emption. While not reaching any definite conclusion, he seems to favour the latter view. He observes that although the Stuart kings clearly assumed the fee to be in the Crown, as evidenced by the American Charters of the seventeenth century, it had not been the practice for more than a century, either in the British colonies in America or subsequently in the United States, to permit any patient to pass the public seal previous to the extinguishment of the native title.\(^11\)

B. Martin's Opinion

The theory adopted by the second judge in the case, Chief Justice Martin, is akin to that espoused by Chapman. He states that, under British colonial law, English subjects who appropriated unoccupied lands in an overseas territory to which England held prior title as against other European nations did not thereby acquire any legal right to the soil as against the Crown. This principle, he maintains, applied with equal force whether the

\(^9\) Ibid., at 388.
\(^10\) Ibid., at 388-90.
\(^11\) Ibid., at 390.
\(^12\) Ibid., at 391.
country was already partially populated or completely uninhabited, and whether the settlers obtained lands with or without the consent of the original inhabitants. Accordingly, colonial titles have rested uniformly upon Crown grants. The rule, he concludes, has been enforced by England both in its American colonies and in Australia, and also by the United States. 105

Martin, like his fellow-judge, presumes that native title coexists with some sort of underlying title of the Crown, but he does not attempt to characterize either with much exactitude. Native title, in his view, continues to exist following the Crown's acquisition of sovereignty until extinguished in favour of the Crown. It is not a mere creature of policy, but constitutes a legal title cognizable by the courts. 106 Speaking of the New Zealand Land Claims Ordinance of 1841, Martin states: “It is everywhere assumed that where the Native owners have fairly and freely parted with their lands the same at once vest in the Crown, and become subject wholly to the disposing power of the Crown.” 107 Later he reiterates: “So soon, then, as the right of the Native owner is withdrawn, the soil vests entirely in the Crown for the behoof of the nation.” 108 The use of the term “Native owner” in both passages seems significant. Martin sums up his views as follows: “whenever the original Native right is ceded in respect of any portion of the soil of these Islands, the right which succeeds thereto is not the right of any individual subject of the Crown, . . . but the right of the Crown on behalf of the whole nation. . . .” He continues: “the land becomes from the moment of cession not the private property of one man, but the heritage of the whole people; . . .” 109

These observations leave little room for doubt that the native inhabitants are considered to hold a legal title akin to ownership, which passes to the Crown upon surrender and thereby completes the Crown's title. Nevertheless, near the end of this judgment Martin makes a puzzling remark. Referring to the plaintiff's claim that a private purchase of native land overrides a subsequent Crown grant, he states that the plaintiff “cannot possibly stand in a better position than did the original land claimants. He cannot possess, any more than they did, a title against the Crown or the Crown's grantee.” 110 Some have taken this to mean that the Crown's title to native-held lands is complete even prior to the surrender of native title, or at least that a Crown grant effectively extinguishes native rights. Such an interpretation, however, cannot easily be squared with earlier passages. It seems more likely that Martin means only to emphasize that native title does not stand in opposition to the Crown's title (or that of a Crown grantee), but coexists with it. Even assuming, then, that the plaintiff stood in the shoes of the original native owners, this would not enable him to secure the annulment of a Crown grant. His title, like that of the natives, far from being inconsistent with the Crown's title, would amount to a burden upon it until extinguished by surrender.

105 Ibid., at 393.
106 He quotes Kent's Commentaries on American Law: “The Natives 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. . . .” ibid., at 393.
107 Ibid., at 394.
108 Ibid., at 395.
109 Ibid., at 396.
110 Ibid., at 398.
VIII. CONCLUSION

The reasoning in the Symonds case is particularly interesting because it extends the basic principles laid down for the American colonies by Chief Justice Marshall to a British colony acquired at a later stage, under different circumstances, in a distant region of the world. The essential link is provided by British colonial law. Although the judges in Symonds do not refer to Johnson and Worcester by name, it is clear that they draw heavily upon these decisions for inspiration.111

In Canada as well, courts have looked to Marshall's judgments for guidance on questions of aboriginal rights. The process began as early as 1867, the year of Confederation, when Justice Monk of the Quebec Superior Court quoted at length from Worcester in a judgment upholding the validity of a marriage between a white man and an Indian woman under Cree customary law.112 Marshall's views were cited extensively in the famous St. Catherine's Milling Co. case, as it moved through the Ontario and Canadian courts to the Privy Council.113 Justice Strong's comments in the Supreme Court of Canada seem particularly apt:

The value and importance of these authorities is not merely that they show that the same doctrine as that already propounded regarding the title of the Indians to unsurrendered lands prevails in the United States, but, what is of vastly greater importance, they without exception refer its origin to a date anterior to the revolution and recognise it as a continuance of the principles of law or policy as to Indian titles then established by the British government, and therefore identical with those which have also continued to be recognized and applied in British North America.114

The Privy Council's decision in St. Catherine's does not explicitly refer to the Marshall doctrine. However, both Johnson and Worcester are cited in argument, as is the Symonds case,115 and the Privy Council's characterization of Indian title as a usufructuary right burdening the underlying title of the Crown shows the influence of Marshall's thinking.116

More recently, the Supreme Court of Canada, in the leading Canadian decision on aboriginal title, Calder v. Attorney-General of British Columbia,117 explicitly adopted the Marshall doctrine. Although the court split on the result, the two major opinions written, representing six of the seven judges, both cite Johnson and Worcester approvingly, and quote extracts from the judgments.118 Justice Judson, in particular, notes that the Canadian courts in the St. Catherine's case were "strongly influenced" by Marshall's decision in defining the nature of Indian title, and that the Privy Council followed their lead.

It seems safe to conclude that the new Canadian Constitution, in its recognition and affirmation of "existing aboriginal rights", represents an official endorsement of the basic tenets of the doctrine of aboriginal title, and a rejection of the competing theories of a legal vacuum, radical discontinuity, and common law dispossession.119 This provision stands witness to the remarkable vitality of the ideas put forward by Chief Justice Marshall, more than a century and a half after they were first expressed.

111 See references to the attitude of United States courts and to Kent's Commentaries (which summarizes the Marshall doctrine), ibid., at 388, 390, 392, 393-94.
112 Connolly v. Woolrich (1867), 17 R.R.O. Q. 75 at 84-86 (Que. S.C.); also reported at 11 L.C. Jut. 197. The decision was upheld on appeal sub nom. Johnstone v. Connolly (1869), 17 R.R.Q. 266, 1 R.L.O.S. 253 (Que. Q.B.).
113 St. Catherine's Milling and Lumber Co. v. The Queen (1885), 10 O.R. 196 (Ont. Ch.) per Boyd, C., at 209 (Johnson); (1886), 13 O.A.R. 148 (Ont. C.A.) per Burton, J.A., at 160 (Johnson), per Patterson, J.A., at 169 (Story's Commentaries, summarizing the ruling in Johnson); (1887), 13 S.C.R. 577 per Ritchie, C.J., at 600 (Story's Commentaries, summarizing Johnson), per Strong, J., at 608, 610-12, 633-34 (Johnson, Worcester, Kent's Commentaries), per Taschereau, J., at 642 (Breaux v. Johns (ibid)).
114 (1887), 13 S.C.R. 577 at 610.
115 (1888), 14 A.C. 46 at 48 (P.C.).
116 Ibid., at 54-55, 58.
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THE COVER: A drawing of a carved doorway found in the Cape Commercil region of British Columbia. The carving, done by a Kwakiutl artist, is in wood and measures 3 m. 25 cm. high. The piece was collected in 1899 and is housed in the National Museum of Man in Ottawa, Ontario. Cover design by Waltraude Stehwien, D. A. V. S. Graphics, University of Saskatchewan.

The University of Saskatchewan Native Law Centre, established in 1975, undertakes and supports independent research into legal problems and topics affecting native people in Canada and other countries. The Centre publishes a quarterly legal periodical, the Canadian Native Law Reporter, as well as a Legal Information Service, and a series of books, papers, and research reports dealing with various subjects. A complete list of publications is available on request. Among its other activities, the Centre sponsors a summer pre-law program for native students entering law school. It is also currently engaged in a major research and publishing project concerning native land rights in Canada. The Director of the Centre is Donald John Purcell, L.L.B., and the Research Director is Norman K. Zlotkin, L.L.B., L.I.M.

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