Historical Document Richard Windeyer, *On the Rights of the Aborigines of Australia: A Lecture*

The following is the text of a lecture by Richard Windeyer, taken from the manuscript in the Mitchell Library, Sydney (Call No. NPL MA 1400). It is catalogued as c. 1842, however 1844 is more likely. On 29th April 1844 there was an advertisement in the Sydney Morning Herald *for a course of lectures at the City Theatre in Market Street arranged by the Commercial Reading-Rooms & Library: 'R. Windeyer Esq MC June 7 Rights of the Aborigines'. Windeyer had spoken on the topic in 1842 in a debate, but what follows is the text of the later lecture in full. It has been prepared by Jim Windeyer, and is here presented with as little editorial intervention as possible. In the manuscript Richard Windeyer makes reference to excerpts from other sources but does not transcribe them. As these passages are essential to his argument (and it is likely that he read them in his lecture), they have been included.*

Ladies & Gentlemen

If it should at first sight appear presumptuous in me to select as the subject of a Lecture, 'The Rights of the aborigines of Australia', a topic requiring no particular course of study for its mastery upon which all are presumed to have settled opinions and with which you especially as Colonists of N.S.Wales are familiar, recollection of the absence of any systematic consideration of those rights and of the fruitlessness of all that has hitherto been said respecting them will perhaps supply a sufficing apology.

Possibly also the discussion of this question on a spot where and before an audience to whom the facts that must decide it are necessarily well known will not be without its influence at home upon those who bring zeal to every good cause, but whose very zeal is apt to make them act, not according to knowledge.

It will be convenient at once to state the limits of the inquiry intended to be submitted to you. The rights of the aborigines of Australia proposed to be investigated are those they are assumed to have in the soil of this country, in its wild animals and in the enjoyment of their own laws and customs – in short the rights alleged

to be encroached upon by Britain in the establishment of the various colonies which promise to render this continental island the abode of civilization and Christianity instead of a track for the roamings of a few scattered savages. A discussion of the rights the aborigines have in common with all men so eloquently set forth in that noble declaration which proclaimed American Independence would not only be out of place in this Lecture, but must ever be uncalled for in a community so purely British as to have no thought even of the possibility of here withholding the practical enjoyment of those rights from their brethren of any race or colour. I shall assume that all my hearers have to certain extent a knowledge of the leading principles of the law of nature for although like the Bourgeois Gentlehomme who had been speaking praise all his life without knowing it, some of you may have been unaware of the mode in which your thoughts might be arranged into a system, almost any consideration of the foundation of our everyday duties must have led you to those principles.

Our enquiry will be much simplified by a statement of the customs and rights recognised by the aborigines themselves. Wherever we have settled or explored we have found the natives wandering in families over certain tracts of country without fixed dwelling place of any kind. Families that usually wander about together we have called a tribe and it is the associations connected with that word in Europe that had mainly led to the misconceptions which exist as to the real state of those to whom we have applied it. There is no bond of union between the families, one is not greater than the other, every man is independent of every other and although with notions of savage life derived from our American experience we have dubbed some of these Chiefs and others Kings they themselves know of no such distinctions. The only custom they have which has even the appearance of conferring prominent rank is in fact a mere admission to the rights of manhood common to many barbarous communities. When the youth get too old to be kept longer in subjection they undergo a species of initiation but in what it consists of they have uniformly I believe refused to disclose. The knocking out of one of the first teeth of the upper jaw forms a part of the ceremony and after it is over they are looked upon as men. If they afterwards attain to any peculiar consideration it is due to their personal prowess, to the unwillingness of all around them to quarrel with a

strong man, also to appeal with irresistible effect to the only rule the force of which they acknowledge. Let us however seek to discover this rule and to use the language of certain philanthropists the law of the aborigines in the carreer of the newly admitted member of their Society. The most important privelege attached to the youth's promotion is that of taking to himself a wife. Looking to the analogies of their customs it appears probable that the elder men of the tribe make a form of conceding that privilege just at the time it would be taken without their leave, in order that they may have the opportunity of imposing a condition on the mode of exercising it necessary to their own safety. The condition is that the wife is taken from some neighbouring family in preference to any of their own. The eager youth submitting with proper respect to the customs of his ancestors embraces the condition and either alone or with the assistance of his tribe on the first convenient or safe opportunity knocks on the head some young woman of the vicinage and carries her off from her friends, perhaps a husband who had acquired her in the same manner from a family still further off. The young man repeats this ceremony till he has the number of wives he pleases to acquire. This under favourable circumstances is the Aboriginal law of marriage. If however from the scarcity of women there are none among strangers at hand to be knocked down or that any there may be are too well guarded by husbands or brothers to make the rape safe the sable son of the forest lays himself under the obligation of borrowing a wife from some more fortunate predecessor who may have one to spare. But when the youth has acquired strength or his friend has grown weak he takes a wife from him by force. If the original possessor of the female submits well and good but if not a fight ensues which probably ends in the death of one of the parties. This is the aboriginal law of divorce.

That this statement is not in the least overcharged everyone really acquainted with the aborigines will acknowledge, but as I have met many excellent people, some too who have been in the bush utterly unaware of this internal condition I deem it right to bring before you some evidence with regard to the points at present under consideration. It is all modern & selected from the writings of undoubted friends of the blacks. The older evidence, gathered whilst our knowledge of the country was young by parties who might be supposed to be influenced against the natives I have properly passed

over. The first witness I present to you is our talented fellow citizen Mr. Surgeon Bennett whose book bearing the unassuming title of *Wanderings in New South Wales* is well worthy of your attention not only for the perfect correctness of its notices of the natives but for its pleasing sketches of our natural history. In page 173 of his first volume he gives this general statement

> Polygamy is permitted among the Australian aborigines: each takes as many wives as he pleases or can maintain, and can dismiss or assign them over at pleasure, but many have only one wife, not taking another until she is dismissed.

My next witness is Mr. Moorhouse Protector of the Aborigines in South Australia, a very worthy man as far as we may judge from his reports and who manifests at all times a becoming zeal on behalf of those whose interests are committed to his charge, although I shall have occasion to shew presently that his honesty, inexperience and perceived notions have made him their dupe. This gentleman in his Report to the Governor of South Australia dated 14 Janr 1840, printed by order of the House of Commons says

> The natives have had amongst themselves hostile feelings and manifestations. Early in December two of them were killed in a fight against two others of the same tribe. The quarrel arose in the following manner. Two wives, one belonging to each of the deceased associated with two other natives and accompanied them into the bush. The aggrieved parties wished to punish the offenders and the first time they met a fight took place; the offenders proved conquerors and I believe have kept the females.

After mentioning another disturbance arising from a similar cause Mr. Moorhouse adds

> The more I know of the morals of the aborigines the less I am astonished at these scenes of perturbation. It is well known that the native moral laws of South Australia countenances polygamy, indeed the more extensively a native can practice it the greater is he in the estimation of his brethren and since the Europeans have arrived in the Colony some have been evidently the richer. King John a well known character in Adelaide possesses four wives and they are to him a source of obtaining money.

It is unnecessary to follow the plain speaking Protector any further. Let us look at the state of the case almost on the opposite side of the continent. Mr. Handt one of the German missionaries that were settled at Moreton Bay in his Report to the Colonial Secretary for the year 1841 printed by order of the Legislative Council after stating some of the causes of the small number of aboriginal children compared with the adults says

> The proportion of males to females is likewise unequal, the former being about one third more than the latter; this circumstance frequently induces the men to steal their wives and this has given occasion to many a bloody strife.

The Reverend Mr. Gunther, a missionary in connection with the Church of England established at Wellington Valley in his report for the same year has a passage on this subject not free from the misapprehensions but pregnant with meaning to those who really know aboriginal customs & character.

> During the past year I have had particular opportunities to become acquainted with the nature of the absurd laws, the vile and superstitious practices of the aborigines and the unbounded sway which the old men exercise over their people to counteract every improvement. Those two young women alluded to were

> married one in May, the other in June last partly through my influence to what we considered suitable partners, that is to say some of the young men more advanced in civilization. But according to some strange laws and practices of theirs, the particulars of which are too lengthy to be detailed here, these marriages were considered illegal, and the elderly men, *perceiving that their stronghold was about to be shaken at its very foundation,* were utterly enraged and endeavoured to excite every aborigine against the mission, which for a time prevented even some of our young men to come near us; they even threatened the parties in question with death. Had I exercised no influence in the matter these young women who have for years been instructed at the mission, would in all probability have become the prey of very unsuitable men (*for not one of our young men could in their opinion have legally married them*) most likely elderly men possessed perhaps already of more than one wife. Indeed the costs resulting from polygamy, which is permitted by the said laws are great and manifold. On the one hand, it causes constant strife and fighting; on the other hand, the elderly or influential men, possessed of a plurality of wives, being in reality only the keepers of them have it in their power to hold out certain allurements to the young, who cannot obtain wives, and by obliging the latter, as it is considered, the former can command or extort implicit obedience. This accounts in a great measure for the well known fact that aboriginal males however useful and steady they may have been amongst Europeans when boys, as soon as they grow up to manhood they fall back into their wandering and unsettled habits.

Finally to close the evidence on this subject I will read you a short passage from the report of Mr. Hurst, Superintendant of the Wesleyan Mission at Geelong, written I believe in Decr. 1841 and published in the same return that I last cited. The Reverend Gentleman writes to Mr. Latrobe thus

> On Saturday the 12th ultimo, a party consisting of nearly 200 natives arrived on the station for the *avowed* purpose of committing murder, in order to be revenged for the death of an old man who died here of disease several months ago. Their appearance, conversation and behaviour caused the utmost alarm among the natives who were living with us, and so terrified were they that during the night several of them decamped. On Sunday we made use of every means we could devise to conciliate the hostile party, but without effect, so determined were they to carry out their murderous intentions, and in the evening about an hour after sunset a number of them clandestinely surrounded the breakwind of a man belonging to the Santgort tribe and before either he or his friends had time to make a defence several spears were driven through his body and the murderers had escaped to their own breakwinds, not however without several of them being recognized. About three o'clock on monday morning the whole of the Santgort tribe left the station. During the day matters were finally arranged, by one of the Koligan's consenting to give up his wife. The hostile tribes then went away.

I think I have said enough of evidence to satisfy you that I have correctly laid down the aboriginal law of marriage & divorce.

The Law of Husband and Wife is worthy of the foundation laid for it. It is not who wears the inexpressibles, for the answer would give a happy equality to the woman, but who wields the wadddie who has the great club law of Australia on their side, that decides the respective rights of the parties. Are we left without clues in this abstruse point? By no means. Is there a burden to be carried, the woman carries it. Is there work to be done, she does it. Is there privation of food to be endured, she endures it. I dare say that many of you who have not been out of the settled districts and only know the natives under the influence we have brought to bear upon them may be surprised to hear this and refer to the historical readiness with which the blacks share with one another any thing which is given

to them. This trait of character however so generally noted in their favour is perfectly consistent with the treatment of their women I am describing. The fact is that if a man who had something to eat given him did not share it, two or three of those who had nothing would speedily apply their grand fundamental laws to his case.

> That those should take who have the power & those shall keep who can.

This sharing is the unavoidable condition in which the few families who do congregate are able under this law to associate at all. That this is so we may be assured by the fact that where the law cannot be applied the *sharing* does not take place. Wherever we have long settled the certainty of being able to obtain food from the farm or the station has to some extent taught the aborigines liberality in sharing their supplies with the weaker sex, but in a state of nature there is no doubt of what is the ruling law in the event of scarcity, for it is the women who first suffer from want of food. Even under favourable circumstances in the older settled parts of the country observe half a dozen black men devouring an opossum or other native dainty, they eat without stint and the only proof you have that they are conscious of the presence of wives and daughters is the throwing over their shoulders to them the offal and the bones after they have been picked almost bare.

The Law of Parent & Child is not inconsistent with the rest of the Code under consideration. The facts I have hitherto brought before you I have verified both by my own experience and that of personal friends upon whose veracity I can rely. Those which I am about to state under this head I have had no direct experience of but they rest upon authority which cannot be doubted. The aborigines exercise the liberty not only of destroying but also of eating their children. That cannibalism exists throughout the length and breadth of Australia is generally known and it is but right to attribute the fact to the continual recurrence of the necessity which Dr. Lany I think it is, in his *History of the Migration of the Polynesian Nation* assigns as the origin of the practice throughout the Pacific Ocean, namely starvation – in the *History* arising in the failure of provisions on board

the boats on which the islanders were drifted to their present homes – in our case from the paucity of animals of chase and the scantiness of natural fruits so peculiarly the characteristic of the country. But that parents should be found commonly destroying their offspring is so revolting to our feelings that nothing less than the testimony we have to the fact could induce us to give it credence. Mr. Surgeon Bennett, in the volume I have before cited, after mentioning several instances of infanticide that fell under his observation, but unnecessary to be read to general audience thus speaks upon the subject:

> During a visit to the Murrumbidgee and Tumat countries, as well as other parts of the colony, I availed myself of every opportunity to procure information regarding acts of infanticide, as existing among the aborigines of this country. I succeeded in ascertaining that infants were frequently destroyed: sometimes the reason assigned was some personal defect in the infant, (whence we may attribute the fact of a deformed person being seldom seen among native tribes,) or the mother not wishing to have the trouble of carrying it about: the female children were more frequently destroyed than the males. I heard of a weak and sickly child having been destroyed, even eaten; the reason given by the unnatural parents was, that they were hungry, and the child no use and much trouble; one redeeming quality, however, was, that they displayed sense of shame when acknowledging the fact, and gave the reason for which they had committed so barbarous an act. It is seldom they will confess to destroying their offspring: one, however, who had a child by an European, acknowledged it readily; and the reason given for the commission was its being like *a warragul or native dog*. This was because the infant, like its papa, had a 'carroty poll', and thus resembled, in colour, the hair of the native dog, which is certainly not so handsome as the dark black locks of the aboriginal tribes.

A hideous but true picture of the human mind unenlightened by religion or education – without knowledge of responsibility to God or to Man.

We gather in this passage the cause of the disparity in the numbers of the sexes generally observed in native families. I will add this observation by the way, that wherever the power of the whites suppresses the native laws, although other causes tend to check the increase of the aboriginal population the change is favourable to female infant life, for not only is all dread of famine remissed, but as wives can no longer be taken by the strong hand, they are reared and their having a dash of white blood is not by any means considered an objection. Thus in the neighbourhoods with which I am best acquainted the Lower Williams and Lower Hunter, the larger proportion of the children seen with native families are half caste girls.

The internal relations, so to speak, of native society being such as we have seen it would be strange if their foreign intercourse were governed by higher principles of action. From the practices I have described the usual relation of the families ordinarily congregating is a hostile one to all others. With them as formerly nearer home, stranger and enemy are synonymous terms. To find a stranger asleep and alone is a sufficient reason for spearing him. Indeed it is rarely except under such circumstances of advantage that life is taken, their regular combats among themselves being almost bloodless from the skill with which they evade or fend off adverse weapons. The bullets of the whites not being so easily turned aside they never attempt to engage in an open contest with us after some experience of their effects. Before they have acquired this experience or found that they can obtain the objects of their desire more easily by peaceful means, they generally attempt to apply to us the only notion they have of right, namely force, and this almost as a matter of course. At an examination which took place before a Bench of Magistrates at Adelaide (detailed in the House of Commons papers before mentioned), to inquire into the circumstances of an attack made by the blacks of the Murray River on an overland party from Sydney one of the natives was called to give evidence respecting it. His statement was plain enough. His countrymen wanted the white men's sheep and sugar and thinking themselves strong enough resolved to take

them by force. Although pressed by the Protector as to whether they would have attacked the party, if not themselves first attacked he abided by his theory and seemed unable to comprehend how there could be any doubt upon a matter to him so simple and natural. It was manifest that there as all over the rest of the continent the natives were almost in that state of nature conceived by Hobbes, before the gathering of the experience which Australia has afforded since he wrote *viz.*, a state in which all having a right to every thing, a consequence is the war of all against all.

When in a state of peace, that is when food is abundant and there is no immediate cause of quarrel from wife stealing or mass slaying, the tribes for many miles round will meet together and enjoy themselves both with dance and song, until their connection with us, without other stimulus than that afforded by their pastimes, they being the only race ever discovered that had not found means to produce for use on such occasions an intoxicating liquor. I have been informed by gentlemen on whose veracity I can depend that on some of these occasions they display capabilities of refinement much greater than could be expected from their usual rude corroborries. It has been related to me that a new and popular song will travel through different coast tribes, speaking different languages and scattered over a space of 500 or 600 miles, in a few weeks. It appears too that such of our own amusements as come within the scope of their understanding they are not slow to imitate. A young aboriginal of the Upper Williams named [name unreadable] who from an early age had been a favorite of a near relative of mine was a few years back brought to Sydney and by way of treat was taken to the theatre. Amid much matter, which, from not understanding it, astonished and bewildered, more than amused him, there was one thing that especially fixed his attention and that was a *pas seul* danced by Miss Lazar. From the moment she appeared upon the stage he followed her intently with his eyes, never taking them off, hardly daring to breathe, afraid to lose a single waive of her arms and dreading lest any disturbance on his part should cause the ethereal vision to vanish. It appears that notwithstanding the vast difference there was between this exhibition and the rude imitation of Kangaroo and Emu actions prevailing in their native corroborries 'the poetry of motion' realized in Miss Lazar's performance sank deep into his soul for on his return to the forest he was able to go through

all the mazes of the *pas seul* to the unbounded admiration of the neighbouring tribes, without, I am told, missing a single step or grace belonging to it. In the study of their character and to enjoy the pleasure they have in the exhibition I have atime taken many natives to the Theatre and have uniformly found that it was the dancing that delighted them above every thing else. At some of their larger assemblages I have mentioned, they have also been known to perform a species of drama, which notwithstanding some appearances to the contrary I incline to think indigenous. The rehearsals are frequent, the performers are carefully drilled into their respective parts and every means afforded by trees, bushes, darkness and a well managed fire are taken advantage of to give effect to the scene. No woman is permitted to visit any of the preparations but when the representation takes place they, as well as all comers, sit on each side of the fire and are at liberty to call their tufts of grass, gallery, pit or boxes according to fancy without additional charge. At one of these performances, seen by the relation I have before alluded to, the plot of which turned upon the causes of death of the hero, after proper preparation his ghost was made to appear upon the scene, and I am told that the actor by his shadowy progression – the outline of white paint on his dark figure the dim and obscure glimpses which he permitted to be caught of it in the fitful blazing of the fire and the sepulchural tones of his voice showed that the natives did not much differ from the popular ideas of Europe concerning the inhabitants of the shaded below. I am afraid that this is a digression from our subject, but I could not refuse myself the pleasure of admitting a ray of light, shot from our common sensibilities, across the somber picture of aboriginal manner which truth compels me to draw.

It will I think be manifest from the details we have gone through that although following our preconceived notions we have spoken of the *laws* of the aborigines, the fact is that they have no laws properly so called – that the condemnation of the Brehon Law by Edward 3rd's Parliament at Kilkenny as a 'lewd custom' may both in the ancient and modern sense of the language be applied to their practices without a particle of injustice. Indeed not only are they without any law of convention, such as we are called upon to respect, but they have for a time been permitted to violate, to overthrow, the law of nature, which we are bound every where to respect and by our

position here are entitled, nay called upon to restore. Does it not shock common sense for us to be told that we had no right to interfere with such atrocities, passing as they do under our very eyes? Is it not a perversion of terms to call them laws? Laws in a large sense are rules of conduct by which man is directed in the right way to the end and object of his being – his happiness here and hereafter. Do the Customs of the Aborigines come within the definition? The mere statement of them is an answer to the question.

But then it is said that supposing, as we are here, we have a right to abolish these customs and impose our own laws upon the natives, we had no right to their land. The objection begs the whole question, which is whether the land be theirs? The fallacy of the Philanthropists in reproaching the British government with infringement of the aboriginal laws consisted in the assumption that they had laws. The fallacy involved in the present position is the assumption that the land *belongs* to them. The pertinacious reiteration of the charges & claims on behalf of the aborigines founded on this fallacy, would surprize us did we not know how difficult it is for the human mind to run out of its old ruts. Before the discovery of this continent Europeans wherever they had penetrated and found inhabitants had found the land more or less appropriated and forgetful of the infamy of society at once took for granted that so it must be here, – that at all events society did exist although perhaps in a primitive state. But in fact society can hardly be said to have struggled into existence among the aborigines. Indeed if we are to apply to them a conclusion of that elegant thinker and acute reasoner Sir James Mackintosh that 'no human society ever has subsisted or ever could subsist without being protected by government and bound together by laws' we cannot help denying that they have a society at all. But without discussing what is the *minimum* of elevation above the habits of the brute creation that will constitute human society, let us see how the right of property in land originates and what the aborigines of Australia have done to give them the soil of the country to our exclusion. As regards the first branch of the enquiry, I do not know that it can be made clearer in that I can afford you a higher gratification than by reading to you a few extracts from the eloquent and profound disquisition of Blackstone upon the right of property in general.

In the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man 'dominion over all the earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moves upon the earth'. This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose, that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required.

These general notions of property were then sufficient to answer all the purposes of human life; and might perhaps still have answered them had it been possible for mankind to have remained in a state of primeval simplicity: as may be collected from the manners of many American nations when first discovered by the Europeans; and from the ancient method of living among the first Europeans themselves, if we may credit either the memorials of them preserved in the golden age of the poets, or the uniform accounts given by historians of these times, wherein *'erant omnia communia et indivisa omnibus veluti unum cunctis patrimonium esset'.* Not that this communion of goods seems ever to have been applicable, even in the earliest ages, to ought but the substance of the thing; nor could it be extended to the use of it. For, by the law of nature and reason, he, who first began to use it, acquired therein a kind of transient property, that lasted so long as he was using it, and no longer: or, to speak with greater precision, the right of possession continued for the same time only that the act of possession lasted. Thus the ground was in common, and no part of it was

the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force; but the instant that he quitted the use or occupation of it, another might seize it, without injustice. Thus also a vine or other tree might be said to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the sole property of the fruit, which he had gathered for his own repast. A doctrine well illustrated by Cicero, who compares the world to a great theatre, which is common to the public, and yet the place which any man has taken is for the time his own.

[...]

Upon the same principle [the shortage of resources] was founded the right of migration, or sending colonies to find out new habitations, when the mother-country was overcharged with inhabitants; which was practised as well by the Phœnicians and Greeks, as the Germans, Scythians, and the other northern people. And as long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the the limits of the law of nature. But how far the seizing of countries already peopled, and driving out or massacring the innocent or defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour: how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those who have rendered their names immortal by thus civilizing mankind.

As the world by degrees grew more populous, it daily became more difficult to find out new spots to

inhabit, without encroaching upon former occupants: and, by constantly occupying the same individual spot, the fruits of the earth were consumed, and its spontaneous produce destroyed, without any provision for future supply or succession. It therefore became necessary to pursue some regular method of providing a constant subsistence; and this necessity produced, or at least promoted and encouraged, the art of agriculture. And the art of agriculture, by a regular connection and consequence, introduced and established the idea of a more permanent property in the soil, than had hitherto been received and adopted. It was clear that the earth would not produce her fruits in sufficient quantities, without the assistance of tillage: but who would be at pains of tilling it, if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labour? Had not therefore a separate property in lands, as well as moveables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey; which according to some philosophers, is the genuine state of nature [...].

The only question remaining is, how this property became actually vested; or what it is that gave a man an exclusive right to retain in a permanent manner that specific land, which before belonged generally to every body, but particularly to nobody. And as we before observed that occupancy gave right to temporary use of the soil, so it is agreed upon all hands that occupancy gave also the right to the permanent property in the substance of the earth itself; which excludes every one else but the owner from the use of it. There is indeed some difference among the writers on natural law, concerning the reason why occupancy should convey this right, and invest one with this absolute property: Grotius and Puffendorf insisting, that this right of occupancy is founded on a tacit and implied assent of all mankind, that the first occupant should become the owner; and Barbeyrac, Titius, Mr. Locke, and others, holding, that there is no such implied assent, neither is

> it necessary that there should be; for that the very act of occupancy, alone, being a degree of bodily labour, is, from a principle of natural justice, without any consent or compact, sufficient of itself to gain a title. A dispute that savours too much of nice and scholastic refinement! However both sides agree in this, that occupancy is the thing by which the title was in fact originally gained; every man seizing to his own continued use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by any one else.
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> Property, both in lands and moveables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shews an intention to abandon it; for then it becomes, naturally speaking, *publici juris* once more, and is liable to be again appropriated by the next occupant.

The occupation last spoken of is a continuous occupation and of course not attended with the consequent loss to the right of possession entailed by abandonment as before stated. Vattel in the first book of the work by which he is generally known has several passages to the same effect but one will suffice as an example of the views on this subject of writers professedly treating of the Law of Nature.

> The earth belongs to mankind in general, destined by the Creator to be their common habitation and supply them with food they *all* possess a natural right to inhabit it, and to derive from it whatever is necessary for their subsistence and suitable to their wants. But when the human race became extremely multiplied the earth was no longer capable of furnishing spontaneously and without culture sufficient support for its inhabitants.

> Neither could it have received proper cultivation from wandering tribes of men continuing to possess it in common. It therefore became necessary that those tribes should *fix* themselves somewhere and appropriate to themselves portions of land in order that they might without being disturbed in *their labour* or disappointed of *the fruits of their industry* apply themselves to render those lands fertile and thence derive their subsistence. Luck must have been the origin of the rights of property and dominion and it was a sufficient ground to justify their establishment.

Both of these celebrated writers you perceive trace the appropriation of land, from occupancy by all maintained in common, to individual holding excluding all other right, to *necessity* and the title of individuals or communities to their having acted upon the necessity by bestowing their *labour* upon particular portions of ground. Both of them condemn the proceedings of Europeans in America because there the aborigines had in many places from which they were driven with slaughter bestowed their labour upon the land; but Vattel adds

> the establishment of many colonies on the continent of North America, might, on their confining themselves within just bounds be extremely lawful. The people of those extensive tracts rather ranged through than inhabited them.

Since the time of Blackstone & Vattel a new and unexpected Chapter in the history of the human race has been opened to the student of his trend by the discovery of this continent. Over a space of the earth 2000 miles long by 1000 broad at the least were found 'ranging rather than inhabiting' an evergreen country, in a climate surpassing all others in salubrity, a few thousands of savages without laws, without government, without a trace of ever having yielded to the necessity which had every where else been yielded to, of making the land produce by labour what it would not produce spontaneously. That they have never tilled the soil, or enclosed it, or cleared any

portion of it, or planted a single tree or grain or root, is admitted by all, – nay except in one or two spots peculiarly situated, it is not pretended that they ever erected by way of habitation any thing beyond 'breakwinds', as a Mr. Hurst the missionary expressively calls the two or three strips of bark under which they crouch for the few consecutive nights they stop at one place. It is true that individuals speak of being born or 'jumping-up' at particular spots we occupy, as a claim on us for sugar or rum because they have found that it is one rarely resisted, but that it manifests even a conception of ownership of the substance of the soil to the exclusion of others, much more than it proves an actual appropriation to have existed may be safely denied. There are spots, not occupied by Europeans, known to have been the birth places of natives, but we never hear of their attempting to set up a right of exclusive possession. Moreover, where from any cause the aborigines have become diminished in number in the settled districts, others from neighbouring tribes will come in without any complaint of private property being encroached upon although such a proceeding would heretofore have produced as of course, and even now does occasionally, produce a fight. Indeed such an entrance into strange grounds is in their natural state an act of war because their subsistence depends upon the preservation of game and fish which in that state would be the object of the visit. But so treating such an act does not by the law of nature establish any title to the substance of the soil. On the contrary it is the violation of another law of nature consisting in an attempt to appropriate the wild animals given to mankind in common, without complying with the condition by which a right of appropriation is acquired, as we shall presently see. Although their evident continuation of the original mode of occupying the earth so effectually excluded the notion of their having according to the law of nature appropriated its substance, in our sense of the phrase as to cause the point to be generally given up by those acquainted with them, it is but candid to state that I have found these claims lately revived by Mr Moorhouse who I have before mentioned. In a report of his dated in July 1840 he announces his discovery.

> A more extended knowledge of the language has introduced us to a more general acquaintance with the

> manners and customs of these people. We find – what the Europeans thought the aborigines of Australasia did not possess – territorial rights, families owning and holding certain districts of land which pass from father to sons, never to daughters, with as much regularity as property in our own country. They go further than this; occasionally one family will barter their territory for a district belonging to another family as in the case of King John who formerly belonged to the districts of Adelaide, Glenelg, Sturt river and Hurtle 'a good estate certainly' and he exchanged them for Ugaldinga and Maitpunga Plains. One circumstance regarding property is peculiar: some own large districts of land while others have none at all. We do not know how it was originally obtained, how it happens that some have whilst others have not. Captain Jack a few years back belonged to the Koulanda (Northern) tribe and possessed no land. King John received him into his family and made him copartner with the whole of the district just mentioned. Encounter Bay Bob was the first native to claim land and gave us a distinct idea of their hereditary laws and he described to me a piece of land which was his birth right; the part he mentioned had been selected by holders of preliminary land orders but he expressed a willingness to give that up provided his excellency the Governor would let him have some equally good land in exchange. I laid Bob's claims before his Excellency who I am glad to say listened to them at once and allowed three sections in the District of Encounter Bay to be reserved. I am of opinion that Bob will cultivate a portion of his as soon as a missionary is stationed in that neighbourhood to instruct and encourage him.

Encounter Bay Bob is evidently an original genius who had discovered or been readily made to apprehend that the 'jump up' claim to land which had perhaps never fed a Bandicoot might possibly be converted into white money and I have no doubt the reserve was anything but the desired result of the speculation. With

respect to King John & Capt. Jack's claims it is much easier for me to believe either that they are humble imitators of the Great Bob & have found out the weak side of the worthy Protector or at most that theirs is the old assertion to the right of the Kangaroo & fish fastened upon the land, than that without any cause whatever there should be an exception at Adelaide to the rule found to be general all over the Continent and for which rule sufficing statutes can be assigned. I will state them to you as they first struck my own mind. I know the law of nature to be as I have read it to you, and I marvelled how it came to pass that the aborigines of Australia had as it were by common consent refused to yield to the necessity of labouring the earth to which the rest of mankind have bowed. I then imagined to myself the process by which the law of nature had come into operation. I pictured to myself the human race spreading in the hunter state, from its nursery in Asia, over surrounding tracts – the multiplication of the species – the progressive scarcity of game – the increasing contest between individuals for the spontaneous fruits of the soil – the miseries of famine occasioned till at length some parent seeing his children punished by want or some young man barely able to maintain himself, but longing to have a companion meet for him hit upon the idea that by rearing instead of devouring some of the wild lambs & kids that fell in their way or by planting a fruit tree or grains of corn and preventing their destruction during growth they would obtain a more certain supply of food and in greater abundance than by the old plan. But all who had the right of hunting over the ground would not give it up: those who wished to reap the rewards of labour would then join together to restrain the hunter from killing these tamed animals or breaking the fences of their cultivated grounds. Their doing so would constitute the first society. Other societies would spring up in imitation of them and the hunter would every where be obliged to join their numbers or be driven into remote corners by the tillers and appropriators of land. Why had not this process taken place in Australia? The necessity was the same, human sensations the same, human passions the same as elsewhere, but in endeavouring to follow out their requisitions as they had been followed out elsewhere I found that to the Australians the lamb, the kid, the corn and the fruit seed wherewith to begin were not. The kangaro was perhaps capable of domestication to a certain extent, but having no fruit, corn or root to live upon during the process it

was impossible for the wild hunter of food to stay long enough in one spot to attempt the task.

The possession of a few roots which would repay cultivation is the advantage which has induced the New Zealander to give the title he has to certain portions of the soil occupied by him. As it is not to be supposed that the Australian ever laboured without an object we may be certain that he never did what we have seen affords the only foundation upon which the right to appropriate land from the common stock can rest, and that he is, as regards title to the substance of the soil, in precisely the situation he was when driven ages back upon a shore to which nature herself had denied the elements out of which society was to arise. But putting the impossibility of the fact aside how can we reasonably expect to find a right to land which would be of no use recognized and established in the absence of all personal rights. The necessity of establishing the rights of persons is felt and acted upon before the necessity of acknowledging the rights of things. With such rights of persons as we have examined is it not the height of absurdity to talk of the title of these men of the woods to anything not under the immediate control of their bludgeons. If there were other right than that of individual might or cunning there would be some traces, however rude, of a system to punish violations of it, but whoever heard among them of judges or judgment or of punishment, beyond what the dogs in the street will join in bestowing upon any strange cur that comes among them.

Those however who insist that we have violated some natural right in appropriating the substance of the soil of this country, admitting all we have urged, finally contend that the aborigines have sufficiently complied with the conditions under which such appropriation can be made by having employed the soil in the only way they required it, namely the grazing of their Kangaroos. Granting, for the sake of argument that the mere act of grazing tamed animals in the land would give title to it, because of the labour bestowed upon the animals, we have here a fallacy similar to those we have already noted in the former propositions. It consists in assuming that the kangaroos are theirs. But what have they done to make them theirs more than ours. We are equally dwellers upon the Earth with themselves and the wild animals of the earth have been

bestowed on all mankind in common. They belong neither to individuals nor societies till brought under actual dominion. A wild animal killed or subdued belongs to the killer or the subduer but as the effect of his labour does not extend beyond the actual animal killed or subdued neither does the title thereby acquired. The present argument in favor of the natural title of the aborigines to the land is no less unreasonable than it would be to say that the sea is theirs because of the fish they have caught or may catch in it. The thing to be taken not having submitted to human power, a black man here first has no better title to subdue it than a white man here last. Let us simplify the question by reducing the contending parties to two. Imagine a pair wrecked in an unknown sea: one lands on a beautiful island, the other is drifted to a rock on its farther side where he subsists for a day or two on limpits, but at length the waves abating succeeds in swimming to the verdant shores where he hopes for a happier fate. His fellow, having walked across the island, meets him on the sands, saying 'Back to your rock and your limpits, this beautiful island is mine, all the living things on it are mine for I slept under yonder tree last night, yesterday I slew a deer and presently I intend to have one of the birds flying in the air for breakfast'. This is our case: the globe is an islet in the infinity of the creation – Centuries but days in Eternity.

The consideration of the rights of the Aborigines to the enjoyment of their laws and customs, to the soil of the country, to its wild animals is closed. We pause – How is it our minds are not satisfied? – What means this whispering in the bottom of our hearts? – Conscience! What wouldest thou? Am I my brothers keeper? – Ay, art thou, and more than thy Brother's blood, his immortal spirit shall be required at thy hands: thou quibblest of his laws, of his land, of his physical food, of his title and thy title to the things that perish; but hast thou not in thy possession the great birth right of all, and hast not shared it with him?

What answer can we give to this? Our vacillation and ill directed efforts have left us none. I had intended to shew but that this lecture without so doing exceeds all reasonable length, what in my humble judgment might have been our answer and how it might yet be given. It must content me however if, on arriving at the end, you should feel we have only reached the beginning, for the more

debased, the more vile, the more wretched we have shewn the Aboriginal to be the more imperatively is the duty cast upon us by fit means of education to make him conscious of the dignity, the holiness of the *Mind* he shares with ourselves. His claims to the baser things we have talked about we may deny, but the very evidence that enabled us to do so establishes beyond a doubt his *right* to receive at our hands all the duties which Superior Intellect owes to Inferior. In conclusion let us remember that the clear recognition of any right in another involves the moral necessity of respecting it.