IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Brisbane No B12 of 1982

B e t w e e n -

EDDIE MABO

First-named Plaintiff

DAVID PASSI

Second-named Plaintiff

JAMES RICE

Third-named Plaintiff

(who bring this action on their own behalf, and on behalf of the members of their respective family groups)

and

THE STATE OF QUEENSLAND

Defendant

MASON CJ
BRENNAN J
DEANE J
DAWSON J
TOOHEY J
GAUDRON J
McHUGH J

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA ON 28 MAY 1991, AT 10.19 AM

MR A.R. CASTAN, QC: May it please the Court I appear with my learned friend, MR B.A. KEON-COHEN for the plaintiffs David Passi and James Rice. (instructed by Corser and Corser)

MR G.M. McINTYRE: If it pleases the Court, I appear for the first named plaintiff, Mr Mabo. (instructed by Corser and Corser)

MR G.L. DAVIES, QC, Solicitor-General for Queensland: May it please the Court, I appear with my learned friends, MR H.B. FRASER and MR G.J. KOPPENOL, for the defendant. (instructed by the Crown Solicitor for the State of Queensland)

MASON CJ: Yes, Mr Solicitor?

MR DAVIES: Your Honours, before our learned friend addresses, could I indicate to Your Honours the material which we have handed up to the Court this morning. We have handed up in a blue folder the pleadings and the questions stated for the Court - pleadings in particular of the questions stated. In two red folders we have handed up copies of the relevant statutes and in two green folders we have handed up copies of the relevant cases which are not reported in the Commonwealth Law Reports or the Appeal Cases.

TOOHEY J: Thank you. Mr Solicitor, in the material handed up by the plaintiff, I think it is volume 3 of the three volume set there is a set of pleadings, is there any difference between pleadings in that material and pleadings in the blue volumes?

MR DAVIES: I think no material difference, Your Honour.

MASON CJ: Yes, Mr Castan?

Perhaps I should mention, Your Honours, about the pleadings, that there is just one matter for note about them, that there is a set of pleadings reproduced by His Honour Mr Justice Moynihan in his determination, and on closer examination it became apparent to us that there had been some amendments made by His Honour subsequent to the set in the form that His Honour had reproduced in the determination, but I think the set that our learned friends have reproduced and the set that we have reproduced in our our volume - I think it is volume 6 of our - I do not remember the number, but in any event, I think we are agreed on the final set.

Your Honours, we have in our written submissions commenced with a summary of contentions which, we would respectfully submit, may assist the

Court in grasping the range of issues that are to be examined, and in a volume which I understand Your Honours have, which was a volume of extracts of our submissions, which was, I think, entitled volume 7 - that volume starts off with those contentions reproduced. They are marked as pages 1 to 5 of our submissions, and in the compilation, if I can call it that, someone has referred to it as the airmail version. That is accompanied by some pages which contain some diagrammatic representations of the way the issues fall, and I would seek to briefly take Your Honours to those passages; that is pages 1 to 5 of our submissions and accompanying them in the compilation set, if I can call it that, what appeared as pages 1077 to 1092, and the summary of contentions at page 1 of our submissions endeavours to encapsulate what the basic issues are.

It is put firstly that one must examine the pre-annexation situation here, that prior to annexation the islands were occupied by the Meriam people and that individuals held and exercised rights and interests within that society in areas of land on behalf of themselves and the groups.

Secondly, we put it that the islands formed part of an area in which the Government of Great Britain acknowledged sovereignty and dominion of respective peoples. Your Honours will see that as the second general proposition - that the persons who held such interests included the ancestors and predecessors in title of the plaintiffs Passi and Rice - and then paragraph 4 expresses the annexation and raises the question of the effect of an annexation on that pre-existing situation that upon annexation, however effected - and that is dealt with in *Wacando*, and we have some submissions as to the meaning and effect of the *Wacando* decision, in which this question of annexation of these islands is looked at, and I will be coming to that later - that sovereignty passed to the British Crown, and our submission is in the second sentence of paragraph 4 that such transfer did not have the effect of extinguishing those interests which existed prior to annexation. Whether settled, ceded, conquered or otherwise acquired they continued without the need for any act of recognition.

Apart from the controversy over the earlier matters which has been put in issue about the type of interest which existed prior to annexation, that proposition raises the first matter, as we have now seen from the exchange of written submissions, that is the first what we might call principal legal issue raised, the effect of annexation, whether

there is a need for positive recognition by the relevant Crown in its appropriate capacity or whether the interests continue until otherwise extinguished.

Then it is put, in paragraph 5, and on that, of course, we differ and is the subject already of lengthy written contentions, and we will endeavour to outline the way in which it is put.

The fifth proposition is that if the correct position be that traditional interests in land did not continue after annexation, in the absence of positive acts of recognition by the Crown, then such positive acts of recognition in fact occurred in this instance. We are at issue as to that and will have to take Your Honours - we dealt with that in the submissions in some detail, and our learned friends have put their reasons in their submissions why they say those do not amount to that kind of recognition.

Then the next question is assuming that there was a power to extinguish in existence, it is submitted that the power has not been exercised. It is submitted that the declaration of a "Reserve" in 1882 and again in 1912 had the effect of removing land from the category of land which might be the subject of a Crown grant pursuant to the provisions of the relevant *Lands Act*. However, it did not amount, we submit, to an extinguishment, merely by the fact of a reserve. No de-gazettal of the reserve so as to enable a Crown grant inconsistent with the interests claimed by the plaintiffs has occurred, and we submit no legislation or implementation of executive policy has had the effect of extinguishing those interests. And we, of course, submit that the existence of the provisions of the *Lands Act* themselves providing for Crown grants does not of itself amount to extinguishment of those interests, nor the subsequent amendments which provided in 1982 and 1984 and, in fact, subsequently I think, there are later amendments, providing the specific concept of the deeds of grant in trust.

Now, the question of whether there has been an extinguishment is, of course, very much in issue and the principal question that arises as we understand it, having now had the benefit of our learned friends' submissions, is the question of whether the very existence of the provision of a Crown land scheme of the kind that is typical to all of the States of Australia, whether the mere existence of such a scheme meant that interests of the kind claimed here cannot continue. We

respectfully submit that the existence of such a Crown land scheme does not, and we will deal with that.

Then we summarize the ways in which we say those interest which are claimed continued - at paragraph 7 at the foot of page 2 - that they continued as traditional ownership, being a burden upon the radical title of the Crown, but which was nonetheless enforceable against the Crown, and as against third parties, until effectively extinguished and that they have continued until today.

Alternatively, we submit we have established customs operating in relation to land in the local area of the Murray Islands which are given statutory force and effect. We will take Your Honours to the statutes which provide for local usage and custom to operate on the islands and which also meet the common law test required to establish what we have elsewhere called local legal "custom". Thus they have a customary title, using that in its what we might all more technical sense, whether or not the interests of their respective predecessors in title survived annexation. That is the second basis on which the nature of the rights is claimed.

Then, in 8, alternatively, there is a claim based on possession; that is to say they have been in possession of respective areas since beyond living memory and they are entitled to be treated as owners whether or not they are able to establish traditional title in accordance with Murray Island tradition or in accordance with the law of custom. As persons in possession they are entitled to be treated as owners or entitled at the least to usufructuary rights by reason of their possession.

That raises a matter which overlaps with the earlier question of the underlying concepts and effect of Crown lands legislation because, of course, the Crown lands legislation itself turns on questions of into the possession of whom does land come when first annexed by the Crown. And we are at odds on that, of course, the defendant claiming that on annexation possession, as we understand it, actual possession, of all lands is taken by the Crown notwithstanding the fact of occupation, the fact of de facto occupation by peoples and notwithstanding that that de facto occupation continues. And that issue we will come to.

And then, it is submitted, pursuant to the provisions of the *Lands Acts* and the provisions of the *Torres Strait Islanders Acts* and various legislation, we say there are particular statutory

rights which exist and we will deal with those, though obviously, of course, being statutory rights, they are liable to be altered by the legislature subject to what we say in the last proposition concerning power.

In paragraph 10 we contend that the defendant, in any event, is under a fiduciary duty, or alternatively, is trustee of a trust of which the plaintiffs and the other islanders are the beneficiaries, in relation to their rights and interests and that they arise from the existence of those traditional rights and interests and their exercise on a continuous basis since 1879, and from the statutory basis upon which they have been held under the relevant *Land Acts* and the specific Acts dealing with the Torres Strait Islands from the history of administration, from the sui generis nature and the other matters there set out.

Then we put the general proposition in paragraph 11 that the society has continued and that there are interests operating in continuity with the interests which existed before though, of course, subject to change. We then, in paragraph 12, put the proposition that assuming Queensland has power to extinguish, that it did not do so prior to the passage of the *Racial Discrimination Act* of 1975 and that if the amendments which have brought about the current situation in which the deeds of grant in trust may be given, if they now provide for administrative action which would impair the rights that we say have continued, then that administrative action and those provisions would be in conflict with the provisions of the *Racial Discrimination Act*, and we have got submissions as to why that is, and therefore invalid pursuant to section 109.

That raises questions very similar to those that were dealt with by the Court in the earlier proceedings in relation to this action in which a positive extinguishing Act of 1985 was dealt with by the Court some three years ago. We have not put it there. We have dealt with it elsewhere. I should add to paragraph 12, if those provisions are not otherwise invalid, pursuant to section 109 - and they have the effect of extinguishing - then we say the plaintiffs are entitled to compensation, for reasons that are developed.

Then in 13 we put that in any event, alternatively, the amendments, and any administrative action would be beyond the power of Queensland in the absence of imperial legislation expressly empowering Queensland to deal with the islands as "wastelands of the Crown"; that the

power to extinguish the interests is vested solely in the Crown in right of the Commonwealth as an international sovereign.

Now, that is a broad outline of the way in which the issues fall and we, in our written submissions, have endeavoured to deal with the matters in those categories or heads though there is inevitably some overlap with some of those issues. And we will endeavour, in the course of submissions to Your Honours here, to isolate what the issues are as we deal with each of them.

Could I take Your Honours to the page which is numbered 1078 and following pages which, if Your Honours have the summarized compilation, would follow the pages I have just been referring to. It is in the form of diagrams and it has been assembled in that way because we were concerned about clarifying the way in which the issues fall for determination. And, really, all that we have endeavoured to do here is to try and set out the way in which the issues are raised.

One has, first of all, the question of the holding of traditional interests in land under the local system prior to 1879, at the top of the first page marked "A. Enforceable Rights based on Traditional Title". There is then raised the question, what is the effect of annexation? That is the second box there. And if one takes the view that change in sovereignty does not automatically abolish those interests, one then gets to the effect of a *Crown Lands Act* scheme.

If the view is taken, as expressed on the right, that a change in sovereignty does automatically abolish those interests unless they were recognized, then it is our submission, and the question is raised whether there was recognition and we have put that as "Numerous acts of recognition 1879-1991". Therefore the interests are recognized at law and one still then has to look at the question of the effect of *Crown Lands Act* legislation and the two possibilities. There may be others, but we have endeavoured to express them in as concise a way as possible: that there is "No extinguishment" under a *Crown Lands Act* scheme "unless there is an actual Crown Grant" inconsistent.

That is to say, the land is actually granted out inconsistently with the interests which are claimed by the plaintiffs. On the other hand, that the *Crown Lands Act* scheme may amount to an extinguishment, as we would submit, only if the scheme, in fact, opens land up for settlement.

Our responses to those two propositions are that since there was no actual Crown grant as we have put it on the left, the interests were not extinguished, one then comes to the relatively recent amendments providing for deeds of grants in trust. On the other side, we say in any event this cannot have been that these lands were opened up for settlement, they were not opened up for settlement on any view of it in fact, no settler has been permitted to go there, and it was reserved and in fact the reserve has been fairly strictly observed. And so the interests were recognised by the reserve and that brings one to the same question, and one then gets to those last issues that I briefly summarized when I was reading the outline.

The following page simply consists of an expression of those issues shown in those boxes on page 1078 in narrative form. If I take Your Honours to page 1081 there is the second basis on which the issues are raised because it is there put that if one is examining the question of enforceable rights based on title derived from local legal custom the starting point, we would respectfully submit, is not to look backwards at pre-1879 but to look at the operation of a local legal custom now and then apply the relevant tests. So one would ask, 'Do the Islanders currently practice a local custom relating to interests in land' and the question then is, 'Does that meet the common law criteria for recognition of local custom - "time immemorial", "local", "certainty"', and so on, what is sometimes called Halsbury custom. And then on the right we say, in any event there has been numerous acts of recognition of that custom currently operating in express statutory force since 1939. In that situation the operation of a Crown Lands Act scheme, we would respectfully submit, is irrelevant, the custom operates notwithstanding the vesting of the land in the Crown.

And then the same questions about the amendments of 1982 and section 109 and so on are raised below that point. That again is the subject of a brief outline of the propositions at 1082 to 1083. I then go to 1085. If the issue is looked at on the basis are there enforceable rights based on a possessory title then the starting proposition is to examine the situation as of today and look back, are they in possession and have they always been in possession or for how long have they been in possession? On the basis that possession founds title, then the plaintiffs and their predecessors were entitled to a fee simple title founded on possession. We then submit, possession is

continued regardless of any extinguishment of traditional or customary title that might have been effected by an annexation. In other words, this argument would stand notwithstanding an extinguishment on annexation under what we have called the traditional title foundation.

We point out in the fourth box on 1085, no action has been taken to extinguish or acquire. In fact, the islanders have been recognized as owners and we therefore would say the *Crown Lands Act* scheme is irrelevant and the only question one is left with is whether the new proposals - the new scheme of 82 to 84 amounts to an extinguishment: the same kind of question as previously raised.

I take Your Honours over to what is number 1087A, "Enforceable rights based on fiduciary duty or trust", is there a summary of what we would respectfully submit is the way in which the issues are raised there, that, as a fiduciary, the Crown has a relationship with the islanders based on the relative positions and history of dealings in which they are dependent on the Crown of their protector; that the relationship creates a fiduciary duty to the Islanders in relation to their land, including the plaintiffs; and then, on the right, that specific statutory trustees were appointed in 1939, together with the fiduciary relationship and, therefore, the Crown owes the duties and the plaintiffs have the benefit and the consequence of that is expressed as the obligation to exercise any statutory powers or discretions so as to preserve the interests in land.

Again, we do not submit that the obligation as trustee restricts Queensland legislative power. That the exercise of administrative powers, of course, we would submit, would be subject to such fiduciary duty or trust. The narrative for that is briefly set out at 1088 to 1089. The last is not so much a proposition of the way in which rights arise, but rather an endeavour to summarize the way in which the rights, assuming they exist, are not affected because of limits on Queensland legislative power, and it summarizes the elements that I will take Your Honours to when we come to look at that question of the limits on legislative power derived from the concept of imperial power as the foundation of the power to deal with wastelands, and in brief that is on the left, that the grant of power in 1855 - this is on page 1090, Your Honours - the grant of power to deal with wastelands, we would respectfully submit, was limited to the colonies as then constituted, and of course, in 1855 they did not include the land which

was the subject of these islands, which were annexed by the Crown in 1879, and we say, in addition to that, an Imperial Act of 1872 to 1875 contained express imperial recognition of sovereignty and native peoples' rights and interest in relation to all of the territories within the *Pacific Islanders Protection Act*, which included these islands and we say that the annexation of 1879 was confirmed by Imperial Statute in 1895, but there was no express imperial grant of power to deal with wastelands - of those wastelands. The question, of course, is raised whether the pre-existing power to deal with wastelands that Queensland had extended without further words, without further legislative grant, to the additional lands that are comprised in the additional part of Queensland that was annexed to Queensland by the Imperial Letters Patent combined with legislation in 1879, and we say it did not, and there was no express extinguishment of the rights recognized in the imperial legislation, so Queensland does not have the power to deal with them. And that encapsulates, if we can encapsulate, the way in which the questions arise, and the sequence in which those issues are raised.

Your Honours, if I can go back to what seems to be the first question to be asked, which is the question of what was the situation in fact and law on these islands prior to 1879 and, we would respectfully submit, there are questions which arise on the facts, and we will come to those in a moment but, in our respectful submission, considerable assistance is gained in determining what the principles are that should be applied in a case which has been dealt with in this Court in which pre-annexation rights and interests were in fact looked at in considerable detail. That case is *Administration of the Territory of Papua New Guinea v Daera Guba*, and if I can - - -

TOOHEY J: What is the reference?

MR CASTAN: Sorry, Your Honour. It is (1973) 130 CLR 353. *Daera Guba* is an interesting case in the context of the questions which are raised here because there this Court, acting in its capacity as a court of appeal from the Supreme Court of Papua New Guinea, was required to examine a question which actually raised a similar question to this first issue, what I will call the pre-annexation issue.

The question in *Daera Guba* was whether or not the Papuan claimants could make out ownership of particular land which was apparently vested in the administration and which the administration claimed had been purchased from the predecessors in title

of the original Papuan owners prior to annexation of British Papua. In other words, the question that was raised was what was the effect of an acquisition by, in that case it was British officers but there was no argument about third party interests, if I can call it that. The issue remained, what effect, and how would the courts and how does the law test the question of an acquisition of land from local Papuan land owners, or purported acquisition, prior to annexation.

The way in which the case was analysed by Their Honours was upon the basis that there was no British law operating in relation to the Territory at the time that acquisition took place. And the significance of it to which we draw attention, for present purposes - apart from the assistance that is given to this Court now in looking at the way in which Their Honours analysed the evidence and the matters that came up in determining that question, the effectiveness of a pre-annexation acquisition - the significance is that Their Honours ultimately came to the conclusion that the way to test the effectiveness or validity of that acquisition was to apply to it the test of whether it complied with local law or local system, and the local system, of course, was the native customary system operating in the absence of British rule or any other European or colonial system. So, it is a case where the Court was required to examine the effectiveness of a sale pursuant to native custom in 1886, from recollection, the Territory not having been annexed to the British Crown until 1888.

Now, we would respectfully submit, and throughout the case there are numerous references to the question of custom and how one determines custom. And I take Your Honours to some illustrations of the way in which the question was looked at. If I could take Your Honours to page 377, first of all, in the judgment of His Honour the Chief Justice, Sir Garfield Barwick, and just about half-way down the page, he says:

> Before turning to consider the probabilities in 1886 in relation to the dispute as to whether or not a transaction then took place which placed in the ownership of the Administration substantially the whole of the subject land, I should make two observations.
>
> First, the capacity according to their own customs of a Papuan or Papuan clan in the Port Moresby district in 1886 to sell interests in land so as to place it in the

> perpetual possession of the Administration free of claim by the sellers was disputed by counsel for the Papuans.

So, obviously enough, Your Honours, in this case, the Papuans of 1973 were saying their predecessors could not sell and therefore the sale was ineffectual. And the Crown was saying, "Yes, your predecessors had title, could sell and conveyed good title and the Crown is the successor of that good title.". He goes on:

> But there were many such transactions referred to in the proceedings of which the validity or effectiveness has never been challenged, the purchasers having after purchase had the benefit of complete ownership and indefinite undisturbed possession of the land sold. Instances of these transactions occurred both before and after the transaction claim by the Administration to have taken place in 1886 with respect to the land. Further, both Rev W.G. Lawes who as at 1884 had had more than ten years' experience of the tribal customs of the people of the Port Moresby area, and his son, who later became resident magistrate of the Colony and knowledgeable of those customs, affirmed that the people of the area according to their customs, owned and both individually and collectively sold their claims to the possession of the land.

And then he sets out some of the evidence from a -

> Rev W.G. Lawes in an article prepared at the request of of Sir Peter Scratchley -

which talks of -

> "The land on the coast is all owned by families, each member having his own plot. They are accustomed to sell their land occasionally. A man who has but little will beg of one who has plenty. Sometimes they loan it for one crop - a short rental really. Often, however, it is an absolute sale.

And so on. And we there find some of the evidence that Their Honours ultimately relied on. And then, in the next paragraph, His Honour refers to the recognition -

> by the Ordinances of the Territory and restraints placed upon any sale by them to other persons -

in subsequent ordinances. That, of course, occurring after annexation.

> Consequently, I am satisfied that it was possible according to the usages of the Papuans of the Port Moresby area as understood by them in 1886 for a stranger to their clan to have acquired land from individuals as well as from groups by outright sale and purchase for value in the form of "trade" mutually agreed. It seems to me, also, that the law which the proclamation of the Protectorate introduced into the Territory, it being my opinion that it did introduce some law, included the recognition of the right and ability of the Papuans to sell their interest in land to the Crown.

And he refers to Commodore Erskine's announcement. And he then deals with the question of whether they did not understand, and we need not go into that in this case. There is then some of the history set out at page 379 and the history of who first came to the Port Moresby district is set out in the bottom two-thirds of page 379. And, again, a description at the foot of the page and over to page 380:

> The coastal area of Port Moresby was inhabited by Motuans and Koitapuans. They dwelt in villages consisting of houses erected on stilts at the margins of the land and extending into and over the tidal flats. Their villages were adjacent to and scarcely separated from one another. Some intermarriage between members of the two groups appears to have taken place. Neither group at any time resided on the land claimed in these proceedings, which would be about forty chains from their villages.

He describes the topography and goes on half-way down the page:

> The Papuans as of that time were singularly savage and given to reprisal raids on one another in which barbarous killings took place, frequently of women and children who were the easiest caught or waylaid. In addition, they suffered either from occasional drought or were at time so terrified of neighbouring groups as to be unwilling to cultivate the gardens.....though the sea provided food.....they were in danger of extinction by slaughter, by starvation or by disease which apparently was rampant. Thus

the subject land had significance to the local people.

So there is an examination of the detail of the significance to the people, all this in the early 1880s.

Then there is a reference to the pressure from the Australasian colonies, the interim measure which was the protectorate, and towards the foot of the page he says:

> It is very important, in my opinion, in connexion with the consideration of the material available for decision of the questions arising in this appeal, to observe that the policy of the British Government.....was that there should be settlement in New Guinea when the Territory was annexed but that there should be no disturbance of the Papuans in the enjoyment of their use of the land except in so far as the Government might purchase land or acquire it by compulsion for public purposes or supervise any permitted purchase by intending settlers.

And we would respectfully say that, as Your Honours will see in due course, a similar policy was operating in relation to Murray Island, but without any contemplation of settlers, that is to say the policy of no disturbance was adopted in relation to Murray Island. The policy of encouraging settlers was not.

Then half-way down page 381:

> Thus the policy of preserving the use of the land by the Papuans was to be implemented by preventing any persons other than the Crown from purchasing from them any interest in land and by the Crown limiting its compulsory acquisition of land to acquisition for public purposes. From a close perusal of the official documents the position in 1886 was that settlement of the intended colony was contemplated with the abovementioned consequences.

If I might say in passing, Your Honours will observe that His Honour the Chief Justice has no difficulty in contemplating of a colony to be acquired for settlement, but at the same time the concept of the existence of a significant population and the protection of that population in their lands.

Towards the foot of page 382 there is further material about the kind of society which was examined by the Court, and the last full paragraph refers to Mr Musgrave Junior who was Assistant Deputy Commissioner:

> His reports are the source of much information, though challenges have been made on this occasion to their accuracy. As I have indicated, having considered the various criticisms, I am prepared to accept the reports as substantially accurate. From his reports and a report of Rev. W.G. Lawes.....we learn that though the particular clans had headmen or leaders, there were really no chiefs amongst the Port Moresby Papuans who exercised authority over the tribes or clans or who exacted service from them. But it would seem that amongst the headmen, sometimes referred to as chiefs in the official documents, one was by common consent of the Papuans regarded as the principal or senior. Thus Erskine found Boi Vagi to be the most influential chief in the Port Moresby district and to him he presented a stick mounted with a florin as "an emblem of his authority".

Very analogous matters, we would respectfully submit, arise in this matter.

If I can then go over to page 389, in the paragraph approximately in the middle of the page His Honour deals with what the probabilities might be in relation to the capacity to sell land. He says:

> I find these probabilities much more convincing than anything I have read in the evidence given before the Commissioner by Daera Guba or heard from counsel on this appeal. It is quite unacceptable to my mind that the real claimants to the land or even their relatives or connexions stood by whilst others without claim to it were given coveted items of trade as its price. As I have said, these were belligerent people given to quite savage, at times quite inhuman, acts of revenge or reprisal where it was felt or even imagined that some wrong had been done to themselves or their kinsfolk. I just cannot conceive that a proceeding with respect to the acquisition of land, publicly carried out because of the habit of walking the bounds, could have resulted in other than carnage if the rightful claimants were not satisfied parties to the transactions.

Nor would the missionaries not have intervened, and so on. So he applies those kinds of tests.

If I could then take Your Honours over - there is a passing reference to one of the fundamental questions that is raised in this case, at page 396. His Honour actually does deal with the question of the effect of annexation in the absence of statutory provisions though that was not immediately pertinent. At the foot of page 396, the last sentence commences:

> I have also assumed, without deciding that the declaration of the Protectorate or the annexation by the British Government did not vest in the Crown the ultimate title to all the land in Papua -

that may be a misprint, Your Honours -

> subject only to any usufructuary or other rights of the Papuans, these to be determined by native custom.

Then he goes on:

> Whatever the traditional view in this connexion (as to which see generally *Milirrpum v Nabalco Pty. Ltd.*, and more recently *Calder v Attorney-General (British Columbia)* in the Supreme Court of Canada), the title of the Papuans whatever its nature according to native custom was confirmed in them expressly by legislative acts from time to time on the part of the Territorial Administration. I find no need to detail these or to discuss further that matter.
>
> It is enough for present purposes that from the inception the law applicable in the Territory by virtue of the Protectorate and of the Colony, recognised a right in the Papuans to sell or surrender to the Crown whatever right they had communally or individually in the land.

And he refers to Commodore Erskine's proclamation announcing:

> no acquisition.....would be recognized -

other than by -

> Her Majesty.

But then he goes on, and this is the critical paragraph:

> But none of this activity on the part of the Crown was inconsistent with the traditional result of occupation or settlement, namely, that though the indigenous people were secure in their usufructuary title to land, the land came from the inception of the colony into the dominion of Her Majesty. That is to say, the ultimate title subject to the usufructuary title was vested in the Crown. Alienation of that usufructuary title to the Crown completed the absolute fee simple in the Crown. Whether the subsequent legislative history of the territory denies that traditional position is a matter with which I am not presently concerned.

And that, Your Honours, seems to be an express adoption, albeit it in passing, and one might assume, perhaps without the whole of all the issues argued before His Honour, but an express adoption of the position in the Supreme Court of Canada in *Attorney-General v Calder*, which I will be taking Your Honours to in some detail and which, we respectfully submit, should be adopted in this Court. I should go - - -

BRENNAN J: What, that this Court should adopt the notion that on occupation or settlement the radical title is vested in the Crown?

MR CASTAN: That the radical title is vested in the Crown, yes, Your Honour, and I will be coming to that in some detail. The question of what that is and how far it goes in relation to those who are in actual occupation at the time, is the question of some controversy between us in these proceedings. But, ultimately, that is the position for which we contend under what we have called the "traditional title argument". We have also got our arguments founded on, what I will call, "conventional or strict legal custom in English law" and our arguments are founded simply on possessory title, in any event, but, perhaps I will come to those, Your Honour.

Can I just complete my references to *Daera Guba* by taking Your Honours to page 438, where His Honour Mr Justice Gibbs puts the test of how to determine the question that was raised. His view, at the top of page 438 at the end of the paragraph which commences on the previous page, his last sentence there is:

> Since nothing was done to introduce English law governing sales of land into the Protectorate, the purported sales can only be

upheld if they were valid in accordance with the native law then in force.

And in his approach is:

> There is very little evidence as to the rules of the customary law governing the ownership and disposition of land by Motuans in general and by the Tubumaga in particular. Clearly enough a number of transactions which the Europeans regarded as sales occurred between Europeans and natives in and before 1886. Whether the natives' understanding of these transactions was the same as that of the Europeans, and whether they appreciated that in return for the trade goods which they received they were not merely giving the Europeans a right to use their land but were surrendering all their interests in it for ever, is another question. The Rev. Lawes apparently believed that native custom recognized the perpetual -

ownership. He then sets out some of Reverend Lawes concepts. There are some paragraphs there about ownership which had already been referred to. There is a paragraph about actual ownership based on the basis of kinship, and over at page 439 he says:

> There was thus some evidence that sales were recognized by native custom and, although one would have wished that fuller and more satisfactory evidence had been adduced on this point, the evidence was all one way. On behalf of the applicants it was submitted that the evidence did not show whether or not the rules of native customary law permitted alienation outside the iduhu to strangers such as officers of the Protectorate, or what the customary rules required as the essential elements, or as the necessary formalities, of a binding alienation, so that assuming that alienation in perpetuity was a concept which the natives understood, there was no evidence as to whether or how such an alienation to the Crown could validly have been effected.

And he goes on and ultimately comes to the conclusion towards the foot of the page:

> However, nowhere was it suggested that the purported sales were invalid except on the ground (first raised before the Commission) that they were made by persons who did not own the land. There can be no doubt that the native witnesses who gave evidence that sales

took place meant sales that were effective to divest the natives of their interests. It is a proper conclusion from this evidence that sales such as those made in 1886 - by free agreement coupled with the handing over of consideration - were recognized by native law as valid.

Now, of course, the precise kinds of interest in this case that I will be taking Your Honour to are different, though surprisingly not all that different, perhaps it is not all that surprisingly, Dr Beckett who was the anthropologist, who gave evidence in this case, described the Islanders on Murray Island as a Melanesian people. It is located, of course, not all that far away from the portion of Papua with which *Daera Guba* was concerned, but in looking at the question of how to evaluate that which was there prior to the annexation, we would respectfully submit, that the test is - as we have put it in our general propositions - can it be said that the relationships which the people who were there, the predecessors of the plaintiffs who were there prior to 1879, the date of annexation, were persons who as between themselves within their system had interests, and that that is the only way to test it, that in effect it is looking to the existence of a lex loci.

Now, that raises the question what are the criteria; what are the kinds of test that one might apply to determine whether or not that which was happening there can be recognized as having amounted to some kind of interest such that the successors in title, assuming they are not otherwise extinguished, can make out a case now. In our respectful submission, we have put some lengthy submissions about this, it is very important that the Court not fall into what we would respectfully submit is the error of seeking to apply the concepts of applying English law concepts as the only test. To some extent, one inevitably looks to some of the criteria that are familiar but, in our respectful submission, it is necessary to look at societies of the kind there being discussed in the case of *Papua and New Guinea v Daera Guba* and in the case of the Murray Islands, in terms of the kind of society that existed, not in terms of the criteria of Australia today or for that matter the Australian colonies prior to the time when these islands became part of one of those colonies.

There is an interesting reference to the way in which that kind of test is to be applied in the case of *The Hamlet of Baker Lake*, one of the

Canadian cases, which is in (1979) 107 DLR (3d) 513, and at page 543 - this is the decision of the trial division of the Federal Court, Mr Justice Mahoney - His Honour, in the last paragraph on that page, deals with this kind of question, the test to be applied in examining the position of the Inuit in Canada.

Perhaps before I go to that last paragraph, Your Honours will see that the heading on page 542 is headed "Proof of Aboriginal Title", and what His Honour Mr Justice Mahoney did was to set out the criteria that he understood were the criteria that he should apply in order to establish the title cognizable at common law: members of an organized society, occupied specific territory to the exclusion of other organized societies, and an established fact at the time sovereignty was asserted; and he refers to the authorities that lead to that.

He then refers to *Re Southern Rhodesia*. It is perhaps apposite at this stage to take Your Honours to that passage in the case of *Re Southern Rhodesia*, conveniently extracted here:

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor "richer than all his tribe". On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforcable than rights arising under English law. Between the two there is a wide tract of much ethnological interest, but the position of the natives of Southern Rhodesia within it is very uncertain; clearly they approximate rather to the lower than to the higher limit.

Now, our submission in relation to that, and we have put this in our written submissions, is that that unbridgeable gulf, that concept of the two kinds of societies, should be wholly rejected by this Court as an inappropriate test to apply.

His Honour Mr Justice Mahoney did adopt it, but his method of adopting it we would commend to Your Honours because he goes on and says:

> It is apparent that the relevant sophistication of the organization of any society will be a function of the needs of its members, the demands they make of it. While the existence of an organized society is a prerequisite to the existence of an aboriginal title, there appears no valid reason to demand proof of the existence of a society more elaborately structured than is necessary to demonstrate that there existed among the aborigines a recognition of the claimed rights, sufficiently defined to permit their recognition by the common law upon its advent in the territory. The thrust of all the authorities is not that the common law necessarily deprives aborigines of their enjoyment of the land in any particular but, rather, that it can give effect only to those incidents of that enjoyment that were, themselves, given effect by the regime that prevailed before.

And he refers to *Amodu Tijani*, which is a critical case.

He goes on:

> The fact is that the aboriginal Inuit had an organized society. It was not a society with very elaborate institutions but it was a society organized to exploit the resources available on the barrens and essential to sustain human life there. That was about all they could do: hunt and fish and survive. The aboriginal title asserted here encompassed only the right to hunt and fish as their ancestors did.

And then he says:

> The organized society of the Caribou Eskimos, such as it was, and it was sufficient to serve them, did not change significantly from well before England's assertion of sovereignty over the barren lands until their settlement....the ancestors.....were members of that society.....That their society has materially changed in recent years is of no relevance.

The specificity -

and he then goes on to specificity, and then in the next full paragraph says this:

> There were obviously great differences between the aboriginal societies of the Indians and the Inuit and decisions expressed in the context of Indian societies must be applied to the Inuit with those differences in mind. The absence of political structures like tribes was an inevitable consequence of the modus vivendi dictated by the Inuit's physical environment. Similarly the Inuit appear to have occupied the barren lands without competition except in the vicinity of the tree line. That, too, was a function of their physical environment. The pressures of other peoples, except from the fringes of the boreal forest, were non-existent and, thus, the Inuit were not confined in their occupation of the barrens in the same way Indian tribes may have confined each other elsewhere on the continent. Furthermore, the exigencies of survival dictated the sparse, but wide ranging, nature of their occupation.

And he quotes a passage from *Mitchel v United States* in 1835:

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals.
>
> The merits of this case do not make it necessary to inquire whether the Indians within the United States had any other rights of soil or jurisdiction; it is enough to consider it as a settled principle that their right of occupancy is considered as sacred as the fee-simple of the whites.

And then, going on, after further reference to authority and the American decisions, he then says, about two-thirds down the page:

> The nature, extent or degree or the aborigines' physical presence on the land they occupied, required by the law as an essential element of their aboriginal title is to be determined in each case by a subjective test. To the extent human beings were capable of

> surviving on the barren lands, the Inuit were there; to the extent the barrens lent themselves to human occupation, the Inuit occupied them.

And then he goes on:

> The occupation of the territory must have been to the exclusion of other organized societies. In the *Santa Fe case* Justice Douglas, giving the opinion of the court, held:
>
> Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes), then the Walapais had "Indian title" which, unless extinguished, survived the railroad grant of 1866.

Now, Your Honours see that in that case Mr Justice Mahoney, in formulating the way in which one is to approach the kind of society, is not - though he has recited the passage from *Re Southern Rhodesia*, referring to conceptions as familiar as our own, and that unbridgeable gulf, and he has, in substance, ignored it, we would respectfully submit, because he has gone to say the correct way to test matter is to look at the society as it is, to see if it in fact functions, and then see what are the operative ways in which it actually functions in relation to land.

Now, turning in the framework of that context it is, we would respectfully submit, necessary to go to some of the actual findings of His Honour Mr Justice Moynihan, and it is our submission - and I should say, we are at odds about this, there are some controversy as to the correct view to be taken about His Honour's determination of the issues of fact, and our respective submissions have dealt with that in some considerable detail, but it is our respectful submission that His Honour's findings are clear once one sees the task His Honour had set himself.

Could I take Your Honours to page 13 of volume 1, His Honour Mr Justice Moynihan's determination. His Honour has been discussing, and I will not go over the whole of it, two possible approaches which he says were urged on him by the

respective sides or the parties, on the submissions, as to the findings he should make. He says, just below half-way down the page:

> I have sought to approach the evidence free of such conceptional models while acknowledging that each may, on occasion, have its uses as an aid in reaching or evaluating a conclusion without the application of either (or for that matter both) being necessarily determinative.

Then he goes on to his approach -

> It seems to me that a useful working approach to the issues in terms of the pleadings, particulars and further particulars is along the lines of the following starting point. Has it been established that the plaintiffs are members of a society which both recognised -

that is referring to the past -

> and continues to recognise a connected intelligible pattern of relationships to land and in which recognition the plaintiffs are accepted as participating and which confers on them the recognition for which they contend as against the State of Queensland.

Now that last requirement, which confers on them the recognition, ultimately, of course, is a matter for this Court. But the purpose of His Honour's analysis of the facts he there states what it is that he is examining, whether it has been established that they are members of a society which recognized, putting it in the past, and continues to recognize, in the present, a connected intelligible pattern of relationships to land. We would respectfully submit that that is a proper and appropriate test within the context of the framework of the matters I put earlier this morning, and when looked at in that way His Honour's various comments, and there are many of them where His Honour criticizes particular evidence or expresses hesitations about a particular conclusion or says that there is little direct evidence for a particular conclusion, then takes form.

There has been a great deal made by the submissions of our learned friends concerning some of the qualifications that His Honour expressed concerning particular evidence.

Your Honours, at page 163, His Honour commences an examination of the situation with respect to land usage prior to European contact and as observed by the Haddon Party. I should say, when looking at His Honour's comments and conclusions in the context of that issue which he stated at page 13, I should mention to Your Honours that one of the most significant sources of information concerning these islands was the report of the Cambridge expedition in 1898. What happened was that, annexation having taken place in 1879, an expedition headed by Professor Haddon, and there are constant references throughout by His Honour to Haddon, Wilkin or Rivers, and they are references to the authors of the six volumes which comprise what is known as the Haddon Report, or the Cambridge anthropological expedition to the Torres Strait Islands which was in the islands and in particular spent a considerable time on the Murray Islands - there are actually three islands, the main island and the two smaller islands - and in which detailed reports were made on every aspect of society, as it was in 1898.

The question is then raised, of course, as to the sources of the information that the Haddon Report contains and the inferences to be drawn from the Haddon Report material as at 1898 and how it functions in relation to what the position was some 20-odd years earlier, 1879 being the date of annexation.

Now, one particular passage that our learned friends rely on heavily appears - in which His Honour makes a comment, is at 163, where, about half-way down the page - perhaps I should start the whole of that:

> It was, as I understand it, accepted by the plaintiffs that in order to evaluate the continuity of the system for which they contended it was necessary to attempt to form a view as to its existence, content and operation prior to 1879. This is not without difficulty. Dr Beckett, the plaintiffs placed considerable reliance upon his evidence, acknowledged this.

Dr Beckett was the anthropologist who had lived on the island in the late 1950s and had been back there again in the 60s, has written many works, including a book as well as his thesis and other works, has written substantially on the Torres Strait Islands and in particular on Murray Island.

McHUGH J: Could I just get something clear in my mind. The Haddon work was published over a 25 year period or so?

MR CASTAN: Yes, Your Honour.

McHUGH J: And was it based on their observations during the period they were there or does it take into account the correspondence with Bruce which apparently continued - - -

MR CASTAN: It took into account - it appears clear that Bruce continued to be an informant. Bruce was the school teacher who was there from the 1880s through until 1930, I think it was, for a long period and, of course, became, as it was termed, the trusted advisor and friend of the - - -

McHUGH J: Does that mean that the knowledge of the report is fixed as at 1898 or was it knowledge that was acquired past that date?

MR CASTAN: One could not assume, necessarily, that it was fixed at 1898. The observations were there but it seems that Bruce continued to be an informant. On the other hand, the chapter dealing with native land tenure, written by Wilkin, must have been written early because Wilkin died in 1902, very shortly after, though His Honour finds - and it is quite clear; Wilkin's chapter states that one of principal informants was Bruce. There is no question about that. But that chapter, the one dealing with inheritance and land, clearly does not extend forward over any considerable period.

I was reading that:

> Dr Beckett, the plaintiffs placed considerable reliance upon his evidence, acknowledged this. Thus at p 11 of his statement Exhibit 214 he mentions that two of the earliest detailed accounts of land tenure on Murray Island come from the Reverend Hunt of the London Missionary Society and Wilkin in his Chapter in Vol VI of Haddon Exhibit 117. He concedes that there is little direct evidence to support the view which he attributes to them that there was an ordered system of land tenure prior to the arrival of Europeans and that it was substantially the same as that operating today. He also says that the Reverend Hunt's reference to a system of land tenure is one which "does not bear any resemblance to my understanding" t 2225. I am inclined to agree with him. In "Torres Strait Islanders" at p 30 he says:-

"The documentary sources do not allow us to form more than a vague impression of island life in pre-colonial times, and no doubt there were important variations (between the various islands)."

He says that it was "very difficult indeed" to arrive at any understanding as to how the Meriam community made decisions for example concerning land disputes. In the context of the role of the Magor, to which Dr Beckett tentatively ascribed (in my view incorrectly) the role of the executive arm of the Bomai Malo cult, in enforcement Dr Beckett conceded that it was a possibility that they had nothing to do with controlling or enforcing rules.....that neither he nor anybody else had enough evidence to reach any conclusion on the matter.

He refers to other matters.

it was just not possible to know what the governmental system was prior to contact; "in any detail -

But then His Honour goes on - and our learned friends rely heavily on that and Your Honours will see as we go through it that in the written submissions there is a substantial amount of comment of the kind by His Honour Mr Justice Moynihan about the difficulties of ascertaining some of these things. But, if one goes down to the foot of page 164, one sees His Honour then directing himself to the evidence that was there.

The first detailed description of any consequence with respect to Murray Islanders and property is that by Wilkin in Chapter IX "Property and Inheritance" in Vol VI of Haddon (Exhibit 117). I spoke of Wilkin's qualification and premature death. Wilkin died at the age of 24 in 1901. It may be assumed with a deal of confidence that what he wrote reflects his perception of information provided him by James Bruce. Wilkin commences the chapter by saying:-

"Queensland has not affected native land tenure which is upheld in the court of the island. In a few instances it is not impossible that English ideas - especially of inheritance - are making themselves felt. There is no common land, and each makes his own garden on his own land at his own convenience."

Now, what we have in this example - and I give it by way of example - is that His Honour expresses reservations about some matters but then picks up a particular conclusion that is there expressed in the Wilkin's chapter.

And he goes on, and it then continues over a number of pages, and I will not take Your Honours to all the pages that then follow, but from 165 through to 170 there is a series of detailed extracts from the Wilkin chapter set out by His Honour. So we perhaps by way of caution indicate to Your Honours that there are reservations expressed but His Honour also then adopts substantial portions and then ultimately reaches significant conclusions.

Could I take Your Honours for the present purposes to page 173 to indicate to Your Honours the way in which His Honour, having gone through this significant body of material, then seeks to answer his question posed at page 13. At page 173 he says:

> It seems to me however that some conclusions are possible with respect to aspects of a continuous "system" operating in Murray Island society and dealing with relations between the people and land. I will now attempt to offer my conclusions. These do not reflect simply the views canvassed in this chapter but a perception of the whole of the evidence.

Now, from pages 173 to 180 - and I will not read the whole of it to Your Honours, but what one finds there is a series of conclusions, the essence of which is, to take the fourth sentence under "Village Land":

> The evidence seems to establish that within the boundaries of a village the land continues to be divided into what in modern town planning jargon might be referred to as single residential lots or house sites upon which is erected a single unit dwelling. This is usually occupied by a married couple.....usually also be occupied by the couple's children.....may also be an older family -

and then on page 174 -

> Each site was and is divided from the adjoining site by a boundary defined by some geographical or artificial feature, although on occasion adjoining occupiers might share some facilities. Failure on the part of an

> adjoining occupier to agree on or to observe a boundary.....could become a serious matter.....Disputes over boundaries were, and to a degree remain a notable feature of island life although their frequency may be overstated by some. They seem to have been among the first aspects of society and organisation to come under notice and invite the intervention of outside administrative authorities in the person of the catechist, the teacher or the Island Court.
>
> The rights associated with a site include a right to use it for domestic residence to the exclusion of others and an entitlement to determine the disposition of the land, either during life or as a consequence of death.

He then goes on to deal with the concept of inheritance. At 175 he deals with the question of restraints and comes to the conclusion there appear not to have been any, though there are some expectations. He deals with adoption and, at page 176, comes to a conclusion that there was a very wide capacity to alienate:

> One is left with an impression that, as amongst themselves, it may be that the islanders may dispose of land on whatever basis is acceptable to those directly affected and, to the extent to which a wider community may be affected, is acceptable to that community. Such acceptance is more readily attainable in terms of expectations relating to descent such as those to which I have referred. There do not, however, seem to be any qualifications on the disposition or acquisition of land which could be described as crucial.
>
> Arrangements short of disposition seem to be available on the same basis of acceptability.

He refers to leases, licence or loans, "may lead to quarrels", and caretaking arrangements. Then he goes on with gardening land and the garden land he similarly describes, and describes the features. At page 177, just below half-way down the page:

> Notwithstanding the considerations to which I have referred, there remains among Murray Islanders a strong remembrance of the previous role and importance of gardening in the society and of the gardening practices and activities which reflected that. There are, and have been since European contact, Murray

> Islanders who continue to garden basically as their ancestors did on garden plots in the interior of the Islands. Other Islanders recognise them as being entitled to so so. If they do not, disputes are settled in the Island Court.

And so it goes on.

> On page 178 towards the foot of the page:
>
> > There is no doubt that the evidence establishes that Murray Islanders recognise the continuance of claims to garden plots and recognise or dispute claims of entitlement by individuals in respect of those plots.

What we have endeavoured to do rather than take Your Honours to all of this and there are other findings as well, what we have done in a form of a document that I hope has made its way to Your Honours, which was left with the Court yesterday in response to our learned friends' submissions, is to put in a document which we have headed "Plaintiffs' Reply" and the first section of that - if I could take Your Honours to that - what we have done, having realized that there is a real issue raised as to what precisely His Honour's findings were, is to set out there the precise finding.

It is headed firstly "A. Interests in Land - General Concepts", and those are then set out as specific extracts and it may be unnecessary, I think, to take Your Honours to that. Your Honours will see that they run for some six pages as "General Concepts". They are conclusions reached by His Honour at various pages in that category of "Interests in Land". We then have set out from page 7 the specific conclusions. That is from those pages that I have just taken Your Honours to - pages 173 to 180. Can I take you to the foot of page 9 of that document that is now before Your Honours where we have also extracted what we might call "negative findings" so as to indicate to Your Honours that there is no doubt in His Honour's mind when he was rejecting a claim, and this assists, we would respectfully submit. Towards the foot of the page Your Honours will see "V.I p.184":

> I am not on the evidence inclined to conclude that any recognition to claims of various individuals to fish traps or the produce of fish traps in fact reflects a recognition of an entitlement transmitted in the context of a system such as is contended for in this action.

But there is a clear rejection of that, and then at page 185 he continues:

> I would not therefore be inclined to conclude that the plaintiffs have any of the rights which they claim to the area of the reefs and reef flats -

and so on. In formulating the particulars for the purpose of these questions now reserved for this Court, we have indicated that we do not pursue the claims to fish traps, to reefs, to sea areas, and we do not pursue claims to shrine land which was originally claimed which was rejected by His Honour, and we do not pursue claims to some plots which were areas which were claimed by the plaintiff James Rice on the island of Dauar, one of the subsidiary islands, which His Honour said expressly had not been made out.

So His Honour has made express negative findings, and then His Honour's positive findings are set out in a series of propositions, though subject to various comments all the way through, comments and some hesitations about the state of the evidence are expressed in a similar way to the way in which His Honour Sir Garfield Barwick expressed reservations about the state of the evidence in the *Daera Guba* case.

Could I take Your Honours to page - - -

BRENNAN J: Can you articulate the finding in your favour which you say His Honour made which is the finding upon which you need to rely?

MR CASTAN: Yes, if Your Honour goes to page 12 - we could formulate it, but I cannot say which in particular of the lengthy sets of findings that follow from page 12 under the heading "Society" would be the ones that are necessary to rely - we would rely on all of these findings about the kind of society it was because having set himself the task of looking at this question of whether there exists a state in which there is among the people a recognition of certain kinds of relationship to land functioning in that society, His Honour then proceeds to make findings about the society in those terms, and those findings that are set out from page 12 onwards are His Honour's findings.

For instance, in relation to long occupancy, one sees the first few findings.

BRENNAN J: As at present advised, I do not understand precisely what we are looking at these findings

for, and I understand your general approach to be that there are some surviving kinds of "interests".

MR CASTAN: Yes, Your Honour.

BRENNAN J: What are the kinds of interests which you say have been established and which therefore survive?

MR CASTAN: The interests, we say, are the interests that are expressed in our particulars which I can take Your Honour to.

BRENNAN J: I see.

MR CASTAN: We have particularized particular kinds of - - -

BRENNAN J: Do you say that the findings support the particulars that you have given?

MR CASTAN: Yes, Your Honour.

BRENNAN J: Except in relation to reefs and - - -

MR CASTAN: Yes, and our particulars as now given, if I could say this, Your Honour, do not include the reefs; in other words, we were required, for the purposes of this hearing by order of His Honour the Chief Justice on 20 March, to give particulars of the matters now claimed in the light of His Honour's findings. We have given those and we have identified the incidence or particular rights which we say are claimed and we say these findings in this document support those particular particulars as specified.

TOOHEY J: Does that mean, Mr Castan, that there is no challenge to any of the findings that have been made as opposed to an issue between the parties as to what, in truth, His Honour did find in respect of a particular matter?

MR CASTAN: Yes, Your Honour. In substance that is right.

TOOHEY J: So, in so far as there is an issue, it is an issue that really goes to what His Honour found?

MR CASTAN: Yes, Your Honour.

TOOHEY J: Yes, thank you.

MR CASTAN: And all we seek to say is that as we understand it, it is being put by the defendant that His Honour found none of the kind of things that are necessary to be found. He did not find that there was any sort of society there beforehand, and that he did not find that there were any people there who were there for a long enough time, and

that he did not find any of those things. We have some difficulty with understanding how that is put in the context of explicit matters that are set out in the document that I have now taken Your Honours to because there are lengthy sets of findings. But - - -

BRENNAN J: Could you give me the reference to the particulars which are relevant?

MR CASTAN: Yes, Your Honour. They appear in volume 6 of our submissions.

TOOHEY J: They are also in that blue volume, are they?

MR CAPSTAN: Yes, they are in the blue volume I believe that has been handed up, we have now got a copy of it, as item - - -

MASON CJ: Section 7.

MR CASTAN: - - - section 7 of the blue volume that was handed up by our learned friends. Now, Your Honour, the way we - - -

TOOHEY J: Could I just ask you this, Mr Castan: to the extent the rights asserted in those particulars are to be gathered from a number of findings of fact as opposed to one express finding on the point, there presumably will be dispute and an issue which this Court will have to resolve?

MR CASTAN: Yes, Your Honour, because we say the findings do support those kinds of rights and interests. Our learned friends say, as we understand it, they do not. And that is a matter of looking at the determination. Can I illustrate how that arises by taking Your Honours to page 205, in respect of a specific plaintiff, Dave Passi. Now, the way in which His Honour introduces this aspect of his determination is that:

> The plaintiff Dave (that rather than David seems to be his name) Passi advances claims in respect of a residential block in the village area of Zomared on the island of Mer and two portions of land at either end of Dauar Island named (or at least in localities named) Gair and Teg together with "the beach, the reef and the sea and seabed extending to the reef fringing the island of Dauar". He also claims portion of the land and beach on Waier Island being a sandpit "Waier", the beaches and waters of the Neh Lagoon and a place called Zei - Geitz in the narrow cleft in the rocks on the Waier shorelines into

which turtles crawl to lay their eggs and become trapped.

Now, that was the way they were particularized at that time before His Honour. He then says:

> I refer to my conclusions as to claims to areas of reef flat and sea and as to what I have called shrine land and that applies here. It is impossible to conclude on the balance of probabilities given the evidence as to what the situation was in respect of such land.

That is reef flat and sea and shrine land.

> It is a matter of history and remembrance. The Islanders today seem to regard the reef and sea as accessible to them all with produce available to all. The sustaining purpose of shrine land seem long gone and the memory of many aspects of the practices is fading and selective.

So, His Honour clearly rejects those claims. He then goes on to deal with the background of Dave Passi and he - if I can take Your Honours to the top of page 207, he says:

> Dave Passi's claim as to his representative group was limited as I indicated in chapter 4.....His claim, in his own and representative capacity, is apparently to a general inchoate right as a Passi to land claimed as Passi land and as a consequence of a specific permission he had concerning a block in the village of Zomared. It is best that he advances his claim in his own words:-
>
> "In accordance with this traditional system I would have been entitled to control the Passi lands as the son adopted by Charlie Passi would have been entitled to assume that right and duty if he had made no oral or written appointment. However he chose to appoint Sam and I accept that. It was appropriate as Sam was senior in years to myself. The same traditional system allows for him making such a choice, as I understand it.
>
> ...
>
> In acknowledgments of Sam's traditional rights to decide these things (as told to me by Charlie Passi) I approached him a few years ago and requested -

Charlie was his father -

> that I be permitted to build a house for myself and wife and children on the land where Charlie Passi's house stood. He agreed to that and I intend to build there in the future when the time is right, bearing in mind my present priestly duties at Darnley Island.
>
> Charlie Passi said on a number of occasions that the land he was placing in the control of Sam were for use of the Passi family as a family, and so, as a member of the Passi family, I have a right to use a portion of the Passi lands. Sam's duties as head of the family and caretaker of the Passi family land was to allocate to me a particular portion of the land, and he has done that.
>
> ...
>
> In accordance with the tradition and practice of Meriam people and in particular, the Passi family (as I understand it from my father Charlie Passi) I am entitled to use any of the Passi family lands, provided that I have the prior approval of the head of the family, presently Sam Passi and after his death Danny Passi....."

And then His Honour refers, at 208, to Sam Passi's evidence:

> Sam Passi spoke of what is set out above as being "the practice" -

he was the current head referred to by Dave -

> and was led to say that it was his "observation". He said he had not tried to observe whether other family groups.....Dave Passi (and other Passi's) attributed the system to the determination of grandfather Aiet Passi that the Passi lands should never be divided.

And he goes on about that, and he then sets out the evidence in some detail over pages 208 to 209. At 209 towards the top of the page he says:

> Later (on the same page of the transcript) he described his interest or rights in respect of the land at Zomared out -

that may be a misprint, Your Honour -

> in these terms:-

"As an individual I have right to the Passi land and I am aware of clan ownership of that land. Sam as the eldest controls the land."

And then he is asked:

"You mentioned that you believe you have rights in the land with the Passi clan. What do you mean today by the Passi clan sharing these rights in the land. Who is in the clan? -- By tradition the sons are.

When you say by tradition, has someone told you about this tradition? -- It is the practice of the Passi clan. The land was handed for the use of - we owned them and if my sister want to use the land she may use it, but will not own it. The ownership goes to the men."

Dave Passi was asked what could happen if another Passi for example wanted to make a garden on the land at Zomared on which he proposed to build.....

"I would put the complaint before the clan... Because of the clan ownership and my part in it ... but if what they will do is in the best interests of the clan then I have to accept it. ... Myself as just an individual, I have no right. It has to come from the clan. The decision would have to be made by the clan."

This resolution seems to contemplate some sort of group control rather than a ruling by one one.

There is evidence to support a conclusion that the Passi family (and other Islanders it seems) accept that Passi lands are not divided but "used as a family", that the eldest son is head of the family and "owns the land on behalf of the family" or is overseer on behalf of the family.

Each Passi man had the right to use the land with the permission of the leader of the family -

refers to evidence -

although George Passi at one stage suggested it was sufficient that he "tell" Sam, of his proposed use. It seems that the "caretaker" (the head of the clan) had the right to lend or lease Passi land and was the one to exclude people from clan land.

> Dave Passi said his house site was still the clans, when he died someone else would enjoy the benefit of the land and he would need Danny Passi's permission to build on the land.

And then he sets out Dr Beckett's evidence, from the bottom of page 210, over 211 and 212. Dr Beckett's evidence supports all of that. Then, in the middle of the page is His Honour's conclusion - at 212:

> I am prepared to conclude that the Passi lands are held pursuant to an arrangement such as is contemplated by the evidence I have canvassed. Such arrangements, which depend essentially upon acceptance by those affected, reflect an aspect of Murray Island social organisations for generations - probably antedating European contact. The arrangements, and the ultimate breaking up of the holdings, illustrate perhaps that the real pressure on land distribution comes when sons marry. Dr. Beckett indicated children have very little use for land until they marry.
>
> The legal consequences of those findings are to be determined elsewhere.

DAWSON J: That is all very well, but what His Honour has done is really to set out the evidence.

MR CASTAN: But His Honour has said he accepts the evidence. There was evidence about - - -

DAWSON J: It might point in various directions. What was the question His Honour was asking himself?

MR CASTAN: The question that he posed, at page 13, in our respectful submission. It is tested by reference to His Honour's findings in relation to the sea areas in respect to the Passi lands because he said he will not accept those.

TOOHEY J: When you say, "His Honour said he won't accept those", you said a moment ago, Mr Castan, that His Honour rejected those claims, do you mean any more than that His Honour was not satisfied that by tradition or custom the individual plaintiffs had any particular rights in respect of those areas?

MR CASTAN: It goes a bit further than that, Your Honour, because in relation to seas and sea areas His Honour made a finding that the whole of the system no longer operated.

BRENNAN J: Is that right? I thought he was saying that everybody in the community regarded it as theirs.

MR CASTAN: Your Honour has put it correctly. What he said was that it was not the subject of the kind of separate ownership of reef that was claimed by the individuals who had claimed that they themselves had entitlement to a particular area of reef and that no individual could make out a claim to reefs since everybody was now using it. Perhaps I overstated it, Your Honour, but he made that as a general finding that there was no longer the operation of individual ownership under the system of reefs and sea areas.

Now, that means that those claims made by the plaintiffs of reefs and sea areas have not been made out on the evidence because His Honour said there does not exist a system which provides ownership of that kind in relation to those areas. There was explicit findings, for instance - to take another example - there were claims made by the first-named plaintiff, Mr Mabo. His Honour ultimately came to the conclusion that he did not accept that Mr Mabo was the person entitled to make those claims within the society. In relation to Mr Rice who had claims to land on the major island, the Island of Mer - colloquially known as Murray Island - and also some claims in relation to areas on Dauar Island, His Honour said that the claims are made out in relation to the area on Mer meaning that he accepted the evidence established within the context of "the system" - as he has called it - the recognition between themselves of that; that Mr Rice had made out those kinds of interests in relation to the areas on Mer, but that the evidence was in a state of some confusion in relation to the particular areas that were claimed on the island of Dauar and therefore he could not accept them as falling within the context of what he had already said was that particular system.

Now, that is all. It is true in a sense, as Your Honour Mr Justice Dawson put to me, that His Honour's findings in one sense only amount to a setting out of the evidence, but His Honour has been careful to say where the evidence is either rejected as not credible or is, in His Honour's view, insufficient to amount to that which an individual has claimed. And he has also been careful to say, as he does with that passage dealing with the Passi lands, that the lands are held pursuant to that arrangement. Elsewhere, of course, he has dealt with the particulars. I took Your Honours to 173 to 180 where he gives the particular incidents of the operation of lands

which are held, such as the ability to pass it and so on.

So far as His Honour's findings are concerned, they do contain specific positive findings and they contain some negative findings in the sense that either the evidence is rejected of a particular individual as not credible or, something is not made out that is an essential component. To that extent, there are such findings. We do not here seek to say that, for instance, the findings in relation to the Island of Dauar in the case of Mr Rice are not findings that were open. We simply accept those but we say there are ample findings in relation to other areas.

Now, what we have done in the document that I have taken Your Honours to, the reply, is simply set out under the three or four heads that are there specific findings. His Honour's introduction to the passage at page 173 refers to conclusions, and they are specific conclusions in relation to the system in the context of the question which he posed for himself at page 13.

When one comes to see the framework in which those rights exist within the society, it is necessary to examine more than - one needs to go to more than one finding because findings, if I could take Your Honours again to page 1 of the reply, His Honour's findings, even taking the first three or four references there, one sees the way in which His Honour has approached it. He said:

> Given considerations such as the constraints imposed by the rugged terrain..... the pressures of population, the elaborate and complex social organisation of the people and the importance of gardening from the point of view of subsistence and socially it would perhaps be surprising if the Murray Islanders had not, during the period of their occupation of the Islands, developed ways of controlling access to and the use of land (in the extended sense) and the resources it afforded. In any event it seems fairly safe to assume they brought with them a social organisation which they adopted to the conditions on the island.....Murray Islanders have a strong sense of relationship to their Islands and the land and seas of the islands which persists from the time prior to European contact. They have no doubt that the Murray Islands are theirs.....in so far as this perception persisted prior to European contact there was, so far as we know, no outside challenge to it. Even after contact the remoteness of the

> Islands and other considerations meant that there has been no real challenge, except perhaps intermittently, at least until recent times.

And at page 156 there is a quote from Margaret Lawrie, a witness who gave evidence of how she had assembled her book "Myths and Legends":

> Trespass is abhorred on this island. Everything is owned, land, reefs, rocks, stones -

and it goes on -

> A man may speak for what is his, no more. When a girl marries she usually receives dowry land which passes to her son -

and then she describes, to piece together a story, she had to piece together parts of the story from the particular people who related to the part of the story that related to a particular part of the land. And His Honour has, we would respectfully submit, adopted that in setting it out.

> At page 157:
>
> there is a strong sense of the appropriateness of being in your place or locality and of inappropriateness of being in someone else's place or locality. Words such as shame and trespass are used in this context and reflect deeply ingrained social and cultural attitudes. The knowledge of boundaries is important in the observance of those concepts of propriety and of the social behaviour reflecting them. Such attitudes are rooted in the pre contact past.....The attitudes I have mentioned are ingrained in the culture of the people are a part rather than objectively laid down and enforced by some distinct agency.....the people of the Murray Islands perceive themselves as having an enduring relationship with land on the Islands and the seas and reefs surrounding them.

And there are references to some of the early explorers:

> The whole shore here was lined with a continuous row of houses, each in a small courtyard of some 10 to 20 metres square fenced with bamboo. Here and there between the fences..... were left narrow passages..... "... their gardens were extensive, well fenced and cultivated with great care and they almost

> entirely subsist upon their produce ... their territories are not sufficiently extensive to excite cupidity".

There is a reference then in the 1840s to an observer who was on one of the other islands in the Torres Strait, and obviously one can draw inferences from that. There is a reference in "Fences", which His Honour adverts to at page 164, and the text of the exhibit not set out by His Honour - I am at the top of page 3 now of that document - this is in 1825, we have not put the date in, early 19th century:

> "...their wigwams are comfortable and neatly constructed of bamboo - they are generally of conical form surrounded by a yard and bamboo fence. They appeared to be divided into families and each family had a distinct piece of ground".

There is then the passage from Wilkin, and then there is set out those detailed passages from Wilkin, that:

> Queensland has not affected native land tenure -

this is writing in 1898, 19 years after annexation -

> it is not impossible that English ideas.....are making themselves felt. There is no common land, and each makes his own garden.....at his own convenience.....In most, if not all, cases the children or heirs.....have been acquainted with his intentions during his lifetime. The father usually went over his gardens with his children, pointing out to each child the portions that are to be his or hers.

His Honour then comments after setting out the 1898 extract:

> such a practice is prevalent today among certain segments of the population with respect to residential and garden lands notwithstanding the use of written records.....older islanders.....did not regard their property as properly disposed of unless they had personally acquainted the chosen recipient with both intention and boundaries and that they were not impressed with the effectiveness of written dispositions.....

there is a body of evidence from Murray Islanders supporting a favoured position for the eldest son.

as suggested by Wilkin and attributed to Bruce.

A son also, according to Wilkin, inherited any property left to his mother during her life and on the death of a wife the husband was obliged to give back her portion -

and so he deals with inheritance rules.

Wilkin records Bruce as saying that formerly:-

"A man could leave his land to any one he liked of his family, or even alienate it, during his lifetime; but even so the family were not left without provision."

He went on to say further that if a father was very angry with his children he could disinherit them.

DAWSON J: Are we to take it from that that he accepted what Wilkin says?

MR CASTAN: Yes, Your Honour, we would respectfully submit so. But we would respectfully submit that there is no foundation for rejecting it even if one was to - there is no basis on which to look at those extracts from Wilkin otherwise. We would respectfully submit, the material is there as material that was recorded. It is Wilkin's record at the time in 1898, it is said to have attributed to Bruce who is described as the reliable informant who was living there and there is no suggestion otherwise that it is unreliable or that that material coming from that source, as distinct from the Reverend Hunt who had been there earlier, which was criticized, but no suggestion that Wilkin's account should not be accepted. The only comment His Honour makes about it is that he was a young man and that most of it really came from Bruce who was living there and knew all about it and is described as "reliable".

BRENNAN J: Mr Castan, I am still at a loss to understand the nature of the interest which you say burdens what you conceive to be, as I understand, the Crown's radical title. Is it a case where you say the Crown's title is burdened with an interest held by the Meriam people and that that interest, in itself, is divisible amongst the individual members of the Meriam people, or do you say that the Crown's title is burdened directly with an interest held by particular Meriam people?

MR CASTAN: We submit that the Crown's title is burdened by the interest held by the particular people.

BRENNAN J: So, you do not contend for any community rights other than those held by specific individuals?

MR CASTAN: Yes, Your Honour. It seems that in so far as there were community rights, and there may have been some other kinds of rights in addition to the individual rights of what we will call private property on this particular island, there were, at one stage, thought to be additional rights held by various, what are called "tribal groups", if I can use that term very loosely, within Meriam society.

BRENNAN J: Be it so, but I mean the case you are making is not going to be advanced then by pointing to findings that His Honour has made about the views that are held by the community inter se.

MR CASTAN: Yes, it is, Your Honour, because the rights of the individual only exist as part of that community. It is not the case that because the rights are held by individuals that they are held in some abstract context, they only exist in that society, and within that society they have these rights and within that society they are entitled to deal with the land and they are entitled to alienate it, and land was sold.

BRENNAN J: I appreciate that, it just seems to me that the chain of title is either interrupted by the notion of the community rights out of which individual rights are derived or, alternatively, there is no chain of title and there is a straight conflict between community rights and radical title. But you do not put it on either of those bases?

MR CASTAN: No, Your Honour. The way in which it is put is that within - one has to start with a society which existed and within that society people had a strong sense of private ownership, on the view of one of the witnesses, a stronger sense of private property and proprietorship of individual or individuals on behalf of their immediate family in relation to land than any that one might witness in western society.

And that is one of the striking features of the society, a society where it was a major cause of concern to find a footprint on one's land, and explained by Dr Beckett in terms of a group of people living on a small island where there is intense horticultural activity and intense division and so a high degree on focus on individuals separate plots; and then, overridden, at least in the earlier stage by what we might call tribal or

territorial divisions between particular groups within Meriam society. Then, of course, the Meriam people, as a whole, having their relationship with other outside communities.

Now, so far as concerns land, the rights in relation to land, the right to keep someone off, the right to garden the land, the right to pass it down, was held by the individual or the individual on behalf of his wife and immediate family. It was not held communally in the sense that we are perhaps more familiar with in some of the cases that deal with African situations or the obvious more familiar case of Australian Aboriginal interests.

And so it is our respectful submission that those individual where a whole community was in occupation of the entire island and within that whole community there was a society functioning and within that society there were people who were the actual - I use the term "owners" now for present purposes without seeking to beg any question but just in terms of the operation there, they were treated within that society as owners of their respective areas of land; so they had an interest; each individual had an interest.

It is to be characterized, we would respectfully submit, in the way that if we were testing, if this was another *Daera Guba* and the question here now was whether, for instance, coincidentally there was an instance of a sale pre-annexation here, as it occurred in Papua, there was land sold to London Missionary Society, pre-annexation.

Another way of testing this is to say, "What would happen if individuals came along now and said, 'Well, we want to set aside that sale, or the land claimed by the London Missionary Society is not really owned by it at all.'" Presumably, the London Missionary Society might seek to say that it purchased that land pre-annexation; subsequently it was granted a lease by the Queensland Government, purporting to act under Queensland legislation. That, we say, reflects the right of pre-emption but that is a separate issue.

The principal point we make is that one can look at this community as a community in which there was private ownership of land within the community and, in that sense, it is to be regarded as analogous to the sort of case where colonization takes place and the British Crown annexes territory

where there are private owners holding under a pre-existing system. One does not need to go to concepts of communal ownership and the like.

If people in fact have individual interests within the pre-existing society, and those are the kinds of interests that function there and are acknowledged as such and are recognized within that community, to use His Honour's terminology at page 13, then the real question is what happens on annexation? Do those privately owned house lots and garden lots and the like simply vanish into thin air? That is, in substance, the question.

It is not just a question of whether the overall - and, of course, it would apply. We have two plaintiffs but, as is clear from the material, the whole of the island was owned in a similar way. They are a whole community there and each individual or each family had greater or lesser areas prior to annexation under this intense proprietary - and I use that word advisedly - system that operated among these people. And if it operated then the question that is raised here, the first question, is what happened? Did it all just vanish when some instruments were signed in London and in Brisbane? Because that is how the annexation occurred here. The annexation occurred by letters patent issuing from London and by a statute passed in the Queensland colonial Parliament and by a proclamation by the Queensland Governor, and possibly, on one view of it, a remedial statute, Imperial Statute, passed in 1895.

Now, they are the four steps that were taken to bring about this change. They happened either in - two of those steps happened in London, the first and the last, and the intermediate two happened in Brisbane. And the question for this Court is did this, what we would described as an intensively private system of ownership operating there, suddenly vanish in 1879.

As we understand our learned friends' case, the case is that it did and we would respectfully submit that that is not the proper view. But that is the way in which it arises on the facts as found.

MASON CJ: But Mr Castan, I do not follow from the pages that you have referred us to, say from 208 onwards, that the findings of Mr Justice Moynihan support this individual ownership claim that you are making because essentially at page 212, His Honour seems to be finding that the land in question is held pursuant to a group holding arrangement.

MR CASTAN: In the case of the Passi situation there is a special arrangement. What happened here, Your Honour, is that the Passis had a particular arrangement where the private ownership was held in common by a particular family. That does not affect anything of what I have said, Your Honour. All that is talking about is that in this particular case the ownership happened to be shared, instead of owned by one person, by a particular group who still held their land in common. It is not communal in the sense that as I understood His Honour Mr Justice Brennan was putting to me.

It happens to be that in the Passi family there was this particular common or joint - and one is tempted to keep applying our familiar notions of ownership by more than one person that it is still private ownership - but whether one calls it common or joint or one can give it the term of an operating family trust relationship with an individual who is the appointor, perhaps, one can put all these notions on it. But in this particular case, the private ownership was held by that family, but that does not alter the fundamentals of what is being said, Your Honour. That remains unaffected.

The significant point I was endeavouring to make is that there was a communal type of ownership, and in relation to the Passis, they had a land dispute, a boundary dispute with their neighbours, the names of which I have just forgotten - the Blanco family - next door, and they litigated this in the court on the island and they fought it as private neighbours would because there was a dispute about whether the boundary ran two feet to the left or two feet to the right. They litigated this, and they dealt among each other, and I am not sure that it had been resolved, in fact, even to today finally. There is still a boundary dispute, a neighbourhood dispute going on there between what is, in effect, two private owners. As it happens the Passis are a group of people. They are a family who own that particular lot. But it does not affect the underlying concept of this private land.

There is some material - and I have forgotten now where it is - about what occurred when the court party which was there in 1989 on a view, walked in the company of some of the plaintiffs to inspect a particular location, and one of the islanders who took the view that the particular land was owned by him and not by the person who those accompanying the court party believed owned the land, one of the islanders commenced to

indicate fairly firmly that the people should get off his land with a description of it as a "whoop whoop" sort of sound to make it very clear that they were trespassing. This occurred notwithstanding, I might say, the inevitable respect and so on with which the court was treated, the welcome that the court and the party had there on the island which is referred to by His Honour, in fact, in the course of his determination. But that did not override a concern that there was a trespass going on when the court party trod on the wrong side of a boundary line.

It is difficult to convey the notion that is involved in this particular situation, but it is described by Dr Beckett in some of his writing as the kind of pressures that result in a society which is, as it is called, "sedentary horticultural society" with intense pressure on land. And thus the taboos and customs that grow up relate significantly to observation and rules that govern.

What we say about the findings is that one can approach looking at a community like that and the way in which those kinds of interests in land operate by starting from what we would respectfully submit is the artificial starting point - what was the system of government, how were the rules made and who decided the disputes - and that, in our respectful submission, is a false question because in what are called by the - and we have referred to some of the material and set out some extracts from anthropologists who have commented on the fact that in these societies, what are described as small, acephalous societies, there is no head of state, there is not necessarily a chief who is the ultimate font of authority, the source of all authority, that authority comes from the pressures that are brought to bear, and His Honour makes significant findings about this, the social pressures, the social cohesions brought about by what children are taught, by significant taboos that are put in order to warn off trespassers; all sorts of systems that are brought into existence, which are not what we would perhaps conventionally regard as systems. But they tend, we would respectfully submit, to support the existence of a system - - -

MASON CJ: Mr Castan, it may be that our consideration of this would be advanced if we could induce you to descend from the general to the particular. Could you isolate for us what you consider to be the best individual claim that you can put forward, perhaps in relation to Rice to, as it were, one block of land, so that we can see how the general principles on which you rely actually manage to produce a

specific claim, individual ownership of the kind that you are contending for?

MR CASTAN: I have referred Your Honours to the Passi lands and we say that - - -

MASON CJ: That is the Zomared?

MR CASTAN: That is Zomared and the other areas other than seas and reef, and His Honour has specifically said he finds it operates. He says the chains of title are clear. He refers to chains of title which are the - - -

MASON CJ: In your submission that is the best vehicle, is it, for applying the general principles on which you rely, so as to result in an individual claim to a specific block of land?

MR CASTAN: Yes, although I have to qualify the word "individual" by referring to the joint owners in that particular instance, but subject to that, yes, Your Honour. It is clear, it is unequivocal, there is no hesitation expressed by His Honour about the areas. He says the areas are clear, he says the chain of title is clear, he says that he accepts all the evidence about the way the system operated there and there is no qualification on it.

Can I take you to the Rice claims and at page 214 we can deal with those fairly briefly. Your Honours will see at page 214 that dealing with James Rice he sets out three claims. The first is by patrilineal descent to land on Dauar Island at Aepkess and Dadamud together with seas, seabed and as far as the fringing reef.

The second, as a descendant in the Magaram family group through his grandfather, land situated on Mer in the locality known as Bazmet. The reference to the claim is 44.

As a descendant in the Komet family group through his great-great-grandmother two portions of land, situated on Mer, at Korog and Dei-mi; see the references, the claims are 45 and 46.

His first comment is "I will not repeat what I have already said in respect of claims to areas of reef or sea. I do not regard them as sustainable on any view of it".

Then he deals with what the defendant had pleaded because the defendant had said he had assigned rights to Tapim family from February 1989, and then at page 215 one sees that:

It was opened that James Rice claims three portions of land on Mer, namely Korog.....Dei-Mei.....and Bazmet.

They appear as 45, 46 and 44 on the map.

On Dauar Island it was said James Rice claimed Aepkess and the reef Eurr and the waters offshore from Aepkess, to the reef -

and the claims -

were amended to include an area 250 meters.....

These lands were claimed on the basis of inheritance from James Rice's father Loko Rice. His father gave him all of this land by word of mouth and he inherited it at the time of his father's death on 9 September, 1950. He says his father wrote no will, but:-

"This land, he said to me, you know, this land is mine, if I died, I've got land. -- You mean you, James Rice? - Yeah. -- Would get the land when he died.....When did he say those things.....At Dawar Island.....was he talking about all of the land or just some of the land.....Land at Dawar and land at Murray, he said that."

Then there is a reference to:

his stepmother Balo.....leaving the land to him by a written will -

which cannot be located. And then His Honour says:

All the land claimed is said to have been that of Loko Rice -

that is the father -

from his father James Rice senior (including Bazmet, from his wife). The line of descent seem clear back for two generations (the family tree produced by James Rice is Exhibit 168) but the claim has some interesting features.

He then sets out his background, personal history and at page 217:

The Korog block claimed is residential and has an associated garden area claimed through a fairly distant relation given it as a wedding present - such things did of course

occur. One may have doubts as to how the Korog land came into the Rice family. James Rice says that his mother, father and grandfather (Jimmy Rice who died in about 1942) used to go there to collect fruit and clean up the area when the councillors ordered it. Such use seems to be supported. Such a basis for mounting a claim to apparently abandoned land, bolstered by a basis in descent were not unknown, one suspects, as a means of acquiring land on the Island.

I accept that James Rice has claimed and resorted to the Korog land for many years as did his father and grandfather. This is known and James Rice can name the boundaries and the adjoining owners. The Court records show disputes concerning land at Korog one of which seems to have been decided in favour of Jimmy Rice and may refer to the land in issue. No other claim or dispute in respect of the land has emerged. Nevertheless I am sceptical about the chain of title said to sustain this claim.

That is because His Honour has earlier said that it is abandoned land bolstered by a basis in descent.

It remains to mention that James Rice has entered into a tenancy agreement with the Department of Community Services....I turn now to his claims for land on Dauar Island.

Now those are His Honour's findings in relation to Korog. He accepts that he has claimed and resorted to it; that he can name the boundaries, that there are disputes, that no other claim or dispute in respect to land has emerged, and he expresses some hesitation about the chain of title, but says above that he expresses that hesitation because the chain of title appears to go further back than the occupation by the grandparents resorting to the land. Now, those are the findings in relation to Korog.

TOOHEY J: Mr Castan, on page 214, the claim - not the findings, but the claim is formulated by reference to family groups but, as I understand it, this is a claim based on individual ownership, it is, not a group holding arrangement?

MR CASTAN: I am not sure what Your Honour is referring to by "family group" here.

TOOHEY J: Well, because on page 214, under 1, 2 and 3, there are references to his position as a descendant in a particular family group.

MR CASTAN: Yes, that is describing how he comes to that land.

TOOHEY J: But the claim itself is made in terms of individual ownership - - -

MR CASTAN: Individuals, though it is also - - -

TOOHEY J: Sorry, as opposed to the Rice claim, which is part of a group holding arrangement?

MR CASTAN: Yes, Your Honour. It is solely an individual, though he also claims as a representative, representing himself and his wife and children, but it is claim to him - he is the owner. It is not a family claim in the way that the Passi claim was identified.

TOOHEY J: Well, did the group-holding arrangement amount to anything more than a need to consult and perhaps get permission in order to dispose of an interest which otherwise is yours?

MR CASTAN: No, the group-holding arrangement in the Passi case arises because - and this is dealt with in some of Dr Beckett's evidence that is summarized in relation to Passi by His Honour - that land is held within a family and then is divided to children and the individuals take, but in some instances those individuals continue to hold it together. In the Passi case, because the grandfather had said you should try and keep the land together, so they had kept it together; the brothers had taken the land. That is all. That is no different, really, than what we might call a conventional joint holding passing down to sons of a father until such time as they partition. But that does not apply in the case of the Rice family; that is an individual claim.

Now, those are the findings in relation to Korog. I am not sure whether that answers Your Honour's question about whether that is the best. If I can go over to page 221, in the middle of the page, after three pages of description of the claims to the land on Dauar, His Honour says:

> The evidence as to James Rice's claims concerning Dauar -

that is on that island -

> is to my mind in such an unsatisfactory state that I would not be prepared to act on it. It seems that the facts are now largely lost and that what we see is part memory, part

fabrication or perhaps confabulation and part opportunistic reconstruction.

Now, that is a finding clearly adverse in relation to the lands claimed on Dauar. But, if one goes on, he then deals with Bazmet:

> Bazmet is on the southern part of Murray Island in Magarem tribal territory. It is garden land which James Rice has not used for over 10 years. The land is said to have been a wedding gift to the wife of James Rice Senior the grandfather of the plaintiff James Rice. James Rice took Dr. Beckett there in 1958/59 and showed him a new banana garden 200" x 120" and a sweet potato garden 60" x 60" on a plot 400" x 300" -

I assume these are feet, Your Honours.

> Use of the plot by the plaintiff or his father is confirmed by others. James Rice described the land and its boundaries. Similar considerations apply to Dei-Mei which is named in Exhibit 168 when James Rice appointed Day Day, his brother-in-law as caretaker.

Now, those are the extent of His Honour's specific findings in relation to Bazmet and Dei-Mei. They are brief but they are in clear contrast to His Honour's rejection of the claims concerning Dauar because His Honour has referred to the sketch - the exhibit - and to the basis of the claim. In our respectful submission, His Honour is there making findings. We concede there is an element that is unsatisfactory about this because His Honour has not gone further and set out anything more about the land at Bazmet and, of course, there is a substantial body of evidence. But, in our respectful submission, His Honour has found for James Rice in relation to Bazmet, Dei-Mei and Korog. He has found against him in relation to the three or four portions, in addition to those, which he claimed on the island of Dauar.

MASON CJ: Well now, take Bazmet, for example. If you look at question 2(b), on page 74 of the documents handed up by the Solicitor-General, what are the elements of the rights that James Rice has in relation to Bazmet?

MR CASTAN: All of those elements that are to be found at pages 273 to 280 and the other passages that we have referred to. His Honour has made findings about what happens - what the kind of incidents are of individual ownership. At page 273, he specifically says, "individual house lots are

owned; garden lots are owned. These are the rights in relation to garden lots". Then he identifies a garden lot and finds for James Rice in relation to it. The incidents are not found here; here His Honour is dealing with the particulars of the claim. At pages 273 to 280 His Honour sets out the precise incidents and then one applies those incidents and we cannot apply them to the land at Dauar because His Honour said we have not satisfied him that James Rice is the right person for those lots on the island of Dauar; we have, in relation to Bazmet.

Perhaps the difficulty arises because His Honour has dealt with one aspect of the issues before him in one part or perhaps on a continuous basis. One finds it is not easy to pick up these references, as we have extracted them now in this reply document, to find the precise way in which His Honour has made the findings. He has not linked them up to the particular portion and His Honour has, we would respectfully submit, made those positive findings.

DEANE J: Mr Castan, if I can just take up what the Chief Justice said, if you go to page 221, you have the Bazmet findings being:

> It is garden land which James Rice has not used for over 10 years. The land is said to have been a wedding gift -

he and his father, at some stage, used it. Now, on the basis, as I understand it, of that being the only evidence, we are asked to answer a question, "Does James Rice own this land or interests and title in this land and what precisely are they?".

MR CASTAN: No, that is not the only evidence, Your Honour.

DEANE J: Well, I thought you were referring us to - I am sorry, on the basis of those findings, then the only findings in relation to the Bazmet land, we are asked to give a final answer to a question as to whether James Rice owns interest and title in that land and what they are.

MR CASTAN: Yes, Your Honour, but we would respectfully submit the Court is entitled to go to the transcript references that His Honour has referred to and the Court is entitled to go to the relevant material to amplify whatever is required. His Honour is being very explicit, if I may say so, Your Honour, in rejecting a claim where - - -

DEANE J: Mr Castan, can we just stop. The Court is here to deal with an important question of law. Take

page 74. You are now saying that in relation to three distinct areas of land relating to James Rice the findings are inadequate of themselves and we are expected to go beyond those findings and deal with the evidence in relation to each of those three areas of land; is that the position?

MR CASTAN: No. In our respectful submission, they are not inadequate, but if Your Honour - - -

DEANE J: Well, then, can you just come to Bazmet and tell me how you get the basis for this Court to make a finding that James Rice owns in relevant terms Bazmet from the finding that it is garden land which he has not used for 10 years, that it is said by unidentified people that it was a wedding gift and that he and his father used it years ago?

MR CASTAN: Your Honour, His Honour has been explicit in making negative findings. His Honour has, in relation to Dauar, said the evidence is unsatisfactory; I would not be prepared to act on it. His Honour has gone on and he said why. His Honour has then gone on to deal with Bazmet. Dei-mei said even less because Dei-mei, which is the other block, only gets one line. And there was a substantial body of evidence about each of these.

DEANE J: And Korog gets the line that he is sceptical about the claim to title?

MR CASTAN: No, sceptical about the change of title. He has accepted that - the difficulty there, if I could just take a moment, Your Honour, is that there was a chain of title going back more than beyond the grandfather but the evidence was that the grandfather resorted the land and may have picked up the land as otherwise abandoned land; and therefore he is sceptical about a chain of title that goes beyond the grandfather. Yes, he does say that. And in relation to Dei-mei he says no more than barely two lines. And substantial evidence was given about Dei-mei and each of these was - there was evidence over days.

DEANE J: Well, could I attempt to tie you down to specifics. I mean, assume you succeed to the best of your hopes and expectations on every question of law involved, will you just explain to me what you would ask a member of this Court to write in a judgment holding that James Rice owns Bazmet. What is the factual basis for it in terms of finding of the judge who has found the facts?

MR CASTAN: We would respectfully submit that Your Honours would adopt all of the findings that appear in the

other portions of the judgment relating to the rights that one has in relation to garden - - -

DEANE J: I said, assume all that and we have now reached the stage, "I now come to the specific question of who owns Bazmet". There is a finding that James Rice has not used it for over 10 years, that years ago he and his father used it and somebody said that it was a wedding gift to him.

MR CASTAN: In our respectful submission, Your Honours should find that that is a positive finding in relation to Bazmet and Dei-Mei.

DAWSON J: What, on the basis that because they displayed the attributes of the proprietorship at some time, having regard to the overall system, one can conclude, even though one cannot follow the title through exactly, that they must have been owners at least at that time and inferred that they are owners now or what goes - - -?

MR CASTAN: No, Your Honour, because we would respectfully submit that these, in fact, should be construed as positive findings that he is currently the owner of Bazmet. What His Honour has done is make negative findings where he has found against a particular claim or a particular area and given reasons for it, and he has simply, we would respectfully submit, accepted that he has made out the claim to Bazmet. He has simply accepted it, he has simply said "There is nothing more to be said about it". His phrase, for instance:

> similar considerations apply to Dei-Mei -

cannot mean that the precise facts are the same, because it was not the case that Dr Beckett also went and measured the precisely same garden blocks in 58-59, so His Honour is not saying when he says:

> similar considerations apply to Dei-Mei -

that Dr Beckett also went there in 58-59. His Honour's findings here should be read as an acceptance of these claims, there is nothing more to be said about them, they are made out.

DAWSON J: But it must be if that is so what I said, because all that His Honour has found there, by way of fact, is that the land was used by James Rice. Now, it must be that the inference is from that, with the background of proprietorship to land that is provided in general, that you conclude that James Rice was, in the relevant sense, proprietor of this land. But that must be a matter of inference because he has not found that.

DEANE J: But he has not even found that, he has found it was used by him or his father. He has not found anything about what the father has done except that it is said by unidentified people to have been - - -

MR CASTAN: The evidence, the way it is expressed by His Honour, to come down to, is:

> use of the plot by the plaintiff or his father is confirmed by others.

So, he does not specify whether that is evidence of individuals, and there is material on this which we would seek to take you to and we have outlined in our submission and detailed some of the evidence that supports this finding.

DEANE J: But that is what I mean, why on earth should we get involved in the case of James Rice: three different blocks of land, in the case of the Passis: this obscure family arrangement, can you not identify one block of land where somebody has used it for 20 years and his father used it before him and where there is no dispute that the father took him there and said, "This is your land"? I mean, you are leading us into a path where we are going to be expected to write six separate judgments on who owns and what interests in six different blocks of land on the basis of findings that you tell us can only be understood by tracing them back to the evidence.

MR CASTAN: Your Honour, these are the findings - I said in answer to a question from, I think, His Honour the Chief Justice, that the finding in relation to the Passi lands is probably the most explicit. There is no question mark put over it; there is no query or qualification on it; His Honour upholds it in its entirety and upholds the particular arrangement where it happens to be held by more than one person jointly. It should not provide any difficulties, we would respectfully submit, and it is the strongest. Each of these is expressed in this particular way. Some are rejected and others His Honour has not deigned to go to the evidence. He has not said that the evidence is rejected; he has not said that the evidence is accepted; he has not said that there was any qualification or difficulty with it, he has simply said what he has said.

DEANE J: I could follow what you are saying if, in relation to the Passi land, we were not expected to define the precise interest of David Passi in it.

MR CASTAN: Your Honours, with respect, that is defined in the material in His Honour's findings. He says exactly what it is. And in our respectful submission, when dealing with interests of this kind, Your Honours, operating in a society of this kind, if that is the acceptable way in which these arrangements are made, then it should be accepted, in our respectful submission. His Honour has made the findings. Your Honours do not have to do anything in relation to the Passi lands except accept that which His Honour says.

DEANE J: Well, I do not want to take it further. Mr Castan, it is not of great help to your case if these are the best examples you can give of individual ownership of land. I do not think that you simply disregard the relevance of it by saying, "Well, there it is". I mean, if you cannot point to a better example than these of an individual owning land, in terms of actual findings after all this period, it is not completely irrelevant to the larger issues involved in the case.

MR CASTAN: Of course, and we are conscious of that, Your Honour, but it is our submission that these findings should be interpreted in the context of the way in which His Honour has dealt with the matter. And we stress, when His Honour has refused to accept a claim he has said so. Now, in relation to the Passi lands there is no qualification expressed by His Honour at all. He says, at page 213:

> The Tables.....evidencing the descent sustaining the clan.....follow. There is not, to my recollection, any dispute.

He has made a finding about the holding. He has dealt with the history of it. Perhaps I should - could I take Your Honours to page 205 so that the position is clarified in relation to the Passi lands. He sets out the areas originally claimed and half-way down the page he says:

> I refer to my conclusions as to claims to areas of reef flat and sea and as to what I have called shrine land and that applies here. It is impossible to conclude on the balance of probabilities given the evidence as to what the situation was in respect of such land. It is a matter of history and remembrance. The Islanders today seem to regard the reef and sea as accessible to them all with produce available to all. the sustaining purpose of shrine land seems long gone and the memory of many aspects of the practices is fading and selective.

> Dave Passi was born on 20 September, 1932 to George and Wanee. He was adopted by Charlie Passi and his wife Maria. Charlie was the eldest brother of Dave Passi's father George. Such adoptions seem particularly common among the Passi's, a singular and influential family group or "clan" throughout the known history of the Murray Islands.
>
> In 1956 Dave Passi commenced theological studies at St. Paul's Mission on Moa Island in the Straits and was ordained an Anglican Priest in 1962. He was on Thursday Island and at Mabuiag until March 1968 when he went to St. Paul's College in New South Wales. Between 1970 and 1976 he was at St. Paul's Mission and on Thursday Island. He then spent some two years in Rockhampton.....he has been the Anglican Priest on Darnley Island. I accept him as an essentially honest witness although he has a somewhat idiosyncratic view of some issues, not least the Malo story and christianity, and a propensity for selective reconstruction - although no doubt he is persuaded of the truth of his vision.
>
> Dave Passi adopts the Passi family tree and acknowledges the wills of his older brother Sam Passi and of his uncle Charlie. He understands the effects of these documents to be that Charlie Passi passed control of the Passi family lands to the plaintiff Dave Passi's older brother Sam.
>
> Sam Passi had been a party to the action and gave evidence. As to his ceasing to be a party he spoke of a concern about costs. I suspect also that he did not wish to be seen by others to be partisan by his role in the proceedings. Sam Passi gave evidence that he had or intended to pass his responsibilities in respect of what can conveniently be referred to as the Passi family land to his older son Danny who no longer lives on the Islands.
>
> Dave Passi's claim as to his representative group was limited as I indicated in Chapter 4 "The Representative Aspect of the Proceedings." His claim, in his own and his representative capacity, is apparently to a general inchoate right -

and I read that earlier, and then he sets out the evidence. And at page 208 he discusses the system, and in the middle of that page he said:

Sam's oldest son - "has the right to say and use the lands whenever he likes. At the present time Sam is doing that. This is the practice within our clan. We have learnt - the family talk about it, the Passi clan talk about that. I believe we inherited it from our grandfather. He did not divide his land between his sons. It is the practice on the island that the eldest son usually inherits."

Dave Passi said that he did not expect his eldest daughter to own any land because a daughter "is married to a husband and therefore shares the husband's land".

Dave Passi gave evidence that he asked permission of both Sam and Sam's eldest son Danny to build on the land at Zomerad the subject of his claim some three or four years ago and that they both approved. The land is in fact where he was brought up. He said he asked Danny and Sam for the relevant permission because -

"the eldest ... have control of the lands. That is number one. Number two, to have a centre for the clan and that is important, to hold unity within.".

Later he described his interest or rights in respect of the land at Zomared out in these terms:

"As an individual I have right to the Passi land and I am aware of clan ownership of that land. Sam as the eldest controls the land."

He was asked:

"You mentioned that you believe you have rights in the land with the Passi clan. What do you mean today by the Passi clan sharing these rights in the land. Who is in the clan?---By tradition the sons are.

When you say by tradition, has someone told you about this tradition? --- It is the practice of the Passi clan. the land was handed for the use of - we owned them and if my sister want to use the land she may use it, but will not own it. The ownership goes to the men."

Dave Passi was asked what could happen if another Passi for example wanted to make a garden on the land at Zomared on which he proposed to build. He answered:-

"I would put the complaint before the clan ... Because of the clan ownership and my part in it ... but if what they will do is in the best interests of the clan then I have to accept it. ... Myself as just an individual, I have no right. It has to come from the clan. The decision would have to be made by the clan."

This resolution seems to contemplate some sort of group control rather than a ruling by only one.

There is evidence to support a conclusion that the Passi family (and other Islanders it seems) accept that Passi lands are not divided but "used as a family", that the eldest son is head of the family and "owns the land on behalf of the family" or is overseer on behalf of the family.

Each Passi man had the right to use the land with the permission of the leader of the family - although George Passi at one stage suggested it was sufficient that he "tell" Sam, of his proposed use. It seems that the "caretaker" had the right to lend or lease Passi land and was the one to exclude people from clan land.

Dave Passi said his house site was still the clans, when he died someone else would enjoy the benefit of the land and he would need Danny Passi's permission to build on the land. He said he could not abuse or sell any Passi land.

Dr Beckett gave evidence in respect of land not being divided but held for the benefit of a family group. Thus he said:

Do you see there, you write, "Some parents divided the land among their children to stop quarrelling. In such case it was usual to show some preference to the eldest son. Alternatively, a set of brothers might hold their land jointly under the leadership of the eldest, but if only one brother survived, he might also manage the land on behalf of his deceased brother's children. This was the favoured arrangement when land was short and when most of the members were away from the island or unmarried. There is an expectation that the land will be divided in the long run, however. Sam Passi held land on behalf of his two brothers - one unmarried, one absent - two unmarried sons of his father's brother and two unmarried sisters of another father's

brother." Now, I ask you please how you understand that practice of holding land jointly operated in respect of the members of the family who had interests in that land and the joint ownership which you speak of there?--I think we referred to this at least in passing this morning. The arrangement, as I understand it, is that in the case of joint holding, it's at least a courtesy and maybe something more for the younger brothers and if there are any unmarried sisters to go to the eldest brother before deciding to build a house or making a garden on the family land. It provides a kind of family planning, not of births, but of the use of land. Now, if there was disagreement about that, or if disagreement was anticipated, parents or brothers themselves might decide to come to an amicable agreement whereby the land would be divided. In the second generation, division usually took place in the cases that I know of - and I checked through quite a number of cases - in other words, when you come to a joint holding of first cousins, people usually decide to go their separate ways, but the case of the Passi's was an exception to this, but the case of the Passis was unusual because not many of them were married apart from Sam Passi. So, in fact they were not using the land to any great degree.

Does this practice in regard to joint ownership apply equally or in any different respect if one of the members of the ownership group is absent from the island, perhaps for a long time?-- Oh, then, I think yes, it would. It would be assumed that the interests of the absentee which, of course, would be inactive, would be looked after in a notional sense, but since the absentee was not seeking to make garden or to establish a house, there was not much to be done. Now, what's problematical, I think, is supposing the absentee died if they had a family who subsequently decided to return, whether the head of the family, the joint family would agree to look after the interests of those children. Now, I don't know of a case when that happened."

Dr Beckett went on to expand on the system. He thought that the tensions and pressures within the family group would lead to the land being divided sooner or later. This would involve "a fairly complicated arrangement", "a laborious process" "hopefully" leading to "an amiable agreement". The process might be worked out during the

life of the senior family member and perhaps recorded in the Court Records. The pressures to divide are yet to be felt by the Passi's.

The group holding arrangements usually involved brothers and sisters, occasionally first cousins. Children, Dr. Beckett thought, could make a claim apparently based on a "presumption" that they would inherit from their father "or perhaps mother" or "at least ... be entitled to have access to that land as if the holding remains joint". Married daughters might be able to return to make gardens but "as a courtesy they no longer have a claim to the family holding as a whole".

According to Dr. Beckett once a break up of a group holding occurs each individual owner is free to use his land without consultation or permission of the head of the clan.

I am prepared to conclude that the Passi lands are held pursuant to an arrangement such as is contemplated by the evidence I have canvassed. Such arrangements, which depend essentially upon acceptance by those affected, reflect an aspect of Murray Island social organisations for generations - probably antedating European contact. The arrangements, and the ultimate breaking up of the holdings, illustrate perhaps that the real pressure on land distribution comes when sons marry. Dr. Beckett indicated children have very little use for land until they marry.

The legal consequences of those findings are to be determined elsewhere.

Now, in our respectful submission, His Honour has accepted; he has described in detail the arrangement; he has accepted that they are Passi lands. He then goes on to the chains of title and boundaries:

I will not repeat what I have already said on the topic of boundaries. I note that there seems to be a dispute between the Passi's and adjoining occupier as to the boundary of land at Zomared and not affecting the area Dave Passi says he has been allocated for his house. If it was possible to sustain a claim to areas of the sea or reef there may be a dispute between the Passi's and the plaintiffs and James Rice as to boundaries.

> The Tables submitted by the plaintiffs as evidencing the decent sustaining the clan to Passi lands in the current generation follow as Tables 11, 12 and 13. There is not, to my recollection, any dispute about these.

So, His Honour has accepted the whole of that. In our respectful submission that is the highest or best case we can put because His Honour has accepted all of it and set it out in some considerable detail.

DEANE J: Then what do you say are the answers, for which you would contend, to 1(a) and 1(b), which relate specifically and only to the interests of David Passi?

MR CASTAN: Your Honour, the answers are as set out in the document. Could I take Your Honour to the particulars as we supplied them, because - - -

DEANE J: So you say that, we say David Passi has all those rights to all the lands referred to in 1, 2 and 3?

MR CASTAN: Yes, Your Honour, but could I take - - -

DEANE J: Well, I just wanted to know what your answer was, Mr Castan.

MR CASTAN: Yes, but we have been explicit about it, Your Honour. Could I take Your Honour to page 86 of the same volume. We would respectfully submit that the answer to the question is that he:

> As a member of the Passi Family Group in common with other members of that Family Group (subject to the head of that Family Group, on behalf of the family, having the power to permit use of the family land by David Passi..... On his own behalf (in relation to that part of the family land which has been allocated to him on which to build a house).....As the younger brother of Sam Passi (as a possible successor to Sam -

has then -

> In respect of the house block at Zomared and in respect of the land areas and beach areas of the land on Dauar Island known as Glur and Teg and in respect of the sandspit known as Waier, the beaches of the Neh Lagoon and the area known as Zei-Geitz.

That is to say, we have eliminated the sea and reef areas. Then, on page 87:

> The following rights and interests, held absolutely except to the extent expressly qualified hereunder, and subject to the rights of the Crown as the holder of radical title therein to extinguish the Plaintiff's rights and interests in accordance with law.

Then the rights are set out in detail, Your Honour.

DEANE J: Mr Castan, I have read all that, but take page 88, page 3 of the document 7. All I am putting to you is, I cannot get from the material you have read to us a finding that David Passi personally, with other members of the family presumably, has a right to dispose of all this land. I read it differently.

MR CASTAN: Well, Your Honour, it is expressed as a member - that he has the right to dispose of it as a member of the - - -

DEANE J: Do you follow the point I am trying to raise with you?

MR CASTAN: Yes, Your Honour is raising the question whether the right of disposition is in the group as a whole or in that particular - - -

DEANE J: The point I am trying to raise with you is this: I can follow what you are asking this Court to do, or I could follow, if you were saying, "There is a proprietary-type interest in this land. Here it is held by a group known as the Passi group." But, as I understand it, what you are embarking this Court on is to go far beyond that and here to define - still going - 10 pages of rights of the Passi group inter se in relation to this land on - well then, what is all this - - -

MR CASTAN: It is not inter se, Your Honour, it is not within the Passi group. It is expressed as "his rights or interest to the claim" - at page 86 - "as a member of that group, in common with other members of the group, subject to the rights of the head of the family to:" item 7, "dispose of the areas". Together they have the right to dispose. Now, if we had used the language of "familiar rights and concepts and said, "They are tenants in common. What are their rights? They have the right to sell", presumably Your Honours would have less difficulty. We decline to do that and, in our respectful submission, Your Honours should decline to put as the test of acceptability of defining these things, concepts which are founded in our existing system. This is the system as found by His Honour. That is the system we ask Your Honours to accept. It is not queried; it is not subject to

any hesitations or question marks by His Honour. His Honour has said what the system and, in our respectful submission, it is not appropriate to then say, "Well, that is a difficult system, or one we are not familiar with".

MASON CJ: Well, you might give consideration to this over the adjournment. We will adjourn now and we will resume at 2.15.

AT 12.50 PM LUNCHEON ADJOURNMENT

UPON RESUMING AT 2.17 PM:

MASON CJ: Yes, Mr Castan.

MR CASTAN: May it please the Court. There is a passage from one judgment which may assist the Court in dealing with the matters that we were debating just before the luncheon adjournment. It is a passage in the case of *Amodu Tijani v Secretary Southern Nigeria*, (1921) 2 AC 399, and at page 402 Viscount Haldane, delivering the judgment of Their Lordships, talking about the situation in Africa, said this towards the foot of page 402:

> Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the

> intrusion of the mere analogy of English jurisprudence. Their Lordships have elsewhere explained principles of this kind in connection with the Indian title to reserve lands in Canada. But the Indian title in Canada affords by no means the only illustration of the necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle. Even where an estate in fee is definitely recognized as the most comprehensive estate in land which the law recognizes, it does not follow that outside England it admits of being broken up. In Scotland a life estate imports no freehold title, but is simply in contemplation of Scottish law a burden on a right of full property that cannot be split up. In India much the same principle applies. The division of the fee into successive and independent incorporeal rights of property conceived as existing separately from the possession is unknown. In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of the title to land which must be borne in mind. The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.

Your Honours, we would respectfully submit that the findings in relation to the particular characteristics of the Passi arrangements in relation to land on Murray Island that were made by His Honour have to be looked at in the light of those findings in that case, and that while we could, perhaps, attempt to analogize and say, there exists, say - one might be tempted to put on it a concept of a power of appointment and say, "Well, Sam Passi had a power of appointment and the other members of the other brothers, including Dave, were the objects of a power". We could, perhaps analogize and say, "Well, really this is a

constructive trust and we will call it implied family trust of these lands and we will characterize Sam Passi as the trustee, we will characterize Dave as a beneficiary and we will say Dave, as beneficiary, is the beneficiary of the rights which we have specified in our particulars.

But all of these or any other kinds of analogies that we could draw, in our respectful submission, are not useful. In our respectful submission, one has to take the ample findings, in this particular instance, of His Honour, as they are. He speaks of it as an inchoate rights, as member of the Passi family, and it is the Passi family right. One has to then, we would respectfully submit, take the specifics of ownership of particular land, as they are found at pages 173 to 180, where the incidents are set out in detail, and then apply them to the particular lands, and it does not assist, we would respectfully submit, for us to endeavour to say, "Well, it is a difficult concept to look at because it is one that we are either not familiar with, or we cannot fit it into one of those established interests or established concepts with which we are familiar in Australian law".

So, that perhaps is one we would not seek to say more than that about the factual issues. We say that there are findings there which are sufficient in relation to those. There are other findings - I have already said what we have to say about the findings in relation to James Rice. One might have wished, perhaps, that His Honour had amplified further but we would respectfully submit, in so far as we would submit the correct inference is that they are positive, there are relevant passages of transcript, exhibits, maps and other matters which enable one to isolate precisely what the position is in relation to those three areas claimed in respect of James Rice.

TOOHEY J: Mr Castan, can you explain to us the relationship between volumes 1 and 2 of the determination? Volume 2 consists of a large number of express or specific findings of fact which seems His Honour was invited to make by the plaintiff.

MR CASTAN: Yes, perhaps I should give some brief background of the way the proceedings came on, Your Honour. In 1984 the plaintiffs had formulated a book which finished up as exhibit 1 in the proceedings which was the plaintiff's contentions of fact as then formulated. Initially formulated, I might say, with the perhaps naive hope of reaching agreement on facts which might then formulate the basis for questions. But it was formulated by the plaintiff

with a detailed set of proposed agreed facts or proposed findings.

That ultimately found its way to become particulars of various paragraphs of the statement of claim, so it became incorporated in that sense, and became exhibit 1 in the proceedings. So, in that sense, it formed part of what His Honour had been invited to make findings about because His Honour had a full set of factual proposed findings - if one might call them that - before him. Though whether they were sufficiently comprehensive as formulated back in 1984 is unclear.

Ultimately the submissions that were made to His Honour on the findings he should make after he had heard the whole of the evidence were, of course, much more comprehensive, though His Honour did have before him exhibit 1. And His Honour - I do not actually recollect whether he was specifically invited to make the findings, but there had been versions of those facts put before him, that is to say, the defendant had said, well, there was some inaccuracy in one or other of those facts and so he had had those versions and so he took it on himself to make findings in relation to them though he also, of course, refers in volume 2 back to volume 1 in respect of many of the numbered findings of fact, because he has already dealt with them in the course of the more generalized findings.

But there are specific findings in relation to incidence of ownership also to be found in volume 2, particularly at page 46 of volume 2.

TOOHEY J: I was not asking you to take us to detail so much as to explain the relationship between the two volumes.

MR CASTAN: Well, that is how it works, Your Honour.

TOOHEY J: But does it follow from that that His Honour was not invited to make specific findings of fact in relation to the particular interests that any of the plaintiffs might have had in particular areas of land?

MR CASTAN: On the contrary, Your Honour. His Honour was invited to make findings of fact and the details were - I should indicate to Your Honour that, after the close of the evidence, detailed and very comprehensive written submissions were submitted to His Honour which went to each claimed area, which specified all of the transcript references to each, and which detailed the precise conclusions which it

was contended he should reach in relation to each of them.

TOOHEY J: So volume 1, in effect, represents His Honour's method of dealing with questions of relationship with land and incidence of land holding rather than a response to the particular questions that were put to him. Is that right or not right?

MR CASTAN: No, I do not think one can divide them up in that way. It had not been anticipated. Perhaps I can put it this way: it had not been anticipated that there would be a volume 1 and a volume 2. As it turns out the exhibit 1 that I have referred to, the initial draft statement of facts had - I was going to say fallen by the way side but that is not perhaps accurate but there had been debate about it but it was not any longer central because there were before His Honour much more comprehensive submissions on each item of land, each transcript reference, each finding that it was contended should be made in relation to each aspect and all the incidents in relation to every block. All of that was done in intensive detail and is available to this Court because it was done in writing and their submissions are readily available. So, the detailed submission to His Honour are comprehensive and seek findings on each particular block in relation to all aspects.

TOOHEY J: Yes, thank you.

BRENNAN J: Does that mean that there were some findings that His Honour was asked to make which he did not make either affirmatively or negatively?

MR CASTAN: I think the answer to that would have to be yes. Yes, I think one could not answer other than that. Certainly, I think our view would be that the answer would be that there would be many such matters that were put as to which there simply is no finding.

BRENNAN J: Mr Castan, could I just take you back to your reference to *Amodu Tijani v Secretary Southern Nigeria*. I understand, I think, the way in which you put the argument as to the need to understand traditional native interests in land, but in what way do you say that those tradition native interests are to be recognized at common law or under any statutory scheme of land holding?

MR CASTAN: We say they are to be recognized in the - we say there are three, possibly four, alternative ways in which they can be recognized. They can be recognized under the rubric, as it is sometimes called, of traditional native title which might be

a phrase that might be coined to describe it, which is an interest which is sui generis, as it is put, in the Canadian cases, which I was going to turn to, and which has its own unique features, the features of which will depend on the particular situation in any given community. So the analogy, what is said about then in Canada, will differ from what is said here and what is said on mainland Australia will differ perhaps from Murray Island.

That is the first basis, what we have called traditional native title and, in so far as it is traditional native title, we say that that traditional interest is recognized as an interest in property which is a burden on the radical title of the Crown and which is extinguishable by the Crown subject to a power argument which we have which is a separate issue but, subject to leaving that aside for the moment, which is extinguishable by appropriate clear and plain legislative words.

BRENNAN J: Legislative?

MR CASTAN: Extinguishable by clear and plain legislative words though, we would say, that if the legislation clearly and plainly provides for extinguishment and then there is some mechanism involving administrative conduct, then if that is what the legislation says then it is extinguishable by such administrative conduct. But the foundation of the power to extinguish, it is either a legislative extinguishment per se by the words of legislation or extinguishment by administrative conduct appropriately authorized by clear and plain words permitting such extinguishment.

We have, in our written submissions, put the proposition that so far as concerns the making of a Crown grant to a person inconsistent with a traditional interest of that kind, we say such a Crown grant made under legislation providing for Crown grants would be valid and would prevail against it, that is to say such a Crown grant would amount to an extinguishment assuming that there is legislation in place which covers the relevant land. In other words, we do not say it prevails against an inconsistent Crown grant but we do say that it prevails if all there is is the scheme, if I can call it that, that is to say the mere existence of the *Crown Lands Act* does not operate so as to extinguish and is not inconsistent with the continued existence of the rights as claimed.

And then to come closer to this case, we say if it be a reserve so that the land is taken out of that portion of land which might be the subject of a Crown grant, then all the clearer since it cannot

be the subject of a Crown grant until degazetted and then put back into the pool of Crown land available for grant to third parties, then we say that all the more so it clearly has been set aside and is not available for settlement, as it is put in the cases, and therefore is not to be treated as having been extinguished or to be inconsistent with the continued ultimate dominion of the Crown and the ultimate radical title.

BRENNAN J: Do you say that the burden on the radical title was a burden from the moment of annexation?

MR CASTAN: Yes, Your Honour.

BRENNAN J: So, your proposition is two-fold in respect of the effect of annexation: one, that it vests the radical title in the Crown and the second, that the Crown does not take it otherwise than subject to the burden of the - - -?

MR CASTAN: Yes, Your Honour, that is the way in which we put it.

BRENNAN J: Both of those propositions will no doubt be developed at some stage?

MR CASTAN: Yes. It is also put, I should perhaps add, on alternative bases, that is to say in addition to the basis of traditional title as we have called it and been discussing it in the last minute or two. We respectfully submit that in the appropriate case, and this is one, a title can be made out under the, what we might call the conventional principles of land law for a title founded on what we have termed local legal custom. That is to say, if one can see that there is a local legal custom operating in a particular locality which operates and has the relevant characteristics that the common law traditionally has always required of being local, of being sufficiently certain, of being as time immemorial, as it is put and so on, that one can then say that these rights can be founded on such a claim and, if so, are recognizable in accordance with ordinary common law principles and - - -

BRENNAN J: But on the footing of a lost grant?

MR CASTAN: No, I was going to come to the lost grant. That is the third basis that we would put, Your Honour. The second basis founds it on local legal custom recognizable, per se, no different than the custom as it used to be of gavel kind or of borough English and the various other customs. Interestingly, of course, the ability to devise land by will was originally a local custom; land

not being devisable by will under prevailing English land law until appropriate statutory provisions were introduced. But we founded on what we call the strict common law doctrine of local legal custom.

The third basis on which we would put it is the presumption of a lost grant or, alternatively, the presumption of title founded on possession per se and that is fundamental notion, dealt with in this Court in cases particularly such as *Dalziel v Minister for the Army* dealing with section 51(xxxi) of the *Constitution;* cases which I was going to take Your Honours to in which it is clearly held that possession founds a title and even possession short of sufficient time to constitute adverse possession founds a title and, in our respectful submission, founds a title in these citizens of Australia as in any other person. If persons are in possession then they found a title based on possession. One then is faced with questions of whether there is any other owner or whether there is conduct such as to indicate that there is a better title founded in any other owner. In our respectful submission there is not in this case.

That is the third basis on which it is put and that includes in it presumption of a lost grant. But it may be easier to come to these if I could take Your Honours, dealing with the effect of annexation, to the *Calder case* in Canada because a number of these notions were dealt with there and Your Honours would see the way in which the court comes at it.

Our fundamental argument about annexation is that annexation did not, per se, extinguish. There is a line of cases relied on by our learned friends and relied on in part by His Honour Mr Justice Blackburn in the *Gove case* which suggests that are, in effect, act of State cases, cases which suggest that the onus, so to speak, is reversed; that there is an automatic extinguishment or abolition of pre-existing native interests upon annexation unless there is expressed recognition - sometimes said unless expressed statutory recognition.

We would respectfully submit that that line of cases is not the better line and that the contrary line of cases which suggest the reverse, that there is no abolition of those rights unless there is express extinguishment pursuant to clear and plain legislation, is the better view. That is really where the contest falls on that issue of the effect of annexation.

Can I take Your Honours to the case of *Calder v Attorney-General of British Columbia*, (1973) 34 DLR 3d 145. I should explain about this case that this is a case in which seven of Their Honours in the Supreme Court of Canada sat on the hearing dealing with an action for a declaration that the title of the Nishga Indian tribe had not been extinguished. So, the ultimate issue in the case was whether or not certain events had extinguished the title.

Their Honours split three three on whether or not the Indian title had been extinguished. One member of the court, Mr Justice Pigeon, holding that there was no standing. He did not decide the issue, what we might call the substantive issue. He simply decided the standing question.

Three members of the court held that the title had not been extinguished because there had not been any express or clear and plain extinguishment. Three members of the court held that it had been extinguished by the general pattern of lands legislation in British Columbia, but six members, all members of the court, held that the interest had survived annexation and that is the first point, perhaps, to make about the case, that although the principal judgments differ, the judgments of His Honour Mr Justice Spence holding that there had been an effective extinguishment on the one hand, and His Honour Mr Justice Hall holding that there had not, but all of them agreed - both of those principal judgments agreed that the rights survived annexation and were founded in the common law.

We would respectfully take Your Honours to the judgment of His Honour Mr Justice Hall at page 168 of the judgment. It is described in the Dominion Law Reports as dissenting, but again I stress, it is one of two judgments which split three-three on the principal issue, though ultimately the decision was that the plaintiffs failed because they had three against them and they had one who said there was no standing. I should say the judgment of His Honour Mr Justice Hall ranges somewhat more widely than just on the issue of the question of extinguishment.

He describes, at page 168, that the Nishga tribe has persevered in asserting an interest in the lands, that they were never conquered, they did not:

> enter into a treaty or deed of surrender as many other Indian tribes did....The Crown has never granted the lands in issue in this

action other than a few small parcels later referred to -

then he sets out the claim. And at page 169, in the second full paragraph, he refers to a matter which may perhaps be pertinent to Your Honours in this case, in passing. He says:

> Consideration of the issues involves the study of many historical documents and enactments received in evidence, particularly exs. 8 to 18 inclusive and exs. 25 and 35. The Court may take judicial notice of the facts of history whether past or contemporaneous: *Monarch Steamship*, and the Court is entitled to rely on its own historical knowledge and researches.

Then he says:

> The assessment and interpretation of the historical documents and enactments.....must be approached in the light of present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species. This concept of the original inhabitants of America led Chief Justice Marshall in his otherwise enlightened judgment in *Johnson and Graham's Lessee v M'Intosh*, which is the outstanding judicial pronouncement on the subject of Indian rights to say, "But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war..." We now know that that assessment was ill-founded. The Indians did in fact at times engage in some tribal wars but war was not their vocation and it can be said that their preoccupation with war pales into insignificance when compared to the religious and dynastic wars of "civilized" Europe of the 16th and 17th centuries.
> Chief Justice Marshall was, of course, speaking with the knowledge available to him in 1823.

And then he comments on Chief Justice Davey in the judgement of the Court of Appeal of British Columbia who:

> said of the Indians of the mainland.....
>
> they were undoubtedly at the time of settlement a very primitive people with few of

> the institutions of civilized society, and none at all of our notions of private property.
>
> In so saying this in 1970, he was assessing the Indian culture of 1858 by the same standards that the Europeans applied to the Indians of North America two or more centuries before.

There seems to be an implied criticism in that of His Honour in the court below.

If I could then pass over the factual material which is set out there at pages 170, 171 and 172. At page 173 His Honour refers to a question which strikes a chord, perhaps, with Your Honours:

> When asked to state the nature of the right being asserted and for which a declaration is being sought counsel for the appellants described it as "an interest which is a burden on the title of the Crown; an interest which is usufructuary in nature; a tribal interest inalienable except to the Crown and extinguishable only by legislative enactment of the Parliament of Canada". The exact nature and extent of the Indian right or title does not need to be precisely stated in this litigation. The issue here is whether any right or title the Indians possess as occupants of the land from time immemorial has been extinguished. They ask for a declaration that there has been no extinguishment. The precise nature and value of that right or title would, of course, be most relevant in any litigation that might follow extinguishment in the future because in such an event, according to common law, the expropriation of private rights by the Government under the prerogative necessitates the payment of compensation: *Newcastle Breweries*. Only express words to that effect in an enactment would authorize a taking without compensation. This proposition has been extended to Canada.

He then refers to *DeKeyser's Royal Hotel* and *Burmah Trading*, which are the familiar cases on no taking without compensation. Then he says:

> This is not a claim to title in *fee* but is in the nature of an equitable title or interest (see *Cherokee Nation*), a usufructuary right and a right to occupy the lands and to enjoy the fruits of the soil, the forest and of the rivers and streams which does not in

> any way deny the Crown's paramount title as it is recognized by the law of nations. Nor does the Nishga claim challenge the federal Crown's right to extinguish that title. Their position is that they possess a right of occupation against the world except the Crown and that the Crown has not to date lawfully extinguished that right.

Then, further down, the next full paragraph:

> The right to possession claimed is not prescriptive in origin because a prescriptive right presupposes a prior right in some other person or authority. Since it is admitted that the Nishgas have been in possession since time immemorial, that fact negatives that anyone ever had or claimed prior possession.

That is relevant to our possession argument that I briefly touched on earlier, in answer to Your Honour.

> The Nishgas do not claim to be able to sell or alienate their right to possession except to the Crown. They claim the right to remain in possession themselves and to enjoy the fruits of that possession. They do not deny the right of the Crown to dispossess them but say the Crown has not done so. There is no claim for compensation -

Then he goes on - - -

BRENNAN J: Just pausing there for a moment. The reference on the previous page was dispossession by prerogative. That is before the reference to *Newcastle Breweries Ltd v The King*.

MR CASTAN: Yes.

BRENNAN J: Now one could understand if there is a radical title in the Crown there may be an argument that the Crown can exercise its powers under the radical title to dispossess by prerogative. Do you say that is the situation here?

MR CASTAN: No, we would not concede that the Crown has the right to dispossess by prerogative.

BRENNAN J: Well then, what is the meaning of radical title?

MR CASTAN: We would say that what it means is the ultimate dominion of the Crown as the ultimate owner under the feudal system of tenure.

BRENNAN J: Do your clients have tenure?

MR CASTAN: We say we have tenure, that we have a presumed tenure wherein we say that what we have is a right which is to be treated as held under the feudal system once the land is annexed. So that it is assumed to be held of the Crown, notwithstanding that we know for a fact that the Crown never took full ownership so as to make a grant. It is at that point one gets into the so-called fiction of Crown occupation. Some of this is dealt with in the Australian cases, which I will come to, the early Australian cases, *Steel* and *Attorney-General v Brown* and others, which I was going to turn to, where these matters are analysed.

At page 175 His Honour then sets out the passage which I have just read, from *Amodu Tijani*. I will not repeat that. It goes on with some evidence over the next pages. If I could then take Your Honours past that evidence that is set out in the course of the judgment - cross-examination. At page 185, after setting out various parts of the evidence, including some of the anthropological evidence, after the transcript reference, His Honour then says:

> Possession is of itself at common law proof of ownership:

and refers to Cheshire and Megarry and Wade -

> Unchallenged possession is admitted here.

And that there states the principle which we found what I have called the alternative claim that I earlier referred to, but I will deal with that in more detail later.

If I could then go over to page 187, after again setting out further transcript, His Honour says:

> An interesting and apt line of questions by Gould, J., in which he endeavoured to relate Duff's evidence as to Nishga concepts of ownership of real property to the conventional common law elements of ownership must be quoted here as they disclose that the trial Judge's consideration of the real issue was inhibited by a preoccupation with the traditional indicia of ownership. In so doing, he failed to appreciate what Lord Haldane said in *Amodu Tijani* -

and that is the passage I have already read this afternoon.

The trial Judge's questions and Duff's answers were as follows:

> The Court:
> Q I want to discuss with you the short descriptive concept of your modern ownership of land in British Columbia, and I am going to suggest to you three characteristics
> (1) specific delineation of the land, we understand is the lot.....
> (2) exclusive possession against the whole world, including your own family.....
> (3) to keep the fruits of the barter or to leave it.

Then the first question is put again at the top of page 188:

> Specific delineation, exclusive possession, the right of alienation, have you found in your anthropological studies any evidence of that concept being in the consciousness of the Nishgas and having them executing such a concept?

The answer is:

> My lord, there are three concepts.

And then it goes on. Towards the foot of page 189 His Honour deals with that in the supreme court. He says on the very bottom line:

> In enumerating the indicia of ownership, the trial Judge overlooked that possession is of itself proof of ownership. Prima facie, therefore, the Nishgas are the owners of the lands that have been in their possession from time immemorial and, therefore the burden of establishing that their right has been extinguished rests squarely on the respondent.
>
> What emerges from the foregoing evidence is the following: the Nishgas in fact are and were from time immemorial a distinctive cultural entity with concepts of ownership indigenous to their culture and capable of articulation under the common law having, in the words of Dr Duff, "developed their cultures to higher peaks in many respects than in any other part of the continent north of Mexico".

Then he refers to Captain Cook. In the next paragraph he says:

> While the Nishga claim has not heretofore been litigated, there is a wealth of jurisprudence affirming common law recognition of aboriginal rights to possession and enjoyment of lands of aborigines precisely analogous to the Nishga situation.

He sets out the judgment of Mr Justice Strong in *St Catherine's Milling*, and that is one of the early statements in which it was said:

> In the Commentaries of Chancellor Kent and in some decisions of the Supreme Court of the United States we have full and clear accounts of the policy in question.

The American, as it was in the United States and then adopted in *St Catherine's Milling*.

> It may be summarily stated as consisting in the recognition by the crown of a usufructuary title in the Indians to all unsurrendered lands. This title, though not perhaps susceptible of any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the crown itself, in whom the ultimate title was, in accordance with the English law of real property, considered as vested.

And it goes on. Again at page 191 in the middle passage at about the middle of the page there is a passage which is italicized:

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

> into well established rules of law.....lands in the possession of the Indians are, until surrendered, treated as their rightful though inalienable property, so far as the possession and enjoyment are concerned; in other words, that the dominium utile is recognized as belonging to or reserved for the Indians, though the dominium directum is considered to be in the United States. Then, if this is so as regards Indian lands in the United States, which have been preserved to the Indians by the constant observance of a particular rule of policy acknowledged by the United States courts to have been originally enforced by the crown of Great Britain, how is it possible to suppose that the law can, or rather could have been, at the date of of confederation, in a state any less favourable to the Indians whose lands were situated within the dominion of the British crown, the original author of this beneficent doctrine so carefully adhered to in the United States from the days of the colonial governments?

And then he says, therefore the US doctrine applies in Canada, and then goes on, emphasis added:

> To summarize these arguments, which appear to me to possess great force, we find, that at the date of confederation the Indians, by the constant usage and practice of the crown, were considered to possess a certain proprietary interest in the unsurrendered lands which they occupied as hunting grounds; that this usage had either ripened into a rule of the common law as applicable to the American Colonies, or that such a rule had been derived from the law of nations and had in this way been imported into the Colonial law as applied to Indian Nations; that such property of the Indians was usufructuary only and could not be alienated, except by surrender to the crown as the ultimate owner of the soil.

And towards the foot of the page he refers to the Chief Justice Ritchie in his judgment:

> I am of opinion, that all ungranted lands in the province of Ontario belong to the crown as part of the public domain, subject to the Indian right of occupancy cases in which the same has not been lawfully extinguished, and when such right of occupancy has been lawfully extinguished absolutely to the crown, and as a consequence to the province of Ontario. I

> think the crown owns the soil of all the unpatented lands -

"patented" referring, presumably, to a Crown grant -

> the Indians possessing only the right of occupancy, and the crown possessing the legal title subject to that occupancy, with the absolute exclusive right to extinguish the Indian title either by conquest or by purchase...

Then he continues with a reference to *St Catharine's Milling* in the Privy Council, and towards the foot of that passage from *St Catharine's Milling* in the Privy Council on page 193, the italicized portion reads:

> There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.

And he then refers to *Johnson and Graham's Lessee v McIntosh*. He says:

> It is the locus classicus of the principles governing aboriginal title.

And Mr Justice Gould, in this case, that is in *Calder*, had picked up. And over on page 194, there is a long passage from *Johnson v McIntosh*. Your Honours, I will not read all of that but I would commend it to Your Honours as being, as His Honour Mr Justice Hall says the locus classicus, though one may say that His Honour Mr Justice Hall's judgment is now taken over in modern times that role.

If I could then take Your Honours to page 195, after having quoted from *Johnson v McIntosh*, he says:

> The dominant and recurring proposition stated by Chief Justice Marshall in *Johnson v. M'Intosh* is that on discovery or on conquest the aborigines of newly-found lands were conceded to be the rightful occupants of the soil with a legal as well as a just claim

to retain possessions of it and to use it according to their own discretion, but their rights to complete sovereignty as independent nations were necessarily diminished and their power to dispose of the soil on their own will to whomsoever they pleased was denied by the original fundamental principle that discovery or conquest gave exclusive title to those who made it.

And that perhaps sums up, although in those passages Chief Justice Marshall has explained the way in which the European nations had occupied various parts of the North American continent. He refers then to *Worcester v State of Georgia* and perhaps worth reading that portion also Your Honours:

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own law. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing right of its ancient possessors.
>
> After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting and fishing.
>
> Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturalists and manufacturers?
>
> But power, war, conquest, give rights, which after possession, are conceded by the

world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin, because holding it in our recollection might shed some light on existing pretensions.

He then discusses the way in which -

> The great maritime powers of Europe discovered and visited different parts of the continent at nearly the same time.

And as he puts it -

> To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was, "that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession."
>
> This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.

And it is on those principles, as adopted by Mr Justice Hall, that we found our basic proposition on the first leg of the argument - if I can call it that - that the effect of annexation was not to abolish pre-existing rights.

He then goes on:

> The view that the Indians had a legal as well as a just claim to the territory they occupied was confirmed as recently as 1946 by the Supreme Court of the United States in the case of *United States v Alcea Band of Tillamooks*. In that case it was held that the Indian claims legislation of 1935 did not confer any substantive rights on the Indians, that is, it did not convert a moral claim for taking their land without their consent and without compensation into a legal claim, because they already had a valid legal claim, and there was no necessity to create one. The statute simply removed the necessity that previously existed for the Indians to obtain the consent of the Government of the United States to sue for an alleged wrongful taking. The judgment is based squarely on the recognition by the Court of "original Indian title" founded on their previous possession of the land. It was held that "the Indians have a cause of action for compensation arising out of an involuntary taking of lands held by original Indian title". Vinson, CJ, said at pp 45-8:
>
> > The language of the 1935 Act is specific, and its consequences are clear. By this Act Congress neither admitted or denied liability. The Act removes the impediments of sovereign immunity and lapse of time and provides for judicial determination of the designated claims. No new right or cause of action is created. A merely moral claim is not made a legal one....

Those references are important in considering the American authorities, Your Honours, because the *Tillamooks' case* is a case which we respectfully submit should be regarded as of great weight in considering the questions in this matter. In a subsequent case, the *Tee-Hit-Ton Indian case*, which I will come, a different view was reached in the United States, and that decision in the *Tee-Hit-Ton case*, six or eight years later was much relied on by our learned friends and was relied on by His Honour Mr Justice Blackburn, and, in our respectful submission, the preferable view is the view expressed in the earlier decision in the 1946 case of *Alcea Band of Tillamooks* and not view, the contrary view - and there had been of course a shift in the constitution of the court and other matters which we have put in a submission which forms part of the reply document which Your Honours have. I will not go into the detail of it now. But, Your Honours, we rely on the *Tillamooks' case*

for the reasons there expressed. Quoting from that case and going on:

> It has long been held that by virtue of discovery the title to lands occupied by Indian tribes vested in the sovereign. This title was deemed subject to a right of occupancy in favour of Indian tribes, because of their original and previous possess. It is with the content of this right of occupancy, this original Indian title, that we are concerned here.
>
> As against any but the sovereign, original Indian title was accorded the protection of complete ownership; but it was vulnerable to affirmative action by the sovereign, which possessed exclusive power to extinguish the right of occupancy at will. Termination of the right by sovereign action was complete and left the land free and clear of Indian claims. Third parties could not question the justness or fairness of the methods used to extinguish the right of occupancy. Nor could the Indians themselves prevent a taking of tribal lands or forestall a termination of their title. However, it is now for the first time asked whether the Indians have a cause of action for compensation arising out of an involuntary taking of lands held by original Indian title.
>
> A contrary decision would ignore the plain import of traditional methods of extinguishing original Indian title.

And goes on to quote from *Worcester v Georgia* and says:

> It was the usual policy not to coerce the surrender of lands without consent and without compensation. The great drive to open western lands in the 19th Century, however productive of sharp dealing, did not wholly subvert the settled practice of negotiated extinguishment of original Indian title. In 1896, this Court noted that "... nearly every tribe and ban of Indians within the territorial limits of the United States was under some treaty relations....Some more than sovereign grace prompted the obvious regard given to original Indian title.

Then he refers to the treaties with Indians in Canada.

> These treaties -

he says in the last line -

> were a recognition of Indian title.

Then he quotes from Lord Sumner in *Re Southern Rhodesia*:

> In any case it was necessary that the argument should go the length of showing that the rights, whatever they exactly were, belonged to the category of rights of private property, such that upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and forborne to diminish or modify them.

And then he sets out in *Re Southern Rhodesia* this gap.

> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions.....are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some -

knowledge -

> of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor "richer than all his tribe." On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law.

As I said earlier this morning, Your Honours, we reject the distinction.

> Chief Justice Marshall in his judgment in *Johnson v M'Intosh* referred to the English case of *Campbell v Hall*. This case was an important and decisive one which has been regarded as authoritative throughout the Commonwealth and the United States. It involved.....Grenada -

and then he refers to Lord Mansfield's reasons at pages 208-209, where he sets out certain principles. He says in the second paragraph:

> "A country conquered by the British arms becomes a dominion of the King in the right of his Crown; and, therefore, necessarily subject to the Legislature, and Parliament of Great Britain.
>
> The 2d is, that the conquered inhabitants once received under the King's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens.
>
> The 3d, that the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning.
>
> The 4th, that the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision.....Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives.
>
> The 5th, that the laws of a conquered country continue in force, until they are altered by the conqueror: the absurd exception as to pagans, mentioned in *Calvin's case*, shews the universality and antiquity of the maxim. For that distinction could not exist before the Christian era; and in all probability arose from the mad enthusiasm of the Croisades.....
>
> The 6th, and last proposition is, that if the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put."

And he says:

> A fortiori the same principles, particularly Nos 5 and 6, must apply to lands which become subject to British sovereignty by discovery or by declaration.

So the principles enunciated by Lord Mansfield as the appropriate ones for conquest, His Honour Mr Justice Hall says, by definition, must stronger apply in the case of discovery or declaration. Then there is discussion about treaties which I will not take Your Honours to. But, if we go over to page 200, just before half-way down, he says:

> The aboriginal Indian title does not depend on treaty, executive order or legislative enactment. Sutherland, J., delivering the opinion of the Supreme Court of the United States in *Cramer et al v United States*, dealt with the subject as follows:
>
> "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive. The right, under the circumstances here disclosed, flows from a settled governmental policy."

And he goes on, and towards the foot of the passage:

> "'.....We are of opinion that the section of the act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one.'
>
> The Court of Appeal in its judgment cited and purported to rely on *United States v Santa Fe*. This case must be considered to be the leading modern judgment on the question of aboriginal rights. In my view the Court of Appeal misapplied the *Santa Fe* decision. This becomes clear when the judgment of Douglas, J., in *Santa Fe* is read. He said:
>
> 'Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were' -

That passage has already been read to Your Honours in another context. They are:

'occupied exclusively by the Walapais.....then the Walapais had "Indian title" which.....survived the railroad grant of 1866.'

Then, at the foot of that quoted passage:

> "Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal governmental action.....'The fact that such right of occupancy finds no recognition.....is not conclusive'.

Then he says:

> It is apparent also that the Court of Appeal -

and he is here referring to the court below in *Calder* -

> misapprehended the issues involved in *United States v Alcea Band of Tillamooks*. This is clear from the judgment of Davis, J., in *Lipan Apache Tribe et al*. In that case it was argued unsuccessfully that affirmative recognition by Texas prior to entering the Union was essential to any legal assertion of Indian title.

If I can take Your Honours over to the relevant passage on page 202; it is about a third of the way down the page, the paragraph commencing:

> To the extent that the Commission and the appellee believe that affirmative governmental recognition or approval is a prerequisite to the existence of original title, we think they err. Indian title based on aboriginal possession does not depend on sovereign recognition or affirmative acceptance for its survival. Once established in fact, it endures until extinguished or abandoned.....It is "entitled to the respect of all courts until it should be legitimately extinguished".

The beginning of the next paragraph:

> The correct inquiry is, not whether the Republic of Texas accorded or granted the Indians any rights, but whether that sovereign extinguished their pre-existing occupancy rights.

That is the position which we respectfully would adopt. Then he refers to the Canadian treaties at

the foot of page 202 and over on to page 203, and then, where His Honour's words resume, about a third of the way down:

> If there was no Indian title extant in British Columbia in 1899, why was the treaty negotiated and ratified?

This in support of the contention that the rights clearly survived the change of sovereignty.

He then refers at some length to the proclamation of 1763 which was applicable in North America, and that, of course, is irrelevant for present purposes, the question of whether the rights were founded on the proclamation. If I can pass over those passages and go over to page 208, His Honour poses the question then finally which is the ultimate question for decision in that case, at the top of page 208:

> This important question remains: were the rights either at common law or under the Proclamation extinguished? Tysoe, J. said in this regard.....of his reasons: "It is true, as the appellants have submitted, *that nowhere can one find express words extinguishing Indian title..."*
>
> The parties here agree that if extinguishment was accomplished, it must have occurred between 1858.....and 1871. The respondent relies on what was done by Governor Douglas and.....Seymour, who became Governor in 1864.

He says:

> Once aboriginal title is established, it is presumed to continue until the contrary is proven. This was stated to be the law by Viscount Haldane in *Amodu Tijani v Secretary, Southern Nigeria* at pp. 409-10:
>
> Their Lordships think that the learned Chief Justice in the judgment thus summarised, which virtually excludes *the legal reality of the community usufruct,* has failed to recognize the real character of the title to land occupied by a native community. That title, as they have pointed out, is prima facie based, not on such individual ownership as English law has made familiar, but on a *communal usufructuary occupation,* which may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference. In their opinion there is no evidence that this

kind of usufructuary title of the community was disturbed in law, either when the Benen Kings conquered Lagos or when the cession to the British Crown took place in 1861. The general words used in the treaty of cession are not in themselves to be construed as extinguishing subject rights. *The original native right was a communal right, and it must be presumed to have continued to exist unless the contrary is established by the context or circumstances.*

Passing on to the next paragraph:

> The appellants rely on the presumption that the British Crown intended to respect native rights; therefore, when the Nishga people came under British sovereignty (and that is subject to what I said about sovereignty over part of the lands not being determined until 1903) they were entitled to assert, as a legal right, their Indian title. It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation. There was no surrender by the Nishgas and neither the Colony of British Columbia nor the Province, after Confederation, enacted legislation specifically purporting to extinguish the Indian title.....The following quotation from Lord Denning's judgment in *Oyekan et al v Adele* states the position clearly. He said:
>
> > In order to ascertain what rights pass to the Crown or are retained by the inhabitants, the courts of law look, not to the treaty, but to the conduct of the British Crown. It has been laid down by their Lordships' Board that
> >
> > "Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of his predecessors avail him nothing."

And he then refers to some of the Act of State cases, including the *Joravarsingji case*. He goes on:

> In inquiring, however, what rights are recognised, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully

> respected. Whilst, therefore, the British Crown as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law.

He then refers to *The Queen v Symonds* which is a New Zealand case in 1847 approved in *Tamaki v Baker*, and he sets out a passage from Mr Justice Chapman in *Symonds*:

> The practice of extinguishing Native titles by fair purchases is certainly more than two centuries old. It has long been adopted by the Government in our American colonies, and by that of the United States. It is now part of the law of the land, and although the Courts of the United States.....will not allow a grant to be impeached.....they would certainly not hesitate to do so in a suit by one of the Native Indians.

And then passing down over the reference to *Cherokee Nation v State of Georgia*, in the last sentence on the page:

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

He refers to the statement of Justice Davis in *Lipan Apache*:

> ...In the absence of a "clear and plain indication" in the public records that the sovereign "intended to extinguish all of the (claimants') rights" in their property, Indian title continues...

And His Honour Mr Justice Hall goes on:

> It would, accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be "clear and plain". There is no such proof in the case at bar; no legislation to that effect.
>
> The Court of Appeal also erred in holding that there "is no Indian Title capable of judicial interpretation.....unless it has previously been recognized either by the Legislature or the Executive Branch of Government" -

and that, as we understand it, is the argument now put by our opponents.

> Relying on *Cook et al. v Sprigg* and other cases, the Court of Appeal erroneously applied what is called the Act of State Doctrine. This doctrine denies a remedy to the citizens of an acquired territory for invasion of their rights which may occur during the change of sovereignty. English Courts have held that a municipal Court has no jurisdiction to review the manner in which the Sovereign acquires new territory. The Act of State is the activity of the Sovereign by which he acquires the property. Professor O'Connell in his work, International Law, says:
>
> This doctrine, which was affirmed in several cases arising out of the acquisition of territory in Africa and India has been misinterpreted to the effect that the substantive rights themselves have not survived the change. In fact English courts have gone out of their way to repudiate the construction, and it is clear that the Act of State doctrine is no more than a procedural bar to municipal law action, and as such is irrelevant to the question whether in international law change of sovereignty affects acquired rights.
>
> And Mr Justice Hall says:

> The Act of State doctrine has no application in the present appeal for the following reasons: (a) It has never been invoked in claims dependent on aboriginal title. An examination of its rationale indicates that it would be quite inappropriate for the Courts to extend the doctrine to such cases; (b) It is based on the premise that an Act of State is an exercise of the Sovereign power which a municipal Court has no power to review -

and he refers to *Salaman* and *Cook v Sprigg*.

> When the Sovereign, in dealings with another Sovereign (by treaty of cession or conquest) acquires land, then a municipal Court is without jurisdiction to the extent that any claimant asserts a proprietary right inconsistent with acquisition of property by the Sovereign - i.e., acquisition by Act of State. The ratio for the cases relied upon by the Court of Appeal was that a municipal Court could not review the Act of State if in so doing the Court would be enforcing a treaty between two Sovereign States: see *Cook v Sprigg* and *Joravarsingji v Secretary of State* and *Salaman*. In all the cases referred to by the Court of Appeal the origin of the claim being asserted was a grant to the claimant from the previous Sovereign. In each case the claimants were asking the Courts to give judicial recognition to the claim. In the present case the appellants are not claiming that the origin of their title was a grant from any previous Sovereign, nor are they asking this Court to enforce a treaty of cession between any previous Sovereign and the British Crown. The appellants are not challenging an Act of State - they are asking this Court to recognize that settlement of the north Pacific coast did not extinguish the aboriginal title of the Nishga people - a title which has its origin in antiquity - not in a grant from a previous Sovereign. In applying the Act of State doctrine, the Court of Appeal completely ignored the rationale of the doctrine which is no more than a recognition of the Sovereign prerogative to acquire territory in a way that cannot be later challenged in a municipal Court.
>
> Once it is apparent that the Act of State doctrine has no application, the whole argument of the respondent that there must be some form of "recognition" of aboriginal rights falls to the ground.

We would respectfully adopt all of that. Then there is a reference to reliance on what was done by Douglas and Seymour, and the detail of that I do not think I need trouble Your Honours with.

If I could then go over to page 214. After setting out all the despatches and the statutes and instructions to the governors, His Honour then says:

> There is nothing in the record indicating that the Nishga lands have even yet been surveyed or made ready for immediate survey excepting, perhaps, the land given for the townsite of Stewart. The boundary line with Alaska was not surveyed until after the boundary settlement. Consequently, I cannot see how anything can be derived from the fact that surveys were made on Vancouver Island -

and he then talks about specific declarations by Douglas and by the council of the colony, include - and one of them is significant:

> Proclamation dated February 14, 1859, contained the following paragraph:
>
> > All the lands in British Columbia, and all the Mines and Minerals therein, belong to the Crown in fee.

And the ordinance of 1865:

> All the lands in British Columbia, and all the mines and minerals therein, not otherwise lawfully appropriated belong to the Crown in fee.

And an ordinance in 1866 provided:

> "The aborigines of this colony or the territories neighbouring thereto" could not pre-empt or hold land in fee simple without obtaining special permission of the Governor in writing.
>
> The appellants do not dispute the Province's claim that it holds title to the lands in fee. They acknowledge that the fee is in the Crown. The enactments just referred to merely state what was the actual situation under the common law and add nothing new or additional to the Crown's paramount title and they are of no assistance in this regard to the respondent. In relying so heavily on these enactments, the respondent is fighting an issue that does not arise in the case and is resisting a claim

never made.....As to the Ordinance of 1866, the limitation on the right of an aborigine to hold land in fee simple has no bearing whatsoever on the right of the aborigine to remain in possession of the land which has been in the possession of his people since time immemorial.

And then he refers to a letter to the Colonial Secretary of 1861 which sets out in paragraph 2:

> As the native Indian population of Vancouver Island have distinct ideas of property in land, and mutually recognize their several exclusive possessory rights in certain districts, they would not fail to regard the occupation of such portions of the Colony by white settlers, unless with the full consent of the proprietary tribes, as national wrongs; and the sense of injury might produce a feeling of irritation against the settlers, and perhaps disaffection to the Government that would endanger the peace of the country.
>
> Knowing their feelings on that subject, I made it a practice up to the year 1859, to purchase the native rights in the land, in every case -

and if I could just break there to take Your Honours to volume 1 of the plaintiffs' submissions, at page 24, a statement in relation to Murray Island that is very similar.

This is from our submissions which set out the recorded history and at page 23 Your Honours will see a reference to Hugh Milman, Acting Government Resident on Thursday Island reporting to Chief Secretary, Brisbane:

> "(b) Murray Island was given up entirely to the natives and the London Missionary Society. It was exceptionally rich in coconut trees" -

and refers to the inhabitants -

He imposed a new code of penalties - over on page 24 Your Honours will see the fourth of the items on page 24:

> "If anyone has any dispute with his neighbour or any other person about the boundary of his land such dispute shall be settled finally by the Mamoose and such other natives of Murray Island as he (the Mamoose) shall call into assist him."

And then goes on, Hugh Milman reported:

> "I do not see how it will be possible to administer these islands under the present laws of Queensland, more especially as touching the land question, and the tenure under which the native races are to be allowed to hold the land they own. There is no doubt that if every acre has not a reputed owner (and I am inclined to think every acre has) but every grove or single tree of any value has its proper and legitimate hereditary owner. To disturb these rights, great care would have to be exercised and the natives recompensed for any loss that they might suffer through deprivation."

And there is a striking similarity between that passage coming from Milman as Acting Government Resident reporting in 1886 and the letter of Governor Douglas in 1861, referred to at page 215, referring to the native population of Vancouver Island.

If I can then take Your Honours over to page 217, half-way down the page, His Honour, after referring to the instructions then says this:

> Having reviewed the evidence and cases in considerable detail and having decided that if the Nishgas ever had any right or title that it had been extinguished, Tysoe, JA, was inexorably driven to the conclusion which he stated as follows:
>
> "As a result of these pieces of legislation the Indians of the Colony of British Columbia became in law trespassers on and liable to actions of ejectment from lands in the Colony other than those set aside as reserves for the use of Indians."
>
> Any reasoning that would lead to such a conclusion must necessarily be fallacious. The idea is self-destructive. If trespassers, the Indians are liable to prosecution as such, a proposition which reason itself repudiates.

And we would respectfully refer Your Honour to the fact that in the present case there was a period of three years, at least, prior to Murray Island being declared a reserve by Queensland during which if this be the position so the Murray Islanders instantly, upon annexation taking place in 1879, became trespassers on the same doctrine.

There is then, at the foot of page 217, Your Honours, a commentary by His Honour Mr Justice Hall on the position in Australia. He says:

> Following the hearing, the Court's attention was drawn to a recent Australian decision in which judgment was handed down on April 27, 1971, but the report of the judgment was not available until after the appeal was argued. The case is *Milirrpum v Nabalco Pty Ltd*. It is a judgment at trial by Blackburn, J, and involved a consideration of the rights of aborigines and whether the common law recognized a doctrine of "communal native title". The direct issue was the interpretation to be given to the phrase "interest in the land" contained in s 5(1) of the *Lands Acquisition Act*, 1955-1966 relating to the acquisition of land on just terms. The issue was to this degree different from the issue here. It dealt with the validity of a grant made under the *Lands Acquisition Act*.
>
> Blackburn, J, after an extensive review of the facts and historical records involving some 50 pages, held as follows:
>
> "This question of fact has been for me by far the most difficult of all the difficult questions of fact in the case. I can, in the last resort, do no more than express that degree of conviction which all the evidence has left upon my mind, and it is this: that I am not persuaded that the plaintiffs' contention is more probably correct than incorrect. In other words, I am not satisfied, on the balance of probabilities, that the plaintiffs' predecessors had in 1788 the same links to the same areas of land as those which the plaintiffs now claim."
>
> That finding necessarily disposed of the claim being made. However, the learned Justice proceeded with a very comprehensive review of much of the case law regarding the rights of aborigines and the questions of the recognition and extinguishment of aboriginal title. It is obvious that all of the observations contained in his judgment following the finding of fact above set out were obiter dicta. In his review he dealt with the trial and appeal judgments in this case and said:

> "I consider, with respect, that *Calder's case*, though it is not binding on this Court, is weighty authority for these propositions:
>
> 1. In a settled colony there is no principle of communal native title except such as can be shown by prerogative or legislative act, or a course of dealing.
>
> 2. In a settled colony a legislative and executive policy of treating the land of the colony as open to grant by the Crown, together with the establishment of native reserves, operates as an extinguishment of aboriginal title, if that ever existed."
>
> It will be seen that he fell into the same errors as did Gould, J., and the Court of Appeal. The essence of his concurrence with the Court of Appeal judgment lies in his acceptance of the proposition that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer. That proposition is wholly wrong as the mass of authorities previously cited, including *Johnson v. M'Intosh* and *Campbell v. Hall*, establishes.

And His Honour then goes on to deal with the standing issue which need not trouble us.

Your Honours will have observed that His Honour Mr Justice Hall's judgment covers a wide range of issues. It is true that the specific issue raised and which was called on for decision was the question of extinguishment and whether those various proclamations, whether the creation of a *Crown Lands Act* scheme, so to speak, amounted to an extinguishment and His Honour said they did not, they did not amount to a clear and plain expression, but the fundamental basis of His Honour's decision, and the fundamental matter to which he draws attention is that those rights survive until extinguished. The question is merely one of, "Has there been an extinguishment or what would amount to sufficient to extinguish?" His Honour Mr Justice Judson, whose judgment is considerably shorter but which reflects the judgment of the other three of the six judges who considered this matter, proceeded on the same basis, that is to say, he proceeded on the basis that the Indian title existed at common law, that it continued after annexation and that the question to be asked was one of extinguishment. He, however, came to the view that the existence of the

pattern of lands legislation, British Columbia in that case, did amount to sufficient intent to extinguish. He also referred to the American authorities and also took the view that the proclamation of 1763 did not bear upon the matter and, perhaps, just one passage from his judgment at page 156:

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was "dependent on the goodwill of the Sovereign".

And then went on to consider whether the legislation amounted to and the proclamations were significant enough to amount to an extinguishment. The other matter that I should draw Your Honours attention to is that at page 165, His Honour Mr Justice Judson adopted what I have called the alternative line of American authority on the question of whether the Indian title was such as to require compensation; in effect, whether it was an interest in property. At page 165, His Honour refers - perhaps I should take Your Honours to the bottom of page 164. He reviews the *Tillamooks case* which is the American case that Mr Justice Hall had referred to as holding that there was a compensable interest, and at the foot of the page he says:

> This was the first time that such a claim had been accepted and paid for in the United States. There had been previous cases where lands which had been reserved for Indians pursuant to treaty had been taken by the United States without the consent of the Indians.

And then, at page 165, he says:

> In view of the subsequent developments in the *Tillamooks* and *Tee-Hit-Ton* cases, the basis of the award for compensation is of great interest. The Shoshones were awarded not only the value of their property rights at the time of taking, but also such additional

amount as might be necessary to award just compensation, "the increment to be measured either by interest on the value or by such other standard....

And he refers to *Klamath case*, he says:

> The significance of the *Tillamooks* case is that the Court held that the principle of awarding compensation for the taking of Indian Reserves applied equally to claims arising out of original Indian title. The ratio of the majority appears in the following paragraph.....
>
> Nor do other cases in this Court lend substance to the dichotomy of "recognized" and "unrecognized" Indian title.....Many cases recite the paramount power of Congress to extinguish the Indian right of occupancy by methods the justice of which "is not open to inquiry in the courts." -

He refers to *Sante Fe* -

> Lacking a jurisdictional act permitting judicial inquiry, such language cannot be questioned where Indians are seeking payment for appropriated lands; but here in the 1935 statute Congress has authorized decision by the courts.....some cases speak of the unlimited power of Congress to deal with those Indian lands which are held by what petitioner would call "recognized" title; yet it cannot be doubted that, given the consent of the United States to be sued, recovery may be had for an involuntary, uncompensated taking of "recognized" title. We think the same rule applicable to a taking of original Indian title. "Whether this tract...was properly called a reservation...or unceded Indian country,...is a matter of little moment...the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration.

Now, His Honour, then goes to the foot of page 166, having recited that, and picks up what I will call the alternative line of cases to the *Tillamooks*. He says at the last line of the page:

> The next case is *Tee-Hit-Ton Indians v United States.* The United States had taken certain timber from Alaskan lands which the Indians said belong to them. They asked for compensation. In this case compensation

> claimed did not arise from any statutory direction to pay. The petition was founded on the Fifth Amendment and the aboriginal claim against the lands upon which the timber stood. The suit was one which could be brought as a matter of procedure under a jurisdictional Act of 1946 permitting suits for Indian claims.....The Court held that the recovery in the *Tillamooks* cases was based upon a statutory direction to pay for the aboriginal title in the special jurisdictional Act.

And he stresses:

> Again, I say this was, in effect, an adoption of the opinion of Mr Justice Black.....that the basis of recovery was statutory.

He then refers to the portion of the Fifth Amendment:

> "nor shall private property be taken for public use, without just compensation."

And he says:

> The finding of the Court in the second *Tillamooks* case was that aboriginal title did not constitute private property compensable under the Amendment.
>
> This position is spelled out in the *Tee-Hit-Ton case*. In the opinion of the Court, in discussing the nature of aboriginal Indian title, it is said:
>
> This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.
>
> In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation.

Now, Your Honours will see that His Honour has picked up and adopted the *Tee-Hit-Ton* view in America, as distinct from the approach of

Mr Justice Hall, who has adopted for Canada, what I will call the first *Tillamooks* view, and there is some suggestion that the first *Tillamooks case* was based on a statutory direction to pay, but an examination of the actual case itself makes it clear, as we have already pointed out, that in that first *Tillamooks case* all that the Act did was to create a jurisdiction, it created no new rights and the court there said that the rights were - - -

McHUGH J: Mr Castan, do any of the cases indicate what is the basis of this grant on the *Tee-Hit-Ton* basis? Is it fiction, or - - -

MR CASTAN: The basis of the - - -

McHUGH J: Of the grant of occupancy to the aboriginal occupant?

MR CASTAN: No. They are not talking about a grant of occupancy, with respect, Your Honour. What they are referring to is a right of occupancy. It is assumed that the right exists.

McHUGH J: Well now, I am just referring to the passage at 167 - - -

MR CASTAN: The right which the sovereign grants and protects?

McHUGH J: Yes. What is the nature of the grant? Is it a fiction, or where does it - where are the cases - - -?

MR CASTAN: I can only assume that it is a fiction or a presumption in *Tee-Hit-Ton*, because in saying that in *Tee-Hit-Ton* Their Honours were running contrary to the thrust of everything that was said from *Johnson v McIntosh* on in the American cases. In *Tee-Hit-Ton* itself, the majority judgment purports to rely - it actually sets out passages from *Johnson v McIntosh*, but then goes on to use language, such as, "the grant", and says of course, that it is to be protected in the way set out, but I cannot offer any assistance, Your Honour. The only assistance - one can, reading the *Tee-Hit-Ton* decision carefully - and I do not want to go into the detail of it now; it needs very careful analysis - and we have submitted a written memorandum on it which forms part of the reply document that has been submitted to Your Honours, and it may be more pertinent as a matter for Your Honours to consider in due course.

Our submission about *Tee-Hit-Ton* is that when you examine it very carefully, what had occurred was a very great concern about the fact that a

large area of land might become the subject of compensation, thereby giving rise to a very substantial payment, quantified in one of the footnotes as billions of dollars, and that therefore to run with the first *Tillamooks* decision of 1946, which treated these as compensable, would be to place a very substantial financial burden upon the United States, and that is expressly said in the footnote as a matter of concern, though it obviously does not bear on the principles and the text of the judgment purports to proceed in accordance with principle. But in our respectful submission, the better view is that which was expressed in the 1946 decision and we would respectfully commend it to Your Honour and submit that it should be followed as it was by His Honour Mr Justice Hall in 1973 in Canada.

Your Honours, the *Calder case* is, one might perhaps term it, the foundation of the subsequent development of these rights in Canada and we would respectfully submit that it establishes and lays down principles which are highly relevant and applicable to the situation here.

There was some discussion and comment on the meaning and effect of *Calder* and how it was decided in the case of *Guerin v The Queen* in Canada, (1984) 13 DLR 4d 321. The question that was raised there actually related to an alleged breach of trust arising from the leasing to a golf club of part of an Indian reserve in Vancouver. The court dealt with the concept of fiduciary relationship and I will come back to this case on that topic. But, commencing at page 334 of the report, the court dealt with fiduciary relationship. Then, at page 335 under the heading of "(a) The existence of Indian title", the court commented on *Calder* and there is some assistance to be gained from that. This was a judgment of Mr Justice Dickson which was the judgment of the majority on the ultimate decision on fiduciary and trust interests:

> In *Calder et al*, this court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands. With Judson and Hall JJ. writing the principal judgments, the court split three-three on the major issue of whether the Nishga Indians' aboriginal title to their ancient tribal territory had been extinguished by general land enactments in British Columbia. The court also split on the issue of whether the Royal Proclamation of 1763 was applicable to Indian lands in that province. Judson and Hall JJ. were in agreement, however, that aboriginal title

existed in Canada (at least where it has not been extinguished by appropriate legislative action) independently of the Royal Proclamation of 1763. Judson J. stated expressly that the Proclamation was not the "exclusive" source of Indian title. Hall J. said that "aboriginal Indian title does not depend on treaty, executive order or legislative enactment".

Passing over the Royal Proclamation, His Honour says:

> In recognizing that the Proclamation is not the sole source of Indian title the *Calder* decision went beyond the judgment of the Privy Council in *St. Catherine's Milling*. In that case Lord Watson acknowledged the existence of aboriginal title but said it had its origin in the Royal Proclamation. In this respect *Calder* is consistent with the position of Chief Justice Marshall in the leading American cases of *Johnson v M'Intosh* and *Worcester v State of Georgia*, cited by Judson and Hall JJ. in their respective judgments.
>
> In *Johnson v M'Intosh* Marshall C.J., although he acknowledged the Royal Proclamation of 1763 as one basis for recognition of Indian title, was none the less of opinion that the rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty made by various European nations in the territories of the North American continent. The principle of discovery which justified these claims gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians' rights in the land were obviously diminished; but their rights of occupancy and possession remained unaffected. Marshall C.J. explained this principle as follows, at pp. 573-4:
>
> "The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. . . . It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.
>
> Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights

thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

The principle that a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants was approved by the Privy Council in *Amodu Tijani*. That principle supports the assumption implicit in *Calder* that Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, none the less predates it. For this reason *Kinloch v Secretary of State for India, supra; Tito v Waddell*, and the other "political trust" decisions are inapplicable to the present case.

He is here concerned with the question of trust.

The "political trust" cases concerned essentially the distribution of public funds or other property held by the government. In each case the party claiming to be beneficiary under a trust depended entirely on statute, ordinance or treaty as the basis for its claim to an interest in the funds in question. The situation of the Indians is entirely different. Their interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s.18(1) of the *Indian Act*, or by any other executive order or legislative provision.

It does not matter, in my opinion, that the present case is concerned with the interest of an Indian band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. the Indian interest in the land is the same in both cases.

Then he goes on:

The nature of Indian title.

> In the *St Catherine's Milling case*, the Privy Council held that the Indians had a "personal and usufructuary right" in the lands which they had traditionally occupied. Lord Watson said that "there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever the title was surrendered or otherwise extinguished". He reiterated this idea, stating that the Crown "has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden". This view of aboriginal title was affirmed by the Privy Council in the *Star Chrome case*. In *Amodu Tijani*, Viscount Haldane explained the concept of a usufructuary right as "a mere qualification of or burden on the radical or final title of the Sovereign". He described the title of the Sovereign as a pure legal estate, but one which could be qualified by a right of "beneficial user" that did not necessarily take the form of an estate in land. Indian title in Canada was said to be one illustration "of the necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle". Chief Justice Marshall took a similar view in *Johnson v M'Intosh*, saying, "All our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy".

At page 339 he then tries to reconcile these various concepts about what is the nature of the title. He says in the first full paragraph:

> It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest of some sort, and those which characterize it a personal, usufructuary right. Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law. There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has none the less arisen because in neither case is the categorization quite accurate.

> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the sui generis interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.

And over again at 341, some short passages, after discussing fiduciary obligation, he says, at the top of the page:

> I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.

Then he says, in the next paragraph:

> The categories of fiduciary, like those of negligence, should not be considered closed -

and then discusses the political trust cases. He says:

> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law

> context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the Indians' behalf does not of itself remove the Crown's obligation from the scope of the fiduciary principle. As was pointed out earlier, the Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is none the less in the nature of a private law duty. Therefore, in this sui generis relationship, it is not improper to regard the Crown as a fiduciary.

Now that, Your Honours, is an attempt by the Supreme Court to endeavour to reconcile the various notions, and of course there are a series of these notions that have come out of these cases as to what the character is, and ultimately what Their Honours are saying in the Supreme Court of Canada is that it is sui generis. It is unique. And in the endeavour to characterize it by reference to what we might call conventional legal categories, inevitably difficulties arise, and so His Honour Mr Justice Dickson in *Guerin* says, "Well, the better approach is to treat it as sui generis and then to see what the appropriate remedy or relief is that is relevant for the purpose of the particular case".

There is some discussion in the case of *Sparrow* in the Canadian Supreme Court, which is the last of the Canadian cases that I was going to take Your Honours to, which tends - - -

McHUGH J: Do any of these cases deal with the right of disposition? They seem to deal with the right of occupancy.

MR CASTAN: Yes, and the answer, Your Honour, is no, because the approach that is taken is that what the Indians have in those sorts of situations is a right to dispose only to the Crown because the Crown has taken what is called the right of pre-emption, and also because what they are dealing with in those cases are what seem to be in each case a communal kind of interest of a band or a group of Indians. More analogous, perhaps, to some of those which are

discussed in the English cases coming out of Africa, where they are talking about communal usufructuary rights. And so they have - - -

MASON CJ: But they are all cases which involve rights of occupation and rights of use, are they not?

MR CASTAN: They have involved rights of occupation and rights of use, but in responding to the question of alienation, the question has not been dealt with in those terms because the legal principle laid down is that they cannot alienate. They cannot alienate other than to the Crown - perhaps I should qualify it in that sense - because there is this doctrine of pre-emption that has been developed, originally, it appears, from the United States cases, that it is the government - or originally from the British Crown in America, in the colonies - that it is the government which has the ability to acquire and that no acquisition will be permitted, and there is perhaps some - - -

MASON CJ: Sometimes there is more to it than that, is there not, because underlying some of the cases there appears to be the notion that the rights of occupation and rights to use are not, in essence, proprietary rights?

MR CASTAN: Certainly, Your Honour, and that is what perhaps His Honour Mr Justice Dickson was seeking to reconcile when he identified this dichotomy between the personal right and the larger right.

MASON CJ: Yes.

MR CASTAN: The question of whether they should be characterized as proprietaries is at the heart of that debate that I referred to in passing in the American authorities between the 1946 *Tillamooks case* and the 1954 *Tee-Hit-Ton case*, and it does lie at the heart and there have been different views expressed.

It is clear that there has not been a final resolution of that and nothing after *Guerin* in Canada seems to have finally reconciled that question beyond the kind of reconciliation that one finds in the passage I just read from His Honour Mr Justice Dickson. So, one does not find the wrapped up or easy answer from any of these authorities. What does seem clear, as a principle, is the principle that the interests survive annexation; what does seem clear as a principle is that in order to extinguish - - -

McHUGH J: That is ambiguous, is it not, when you say the interests survive annexation? Some interests seem

to survive the right to occupy, the right to use, but do the cases go any further than that?

MR CASTAN: No, quite so, Your Honour, on the ability to alienate other than to the Crown or to the US government in the American cases, it seems clearly not to survive on these cases. In other words, they suggest that the Crown has taken a pre-emptive that the taking by the Crown of what is called the ultimate or radical title carries with it the right of pre-emption and that, therefore, the ability to alienate to others - and I say "others" meaning outside the whatever levels of alienation exists within the group themselves, if there be such a right. But the ability to alienate to outsiders is limited because the doctrines themselves that have been developed impose that limit. It is discussed in the earlier cases as a protective notion; that it is protecting the relevant band or the relevant group.

McHUGH J: Does that not seem to indicate that upon the Crown taking over there is a new regime in which certain limited rights, somewhere between proprietary and personal, are conferred on the occupants?

MR CASTAN: In our respectful submission, it does not lead to the conclusion that they are in any way conferred on the occupants. It is true that there is a new regime; it is true the cases seem to suggest that there is the ultimate title or ultimate dominion over the land or radical title, perhaps - if that term is used in some of the cases - but the cases do not seem to say that the regime is imposed and then some rights conferred; it is rather that the pre-existing rights, if they include an ability to alienate at all - and it would seem with some of the tribes there it would not be part of their capacity in any event - but if there be such a right it is terminated. That is to say that the taking of sovereignty does carry with it, at least to that extent, the termination of that right if it otherwise exists.

TOOHEY J: But is there a decision that positively deals with a situation where there was a right to alienate, that, to use your expression, did not survive annexation by the Crown?

MR CASTAN: I think the answer to that is probably no, but we have not looked at it looking for that particular perspective and one would have to re-examine the authorities.

TOOHEY J: I only put it to you, Mr Castan, because you have more than once spoken about the right of alienation not surviving.

MR CASTAN: I put it that way because what seems to be said in the cases is that there is a right of pre-emption. The right of pre-emption means only the Crown can purchase, that purchases by others, even if there be a right under the regime of the Indians or the relevant Aboriginal group prior to annexation, prior to the change in sovereignty, but that even if there was such a right, after the Crown takes possession, takes sovereignty, that right can only be exercised by the Crown.

It is precisely in accord with what happened with Governor Burke in relation to the proposed acquisition by John Batman in Melbourne at Port Phillip, that the purported acquisition was simply not recognized because only the Crown could acquire, assuming that the relevant persons had a power of disposal under their own system in any event.

The answer to Your Honour's question is that we have not located that. The situation in Papua would bear investigation and we will perhaps have a look overnight at *Daera Guba*, where there is an acknowledgement that they are continued after the annexation a right to dispose, because that is a case where we know there was a right to dispose under the traditional, or under the customary system because there had been that particular acquisition that was the subject.

Whether those natives could continue to dispose after the change of sovereignty I am not certain, but that might not give us much guidance because, of course, in that case a statutory regime was imposed shortly after annexation, of course, and so one does not get the kind of question arising. Once a statutory regime which acknowledges land interests and permits them to be disposed of is imposed, the questions we are concerned with do not arise. And that happened, of course, in Papua subsequently, so while it is a useful example on the pre-annexation situation, it does not take us too far on these questions when you look at it as a post-annexation situation. But we will certainly endeavour to have a look at that.

I am reminded, of course, that there is an interesting question arising in this case, that does not seem to have arisen in the other cases, because these cases which are dealing principally with communal interests in land do not raise any question of the survival of rights to dispose inter

se between the members of the community that was, so to speak, sovereign over that area prior to the change of sovereignty.

Here we have the unusual situation of a system in which there was a power of disposition which existed, and it is similar perhaps to the Papua situation. Similarly they had a right to dispose, they had interests which each individual or family owned, as one sees from *Daera Guba*, they could dispose one to another. We would submit that the correct view is that after annexation the Crown's right of pre-emption as laid down in these cases operates in respect of any purported acquisition outside the community where the custom applies.

In other words, an acquisition that the right of disposition to outsiders is restricted, the right of alienation to non-Murray Islanders is restricted by the very fact of the change of sovereignty. But we would submit that the right to dispose or alienate inter se would continue because that would not be affected. And, of course, there is ample evidence in this case of such dispositions in fact taking place inter se.

Your Honours, we have dealt in the course of those three cases with a great deal of the underlying material that goes to make up the doctrines and bears on two of the principal questions that are raised in these proceedings. Both the question of the effective annexation and what is required for extinguishment are encompassed, and many of the authorities that one would need to turn to have been encompassed by virtue of their reference and I will not, of course, be turning to those again, and our written submissions deal in considerable detail with the development of these alternate doctrines.

What I would seek to turn to next is the other major area - if I might call it that - of difference between us and focus on the issue that is raised as to the effect on pre-existing interests of the existence of a *Crown Lands Act* scheme and of acquisition of ultimate title in Australia.

By way of general introduction, there is, of course, a great body of authority in this Court dealing with the fundamentals, the way in which the so-called waste lands of the Crown came to be the subject of disposition by the colonial parliaments. The history of the *Australian Waste Lands Act* and then the conferring of power in 1855 has been dealt with in *Williams v The Attorney-General* and

Randwick Corporation v Rutledge and the *Seas and Submerged Lands Act* and then the *Dam's case* and, perhaps, most recently, in *Mabo (No 1)* in 1988, and it is a relatively familiar area, if I can use that language, Your Honours.

What has never been looked at in relation to those doctrines is whether the general expressions that one finds in judgments ranging from *Attorney-General v Brown*, in the Supreme Court of New South Wales, (1847), His Honour Mr Justice Isaacs in *Williams*, whether those general expressions bear on the question of what happens when an interest of the kind, and interest that is held by peoples prior to annexation, continues in the sense that there is a real occupation evidenced on the facts by the people concerned.

The difficulty with all of those decisions - and it is now, of course, a well-established line of authority in this Court - is that on one view of them their starting point is that the land became waste lands of the Crown and became land owned in the forced sense by the Crown, upon the assumption that they were empty and unoccupied lands. And that is an essential ingredient in the doctrines developed, although not expressed in the later cases and not made explicit but what I would seek to do is to take Your Honours to the earliest of the cases to show the way in which that doctrine developed.

From the very earliest days in the 1930s, there were decisions saying, "But in this colony, of course, all the land was owned by the Crown.", and the basis on which that is put is that the land was empty. So that, it is not like in England where there is a fictional ownership by the Crown but a real ownership by the individuals who hold their interests of the Crown.

The assumption that is expressed in the early cases is that the land is unoccupied, the land is truly wasteland, totally empty, and that on that basis, of course, that ownership by the Crown is not fictional and it is not merely an ultimate or title in dominion, an ultimate radical, it is a real ownership of the whole of the lands and then, of course, the *Sale of Waste Lands* legislation and the various provisions for *Lands Acts, Crown Lands Acts*, provide for grants of land and the whole of Australia was, in effect, treated as subject to such grants and there were provisions for reserving land for various purposes and *Randwick Corp v Rutledge*, of course, is the case that deals with the question of reserves - in that case for recreation - and in the *Dam's case* Your Honour

Mr Justice Brennan dealt in some detail with the reserve for national parks and the like, and underlying them is, we would submit, a notion that the land is empty and unoccupied.

Now, whatever - I will take Your Honours to the cases in a moment, but may I say by way of preamble, that whatever might be said about the situation in the colony of New South Wales to which the Crown took sovereignty in 1888, it is our respectful submission that the evidence here establishes that it is not possible for that assumption, whether it be founded on fact or fiction, the land being unoccupied and not subject to a real possession by other persons, it is not possible for that assumption to be made in relation to these territories annexed in 1879, because on the findings of fact as we have them, it is clear that they were not unoccupied lands as a matter of fact, and we have the findings of fact to that effect in this case, so that that underlying assumption, we would submit, cannot be made.

That then raises the question, very much put in issue by our learned friends, of the effect of the operation of the existing *Crown Lands Acts*, which were in operation in the colony of Queensland in 1879 - the particular Act, I think, at that stage, was the 1876 Act, but there had been a succession of them in similar terms - but raises the question of how that particular Act operating at that time then took effect in relation to lands which manifestly, on the evidence now before the Court in this case, were not unoccupied lands and it is our respectful submission that the fiction of the land being unoccupied, which underlies the doctrine of the Crown, in effect, becoming the owner in the fullest sense, owner not just of the ultimate or radical title, or ultimate lordship, but actual owner of the lands, cannot survive, cannot be found in a case like this and that it must yield to the fact of actual occupation.

So that, accepting that the relevant documents, as they did in this case, that the letters patent, the colonial statute of 1879, the governor's proclamation which had the effect of bringing these territories in as part of the colony, it is respectfully submitted that to the extent to which those documents provided and shall be subject to the laws in force therein - therein being Queensland - they have that phrase in them, that cannot mean, we would respectfully submit, that the effect is that the *Crown Lands Act* then in force has operations so as to somehow magically vest in the Crown entire ownership of all of the lands in the new territories that are added to

Queensland and extinguishing the actual possession and the actual ownership that pre-existed. In our respectful submission, that flies in the face of the findings and it is a legal consequence that involves turning, not merely creating a fiction for the purpose of some useful purpose of the law but simply ignoring the facts.

TOOHEY J: Mr Castan, you may be going to take us to this, in which case leave it until it is appropriate. When these early New South Wales cases spoke of the land being unoccupied, were they viewing the land as literally unoccupied or unoccupied in the sense that the land was not occupied by communities who worked the land in some way?

MR CASTAN: The cases seem to proceed on the basis that they were literally unoccupied. In fact some of them actually say, but here it was different because there was no one here; the land was empty. I will take Your Honour to that. There is one exception to that but not a case in which the doctrines of land law were ultimately decided and that is the case of *Bonjon*, a Port Phillip case in 1841 in which Mr Justice Willis discussed at length the question of occupation and possession of land in the colony. There one finds lengthy dissertation on the fact that the land was not unoccupied and he so finds and describes in detail the situation of the Aboriginal population. He deals with that at length and ultimately comes down to the conclusion that - a conclusion which was not accepted ultimately, of course, in the supreme court back in Sydney, which was that there was no jurisdiction in a criminal matter over the Aboriginal peoples; they were to be treated as a domestic, dependent nation in the way that the Americans had developed.

Well, now, that decision did not prevail but it is the one case in which a judge, in the early times, has actually described the de facto situation as he observed it and made findings relating to it at some length and came to a conclusion about an absence of jurisdiction, but it was not upheld.

But it may be appropriate to commence with *The King v Steel*, (1834) 1 Legge 65. In fact three of these cases are all in volume 1 of Legge's Reports from New South Wales. It is an 1834 case and it is, we think, the first of the cases dealing with land issues. I hesitate to say that too confidently but we think it is that.

It was dealing with the question of whether the Nullum Tempus Acts which provided for a period of adverse possession against the Crown, the

statute of 21 James I, applied in New South Wales. So it related to the question of application of ancient English legislation to the colony of New South Wales.

At page 68 of the report towards the foot of the page about nine or ten lines up from the bottom of page 68, the matter is expressed this way:

> By the laws of England, the King, in virtue of his crown, is the possessor of all the unappropriated lands of the Kingdom; and all his subjects are presumed to hold their lands, by original grant from the Crown. The same law applies to this Colony. It is a matter of history that New South Wales was taken possession of, in the name of the King of Great Britain, about fifty-five years ago. This Court is bound to know judicially, that an Act of Parliament passed in the 27th year of King George the 3rd, enabling His Majesty to institute a Colony and civil government on the east side of New South Wales. The right of the soil, and of all lands in the Colony, became vested immediately upon its settlement in His Majesty in right of his crown, and as the representative of the British Nation. His Majesty by his prerogatives is enabled to dispose of the lands so vested in the Crown. It is part of the law of England that the prerogatives can only be exercised in a certain definite and legal manner. His Majesty can only alienate Crown lands by means of a record - that is by a grant, by letters patent, duly passed under the Great Seal of the Colony, according to law, and in conformity with His Majesty's instructions to the Governor. It is also a clear rule of the same law that the right of the Crown cannot be taken away by an adverse possession, under sixty years. The Nullum Tempus Act, as it is called, was expressly passed to limit the remedy for the recovery of lands belonging to the Crown to sixty years - without the statute, there would have been no limit of time - for it is a maxim of law that the King cannot be disseized of his possessions; no laches are imputable to him - nullum tempus occurrit regi. Unless therefore the King has been out of possession of the land now claimed, for full sixty years, there is no defence in point of the mere times of adverse possession to this action.

I need not go further with that. It is merely a case in which this general proposition is stated

that forms the foundation for *Attorney-General v Brown* and the later cases, that -

> the right of the soil and all lands in the Colony became vested immediately upon its settlement in His Majesty.

MASON CJ: Now, can I ask you, Mr Castan, what progressing are we making?

MR CASTAN: Considerable, Your Honour. I was not intending to go back over those areas that are encompassed by looking at those Canadian cases.

MASON CJ: No.

MR CASTAN: Yes, I am inclined to think it would be most of tomorrow, but that we would not go much beyond that. Some of the other issues are in shorter compass.

MASON CJ: Very well, we will adjourn until 10.15 tomorrow morning.

AT 4.17 PM THE MATTER WAS ADJOURNED
UNTIL WEDNESDAY, 29 MAY 1991