COMMUNAL NATIVE TITLE AND THE COMMON LAW: FURTHER THOUGHTS ON THE GOVE LAND RIGHTS CASE

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Mr Priestley disagrees with the view expressed by Dr Hookey in his article "The Gove Land Rights Case", that to a limited extent the common law recognized native communal title to land. Instead he suggests that the decision in Johnson *v.* M'Intosh *which Dr Hookey regards as an exposition of this common law position, was an exposition of the law of Virginia as it had developed to the end of the 18th century. As such it may give guidance in the development of Australian law but similar conclusions should be drawn only in circumstances of sufficiently similar commencement and development. Mr Priestley concludes that in* Milirrpum *v.* Nabalco Pty Ltd *there was not evidence of such similarity before the court.*

Dr Hookey in his article "The Gove Land Rights Case"[1] made a detailed analysis of the judgment of Blackburn J. in *Milirrpum* v. *Nabalco Pty Ltd.*[2] He dealt particularly with the finding of Blackburn J. that the contention of the plaintiffs in *Milirrpum* that the common law recognized "communal native title" in a settled colony such as New South Wales failed for want of authority to support it.[3] Dr Hookey's criticism of this conclusion appears to have two distinct bases. First, he appears to argue that certain authorities in the United States and New Zealand in the first half of the 19th century established a "fundamentalist common law principle of recognition"[4] of native communal rights in land. Secondly, he asserts that the Privy Council in African appeals at a later date expounded very similar common law principles of recognition to those developed in the American Courts[5] which presumed the recognition by the Crown of existing rights in the land following a change of sovereignty.[6] He suggests that the plaintiffs in *Milirrpum* would have done better to formulate their problem in accordance with the principles adopted by the Privy Council rather than seeking to bring themselves within the principles of the United States and New Zealand cases.

In this article I seek to examine one aspect of the first line of argument and no more. This is because after re-reading the judgment of

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1 (1972) 5 F.L. Rev. 85. Dr Hookey replies to this article *infra* p. 174.

2 (1971) 17 F.L.R. 141.

3 (1972) 5 F.L. Rev. 85, 103.

4 *Id.* 102.

5 *Id.* 94.

6 *Id.* 103.

Blackburn J. in light of Dr Hookey's article, it appears to me that the arguments in answer to his two lines of criticism are to be found fully expounded in the judgment. To me, the reasoning of Blackburn J. in both instances seems more persuasive than the criticisms of Dr Hookey. But in any event the opposing views are canvassed in sufficient detail in the article and the judgment for the interested reader to be able to form his own opinion one way or the other. Further analysis or exposition, at least from me, would be superfluous.

One aspect of the first line of argument singled out by Dr Hookey, namely the United States and New Zealand authorities of the first half of the 19th century seems to me to bear a more detailed examination than it has so far received. That is the origin of the doctrines expounded by Chief Justice Marshall in *Johnson* v. *M'Intosh.*[7] This case has been taken by all commentators as the starting point of the first line of authority to which Dr Hookey refers. The judgment was delivered in 1823 and its doctrines were immediately taken up and expounded in two influential American texts: *Kent's Commentaries* and *Story on the Constitution.* In the years following the delivery of the judgment the words of Marshall C.J. were again and again referred to as being the classic exposition of native rights to land; in successive United States judgments,[8] in the speech of Governor Gipps in the New South Wales Legislative Council when justifying legislative intervention to prevent an enormous purchase of land by Wentworth from the Maoris in New Zealand,[9] in the judgment of Chapman J. in the *Queen* v. *Symonds*[10] when similar questions arose in the Supreme Court of New Zealand and in argument in cases in the Privy Council.[11] In the *Queen* v. *Symonds* Chapman J. referred to the "Colonial Courts, and the Courts of such of the United States of America as have adopted the common law of England", as having invariably affirmed and supported certain principles applicable to the intercourse of civilized nations with aboriginal natives of various countries "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".[12] The line of judicial decision referred to was that beginning with *Johnson* v. *M'Intosh.* (It is noteworthy incidentally that in this passage Chapman J. did not assert that recognition of native title was a doctrine of

[7] (1823) 8 Wheaton 543.

[8] A short list is collected in argument in *St Catherine's Milling and Lumber Company* v. *The Queen* (1888) L.R. 14 A.C. 46, 48.

[9] (9 July 1840) Parliamentary Papers, Correspondence Respecting the Colonisation of New Zealand 63-78.

[10] (1847) N.Z. P.C.C. 387.

[11] *St Catherine's Milling* case *supra* n. 8 Note in this case *id.* 58 the adoption of the phraseology of *Johnson* v. *M'Intosh.*

[12] *Id.* 388.

the common law but was a principle emerging *inter alia* from settled practice of the Colonial Governments.)

In substance *Johnson* v. *M'Intosh* denied any recognition in the Courts of the United States to titles to land based upon grants by Indian tribes to private individuals. In the course of coming to this conclusion, however, Marshall C.J. made certain statements which have subsequently provided the basis for claims of the kind made by Dr Hookey that there was a common law principle of recognition of native communal rights in land. In one passage Marshall C.J. said

> 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 . . . While the different nations of Europe respected the rights of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.[13]

Later in the judgment he said

> the court thought [in *Fletcher* v. *Peck*][14] it necessary to notice the Indian title, which, although entitled to the respect of all courts, until it should be legitimately extinguished, was declared not to be such as to be absolutely repugnant to a seisin in fee on the part of the State.
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> This opinion conforms precisely to the principle which has been supposed to be recognized by all European governments, from the first settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with the seisin in fee than a lease for years, and might as effectually bar an ejectment.[15]

Dr Hookey's argument assumes *Johnson* v. *M'Intosh* to be an exposition of common law principle and then argues that the above passages and some others like it to be found in other parts of the judgment and also in *Worcester* v. *State of Georgia*[16] support the proposition that the common law recognized native communal title.

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[13] (1823) 8 Wheaton 543, 574.
[14] (1810) 6 Cranch 87.
[15] 8 Wheaton 543, 592.
[16] (1832) 6 Peters 515.

In *Milirrpum* Blackburn J. was content to treat *Johnson* v. *M'Intosh* as an exposition of common law principle. So regarding it, he (rightly as I think) came to the conclusion that it was not itself authority for the existence of a common law doctrine of the recognition of native title. The purpose of the present article is to explore the question whether *Johnson* v. *M'Intosh* can really be regarded as an exposition of common law principle at all. It is submitted that the correct conclusion is that it can not.

The first step in examining the question is to see precisely what was the issue between the parties in *Johnson* v. *M'Intosh*. In 1773 certain chiefs of the Illinois Indians had sold to a number of traders (including Thomas Marshall, the Chief Justice's father) two large tracts of land within the limits of the colony of Virginia, for $24,000 current money of the United States. In 1775 the Piankeshaw Indians sold two other tracts of land to a number of traders including many who had bought from the Illinois Indians in 1773 for $31,000 current money of the United States, these lands also being within the colony of Virginia. Virginia declared itself an independent State and Government in 1776 and in 1783 ceded its western lands to the United States. The lands ceded included the areas the subject of the purchases in 1773 and 1775. In 1818 the United States granted to M'Intosh, land within the area supposedly sold by the aforementioned Indians in 1773 and 1775. The successors in title of the purchasers in 1773 and 1775 brought ejectment against M'Intosh.

The primary issue raised by the case, therefore, was whether Indians could sell land in 1773 and 1775 in Virginia to individuals. The question which this article raises is, by what law was that issue to be determined? Dr Hookey's article proceeds on the basis that the relevant law was a species of the English common law capable of application in colonial situations generally. Blackburn J. did not find it necessary to examine the assumption.[17] The view put forward in this article is that the assumption is wrong.

The assumption can be examined only after a survey of what had happened at and after the settlement of Virginia between Indians and settlers concerning land.

Virginia was first settled by the London Company pursuant to the three Charters successively issued to it by King James I in 1606, 1609 and 1612. The King granted to the London Company all the territory within the limits designated in these Charters to be held in free and common socage and the right of absolute disposition under the terms of the Charters was given to the officials of the Company. The Company, the direction of which at all times remained in England, conducted the

[17] (1971) 17 F.L.R. 141, 209.

affairs of the colony until 1624 when the Crown took direct control into its own hands.[18] The Company at all times acted on the basis that it had the right of absolute disposition of the land.

In the colony itself, however, from the very beginning, dealings at times took place with the Indians on a somewhat different footing. In 1609 John Smith promised Powhatan, the leading chief in the immediate area (and the father of Pocahontas) certain goods and the protection of the King in return for certain land. This transaction was not proceeded with, but indicates the practical approach of the settlers on the spot.[19]

Relations with the Indians in the Company period varied between friendliness and occasional fighting. Gifts of land were sometimes made by the Indians in the early days of the settlement. These were no doubt accepted without regard to legal theory.

At times land was taken by way of reprisal for damage done by Indians to property, at times it was given. On one occasion, Captain Martin who wanted to buy an island near Nansemond, sent messengers to the appropriate Indian chief, with a view to negotiation. The messengers were killed, whereupon the land was taken by force.[20]

In London, the position continued to be maintained that the Company had absolute right and title to the land in its Charter. This is illustrated by an incident arising from a grant made in 1621 by Governor Yeardley in Virginia to one, Barkham. This grant had been made upon condition that the consent of Opachankana, a local Indian chief be obtained. When the grant came to be approved in London by the Company, the Council asserted that by the King's Letters Patent no other but the Company in London had the right to dispose of land in Virginia, the Governor being merely a ministerial officer "to set out to every man his proper dividend . . ." and condemned "the very dishonourable compounding with Opachankana whereby a sovereignty of that heathen infidel was acknowledged and the Company's title thereby much infringed".[21]

Although there had been some conflict between the colonists and the Indians prior to 1622, relations between the two groups had been comparatively good. In 1622, however, the Indians attempted to mas-

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[18] H. L. Osgood, *The American Colonies in the 17th Century* (1907) iii, 25-52.

[19] Stith, *History of Virginia* 104; Virginia Magazine vi, 214. (Further examples of such incidents are given in "Indian Policy of Colonial Virginia", unpublished Doctoral Thesis of Walter Stitt Robinson, University of Virginia 1950, 15-22, hereinafter cited as Robinson.)

[20] Tyler's Quarterly Historical & Genealogical Magazine iii, 262.

[21] Susan M. Kingsbury (ed.), *The Records of the Virginia Company of London* (1906 and 1933) ii, 94-95: N. M. Nugent, *Cavaliers & Pioneers* (1963) xviii. The Company acted on the basis that the Indians had no particular property in the land but only a general residence there. P. A. Bruce, *Economic History of Virginia* i, 489.

sacre the colonists and succeeded within the space of a few hours in killing at least 349 of the 1240 settlers then in the colony.[22] For a number of years thereafter the colonists took every opportunity to revenge themselves upon the Indians and there was a more or less continual state of hostilities maintained against some groups of Indians although friendly relations remained on foot with some tribes. During this period land was frequently taken without regard to any theory of Indian rights.[23]

The London Company was dissolved in 1624 and thereafter the colony was administered directly as a royal colony the Governor being the King's appointee. From 1624 also there was a general assembly of the colony consisting of a Council and a House of Burgesses, this being a continuation of an arrangement commenced under the Company in 1619. The Acts of the Assembly have been, in large part, preserved from its beginning in a compilation made by W. W. Hening.[24]

The Acts preserved in *Hening* give a clear picture of the early development of the colony and show that from 1624 until 1644 settlement proceeded slowly, grants being made on the head right basis,[25] with no reference in the Acts that survive, to Indian occupation. Numerous statutes were passed, forbidding any trade or intercourse with the Indians at all.

Then in 1644 there was a second attempted massacre. Measures were immediately taken to fortify the frontier by use of block houses and forts. Grants of land adjoining the forts were made to individuals to induce them to accept the responsibility of maintaining both the fort and an adequate defence force nearby. There is no suggestion that these grants paid any heed to Indian rights. In 1646 a Treaty of Submission was signed by the chief of the Indians in the colony whereby he became a tributary of the English, acknowledging that he held his kingdom from the Crown. This Treaty also provided for a boundary line, the York River, between the Indians and the English and the Indians agreed to abandon any lands inhabited by them on the English side of the line. The English undertook to protect the Indians against their enemies.

The York River boundary soon needed to be changed. In 1649 the opening of the land north of the York River was made legal.[26] In 1665 the Indian boundary line was again removed further away from the

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[22] Alexander Brown, *First Republic* 464.

[23] Robinson *supra* n. 19, 67.

[24] W. W. Hening (ed.), *Statutes at Large: being a collection of all the Laws of Virginia from the first session of the Legislature in the year 1619 (Richmond, 1819-1823)*—cited hereafter as *Hening*.

[25] Settlers were entitled to grants of land according to the number of persons they brought with them.

[26] *Hening* i, 353-354.

original seat of settlement.[27] As the boundary line moved further inland, the number of the Indians in close proximity to the settlers dwindled.

The Treaty of 1646 marked the beginning of a period lasting until 1676 during which the relations between the English and the neighbouring Indians were largely peaceful. During this period, and consequent both upon the events leading to the Treaty and the Treaty itself, the Indians with whom the English were in contact were in a dependent position.

From the time of this Treaty there is observable the pattern into which Virginia's relations with Indians fell: there were dependent or tributary Indians, and foreign Indians. The former were dealt with virtually as (inferior) citizens and the latter as independent groups of aliens, with whom war was waged and treaties made and who were regarded as having territorial rights.

From that time also the English showed flexibility in the way in which they treated questions of dealings in land between the dependent Indians and themselves. This can be seen from the Acts recorded in *Hening*, which also show that during this period a consistent effort was made to be fair to dependent Indians.

For example, an Act of 1657-1658[28] provided that there should be no grants of land to any Englishman in the future until the Indians were first served with 50 acres of land for each bowman. The same Act provided that where the land of any Indian or Indians was found to be included in any patent already granted for land at Rappahannock or the parts adjacent, such patentee must either purchase the said land of the Indians or relinquish the same. If he relinquished the land, he was to be compensated by the English inhabitants of the neighbourhood proportionately amongst themselves.

In the same Session a further Act[29] was passed which recited that many complaints had been brought to the assembly touching wrong done to the Indians in taking away their land which had been endeavoured to be remedied by former acts of assembly notwithstanding which, many English did still entrench upon the Indians' land which the assembly conceived to be contrary to justice and the true intent of the English plantation in the country whereupon it was ordained and enacted that all the Indians of the colony should hold and keep the land which they then had and that no person would be suffered to entrench or plant upon such places as the Indians claim until full leave from the Governor and Council or Commissioners for the place had been given. It was further provided that no Indians should sell their

[27] *Hening* iii, 84-85, 220.
[28] *Hening* i, 456, 457.
[29] *Id.* 467, 468.

lands except at Quarter Courts. (The reference to the Indians "of the colony" is a clear indication that the legislation generally which regulated the dealings between the Indians and the English was concerned with those Indians who had "submitted" in the Treaty of 1646.)

Further examples of the flexibility with which the questions of dealings in land between these Indians and the English were treated, appear in Acts of the Assembly of the years 1660 and 1661. One Act recited that the Indians of Accomacke had complained that they were short of land and that the English were seating themselves so near them that their corn was greatly damaged. It was ordered that a commission be given to two or three gentlemen with a surveyor to go over the bay to Accomacke and lay out such a proportion of land for the Indians as should be sufficient for their maintenance, with hunting and fishing excluded and that the lands so laid out should be so secured to the Indians that they might have no power to alienate it, or any part of it, thereafter to the English.[30]

Another Act records that a committee had reported that Colonel Fantleroy had from the Indians, a conveyance of certain land and an acknowledgement, but not according to Act. The conveyance referred to a former deed on the basis of which Colonel Fantleroy claimed he had made the Indians satisfaction for the land. Neither the former deed nor evidence was forthcoming to show that satisfaction had been made and it was ordered that the matter should be dealt with at the next Assembly, a Colonel Carter being appointed to acquaint the Indians in the meantime of what care the Assembly was taking to preserve their rights. Colonel Carter was also empowered to prosecute the cause of the Indians at the next Assembly.[31]

In the next Assembly an Act was passed which recited a petition on the part of the Chickahomini Indians, to have certain lands. It was ordered that such lands be confirmed to them by patent and that no Englishman should upon any pretence disturb them in their land nor purchase it of them unless the major part of the great men should freely and voluntarily declare their consent in the Quarter Court or Assembly.[32] A further Act passed shortly afterwards referred to the grant to the Chickahomini Indians and mentioned that within the tract of land granted to them Major-General Manwaring Hamond claimed 2,000 acres granted him by patent. It was ordered that the said Major-General Hamond "be desired to purchase the same of the Indians or to procure their consent for the preservation of the country's honour and reputation".[33]

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[30] *Hening* ii, 13, 14.
[31] *Id.* 14, 15.
[32] *Id.* 34.
[33] *Id.* 35.

A little later again an Act recited that upon examination of the difference between Colonel Fantleroy and the Indians it appeared that Colonel Fantleroy had a conveyance of land from the Indians; that he had given them some recompense though not full satisfaction for the same and that it was manifest that the Indians were not able to make him satisfaction for his building and clearing. It was ordered by the Assembly that the land should remain and be confirmed to Colonel Fantleroy, he paying unto a Mr Kempe for the use of the Indians 30 match coats of two yards apiece whereof one to the King was to be handsomely trimmed with copper lace.[34]

The foregoing examples show a concern to deal fairly with the Indians in relation to land. This concern does not appear to be based upon any settled theory of Indian title to land, but rather on recognition of the Indians' need for land and on a policy of upholding "the country's honour and reputation".

In March 1661-1662 a Grand Assembly was held at James City; after a preamble reciting the unhappy distractions of the Civil War in England and the dislocation caused to the colony and its laws thereby and affirming adherence to the laws of England,[35] 142 Acts were passed, the 138th of which was a consolidation in one Act of the then extant general provisions concerning Indians.[36] This Act recited that the laws prohibiting the purchase of Indian lands unless acknowledged at General Courts or Assemblies had proved fruitless and ineffectual, leading to great inconvenience. It enacted, *inter alia*, that for the future no Indian King or other should upon any pretence sell nor no English for any cause whatsoever purchase or buy any land then claimed or possessed by any Indian or Indians whatsoever and further declared that all such bargains and sales thereafter made were invalid, void and null.

The same Act made provision for "poor Indians whom the seatings of the English had forced from their wanted conveniences of oystering, fishing and gathering tuckahoe or other wild fruits, the said Indians might upon certain conditions be licensed to gather oysters or fruits from lands now occupied by Englishmen". Penalties were provided for persons trading with the Indians without a licence. The Act continued,

> because this Act cannot be put into execution without Commissioners to view the present bounds of the English and Indians, be it therefore enacted that the Honourable Governor be desired and authorized to appoint uninterested Commissioners to go with parties of horse to the several Indians towns, and there to proclaim these and the following articles of peace between us and the Indians, to settle the bounds between us, and to appoint others of

[34] *Id.* 36.
[35] *Id.* 41.
[36] *Id.* 138-143.

> the most integrity to fix the time and assess the work to help the Indian census . . . and for prevention of future entrenchments beyond the bounds once fixed, be it further enacted that the Governor be desired and authorized to commission certain persons annually to visit the same and to take care that no entrenchments be henceforth any further made upon the Indians . . .[37]

While these practical arrangements were being made in the colony, the Crown in England continued to act upon the basis that it had the unqualified right to grant lands within Virginia in fee simple and without regard to any Indian rights.

A clear example of this is what happened in relation to the Northern Neck. In 1649 Charles II, in exile, first granted this tract of land to seven of his friends. It was described as bounded by and within the heads of the Potomac and Rappahannock Rivers and Chesapeake Bay. In 1669, now restored, Charles II again granted the land by letters patent. Subsequently the grantees sold the land to Lord Culpeper to whom James II made a further confirmatory grant. In due course the grant devolved upon Lord Culpeper's grandson, Lord Fairfax.[38]

At the time of these grants the greater part of the Northern Neck was occupied by Indians and it seems certain that at least as regards the lands lying beyond the Blue Ridge no treaties had been made dealing with Indian "rights" in the lands. In the early 18th century litigation arose concerning the boundaries of the lands in the grant. In effect the question was whether the grant extended beyond the Blue Ridge. It was eventually decided in the Privy Council in 1745 that the boundary of the Northern Neck extended westward to the fountainhead (in the Alleghenies) of the Potomac River some 80 miles beyond the Blue Ridge.[39]

Thus the Fairfax estate was one granted by the Crown at least to a considerable extent, out of land in the occupation of Indians in respect of which neither treaty arrangements had been made by the colony nor purchases made by the grantee. The validity of these grants to the predecessors in title of Lord Fairfax was subsequently accepted without question in a judgment of the Supreme Court of the United States.[40]

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[37] *Id.* 141.

[38] Lord Culpeper's heir was his daughter who was the mother of the Lord Fairfax (*circa* 1698-1780) who moved to Virginia to set up his proprietary land office.

[39] *Hite* v. *Fairfax* 8 Virginia Reports 42; J. P. Boyd (ed.), *The Papers of Thomas Jefferson* (1952) vi, appendix 3, 647-668, especially 659; W. O. Grant and James Munroe (eds.), *Acts of the Privy Council of England, Colonial Series* (1910) iii, 388-391; Letter from George Mason to Edmund Randolph, 19 October 1782 in Rutland (ed.), *The Papers of George Mason 1779-1786* (1970) ii, 746-755.

[40] *Fairfax's Devisee* v. *Hunter's Lessee* (1813) 6 Cranch 602.

In 1676 a momentarily successful rebellion, known as Bacon's Rebellion, took place in the colony. During his brief period of power Bacon attacked the Indians on the frontier. After the collapse of the rebellion the Indians were brought to submission and a treaty of peace was signed in 1677 in which the various Indian tribes of Virginia acknowledged their dependence on the Crown and agreed to pay annually 3 arrows for their land and 20 beaver skins for protection. The treaty also provided that the Indians were to hold their land by confirmed patents under the seal of the colony.[41] By the end of the 17th century the tribes had diminished in number. The Indians who entered into the treaties of submission with the Englsh became their allies in hostilities with Indian tribes more distant from the areas of settlement. Protection was extended to their landholdings. No grants were allowed to be made to members of the colony of any land reserved by the treaty of 1677 and as late as 1705 a statute was passed making colonists liable to conviction for illegal purchase or occupation of such land.[42]

In 1714 further treaties were signed with local tribes under which agreement was reached whereby the Indians moved further away from the colony and were allotted lands to hold in their own right.[43]

During the last quarter of the 17th century little difficulty was experienced by the colonists with Indians in the Tidewater and Piedmont areas of Virginia: broadly speaking these were the areas between the Blue Ridge and the sea. In this period exploration and trade to the west of the mountains steadily increased. In the 18th century, settlement across the mountains took place, at first between the Blue Ridge and the Alleghenies, and later west of the Alleghenies; and a pattern emerged of purchases or treaties being made with Indian tribes by commissioners on behalf of the colony before settlement in any force began. These transactions were not recognition of legal right nor based upon notions of fair dealing but matters made essential by practical considerations because as expansion to the west took place it was necessarily in small numbers and the English were moving into an area claimed by the Five Nations (the Iroquois Federation). Their principal lands lay further to the north but they were of sufficient numbers and strength to inflict serious damage upon parties of settlers and their acquiescence was necessary or prudent to purchase in advance of settlement. It was not until after the Treaty of Lancaster in 1744 that settlement in any large scale was contemplated. By this treaty the Six Nations (an additional tribe having been added about 1715)[44] agreed to relinquish all claims

[41] Virginia Magazine xiv, 289.
[42] *Hening* iii, 464-466.
[43] Robinson *supra* n. 19, 155.
[44] Clark Whissler, *Indians of the United States* (1953) 111.

to the land in Virginia between the Blue Ridge and the Ohio River.[45]

The treaty was in fact in the form of a deed and ran as follows

> To all people to whom these presents shall come Conasatugo (and another of other named Sachims or Chiefs) send greeting—whereas the six United Nations of Indians laying claim to some lands in the Colony of Virginia signified their willingness to enter into a Treaty concerning the same—whereupon Thomas Lee, Esquire, a member in ordinary of His Majesty's Honourable Council of State and one of the Judges of the Supreme Court of Judicature in that Colony and William Beverley . . . were deputed by the Governor of the said Colony as Commissioners to treat with the said six Nations . . . as well of and concerning their said claim . . . and the said Commissioners having met at Lancaster in Lancaster County and Province of Pennsylvania and as a foundation for a stricter amity and peace at this juncture, agreed with the said Sachims or Chiefs of the said six nations for a disclaimer and renunciation of all their claim or pretence of right whatsoever of the said six nations and an acknowledgement of the right of Our Sovereign the King of Great Britain to all the land in the said Colony of Virginia. Now know ye that for and in consideration of the sum of £400 current money of Pennsylvania . . . they the said Sachims or Chiefs on behalf of the said six nations do hereby renounce and disclaim not only all the right of the said six nations but also recognize and acknowledge the right and title of Our Sovereign the King of Great Britain to all the land within the said Colony as it is now or hereafter may be peopled and bounded by His said Majesty . . . in witness whereof . . .
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> Signed by all the abovenamed Chiefs . . .

The form of this deed reconciled the practical approach of the Colonial Authorities with the larger claims of the Crown in England. What was purchased was a disclaimer and renunciation of the Indian claims and pretence of right together with an acknowledgement of the sovereignty of the King in regard to all the land in the colony. The transaction was also stated to be one for the foundation for stricter amity and peace. So far as those paying the £400 current money of Pennsylvania were concerned, no acknowledgement was made of any title in the land to the Indians and the transaction was quite consistent with the legal position adopted by the Crown. Nevertheless it is significant again from the practical point of view that it was not until after the obtaining of the "Treaty" that grants of land were made in the area or that settlement in any numbers of the land was contemplated.

Following the Treaty of Lancaster a number of land companies were organized which obtained large grants of land to the west of the Blue Ridge. Further treaties were entered into confirming what had been

[45] Virginia Magazine xiii, 141-142.

agreed upon in the Treaty of Lancaster. This again was a matter of practical expediency rather than any recognition of legal right. The Indians complained that they had not been fairly treated at the Treaty of Lancaster. The chief treaty of confirmation was the Treaty of Logg's Town in 1752. Its objects, in addition to confirmation of the Treaty of Lancaster were said to be to facilitate the operation of the Ohio Company by securing the good will of the Indians occupying or claiming the lands granted to the Company and to obtain the assistance of the tribes in the contest with France, which was seen to be near at hand.[46]

The grants to the land companies were made on the basis that settlement take place within stated times. Construction of forts and the settlement of the land began but came to a halt with the outbreak of the French and Indian war. This war was not brought to an end until 1763. In that year the Treaty of Paris was concluded between France and England. By this Treaty France acknowledged England's right to all the territory east of the Mississippi River. England gave up its claim to the lands to the west of the Mississippi, thus curtailing at the Mississippi the charter boundaries of Virginia which until that time had been to the South Sea. Late in the year the well-known Proclamation of 1763 was made.[47] For immediate purposes its relevance is that it proclaimed in part that

> Whereas 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 ground—we do therefore, with the advice of our Privy Council, declare it to be our royal will and pleasure that no Governor . . . in any of our colonies . . . in America do presume for the present, and until our further pleasure be known, to grant warrants of survey, or pass patents for any lands beyond the heads or sources of any of the rivers which fall into the Atlantic Ocean from the west and north west or upon any lands whatever which, not having been ceded to or purchased by us as aforesaid, are reserved to the said Indians or any of them.
>
> And we do further declare it to be our royal will and pleasure, for the present as aforesaid, to reserve under our Sovereignty, protection and dominion, the use of the said Indians, all the lands and territories not included within the limits of (Quebec, East

[46] Virginia Historical Magazine xvi, 143.

[47] It was this Proclamation which ten years later gave rise to *Campbell* v. *Hall* (1774) 1 Cowp, 204; 98 E.R. 1045 which became the foremost 18th century repository of the common law as it impinged upon English colonies. It was also later construed by the Privy Council in the *St Catherine's Milling* case (1888) L.R. 14 A.C. 46, 54-55.

> Florida, and West Florida) or within the limits of the territory granted to the Hudsons Bay Company, as also the lands and territories lying to the westward of the sources of rivers which fall into the sea from the west and north west as aforesaid.
>
> And we do hereby strictly forbid . . . all our . . . subjects from making any purchase or settlements whatever, or taking possession of any of the lands above reserved, without our especial leave and licence for that purpose first obtained.

The Proclamation of 1763 threw into confusion the activities of those land companies whose development activities had been interrupted by the French and Indian War. Further land companies came into existence after the Proclamation, and despite the terms of the Proclamation made considerable purchases of land west of the Alleghenies direct from Indian tribes. Much lobbying went forward in London to overcome the restrictions imposed by the Proclamation but matters were still unsettled at the commencement of the American Revolution.

So far as Virginia was concerned, matters were regulated by various Acts of the Assembly passed in 1779. One Act made provision for the perfecting of titles for lands to which the title was incomplete because of the events from 1754 onwards. Under this Act various companies applied for confirmation of their earlier incomplete titles, some being successful and some not. The case of the Loyal and Greenbrier Companies is an example of a successful application, and from the report of it in the Virginia Reports considerable detail of the history can be obtained.[48]

So far as those companies were concerned as were relying on purchases direct from Indian tribes, the Virginian Assembly brought their claims to an abrupt ending in 1779 when an Act was passed as follows

> To remove and prevent all doubts concerning purchases of land from the Indian natives, be it declared by the general assembly, that this commonwealth hath the exclusive right of pre-emption from the Indians, of all lands within the limits of its own chartered territory, as described by the act and constitution of government in the year 1776—That no person or persons whatsoever have, or ever had, a right to purchase any lands within the same, from any Indian nation, except only persons duly authorized to make such purchases on the public account, formerly for the use and benefit of the colony, and lately of the Commonwealth, and that such exclusive right of pre-emption will, and ought to be maintained by this Commonwealth, to the utmost of its power. And be it further declared and enacted, that every purchase of lands heretofore made by or on behalf of the Crown of England, or of Great Britain,

[48] The case of the *Loyal & Greenbrier Companies* (1783) Court of Appeal of Virginia, 1 Virginia Reports 21.

> from any Indian nation or nations, within the before mentioned limits, doth and ought to enure for ever, to and for the use and benefit of the Commonwealth, and to and for no other use or purpose whatsoever, and that all sales and deeds, which have been, or shall be made by any Indian or Indians, or by any Indian nation or nations, for lands within the said limits, to or for the separate use of any person or persons whatsoever, shall be, and the same are hereby declared utterly void, and of no effect.[49]

Thus finally, by Statute, the law of Virginia became settled. The evolution, first in the colony and then in the States, from the strict position of the Crown (still maintained at the time of the Revolution) that Indians had no legal rights of any kind in the soil, to the final position that the State had the exclusive right of pre-emption from the Indians, was complete. The sketch of the history of Virginia regarding land dealings with the Indians which has been attempted above makes intelligible the description given by Jefferson in 1782 in his *Notes on Virginia*, of the system of land holding and its relation to the Indians.

> The mode of acquiring lands, in the earliest times of our settlement, was by petition to the general assembly. If the lands prayed for were already cleared of the Indian title, and the assembly thought the prayer reasonable, they passed the property by their vote to the petitioner. But if they had not yet been ceded by the Indians, it was necessary that the petitioner should previously purchase their right. This purchase the assembly verified, by enquiries of the Indian proprietors; and being satisfied of its reality and fairness, proceeded further to examine the reasonableness of the petition, and its consistence with policy; and according to the result either granted or rejected the petition. The company also sometimes, though very rarely, granted lands, independently of the general assembly. As the colony increased, and individual applications for land multiplied, it was found to give too much occupation to the general assembly to inquire into and execute the grant in every special case. They therefore thought it better to establish general rules, according to which all grants should be made, and to leave to the governor the execution of them, under these rules. This they did by what have been usually called the land laws, amending them from time to time, as their defects were developed. According to these laws, when an individual wished a portion of unappropriated land, he was to locate and survey it by a public officer, appointed for that purpose: its breadth was to bear a certain proportion to its length: the grant was to be executed by the governor: and the lands were to be improved in a certain manner, within a given time. From these regulations there resulted to the state a sole and exclusive power of taking conveyances of

[49] *Hening* 97-98.

> the Indian right of soil; since, according to them an Indian conveyance alone could give no right to an individual, which the laws would acknowledge. The state, or the crown, thereafter, made general purchases of the Indians from time to time, and the governor parcelled them out by special grants, conformed to the rules before described, which it was not in his power, or in that of the crown, to dispense with. Grants, unaccompanied by their proper legal circumstances, were set aside regularly by *scire facias*, or by bill in Chancery. Since the establishment of our new government, this order of things is but little changed.[50]

From the history as it has been outlined, it may seem that Jefferson's account overstates the regularity and degree of the purchases of land from the Indians by the English; American scholars have made this point.[51] Jefferson's account applies more accurately to the period after 1646 than it does to the period before; also, it should be remembered that at the time he wrote, although large purchases of land had been made to the west of the Alleghenies subsequently to the Treaty of Lancaster, comparatively little settlement had actually taken place and what he was saying had more particular reference to Tidewater Virginia.

At almost exactly the same time as Jefferson was writing what has been set out above, George Mason[52] was writing on the same subject to Edmund Randolph. He said, in part,

> As our settlements were extended, the wild game destroyed, and the country rendered unfit for the savage life, the Indians have been forced to remove farther, for the convenience of hunting; as they retired, purchase after purchase hath been made from them, and temporary lines and boundaries, for the sake of peace, from time to time accordingly settled between them and the English inhabitants here: but none of them have ever been considered as at all affecting the Title of Virginia. When the Colony of Virginia was first settled, it was without any previous purchase from the Indians. The first lands purchased from the Indians were only upon and near the mouth and larger parts of the rivers, then to the falls of the said rivers, then to the Blue Ridge of mountains, afterwards . . . as far westward as the claim of Great Britain extended. Most of these purchases were made subsequent to the actual settlement and occupation of part of the lands purchased. It is about 60 years ago since the people of Virginia settled the country over the Blue Ridge and near 40 years since they begun to settle beyond the Apalation or Alleghany Mountains; but the purchase at Lancaster was not made until 1743 . . .[53]

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[50] Jefferson's Notes on Virginia, reprinted in *Basic Writings of Jefferson* 143.
[51] Robinson *supra* n. 19, 79.
[52] Leading politician and draftsman of Virginia Bill of Rights in 1776.
[53] Letter of 19 October 1782 cited *supra* n. 39.

This summary appears to be an accurate account of the history until that time. The view expressed by Jefferson, however, in its dealing with the "Indian Right" was not inconsistent with the historical facts and enabled those facts to be presented in a favourable light from Virginia's point of view. It also fitted well with the Act of 1779 which has been set out above.

Mason's letter was written in the course of a controversy concerning Virginia's title to its western lands. In the interval between the end of the Revolution and the ratification in 1788 of the United States Constitution, the former colonies worked together under Articles of Confederation which had been ratified in 1781. A movement was begun after the Revolution to promote the cession of the north west territory (the area to the south of the Great Lakes, the east of the Mississippi and north of the Ohio) to the Confederation by those States which had claims to the territory. New York, Connecticut, Pennsylvania and Virginia variously laid claim to some or (in the case of Virginia) the whole of the territory. The various States ceded their claims to the United States, Virginia doing so in 1784. During the period leading up to this cession much argument took place concerning the strength of the title of the various States to the land they claimed in the north west territory. This argument caused detailed research into the history of the claims of the various States to their lands; Mason's letter was one of the steps in the preparation of Virginia's case.

At the same period, disputes between States concerning their boundaries created interest in and brought about extensive legal research into the legal and historical basis of the States' claims to dominion over their lands. The outstanding example of this is the Connecticut Pennsylvania dispute which was decided in 1782, pursuant to Article IX of the Articles of Confederation, by a Court of Commissioners appointed by the Congress. The arguments in the case were recorded and have recently been printed for the first time.[54]

Johnson who argued the case on the part of Connecticut is recorded as having argued as follows in support of one proposition that he advanced:

> . . . Connecticut at the time of the late Revolution was in fact seised of the right of jurisdiction of property and pre-emption in and to all the territory in their charter and patent including the lands in controversy.
>
> This question . . . ought to be determined by the law which existed at the moment of acquisition.
>
> This law had for its basis the great principle or title of occupancy and the acknowledged right of the Prince.

[54] Boyd *op. cit.* 488 ff.

> But America was inhabited. Therefore some additional principles were necessary and what were these additional principles? Pre-emption, and actual purchase.
>
> But no such purchases could be made unless they were made under the authority of the Prince, agreeable to the feudal ideas prevalent at that period.
>
> Hence it followed that the Indian title was subordinate to the Crown title.
>
> The Indian title can give no certainty and certainty is necessary to the establishment of property.
>
> . . .
>
> We made actual purchases of the Indians but why? That we might purchase peace and quiet.
>
> All titles in America take their origin from the Crown in the way of charters and other grants.
>
> The Crown only could give a right of pre-emption, and that right of pre-emption seems to be admitted by the laws of nations, consented to by all civilized people and sanctified by prescription.
>
> All the legislatures upon this continent have adopted a language of this sort and therefore ought to be binding upon this Court as a fixed determination or law in the American code.[55]

The decision of the Court of Commissioners, given without reasons, denied any right in Connecticut to the lands and held that "the jurisdiction and pre-emption of all the territory . . . claimed by . . . Connecticut, do of right belong to . . . Pennsylvania".[56]

As can be seen from Johnson's argument, the pre-emption theory was thought of as something engrafted upon the common law rights flowing from the original grants by the Crown to the colonies by the legislative adoption in the colonies of an international law principle based upon the extent of inhabitation of America at the time of colonization and growing as a matter of fact from the necessity to make purchases of the Indians for the sake of peace and quiet. The theory is completely consistent with the development of the law in Virginia as outlined above and with the Virginian Act of 1779 which has been set out above.

A consequence of the cession to the United States of the claims of the various States to their western lands was that the land companies who had made purchases direct from Indian tribes in those western lands was that the land companies who had made purchases direct from Indian tribes in those western lands prior to the Revolution now had to carry their claims before Congress in their efforts to secure recognition of their "ownership" of such lands. One document produced in

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[55] *Id.* 480.
[56] *Ibid.*

support of such a claim, that of the company claiming proprietorship of an area known as Indiana (not coincident with the present State of that name) entitled

> Plain Facts, being an examination into the rights of the Indian nations of America to their respective countries and a vindication of the grant from the six united nations of Indians to the proprietors of Indiana against the decision of the legislature of Virginia together with authentic documents, proving that the territory westward of the Allegheny Mountain never belonged to Virginia

is a masterly presentation of the argument that the Indian nations of that area had a full legal title to their lands. The history, the documents, opinions from eminent lawyers, and the legal argument in support of a company's position are marshalled in a manner for which it is difficult to see any improvement. The petition of this company and of other companies were considered by Congress on numerous occasions and invariably denied. The argument advanced on behalf of these land companies was the same as that advanced in "*Plain Facts*", referred to above; it was in turn precisely the same argument as that put for the unsuccessful claimants in *Johnson* v. *M'Intosh* and rejected so elaborately by Marshall C.J.[57]

Before returning to consider *Johnson* v. *M'Intosh* in the light of the history reviewed in this article, there are some further matters to mention.

The first is the position in the other colonies. I have in this article attempted to focus upon the situation in Virginia since it was with land which was at the relevant times in that State that Marshall C.J. was dealing in *Johnson* v. *M'Intosh*. It appears, however, that the historical development in at least a number of the other colonies was similar to that in Virginia. In the excerpt set out above from Johnson's argument in the Connecticut Pennsylvania dispute, he asserted the similarity of the development in the various colonies. The same Johnson was one of the chief lawyers concerned in the final disposal in the Privy Council of a long and complicated dispute between the Mohegan Indians and Connecticut; he represented Connecticut and in the detailed arguments that have been preserved put the same view concerning the dealings with the Mohegans as appeared in the excerpt above. The Privy Council decided in favour of Connecticut in 1772; the reasons for their decision, however, if any, do not appear to be available.[58] Although the early history of New York is quite different from that of Virginia, the position as from the end of the 17th and during the 18th century appears again

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[57] (1823) 8 Wheaton 543.

[58] A detailed account of this long drawnout case is to be found in J. H. Smith, *Appeals to the Privy Council from the American Plantations* (1950) 422-442.

to have been much the same: see for example the decision of Chancellor Kent in *Jackson* v. *Hudson*, 1808.[59] It is to be noted also that in New York the Crown had always maintained its right to grant land within the colony without regard to any "Indian title". It had become the practice not to grant land unless the proposed grantee could show that he had a previous conveyance from the Indians but the Crown at all times insisted that this was a matter of practice and not of right. An opinion of the Attorney-General of the colony, J. T. Kempe, of 1765 has been preserved which was written at the time of some litigation in which the question of the validity of a grant without the Indian title having first been obtained was raised. He said

> As to the necessity of an Indian deed to enable the King to grant. . . . I must observe . . . that it is the policy of our constitution, that wheresoever the King's dominions extend he is the fountain of all property in lands, and to deny that right, in the Crown, in any place, is in effect denying his right to rule there—hence it follows, that in a legal consideration the King can grant lands within his dominions here, as well without a previous conveyance from the Indians, as with—nevertheless the Crown has thought fit by its instructions to its Governors here, to direct them not to grant lands before they were purchased from the Indians, but this is not a restriction contained in his commission by which he has power to grant, but exists in the private instructions—and tho if a Governor should act contrary to his instructions it would justly expose him to the King's displeasure, yet perhaps his acts might be nevertheless binding, and a grant contrary to the instructions good, if the Governor pursued the powers in his commission.[60]

Kempe argued ejectment cases in New York at about this time in which his case rested upon this view and which were successful.[61]

Following the cession of the north western area to the United States, the Congress passed ordinances for the government of that area. The principal one of these was the North West Ordinance of 1787. This provided in its third Article, *inter alia*, that

> The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress.[62]

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[59] *Jackson* v. *Hudson* 3 Johnson 375.

[60] A. C. Flick (ed.), *The Papers of Sir William Johnson* Albany (1925) iv, 818.

[61] J. Goebel and T. Naughton, *Law Enforcement in Colonial New York* (1944) 34, 35, 207-220.

[62] S. E. Morison (ed.), *Sources and documents illustrating the American Revolution* (1955), 231.

This Ordinance, in the climate of opinion that had grown up as already described must clearly have had an influence on any subsequent judicial consideration of the question of Indian title.

Marshall C.J. himself had an intimate knowledge of the Virginian land law. His father had been a surveyor (in that period an official post of importance) and a man active in Virginian affairs and land dealing. He himself was one of the leaders of the Virginian bar, with an extremely busy practice. He appeared for one of the parties in *Hite* v. *Fairfax*,[63] a case which involved a detailed scrutiny of the history of the Fairfax estate;[64] subsequently his father was involved in the case which is the first I know of in which the pre-emption idea was judicially approved. This was *Marshall* v. *Clark*[65] decided by the Virginian Court of Appeals in 1791. This case proceeded on the basis upon which the Virginia legislation of 1779 (and Johnson's arguments) referred to above had been framed. A question in the case was whether the claims of Indian tribes had been extinguished to land which had been the subject of two grants to citizens of Virginia. The answer given was that in a dispute between citizens both claiming under a Virginian grant the question was immaterial. The land in dispute was within the area formerly claimed by the Crown within the limits of Virginia.

> The dormant title of the Indian tribes remained to be extinguished by government, either by purchase or conquest; and when that was done, it enured to the benefit of the citizen, who had previously acquired a title from the Crown . . .
>
> . . . The Indian title did not impede either the power of the legislature to grant the land . . . or the location of the lands on treasury warrants, the grantee, in either case, must risk the event of the Indian claim, and yield to it, if finally established, or have the benefit of a former or future extinction thereof.[66]

In 1800 the House of Representatives of the United States Congress received a report from a Committee to which had been referred the consideration of the expediency of accepting from the State of Connecticut a cession of jurisdiction of territory west of Pennsylvania. Marshall C.J. was the person named as making the report. The report involved a full consideration of the history of Connecticut's territorial rights including a claim which it was maintaining as late as 1800 to land in the western area. The report shows, as one would expect, a full knowledge of the history together with a full awareness of the way in which matters of the "Indian title" were dealt at that time.[67]

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[63] 8 Virginia Reports 42.
[64] *Supra* pp. 158-159.
[65] (1791) 1 Kentucky Reports 77.
[66] *Id.* 80-81.
[67] Amercian State Papers Class VIII Public Lands 94-98.

Finally, the case of *Fairfax's Devisee* v. *Hunter's Lessee* referred to above[68] was a case in which Marshall C.J. had a personal interest. He and two members of his family had acquired during the 1790s an interest in the Fairfax Estate. Lengthy litigation to establish the validity of the title came to a successful conclusion when the case was heard before the Supreme Court. The litigation did not directly relate to "Indian title" but, dealing as it did with the Northern Neck, itself involved a survey of a good deal of the legal history of Virginia in so far as it related to land.

All this goes to indicate how thoroughly Marshall C.J. was steeped in the learning of his period concerning the theory of the acquisition of land in America and the prevalent ideas concerning Indian rights relating to land.

When *Johnson* v. *M'Intosh* came before him then, Marshall C.J. was fully equipped to answer the questions it raised. The central issue was that raised in *Plain Facts*,[69] whether Indian tribes could sell land directly to individuals. The political answer to this question had already been given in the negative, when the petitions of the land companies to Congress had been denied; now the legal answer also was to be the same. In giving that answer he clearly felt himself constrained by the necessity of the case, (that almost all titles in the U.S. were dependent on original grants from the Crown without reference to Indian rights) to find as he did;[70] and yet repelled by the legal basis on which the Crown had maintained its right to make the original grants, which he seems to have regarded as an "extravagant pretension".[71] This conflict was resolved to an extent by giving his approval to the qualification of the Crown title by the idea of Indian right of occupancy until conquest or purchase. The exact content of this qualification has not been examined in this article: (it is perhaps fair to say that it has since defied definitive analysis). What I have attempted to show is that the idea of the qualification was one that grew out of the history of Virginia (and the other colonies) and had become known and accepted in the latter part of the 18th century.

It can be seen that in Virginia, it was from the purchases, gifts, conquests and agreements of the early 17th century that practices arose which were embodied in the statutes of the late 17th and 18th centuries. When these practices encountered the "foreign" Indians, across the mountains in the Western lands, in the early 18th century, and treaties were made, of which the Treaty of Lancaster is the best known example, the way was prepared for acceptance, at the practical level of the idea

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[68] *Supra* n. 39.
[69] *Supra* p. 168.
[70] (1823) 8 Wheaton 543, 579.
[71] *Id.* 591.

of the "Indian right". This idea fitted in with the 17th century Acts still standing on the Virginia statute book, and also with the Acts of 1779 quoted above. The royal proclamation of 1763 also fitted in with this approach. Finally the idea became further entrenched following the cession of the Western lands to the United States and the subsequent ordinances, particularly the North West Ordinance of 1787 with its express reference to "Indian Title", and its general indication of the resolve of the United States to follow a fair and decent policy with regard to Indians.

From what has been said in this article, it is submitted that it is clear that the law by reference to which *Johnson* v. *M'Intosh* was decided was not in any sense the common law of England, either as it was in 1788 (the relevant year so far as *Milirrpum* is concerned) or at any other time. It was the law of Virginia as it had developed from the time of the first plantation. Whether the law of Virginia at the time of the first plantation was in any real sense the common law, has been doubted by the Virginians themselves,[72] but the settled view appears to be that at least as from 1662 the common law was in force so far as applicable.[73] The changes which took place in this law, first as a matter of practice (evidenced *inter alia* by the treaties) and later as declared by statute made the law significantly different from the English common law which came to Australia in 1788.

An argument akin to this was put to Blackburn J. in *Milirrpum*. He said it was unacceptable,

> because of the old-fashioned rigidity of the concept of the common law as something which, having been passed on to a colony at its foundation, thereafter develops only in that colony, in England, and in decisions of the Judicial Committee; on this theory, recourse to decisions in other jurisdictions is a waste of time. In the second place, the application of this theory amounts to saying that the existence of a doctrine of communal native title in Australia is categorically impossible because it could not have existed in England in 1788 or at any time, there being no aboriginals to whom it could apply.[74]

However it is not that narrow approach which is being argued here. The argument put in this article is as follows: first, for the reasons already given, it is submitted that the law applied in *Johnson* v. *M'Intosh* was not the common law that came to Australia in 1788; second, that it was the common law of Virginia (in the broad sense of

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[72] *Virginia Reports Colonial*, 1728-1732, Introduction 160-162 (This is a 19th century edition of the Reports of Sir John Randolph & Edward Barradell.)

[73] H. A. Washington (ed.), *The Writings of Thomas Jefferson* (1856) ix, 485-486. *Story on the Constitution* (5th ed. 1891) i, 25.

[74] (1971) 17 F.L.R. 141, 207.

that term) as it had developed to the end of the 18th century; third, that in examining the Australian situation by reference to other common law jurisdictions, guidance can be obtained, but that relevant questions are, how did the law in the other jurisdictions develop, and can it be said that the Australian law developed in a similar fashion. Such an enquiry involves seeing what the common law was upon its introduction in the other jurisdiction, how and in what circumstances it subsequently developed and then looking at the comparable Australian situations. In circumstances of sufficiently similar commencement and development it would be appropriate for similar conclusions to be drawn. In this sense recourse to decisions in various jurisdictions could be of considerable value. The real difficulty for the plaintiffs in *Milirrpum* was that in Australia after 1788 there had never been development of the kind that took place after the first settlements in North America and New Zealand or upon the establishment of British rule in India and Africa, and there was no material before the Court on which it could be said that the law should now develop as it had in other jurisdictions.