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CROWN 'INVALIDATED RIGHTS OF NATIVES'

DARWIN. — Any land rights aboriginals may have had before colonisation had been invalidated by the Crown, Mr Justice Blackburn, of the Northern Territory Supreme Court, said yesterday.

Half the battle 'is won'

Mr Frank Purcell, the Melbourne solicitor for the aboriginals, said last night: "This has been more like a royal commission into the facts of tribal ownership of land

"While the decision is against my clients I believe we have won half the case.

"Throughout the judgment we have won on the facts — that the Yirrkala tribe have a system of real estate which is recognisable, even to our law.

"We have lost on the question of law in Australia recognising the issue of native land rights.

"But I think the result is still half a victory which may be crucial in the event of an appeal to the High Court, where the facts would probably not be disputed — but more legal ammunition maybe raised."

Mr. Tony Lawson, the National Director of Abscol, said yesterday the aboriginals now had no option but to take over their land physically.

Mr Lawson said that without the law on their side the aboriginals had little hope of retaining their land rights.

Abscol is the aboriginal affairs department of the Australian Union of Students. It has 130,000 members.

Mr Justice Blackburn ruled against the aboriginals in a delivered judgment given simultaneously in Alice Springs and Darwin.

The court action against the Commonwealth and Nabalco Pty. Ltd., a twin-Australian bauxite mining consortium, was dismissed.

The case was brought by the 11 tribes at Yirrkala, on Gove Peninsula.

Mr Justice Blackburn said the aboriginal elders of Yirrkala had given evidence in which they expressed language consistent with ownership.

They had used phrases such as "my country," "our country," "Land of the Rirratjingu," and "land belonging to Gumatj."

"The judge commented: "For myself, I do not think that this language is, of itself, of very much weight.

Implied

"In the English language a variety of relationships is indicated by the phrases 'my house,' 'my occupation,' 'my club,' 'my birthday.'"

Mr Justice Blackburn said he could find no authority in binding legal precedent for the proposition raised by **Mr A. E. Woodward**, QC, for the aborginals, that the extinction of native title must be by express enactment.

"Mr Woodward's proposition that the aboriginals think and speak of the land as being theirs may be properly paraphrased as: 'They think and speak of the land as being in a very close relationship to them'.

"And, in this form, there would be no dispute about it."

"There are great and difficult moral issues involved in the colonisation by a more advanced people of a country inhabited by a less advanced people.

● Mr Justice Blackburn

"These issues, though they were rightly dealt with as relevant to the matters before me, were not treated as the foundation of the plaintiffs' case.

"Had they been so treated, the case would have involved an examination, not merely of some aspects of the dealings of some European people with some aboriginal races over the past 400 years as it did, but with much of the history of mankind.

"The foundation of the argument was a proposition of law, that the political sovereignty over, and "the ultimate or radical title to" the subject land, became vested in the Crown by reasons of what Governor Phillip did in pursuance of his commissions at Sydney in 1788.

"And, thus from that time the common law applied to all subjects of the Crown in NSW, including the predecessors of the plaintiffs."

The judge said the central contention of the aboriginals was that at common law, the rights of native communities to land within territory acquired by the Crown provided that these rights were intelligible and capable of recognition by the common law.

They were rights which persisted and must be respected by the Crown and its colonising subjects unless and until they were validly terminated.

The judge traced the application of British law to the history of Australia.

He found that any rights the aboriginals may have had before colonisation had been invalidated by the Crown.

He said the land in dispute — the north-east tip of Arnhem Land aboriginal reserve — had not been included in the "possession" taken by Capt. James Cook in 1770.

The longitude of Capt. Cook's "possession" did not extend westward sufficiently to claim Gove Peninsula.

But the later claim by Governor Arthur Phillip in 1788 at Sydney Cove clearly included the subject land as part of NSW.

The judge said: "My proper procedure is to bear in mind the concept of 'property' in our law."

Beliefs

He said he looked at the aboriginal system to find what corresponded to or resembled "property."

He concluded: "With great respect for the plaintiffs' beliefs, I do not think that they help me to decide the issue before me.

"In my opinion, there is so little resemblance between property, as our law, or what I know of any other law, understands that term, and the claims of the plaintiffs for their clans, that I must hold that these claims are not in the nature of proprietary interests."

The judge found that "the greatest extent" to which clans had the right to use and enjoy clan (tribal) territory and others may not was permission to perform ritual ceremonies on the land.

It was never suggested that ritual rules excluded members of other clans completely from territory. The exclusion was only from sites.

The judge said there was a recognisable system of law which did not provide for any proprietary interest in the land.

"On the foundation of NSW therefore, and of South Australia (which originally included the NT) every square inch of territory in the colony became the property of the Crown."

Mr Justice Blackburn said: "I am not here concerned to give a balanced historical account of the relations between the aboriginal and white races in Australia.

"Everyone knows that the white race has a great deal to be ashamed of.

"What cannot be denied is that there was always an official concern for the welfare of the aboriginals — even wrere punitive measures were applied — and with this went the growth of an understanding, slow at first but later much more vital, that the occupation of land by white man was a deprivation of the aboriginals.

"For the purposes of this case, what is significant is that no attempt was made to solve this by way of the creation of law relating to title of land which the aboriginals could invoke."