Alexandria Park – a tale of terra nullius

By David Ash

Introduction

Cooper v Stuart was the Privy Council determination which cemented terra nullius in Australia for the century up to Mabo. Its interest to a wider Australia is obvious; its own story has not yet been told. The land the subject of *Cooper v Stuart* was no vast outback tract but an industrial estate in the inner city suburbs of Sydney. The dispute – ironically, in light of *Mabo* – was about whether the estate owner had to yield part of the estate to the Crown. As things turn out, he did, and Alexandria Park is the result. This article is about how this came to be.

From the Crown to Mr Hutchinson

William Hutchinson was a convict. When he arrived in Sydney he was convicted afresh of theft from the King's stores and sent to Norfolk Island. A thief of Crown property and a convict, he had the skill set to put himself on the ladder. On the island, he was appointed overseer of government stock and on his return to Sydney Governor Macquarie appointed him principal superintendent of convicts and public works. He moved among and did business with the big name emancipists including William Redfern and Samuel Terry.

Hutchinson's continuing good fortune was recorded by Lord Watson in the opening words of *Cooper v Stuart* some sixty years later:

> *His Excellency Sir Thomas Brisbane, then Governor-in-Chief of New South Wales and its Dependencies, on the 27th May 1823, made a grant to one William Hutchinson, his heirs and assigns, of 1,400 acres of land in the county of Cumberland and district of Sydney…*

The cause of the problem those sixty years later was the qualification 'reserving to His Majesty, his heirs and successors… any quantity of land, not exceeding ten acres, in any part of the said grant, as may be required for public purpose'.

The Majesty was George IV, and the language is language of a sovereign. The land in the grantee might pass either by death – to heirs – or by dealings – to assigns – but the reservation was for the monarch

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and his heirs and successors for the benefit of the public. After George's death there was brother William. After William's death there was their niece Victoria, four years of age in 1823.

In modern language, Hutchinson received about five and two-thirds square kilometres and the reservation was less than one per cent. Getting from Hutchinson to the appellant in *Cooper v Stuart*, and to what part of Sydney we are talking about, goes like this.

From Mr Hutchinson to Mr Daniel Cooper senior

Daniel Cooper had arrived as a convict in 1816 and proved himself an excellent businessman. An early partner was Solomon Levey. They appear as co-plaintiffs in the Supreme Court as early as 1821, in a possession case.

Cooper had a range of interests, including a flour mill in what we now call Sydney's inner west. The *Sydney Gazette* for 30 September 1820 recorded:

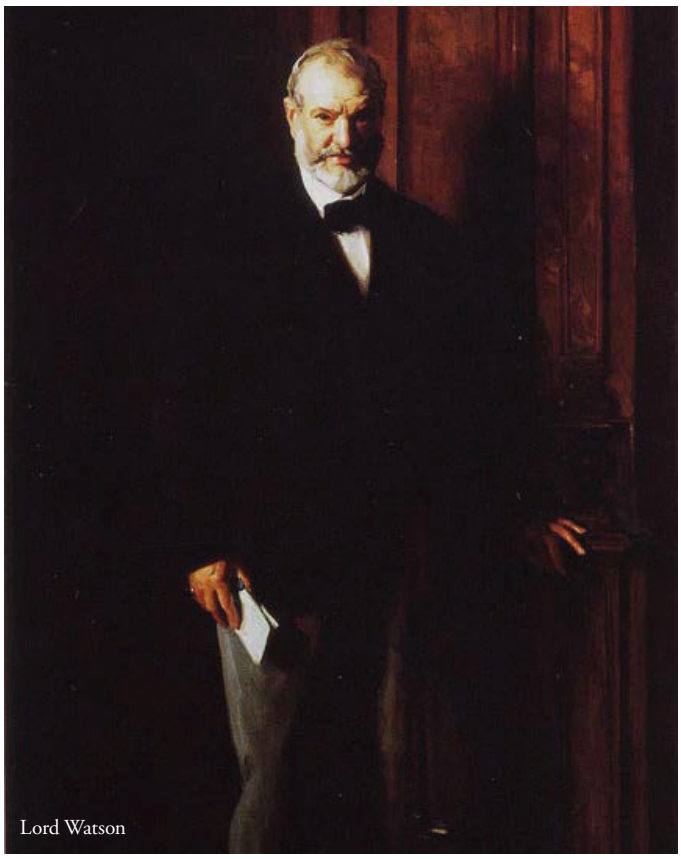
> *A water flour mill, about two miles from town, erected in the joint concerns of Messrs Wm Hutchinson, D Cooper, George Williams, and Wm Leverton, has been recently visited by His Excellency the Governor, who, we understand, was much pleased with the work… It has been attended with considerable expence [sic], and reflects great credit on the proprietors; and so highly was His Excellency gratified with the performance of the undertaking, that he bestowed on it the name of 'The Waterloo Mills'.*

Wellington had defeated Napoleon five years before. By 1821, the operation was known as the Lachlan and Waterloo Flour Mills. It is tempting to think that this was the owners' way of showing a return appreciation to Lachlan Macquarie. The truth is more mundane; the new name was a merger with the Lachlan Flour Mills at Kensington, one of whose owners was Terry.

The business expanded rapidly. By 1822 the firm was issuing bank notes. A classified in the *Gazette* for 6 September 1822 shows how forgeries were dealt with:

> *NOTICE. — The Lachlan and Waterloo Mill Company, having made an Alteration in their ONE and TWO DOLLAR NOTES, beg to state, for public information, that the Alterations are, First, that there are three Numbers in lieu of two; Second, that my Name appears above the entering Clerk's; Thirdly, that the Signatures of William Hutchinson and Samuel Terry, are above instead of over the Words ' for the Proprietors of the Lachlan and Waterloo Mills;' and, Fourthly, that the Name of Samuel Clayton, Engraver, is erased. T. W. M. Winder. N. B.— No Forgeries from the Four Dollar or Twenty Dollar Note ; they remain in their original state.*

In 1823, Hutchinson but not the partnership received the 1,400 acres the subject of *Cooper v Stuart* and at some time


Lord Watson


Daniel Cooper

it understandably became known as the Waterloo Estate. Why Hutchinson and not the partnership? I suspect the answer is that grants were made to individual persons and not to commercial partnerships. Also, Terry would not have been appropriate. The fabulously wealthy 'Rothschild of Botany Bay' was the subject of gossip and more importantly got on the wrong side of Bigge; he was, indubitably, Macquarie's man in Brisbane's new world.

By 1825, the partnership comprised only Hutchinson, Terry and Cooper and the first two were ready to sell out. As far as I can see, there was no animus. It was a straightforward case of two very successful self-made men moving from active management to directorships, philanthropy and pastoral development. The fact that both had been convicts would have made the move the more understandable. Cooper and the member of his other partnership were cashed up and ready; it was a natural development which included a conveyance of the Waterloo Estate from Hutchinson to Cooper & Levey.

Cooper the landowning litigant

Daniel Cooper was good for advocates. He litigated to defend his name, with Wentworth his preferred counsel. He litigated to collect debts. He litigated to protect his land. And he litigated to get the best out of the dissolution of the partnership after Levey's death in 1833.

Cooper litigated from a distance. Like his partner and unlike Hutchinson, Terry, Wentworth and the rest, he did not stay in the colony after finding his wealth. Rather, he moved to London in 1831, still in his mid-forties. While he took on new Sydney partners, he oversaw the business for the next two decades until his death.

And we are talking big business. The commercial operation was huge. The land in what we now call Alexandria and Waterloo – the grant the subject of this article – was huge. Consider also the purchases by Cooper & Levey in Sydney's east. In 1826, they picked up Captain Piper's Point Piper Estate. By the next year, they owned over 1,100 acres of what is now Woollahra Council, some of Australia's premier residential real estate.

Then there was litigation involving the grant over three decades before *Cooper v Stuart*. We have seen that Hutchinson and Cooper merged their interests with Lachlan Flour Mills at Kensington. Kensington bordered on Lachlan Swamp, today's Centennial Park. Between 1827 and 1837, John Busby's bore became a primary source of drinking water. It ran from the Redfern side of the swamp through to Sydney Hospital. In the early 1850s, Cooper as owner of the Waterloo Estate sought to enjoin Sydney City Council. The gist of the argument was that water flowed naturally from the swamp onto the estate and proposed work by the council on the swamp near the estate would interfere with the flow. The Full Court's decision did not resolve the matter; it may have settled.

The younger Daniel Cooper

Daniel's nephew and William's father was also a Daniel. A successful businessman in his own right, he later inherited much of his uncle's wealth. He was also a successful politician, first speaker of the new representative assembly from 1856. Given that the Alexandria owned by Cooper would become known as the Birmingham of Australia, there is a parallel; in the years before the self-made Joseph Chamberlain established his radical Liberal base in Birmingham, the self-made Daniel Cooper was making political capital among the liberal forces of the day. In, around and after the introduction of representative government that meant friendship with Henry Parkes.

Daniel left for England in 1861 where, in 1863, he was created the first baronet of Woollahra. When he left and as we have seen, his ownership of Sydney's commerce and realty remained huge. In a real sense, the colonial servant, and an emancipist at that, had become the imperial overlord. The baronetcy survives in the 21st century.

Parks & gardens

By the middle of the 19th century, Sydney's urbanisation was a process of suburbanisation. In the south west, Redfern was incorporated in 1859. Immediately, 250 residents successfully petitioned to be hived off, and the municipality of Waterloo was proclaimed the following year. By 1868,

257 electors in Waterloo's western ward successfully petitioned that they, in turn, be hived off, and the Borough of Alexandria came into existence in 1868. To the east of the city, Woollahra was incorporated in 1860. Beneath this hustle, bustle and change, the writ of Daniel Cooper ran.

Meanwhile, suburbanisation brought with it a push for parks and gardens. It is unsurprising that the push appealed to Henry Parkes. We remember him for his role as a liberal newspaper owner or, much later, as the overseer of federation. It is as well to remember him for his vigorous and highly successful style of politics, and this is just the sort of thing which would have appealed to him. His particular legacy is Centennial Park, but that is not the limit. On 22 August 1879, five deputations from a number of suburbs attended on him. Two of the councils were Alexandria and Woollahra. The next day, the *Daily Telegraph* summarised their positions:

> *[Alexandria's local MP] said it was understood that on the Waterloo estate, adjoining Alexandria, there were 10 acres of land available for recreation purposes, and the deputation were desirous of having trustees appointed with as little delay as possible, so that the work of improving it might be proceeded with. The Mayor explained that a short time ago ten acres had been surveyed on the hill adjoining the Kerosene Works, but the borough council, thinking that it was in no sense suitable for the purpose intended, communicated with the Minister for Lands, praying that another ten acres, near to Wyndham and Buckland streets be substituted. The Minister consented without hesitation, and the piece substituted is not only pleasingly and conveniently situated, but admirably adapted for the purpose. He hoped there would be no delay in the appointment of the trustees.*

Today, the north corner of Alexandria Park is at Wyndham and Buckland Streets. As to Woollahra:

> *The Mayor [of Woollahra] explained that on the Cooper estate there was a piece of land admirably adapted for the purpose, but as to the tenure or acreage he could say nothing… Sir Henry Parkes… urged the gentlemen present to send into the Government, as soon as possible, all obtainable information regarding the matter, as it was the intention to consider the whole question, probably at the end of ten days from the present.*

Slow progress

Two years on, and Alexandria Park was unborn. The *Evening News* of 26 November 1881 reported:

> *Frequent complaints are made at the dilatory action of the Government respecting the public park for Alexandria. It appears that in 1879 a deputation, consisting of the mayor and aldermen, waited upon the hon. Colonial Secretary, and urged the desirability of resuming certain land for recreation purposes. Sir Henry Parkes then promised to give the matter the earliest possible attention. Ultimately, in reply to communications on the subject, Mr M'Elhone received a letter from the Lands Department, dated January, 1880, intimating that, the technical description of the park having been furnished, the same, with all papers, were being forwarded to the parliamentary draftsman for the preparation of a Resumption Bill. A similar letter was also forwarded to the Mayor, and the early part of the present month Mr Fremlin, member for the electorate, received a letter notifying that the papers were now in the hands of the parliamentary draftsman, &o. Some people are unkind enough to say that the cards are being shuffled for the benefit of a certain wealthy family now absent from the colony. However, to say the least, residents have been treated very badly, and unless the Department bring a little more energy to bear on the matter, very few of the present generation will be spared to enjoy the privilege of a strolling the Alexandria Park.*

The rationale for the rule is clearer than its application; simply put, the dead shouldn't rule from the grave, at least not forever. Lives move on and so should land.

It is tempting to condemn Parkes's fudging for old friend Daniel's family, but there are two points against.

First, the tenor of Parkes's remarks to the Alexandria delegation were different from those to the other delegations. There is a sense of immediacy with respect to the appointment of trustees. And why would it be otherwise? Unlike the other proposed parks, including Cooper's Woollahra land, no money had to change hands because of the 1823 reservation for the public good.

Secondly, the documents do not indicate that Daniel was the player. Yes, rich liberals can tend to Toryism with age. Joseph Chamberlain is the exemplar. But and despite the reference to the absent family, the Cooper still living in New South Wales, Daniel's second son William, was to all intents and purposes running the show. Apart from anything else, William – aged 33 at the time he commenced the action – was the owner of the land the subject of the litigation. Finally, there is good confirmatory evidence from the other side of Sydney that William never grew to like giving up what the two Daniels had got in. As Woollahra Council has recorded:

> *Cooper Park's worth as a recreation area was recognised as far back as 1885 when the Government was asked to purchase land from the Cooper Estate for recreational purposes. It was not until 1913 that Sir William Cooper agreed to give the whole of the gully from Victoria Road, Bellevue Hill to Manning Road, Double Bay to the Council as a park.*

The litigation in the colony

Whatever Cooper's delay tactics, in 1882 the government called his bluff by proclaiming Alexandria Park. William's remaining course was litigation, although the proceedings did not commence until November 1884 and the matter only came on before Sir William Manning in August 1885, with premier Alexander Stuart the nominal defendant.

Stakes were high. For Cooper, there was Darley QC, Owen QC, Pilcher and AH Simpson, and for the Crown, Stephen QC, Salomons QC, and Walker. Darley would be chief justice the next year; Owen, chief judge in Equity a year later, would father a Supreme Court judge and grandfather a High Court judge; Pilcher was already a leader of the common law outer bar; AH Simpson, a future chief judge in Equity; Stephen, a future Supreme Court judge and son of former chief justice Sir Alfred Stephen; Salomons QC, also chief justice the next year; and Walker, future Supreme Court judge. The appointment and prompt resignation of Salomons CJ has one link to the current tale; within months, his leader Stephen would chair the Bar meeting which unanimously resolved to ask Salomons to withdraw his resignation.

The stakes were big but the issue was not. The report suggests that Manning looked at the authorities over lunch and delivered reasons in the afternoon. In any event,

everyone knew it didn't matter; in the judge's closing words:

> *With the full knowledge and expectation that the matter will go before the Full Court, and, probably, before the Privy Council, I decree accordingly. I may add that my own individual opinion is to the same effect [as the authorities before me].*

A columnist for the *Evening News* reported the matter thus:

> *The huge grants of valuable land in and around Sydney made in the early days of the colony form one of the remarkable facts in our history. How these grants came to be made is a question more easily asked than answered now a days. Some of them include a very large part of the foreshore of the harbor, and the 'unearned increment' of the land has made the grantees and their heirs 'rich beyond the dreams of avarice.' Yet the local representative of one of these fortunate families thought it quite consistent with the fitness of things to fight the Government in the Supreme Court the other day over a reserve of ten acres out of a grant of 1400, known as the Waterloo Estate. This grant was made on the 27th May, 1823 — sixty-two years ago — and contained a proviso that ten acres of the land might be resumed for public purposes. The Government resumed their ten acres accordingly for a public park in November 1882. The grantee, considering himself a very ill-used man, retained four leading counsel to oppose this resumption. They moved for an injunction accordingly, and exhausted their ingenuity in a vain effort to discover a flaw in the Crown's title. But the suit was dismissed at once, the points raised being clearly untenable.*
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> *Ten acres out of 1400 was a very modest reservation for public purposes. So modest, indeed, as to show us how little importance'was attached in the old days to the establishment of public parks or recreation grounds. Sydney is miserably deficient in that matter. Instead of being studded with beautiful reserves like Melbourne, it has only one or two to boast of. True, we have Sir Henry Parkes left to us; but even that magnificent property — even if it was unencumbered — would hardly make up for the want of necessary breathing grounds. As to the Waterloo Park, one would suppose that the last person in the world to object to it would be the present owner of the land. Recollecting how – much the Cooper family have made out of the colony — millions of money and a baronetcy — and how very little they have done for it in return, they might at, least have handed over the ten acres graciously. There would be a still nearer approach to a quid pro quo if they were to hand over a hundred acres out of their immense estates, and dedicate them to the public to which they owe so much.*
>
> *If thou art rich, thou art poor;*
> *For, like an ass whose back with ingots bows,*
> *Thou bear'st thy heavy riches but a journey,*
> *And death unloads thee.*

There is a minor error. Cooper was not the original grantee. And for the record, the modern Waterloo Park in Redfern is a different place; Mount Carmel Park was gazetted as the Waterloo Park on 1 November 1892. But the sentiment is clear, in circumstances where Parkes had given the green light six years before and the proclamation had been made three years before.

The appeal was heard by the Full Court in May 1886. Again, notwithstanding the stakes and notwithstanding the presence of high powered counsel, the matter was dealt with abruptly and the Crown was not called on. Leave to appeal to the Privy Council was granted later that month, although it would be another three years before the council heard the matter.

The ingenuity of counsel

The ingenuity of counsel referred to in the *Evening News* comprised three main points. First, the reservation in the 1823 grant was void for uncertainty, as the metes and bounds of the 1,400 acre grant were known but the ten-acre reservation were not. Secondly, that the reservation was a bad exception. Thirdly, the reservation offended the rule against perpetuities.

The first fell away in the Full Court. The second was an attempt to pick up an obscure rule based on two cases from the reigns of Queen Elizabeth I and King James I. The Privy Council referred to the rule as 'very technical' and promptly excepted its operation. An exception, the Council observed, is where the grantor immediately excepts something; here, the Crown was immediately granting everything and excepting nothing; it was simply the case that the Crown could come back in at some later time as to the ten acres.

The rule against perpetuities

The main issue in the Privy Council was that the reservation in the grant fell foul of the rule against perpetuities. The rule required that any interest created by an instrument had to vest within 21 years of the death of a person living at the time the instrument came into effect.

The rule has its oddities. It led to the Royal Lives clause, to the effect 'The interest has to vest by the death of the last descendant of Queen Victoria now living plus 21 years', the argument being that there were so many, that at least one would outlive anyone a conveyancer or lawyer could think of. Over the pond, there were the cognate Rockefeller and Kennedy clauses. The rule has spawned the doctrine of the fertile octogenarian and of the precocious toddler. The rule has been described in the pages of the *Harvard Law Review* as a 'technicality-ridden legal nightmare' and a 'dangerous instrumentality in the hands of most members of the bar'. The Supreme Court of California has relieved at least one practitioner for inadvertently failing to apply it.

The rationale for the rule is clearer than its application; simply put, the dead shouldn't rule from the grave, at least not forever. Lives move on and so should land. What Cooper's lawyers came up with was the argument that a reservation which the Crown could exercise at any time in the future, offended the rule. The obvious retort is that this rule could not apply to the Crown acting in the public good. Mr Justice Faucett in the Full Court said simply:

> *The Crown never dies, and there is no question of one, two, or three lives, or twenty-one years. It is simply the result of the rule 'Nullum tempus occurrit regi.' ['No time runs against the king'].*

Who was at the Privy Council

The members of the Council were the Scot Lord Watson, who gave reasons, the Irish Lord Fitzgerald, the English Lord Hobhouse, the Irish Lord Macnaghten, and the Welsh Sir William Grove. One did not have to be a lord to be a member of the council; Sir Garfield Barwick would later sit. The members were solid and Macnaghten brilliant.

The Gaelic presence has one echo down the ages. In 1932, Lord Atkin led the Gaelic assault in a 3-2 *Donoghue v Stevenson*. One of his Gaelic colleagues was Watson's son, Lord Thankerton, who notoriously knitted while hearing matters.

As for counsel, they were all local, i.e., not from New South Wales. However and just like NSW, no expense was spared. For the appellant there was John Rigby, later Attorney-General and appellate judge, and RB Haldane, whose knowledge of German would on the one hand force him from the Lord Chancellor's office in World War I and on the other would make him co-translator of the first English edition of Schopenhauer's *The World as Will and Representation*. For the respondent, there was Horace Davey, regarded by Macnaghten as the best lawyer of the day, and BJ Leverson, author of at least one legal text.

Cooper's argument in the Privy Council

Cooper's argument in favour of the application of the rule against perpetuities had two steps:

> *it was maintained for the Appellant, in the first place, that the English rule against perpetuities, as now settled, applied in all its entirety to the Colony of New South Wales in the year 1823; and, in the second place, that the rule, as established in the law of England, applies to reservations made by the Crown in the interest of the public.*

The question of whether the rule runs against the Crown was not settled. Given the policy underpinning the rule, it may be difficult to see why the rule should. The Council dodged the question, assuming it in favour of Cooper. All Cooper had to do was make good the first step, that the English rule against perpetuities, as settled in 1889, applied in all its entirety to the Colony of New South Wales in the year 1823. He failed to do so.

Before dealing with the ultimate question, Lord Watson set out these propositions:

1. The extent to which English law is introduced into a colony varies.
2. At one end of the spectrum is a colony acquired by conquest or cession in which there is an established system of law.
3. At the other is a colony which consists of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed.
4. New South Wales is in the latter class.
5. However, it is wrong to say that English law in its domestic maturity arises in colonies of the latter class on the day of colonisation, here 26 January 1788. [It is here that Sir William Blackstone is quoted at length, although his *Commentaries* are also consistent with propositions 1, 2 and 3. As a matter of historical fact, he had nothing to say of proposition 4, having died in 1780.]

This 'silent operation of constitutional principles', to use Lord Watson's words, provided the background to consider the question, did the rule against perpetuities exist in NSW in 1823, so as to render the reservation void. This was the answer:

> *The object of the Government, in giving off public lands to settlers, is not so much to dispose of the land to pecuniary profit as to attract other colonists. It is simply impossible to foresee what land will be required for public uses before the immigrants arrive who are to constitute the public. Their prospective wants can only be provided for in two ways, either by reserving from settlement portions of land, which may prove to be useless for the purpose for which they are reserved, or by making grants of land in settlement, retaining the right to resume such parts as may be found necessary for the uses of an increased population. To adopt the first of these methods might tend to defeat the very objects which it-is the duty of a Colonial Governor to promote; and a rule which rests on considerations of public policy cannot be said to be reasonably applied when its application may probably lead to that result.*
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> *Their Lordships have, accordingly, come to the conclusion that, assuming the Crown to be affected by the rule against perpetuities in England, it was nevertheless inapplicable, in the year 1823, to Crown grants of land in the Colony of New South Wales, or to reservations or defeasances in such grants to take effect on some contingency more or less remote, and only when necessary for the public good.*

In short, it was good policy for the Crown, when granting land in a young colony, to reserve a right to come back into the grant at some remote date for the public good, and the rule against perpetuities, the stuff of more mature legal systems, was not yet applicable.

***Cooper v Stuart* and post-Mabo dialogue**

The expression 'terra nullius' is not used in *Cooper v Stuart*. But this is neither here nor there. The issue is not the law it established, but the assumption that underpinned it. Lord Watson's premise was that New South Wales was 'practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed'.

As to the first half of the premise, that there was no settlement of peoples or laws, Justices Deane and Gaudron explained the decision and three other decisions in this way:

> *It is one thing for our contemporary law to accept that the laws of England, so far as applicable, became the laws of New South Wales and of the other Australian colonies. It is another thing for our contemporary law to accept that, when the common law of England became the common law of the several colonies, the theory which was advanced to support the introduction of the common law of England accords with our present knowledge and appreciation of the facts. When it was sought to apply Lord Watson's assumption in* Cooper v Stuart *that the colony of New South Wales was 'without settled inhabitants or settled law' to Aboriginal society in the Northern Territory, the assumption proved false.*
>
> *It is important to note that, in each of those four cases, the reasoning supporting one or both of the broad propositions that New South Wales had been unoccupied for practical purposes and that the unqualified legal and beneficial ownership of all land in the Colony had vested in the Crown, consists of little more than bare assertion. The question of Aboriginal entitlement was not directly involved in any of them and it would seem that no argument in support of Aboriginal entitlement was advanced on behalf of any party. In three,* Attorney-General v. Brown*;* Williams v. Attorney-General for New South Wales*;* Randwick Corporation v. Rutledge*, and arguably all, of them the relevant comments were obiter dicta. Nonetheless, the authority which the four cases lend to the two propositions is formidable. Indeed, the paucity of the reasoning tends to emphasize the fact that the propositions were regarded as either obvious or well-settled. Certainly, they accorded with the general approach and practice of the representatives of the Crown in the Colony after its establishment.*

As to the second half of the premise, the question of peaceful annexation, that has been the subject of the long-running history wars. It is not the purpose of this essay to remark on that debate. That said, it is readily understandable that those who assert that there was not and has never been a peaceful annexation, speak with the language of 'treaty'.

Alexandria Park

As to the park itself, the fight had been lengthy but the prize had been got. But what prize? On 9 May 1892, three years after the Privy Council made its decision and a year or two after Sir William Cooper had decamped permanently for England, the *Sydney Morning Herald* reported:

> *The residents of Alexandria just now have a special grievance. This, as is well known is a 'poor man's' quarter. It is densely populated and heavily in debt. Within five minutes' walk of the council-chambers there is situate Alexandria Park, which is the property of the municipality [they being made the trustees upon the council's decision]. It is 10 acres in extent. It is bounded by Buckland-street, and is fenced in by fancy wooden railings. It would not, at first sight, appear to the uninitiated to be a park; but it is marked off as such on the map of the borough, and as such it must be accepted in good faith. The subsoil is sand, but the park was below the required level, and it was necessary to fill it up. Having no money to spare, the council adopted the expedient of filling*

Alexandria Park

it up with garbage, street sweepings, and other similar material. The city of Sydney and the boroughs of Darlington and Redfern were only too ready to fall in with the arrangement for sending their tip carts there. Indeed they did so free of cost. So the carts have been coming and going continually. 'The procession started at 4 o'clock in the morning, and did not leave off until late in evening, Sundays as well. 'You could tell they were coming,' said one resident to me, 'by the sense of smell long before you could see them.' The ground has been filled up, in some places, from a depth of 10ft. The work took about 18 months to complete, and it was only finished a few weeks ago. Part of the stuff has been covered with sand; but most of it is to be seen in its raw state – and a sickly spectacle it is. There is some difficulty about getting sand to cover up the stuff with, so the matter has been allowed to 'remain in abeyance for the present.'

The City of Sydney's website states frankly that while a cricket field was built, the balance was used as a municipal tip. The park, with a caretaker, only operated from 1895. The playground and the tennis courts were constructed in 1939, with a strong-willed mayor, popular demand and the good fortune of a local member who would soon be premier and governor-general, Bill McKell.

The current law in NSW

In 1984, eight years upon the Law Reform Commission's recommendation, the NSW legislature enacted the *Perpetuities Act*, replacing the life in being plus 21 years with a set 80 years. As to the Crown, the Law Reform had observed:

> *In the case of dispositions of property made by the Crown, it is likely that* Cooper v. Stuart *would still be followed in New South Wales. In other cases it seems to be an open question whether the rules against perpetuities and perpetual trusts are applicable or inapplicable to the Crown.*

Section 5 of the Act dealt with the Crown as follows:

> *(1) Except as provided by subsection (2) or by any other Act, the rule against perpetuities, the rule against perpetual trusts and this Act bind the Crown not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.*
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> *(2) Nothing in the rule against perpetuities, in the rule against perpetual trusts or in this Act affects any settlement made by the Crown.*

The position in NSW appears to be that the common law rule against perpetuities does not affect settlements made against the Crown, at least prior to 1984, but that the reasoning excluding the operation of the rule on such settlements has, since *Mabo* in 1992, come into question. The ingenuity of counsel may still have a role to play.

An ongoing conclusion

This story tells no tales of the Indigenous people of the area. As was noted in *Mabo*, the assumption underlying *Cooper v Stuart* was that there was no Indigenous tale to tell. The geography tells another tale. Alexandria Park forms an equilateral triangle with Redfern Park, home of Prime Minister Keating's speech, and the Block, the Indigenous cooperative arrangement created during the Whitlam years. The back story of those two places will be told in a later article.

In the meantime, there is Alexandria Park. At the end of one century, it was litigated into existence upon a challenge of the Crown to do with the land of a young colony as it willed. At the end of the next century, that very litigation was litigated away, in recognition of the possibility that the Crown of that young colony had itself held the land upon other and older interests. Whatever the rights and wrongs of Lord Watson's reasons, he erred on one point; the operation of constitutional principles is rarely silent forever. BN