

America's First Great Land Controversy: A Precedent for MABO? Connecticut Settlers vs Pennsylvania.

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On 3 June 1992, the High Court of Australia handed down its decision in the case of *Mabo and Others v. State of Queensland*. The question at issue was whether native title was an institution to be recognized and protected by the common law. Other settled countries with native populations such as the United States, Canada, and New Zealand had held that the 'rightful occupants of the soil' were the natives, but that the Crown could 'grant the soil, while [such soil was] yet in possession of the natives.' The Australian High Court determined that Australia was no different.¹

In making this decision, the High Court relied heavily upon the 1823 United States Supreme Court decision in *Johnson v McIntosh*. That pragmatic decision succinctly stated that 'if a county has been acquired and held under discovery and conquest and if the property of the great mass of the community originates from it, it becomes the law of the land ...'²

The 1823 United States Supreme Court case was not, however, the first American case to argue the question of native title in common law. In 1782, under Article IX of The Articles of Confederation a special court heard arguments in the case of *Connecticut Claimants v Pennsylvania*.³ The major issue was whether one colony had legal claim to a region it had settled and organized within another colony. A further issue was whether the individual settlers who traced their titles to a company that had purchased the region from the Indians had legal claim to the tracts on which they lived.

Prior to 1754, land speculators had concentrated their activities on exploitation of the trans-Appalachian west. They formed grand land companies and secured charters from the colonies that eventually hoped to control the

region. Some companies sanctioned their activities by treaties with the Indians. Their antagonists were French and Indians on the one part and British colonial powers on the other. Of all the land companies formed for the purpose of westward expansion, only one colony supported a company that claimed land within another colony and that was the Susquehanna Land Company.

Beginning in 1762, colonists from Connecticut had moved into the Wyoming Valley in the colony of Pennsylvania and continued to settle the entire area without the approval of Pennsylvania authorities. The matter came to a head during the American revolutionary war when a band of marauding British soldiers and Indians chased the intruding Connecticut settlers from their homes and massacred many of them. Seemingly eager to settle the controversy over who owned the land, Pennsylvania forced Connecticut to court in 1782 before the revolution was over. At that time, a disagreement between two former colonies, then fledgling states, had to be tried under the Articles of Confederation, the precursor of the United States Constitution.

Because the commissioners did not write justifications for the decision, the decision remained specific to the case. The supreme court operating under the United States Constitution made the precedent-setting decision forty years later. Nevertheless, this first and only case ever tried under Article IX of the Articles of Confederation was a forerunner in the development of legal thinking about the role of intrusion and settlement and of native title. The facts leading to the case, the arguments presented in the case, and the results of the decision show in a very specific way how controversies over prior rights to soil work their way out. If history is to be of value in policy analysis, an examination of America's first land controversy may give us an insight into the directions that the Mabo decision will take.

The saga all started one day in 1750 when a group of ten Connecticut colonists sent a

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petition to the Connecticut general assembly. The petition requested the grant of a township ten miles square in 'a Large Tract of Land Lying West of Hudson's River which is not included in any charter to any neighboring government.'⁴ The land was to be given to sixty free persons who would select the location in return for making the first settlement whereby the trade of Connecticut would be enlarged and 'a Howling Wilderness turned into fruitful fields'.⁵ The assembly promptly refused the petition, but the thought remained alive.

The notion of a new western settlement for Connecticut grew. By 1753 it was a common topic of conversation in Connecticut taverns and other meeting places. Interested parties prepared and submitted a new petition with four hundred and twenty-four names. This petition asked for a grant of four townships on the Delaware River.⁶

Another petition signed by 152 men from five Connecticut towns, Windham, Canterbury, Farmington, Plainfield, and Voluntown, but mainly Windham, asked for the right to purchase the Indian title to land in the Wyoming Valley along the northeast branch of the Susquehanna River and for the grant of a township sixteen miles square covering the valley.⁷ At its session in 1753, the Connecticut general assembly received several other petitions for western land. There can be no doubt that Connecticut colonists, hemmed in by other colonies, recognized their own pressing economic and social conditions and were looking to the west for ways to solve them.⁸

Although the Connecticut general assembly did not act on any of the petitions, neither were the men from the town of Windham, the market center of Connecticut, easily discouraged. On 18 July 1753 former assembly representatives, justices of the peace and other local officials and yeomen came together to organize the Susquehanna Land Company.⁹ The Company was not a corporation; it had no statutory basis. It was an ordinary unincorporated joint stock company. Its form was an agreement that all who subscribed would share the benefits. Selected individuals sold rights or shares, giving certificates or more accurately, receipts, in return for the money collected. The holders of the receipts had an interest in the company equal to the number of shares that they had purchased. The idea was that each share would entitle the holder to a given amount of land within an organized township whenever and wherever settlement would begin.

The name of the company was no accident. Its specific intention was to settle the Wyoming Valley, the valley that straddled both sides of the northeast branch of the Susquehanna River. Targeting the Wyoming Valley recognised that Connecticut's western boundary was New York colony, without giving up Connecticut's 1662 charter claim to land from the 'Narrogancet Bay on the East to the South Sea on the West.' The Company justified its interest in the Wyoming Valley by asserting that the Connecticut charter covered the latitude involved and had been granted prior to the Pennsylvania charter. Susquehanna Company shareholders intended to settle the region immediately, while it was still devoid of European settlers.

Pennsylvania found itself off guard in protecting its charter rights to the northeastern part of its own colony because it had not settled the area. Procedures established by William Penn did not permit legal settlement in the Wyoming Valley in 1754. Before the colony of Pennsylvania permitted legal settlement in a region, the proprietors had to purchase the area from the Indians. The land office could not grant a warrant to survey or a patent or final deed to a tract of land until it had the Indian deed in hand. The *Genealogical Map of the Counties* outlines and dates the major purchase treaties and shows that the policy had continued from the time of William Penn.¹⁰

That is not to say that Pennsylvania's policy was different from that of the New England colonies. Although Connecticut largely annihilated its Indian population in the Pequot War and King Philip's War, those wars were fought before 1700. After that, colonies adopted the policy of extinguishing the Indian title to a region before European settlers could obtain legal title in the same region. As Max Savelle showed, after the Treaty of Utrecht in 1713 the custom of purchase by formal treaty became almost universal. Perhaps the earliest insistence upon the idea was by Roger Williams; one of his arguments with Massachusetts Bay was over the Bay colony's failure to occupy the land by purchase treaty. Williams himself acquired Providence Plantation, now Rhode Island, by purchase treaty.¹¹ The purchase treaties might have been extracted on shaky grounds and the amount paid to the Indians negligible by modern standards, but in most cases, the Indians were no longer inhabiting the area they sold.

Both the Susquehanna Company and Pennsylvania thus needed to consummate a purchase treaty with the Indians before either

could settle the Wyoming Valley. The forthcoming Albany congress of 1754 gave them that opportunity. The British Board of Trade called the congress in an attempt to bring the Six Nations of the Iroquois Indians to the British side before the impending war with France. The Susquehanna Company and Pennsylvania had another agenda. Both wanted to buy land. In addition to Connecticut's official delegation to the conference, the Susquehanna Company sent John Lydius to deal on its behalf.¹² Lydius was the foremost Indian trader of the colonies. John Penn represented Pennsylvania. He was the son of Richard Penn and grandson of William Penn. John Penn had recently completed university studies and was in Pennsylvania to learn the family business.¹³ With him was Richard Peters, secretary of the Pennsylvania land office.

Both Pennsylvania and the Susquehanna Company thought they came away from the congress with what they wanted. The Indians sold to Penn and Peters a large tract of land west of the Susquehanna River in the southern part of the colony.¹⁴ They specifically told the Pennsylvania delegates that they reserved the Wyoming Valley for themselves. Nevertheless, a few days later, the Indians sold the Wyoming Valley to the Susquehanna Company. The area covered over five million acres.¹⁵ Some of the same Indians signed both deeds and both deeds were secret.

Historians have made much of the Albany congress as initiating the idea of a colonial union. As set forth by Benjamin Franklin, the plan expressed a perceived need for joint defense and maintenance of good relations with the Indians, but it also called for genuine political union. Along with other colonial assemblies and the home government, the Connecticut legislature rejected the idea of union as inexpedient for a geographic area as large as the thirteen colonies. However, the plan did offer an attractive feature for Connecticut; the legislature wholeheartedly accepted the part that recommended the establishment of new colonies in the west.¹⁶

With legislative support for the building of a western buffer zone and a deed in hand, the Susquehanna Company became very active. They increased the number of possible shareholders to 800, raised the price of shares from \$2.00 to \$9.00, formulated plans for obtaining a grant from the Crown to cover the Wyoming Valley, and began to keep account books.¹⁷ The Company was so successful that

Connecticut colonists formed two other land companies, the First and Second Delaware Companies, and secured new deeds from little known Delaware Indians.¹⁸

Although it was too late in the season to send settlers in 1754, the Susquehanna Company did send a surveying party to the Wyoming Valley in the summer of 1755.¹⁹ The surveyors reached Wyoming just before the news of Braddock's defeat at Fort Duquesne in western Pennsylvania reached the east coast. The war with the French and Indians was well under way. New Englanders needed to protect themselves from French advances south by way of Lake Champlain and Lake George. The Susquehanna Company put settlement plans aside waiting for a more secure frontier.

The Delaware Companies were more active. Their lands lay in a safer, easterly location. They built a large block house, surveyed three townships, erected log houses, a sawmill and a gristmill at Cushitunk (Coshocton, Wayne County, Pennsylvania), all before the surrender of Canada in the fall of 1760.²⁰ Although Pennsylvania did apply to the Board of Trade for a restraining order, so to speak, it was the Delaware Indians who warned of an Indian uprising should settlement continue.²¹

Despite this warning, the Susquehanna Company sent 'One Hundred Men' during the summer of 1762 to open a road from the Delaware River to the Susquehanna River, and to plant and harvest wheat. The men were to be purchasers themselves and not substitutes.²² No women or children made the journey, nor did carts or wagons. Some men went by horseback, some by foot over a rough and narrow trail.²³ As promised, the Indians entered a formal complaint with Sir William Johnson, the Crown's Indian agent in North America.²⁴ In his report to the Board of Trade, Johnson suggested a joint Connecticut-Pennsylvania commission to settle the issue. The Board of Trade responded by issuing an official Order in Council directing that emigration from Connecticut to the Wyoming Valley cease.²⁵ As soon as the Susquehanna Company learned of the forthcoming order, they reluctantly voted to stop further settlement until they could lodge their arguments before the Crown. However, the Company did continue to improve the road and plant and cultivate crops in the immediate vicinity of present day Wilkes-Barre, Pennsylvania, where they intended to lay out their first township.²⁶

Several events then ensued which held off

permanent settlement. While Eliphalet Dyer, the Susquehanna Company's emissary to England, prepared for his journey, the Delaware Indians protested in the Connecticut general assembly. Pontiac's rebellion broke out and a group of Cayuga and Oneida Indians from New York attacked the small Susquehanna Company road and farming crew on Mill Creek just north of present day Wilkes-Barre. The Indians killed about twenty colonists. The rest fled the area.²⁷ Such events made it even more difficult for ministers of the Crown to sanction a grant for westward expansion when it was in conflict with charter claims.

Eventually, it was another Indian treaty conference that encouraged both the Susquehanna Company and Pennsylvania to actively pursue settlement in the Wyoming Valley. Colonial and Indian delegates met at Fort Stanwix (Rome), New York in 1768 and negotiated a boundary line beyond which European settlement would not encroach. The Wyoming Valley was well to the east of this imaginary line. Almost immediately after the news of the 5 November 1768 signing reached Connecticut, the Susquehanna Company held a meeting and voted to continue with settlement.²⁸

Pennsylvania was also able to offer legal settlement in the Wyoming Valley as a result of its part in the Fort Stanwix treaty. Delegates were able to purchase a large swath of land that ran from northeast to southwest across the mid portion of the colony between the new imaginary western boundary line and already purchased eastern land. This large segment, known as the New Purchase or the Purchase of 1768, included the northeast branch of the Susquehanna River.

Politics over the best way to sell the land prevented Pennsylvania from opening the region to immediate settlement while the Susquehanna Company went about the business of settling the Wyoming Valley.²⁹ Forty Connecticut settlers departed from Windham, Connecticut at the end of January 1769. They crossed the Delaware at Shoemakers near Port Jervis-Milford, then walked north west to a few miles above the confluence of the Lackawanna and Susquehanna rivers and arrived at the old Mill Creek blockhouse on 8 February 1769. When they arrived they found the blockhouse occupied, so they returned to Lackawanna Creek and set up camp. About a month later, on 15 March, Pennsylvania authorities arrived and arrested everyone at the camp. On the way to jail in Easton, several escaped. As soon as the

sheriff had officially charged the others, a sympathizer who lived near Easton bailed them out.³⁰ A few returned to their homes, but the rest waited near Dingman's Ferry for a group of 200 more Connecticut settlers. The enlarged contingent returned to the Wyoming Valley and by May 20 had built a stockade and cabins.

Relations between Susquehanna Company settlers and Pennsylvania authorities further deteriorated. Near the end of the same year, Pennsylvanians forced the settlers out of the valley, but the Susquehanna Company people came back in even stronger force in the spring of 1770. Over 283 names appeared on the Susquehanna Company list of inhabitants in June.³¹ The Company surveyed the Township of Wilkes-Barre and decided where to locate four more townships before Pennsylvania even opened its land office to new settlement in the Wyoming Valley. Connecticut people had such firm control of the Wyoming Valley by the winter of 1773-1774, that the Connecticut general assembly sent a committee of three members to Philadelphia. Their goal was to reach an agreement that would make it unnecessary to appeal to the Crown to settle the dispute between the two colonies.³² Favorable opinions recently received from four eminent English attorneys, including the counsel to the Board of Trade, buoyed their mission. These opinions agreed that the settlement of its western boundary with New York did not extinguish Connecticut's claim to western land.³³

The refusal of Pennsylvania to any form of divided jurisdiction left Connecticut little choice but to assert full control over the valley. The Connecticut general assembly formed the five settled townships into the Town of Westmoreland in March 1774. They made the town part of Litchfield County, Connecticut, although it was not contiguous with any part of Connecticut.³⁴ Thereby, Susquehanna Company settlers firmly established Connecticut laws and institutions in northeastern Pennsylvania. Pennsylvanians were not welcome as company purchasers, nor did Pennsylvanians attempt to settle in the area using Pennsylvania warrants to survey. In fact, Susquehanna Company authorities purged their membership of Connecticut settlers who had taken Pennsylvania warrants. Meanwhile, the controversy over ownership of the Wyoming Valley and areas further west gave the newly formed Continental Congress an issue to debate in September and October 1774.

Although the Connecticut general assembly was cautious in its official recognition of the Town of Westmoreland and was unwilling to give it the status of full county government and representation in the Connecticut assembly, it did enlarge the town's boundaries westward in 1775 to the settlement line of 1768 and set up within it the Twenty-fourth Connecticut Militia Regiment under Colonel Zebulon Butler.³⁵ Butler had limited authority. About all he could do was advise the company shareholders to hurry and settle their allotments as occupation meant recognition of ownership. To secure its hold, the Susquehanna Company intended to fill up all the land. As a beginning they approved the survey of a new township, Ulster, far up the Susquehanna River just south of present day Athens.³⁶

Out-and-out armed skirmishes between the two rival colonies marked the end of 1775. From September through December, Pennsylvania sent armed local officials to move against the more isolated settlements and arrest whomever they could find. Pennsylvania also sent an expedition against the more fortified Wilkes-Barre, but the 24th Connecticut regiment ably outflanked the posse, despite two attacks, and sent its members scurrying home. Totally unable to control the situation, the Continental Congress decided to favor temporary jurisdiction for each colony over those areas that its settlers already controlled. Through all the years, Pennsylvania had consistently opposed any sharing of jurisdiction and her delegates angrily threatened to disregard the wishes of the congress.³⁷

The beginning of the revolutionary war with Great Britain brought considerable turmoil to the Wyoming Valley. Yielding to pleas from settlers, the Connecticut general assembly gave the town of Westmoreland county status in October 1776.³⁸ Delegates to the assembly immediately petitioned for better defense of the frontier and the assembly responded by authorizing two additional militia companies. As soon as the two companies formed, military commanders called for their assistance at Valley Forge leaving the Wyoming Valley still weakly defended.³⁹ The British and their Indian allies struck in July 1778 in what was then the famous Battle of Wyoming. They killed about 150 settlers out of a population of roughly 3,000.⁴⁰ The remaining settlers fled and either returned to Connecticut to wait out the war or camped somewhere in New York.

Although a few men returned in 1780,

families did not come back until 1783 when the war was over. By then it was too late for Connecticut to reassert her interest in Pennsylvania. The Sullivan campaign had driven the British and Indians from the Wyoming Valley in the summer of 1779. Pennsylvania immediately revived its suggestion of referring the dispute to settlement under the Articles of Confederation.

The Articles of Confederation were the result of a process that had begun even before the 1776 Declaration of Independence. On 12 June, members of the first continental congress had appointed a committee to draft articles of confederation for the thirteen colonies. Several disputes immediately arose especially over representation, taxation, and the control of western lands. The west was the issue that involved the most bitter controversy - one that evolved into an argument between the landless states, those whose boundaries were explicitly set by latitude and longitude, and the landed states whose western boundaries, as stated in their charters, extended to the sea. James Wilson of Pennsylvania, in particular, insisted that his state would not join the confederation until other states, particularly Virginia, gave up their claims to western lands.

Likewise, Maryland, Delaware and New Jersey had insisted that Virginia give up its claim to western lands before they would ratify the Articles of Confederation. As a compromise, Virginia declared invalid all private purchases from Indians of land that lay within her borders or within land to her west that she claimed. In one fell swoop, Virginia wiped out the claims of four Virginia land companies.⁴¹ One company received compensatory land elsewhere under a state grant, but the other three received nothing. In making this move, Virginia set a precedent for congress to follow. For Virginia, the land was inconsequential as it lay far west in what is now West Virginia, Indiana and Illinois.⁴²

The Articles of Confederation addressed another land issue; the settlement of disputes over private rights to soil claimed by two or more states under different grants made prior to any settlement of jurisdiction in such cases. The dispute between Connecticut and Pennsylvania over the Wyoming Valley was an example of this sort of situation. A leading New York land speculator, James Duane, was responsible for this clause.⁴³ Apparently, Duane had hoped to provide legal justification for land he had sold. The relationship between land speculators and

the continental congress was closely intertwined.

After four years of wrangling, the colonies approved the Articles of Confederation in 1781. The Articles provided the constitution of the United States for the next eight years. In the final draft, Article IX established a method for settling disputes between states over the private rights of soil.

Within several months after the last state ratified the Articles, Pennsylvania presented its formal petition to Congress to hear the Wyoming Valley case and in the summer of 1782 Congress voted to have Connecticut answer Pennsylvania's plea. Commissioners to act as judges were selected and a date in November 1782 set. The court met at Trenton, New Jersey.⁴⁴

Pennsylvania began the presentation with four major points: (1) Charles II, believing the lands west of the Delaware were vacant, granted those lands to William Penn in 1682 for a true consideration, the repayment of a debt which Charles owed to Penn's father, Admiral Sir William Penn, (2) William Penn extinguished any prior European rights by obtaining a release to the same lands from the Duke of York who had prior claim, (3) as proprietors, the Penn family extinguished Indian claims to the land by negotiating purchase treaties and, (4) some Pennsylvania people had settled in the general area before Connecticut people made their claim.

Connecticut's major points were just as impressive. They argued that (1) Connecticut was originally settled under a sea to sea grant interrupted only by the Dutch in New Netherlands and the Connecticut charter of 1662 confirmed these extensive boundaries, (2) the Duke of York could only release his claim to land held by the Dutch because he had never been granted the Pennsylvania region, (3) the Susquehanna Company did have a purchase deed from the Indians for the entire area and, (4) Connecticut had exercised legal jurisdiction over the area since lawyers in England had given favorable opinions in 1773 that the New York border did not mark the end of Connecticut land, but that the Connecticut claim to western land was still valid.⁴⁵

After presenting their major points, the two sides summed up. The final arguments were neither new then nor out of use today. Connecticut argued that discovery of empty lands gave right to them; that Indians could have no permanent landed property and that to think

otherwise was to ignore God's commandment to be fruitful and multiply and fill up the earth. Connecticut also argued that settlement and cultivation defined land ownership. Further, Connecticut said that the royal charter granted to her in 1662 was based on the earlier grant of 1631 and definitely predated the Pennsylvania charter of 1682.

Pennsylvania's final argument sought to throw doubt on the Connecticut idea that prior discovery gave complete rights. Pennsylvania insisted that the Dutch settlements could not be ignored. Pennsylvania further argued that grants from the Crown were only ways of establishing title to whatever one wanted to claim. In any case, Pennsylvania said, the original grant of Connecticut conveyed no rights of jurisdiction nor of soil except that the granting body was a trustee of these rights. In concluding, Pennsylvania insisted upon the Indian right to the soil and that the vague language used in the Connecticut charter left the charter meaningless.

On December 30, just seven weeks after the trial began, the commissioners handed down the only judicial decision ever made under Article IX of the Articles of Confederation. The decision was unanimous and the commissioners unanimously agreed not to make their reason public. The court awarded jurisdiction of the disputed Wyoming Valley to Pennsylvania. The decision was called the Trenton Decision.

However, the Trenton Decision by no means marked the end of the saga nor was it the only development with implications for Mabo. The Trenton decision did not address the private right of soil. The court only urged fair treatment of the settlers until a local court could hear a test case involving individual land holders.

Connecticut settlers responded to the Trenton Decision by pouring back into the Wyoming Valley. They now turned to the Pennsylvania Assembly and petitioned that body for confirmation of their land holdings.⁴⁶ The Susquehanna Company, itself, responded by further efforts to fill up the region. A radical faction of the company, those who doggedly wanted to continue their speculative efforts, gained control. Led by John Franklin, they moved the account books from Windham, Connecticut to Wilkes-Barre, Pennsylvania and began to sell new shares. Known as 'wild yankees' by their Pennsylvania adversaries, they sold full shares, half shares, and whole townships. They even let half-share men who settled for three years become full company

members with full voting rights.⁴⁷

Connecticut settlers resorted to violence and political maneuvering, but it is not correct to say that it was all one sided. Between 1783 and 1787, Pennsylvania initiated the use of force more often than Connecticut settlers. Pennsylvania's main idea was to arrest the Company leaders, destroy all military stores, and force Pennsylvania local government upon them.

As for legally testing the private rights of soil in another court authorized by the Continental Congress, only Pennsylvania proposed to pursue that route. While Connecticut procrastinated by non appearance at the day set for considering a second court, the issue of western land cessions daily became more important to the new federal government and finally overshadowed any interest that Congress had in getting involved in the Connecticut-Pennsylvania controversy again.

The western land issue also marked the end of any possible influence that the Connecticut general assembly might have exerted on behalf of the Susquehanna settlers. In return for being able to keep a portion of its Western Reserve, located in the current state of Ohio, Connecticut promised Pennsylvania, in a gentleman's agreement, not to support the Susquehanna and Delaware companies. In its turn, Pennsylvania promised to treat the actual Wyoming settlers fairly.

The burden of protecting private rights of soil, thus fell squarely on the shoulders of the settlers. They united and petitioned the Pennsylvania legislature to set the Wyoming Valley off as a separate county. Sensibly, the legislature agreed and at the end of 1786 Luzerne County came into being. Connecticut settlers now had a badly needed voice with Pennsylvania politicians. The next battle would be over which side controlled the county, Connecticut settlers or absentee Pennsylvania land holders.

Pennsylvania kept its word to treat the settlers fairly by passing the Confirming Act in 1787.⁴⁸ This act recognized the right of Connecticut settlers and their heirs to lots 'occupied and acquired' by actual settlers and assigned to them before the Trenton Decision of 1782. To qualify, the settlers needed to present their titles to a board of commissioners within the ensuing eight months. Commissioners accepted evidence and recorded claims in a volume that survives in the Pennsylvania land office.⁴⁹ The 1787 scheme, however, applied to only about 250 families in the seventeen townships

surveyed before 1782 and the settlers generally did not support it.

Radical Connecticut yankees rallied together and published rather strong statements concerning their stand on the issue. Likewise, absentee Pennsylvania land holders who were to turn in their warrants or patents to land in the same area and receive tracts elsewhere were unhappy with the conditions and workings of the Confirming Act. After weeks of arguing, the Pennsylvania legislature suspended the act. Connecticut settlers had gained more time and the controversy moved into the decade of the 1790s.

Children of the original Susquehanna Company shareholders began to fight their parent's battles with legal and legislative maneuvering. A series of ejectment suits brought by Pennsylvania land holders whose tracts overlapped the tracts of Connecticut settlers marked this period. Jurisdiction lay with the federal courts since title holders from both Connecticut and Pennsylvania claimed the same piece of land. One of these cases over private rights to soil developed into the test case that the Trenton commissioners had anticipated. Unfortunately, the case dragged on for five years and proved little. Although the court decided in favor of the Pennsylvania land holder, it awarded only seven cents in damages!⁵⁰

In the 1790s, the Susquehanna Company made a renewed effort to fill up the land. The company opened a land office at Tioga Point, now Athens, Pennsylvania and began to sell to land speculators.⁵¹ New company commissioners travelled about New York and Connecticut selling shares to wheelers and dealers. By 1796 the Company had sold the rights to over 250 townships.⁵²

Finally, Governor Thomas Mifflin of Pennsylvania, involved in land speculation himself, could no longer tolerate competition from the Connecticut settlers in his own back yard. In his speech to the newly elected 1798 legislature, he called for a quick and complete resolution. In the spring of 1799, the legislature passed the Compromise Act.⁵³ It required Connecticut settlers in the seventeen townships surveyed before the Trenton Decision of 1782 to prove their chain of title and to pay for their lands according to the quality determined at the time of a resurvey. The money collected from the settlers would back up interest bearing certificates given to absentee Pennsylvania land holders required to release their land. Anyone

with an interest in the remaining 233 Susquehanna Company townships was simply out of luck.

The problem next became one of finding a group of commissioners who could work together to execute the law. Since the Connecticut claimants needed to submit their proof of title all over again, the legislature amended the law to give them more time. The legislature also made other adjustments. With administrative procedures finally in order, the commissioners began to make progress in authenticating titles. Much to the dismay of settlers in two townships, Ulster and Bedford, the commissioners decided to disallow their claims. The Susquehanna Company minutes did not show grants of either Bedford or Ulster before 1782. Nevertheless, the commissioners made good progress on reviewing chains of title and resurveying the other fifteen townships. By the end of 1803, exactly fifty years after Connecticut settlers began to look for western lands, the commissioners finished and closed their office. The radical faction of the Susquehanna Company finally admitted defeat. They ceased to sell land and closed their office. John Franklin took the account books home.⁵⁴

It would be neat and clean to relate that this was the end of the saga, but of course it was not. Bureaucratic bungling and ego driven state employees put up roadblocks to the issuing of Pennsylvania patents to the certified Connecticut claimants. The legislature enacted still another law in 1807 that allowed Pennsylvania land holders who had acquired their land after the Trenton decision to release any overlapping land so affected Connecticut claimants in the fifteen townships could secure title.⁵⁵ Finally, the Pennsylvania legislature had to order an official end to activities under the Act in order to force the land office to complete the patents.

The 'wild yankees' who had controlled the Susquehanna company also continued to fight for their rights as they saw them, that is the reinstatement of the two disallowed townships, since many of the wild yankees lived in Ulster. To quell their constant cries, the Pennsylvania legislature finally reinstated Bedford and Ulster in 1810.⁵⁶ Anyone who could prove acquisition and occupation of their lots to March, 1787 and trace their title to 1775, the first grant of the townships, could obtain a Pennsylvania title to their land if they were willing to pay for it at the newly assessed rate. Unfortunately, by that time

half of the Connecticut settlers had sold out and moved on.

Still the problems wore on. Another decade and a half later in the mid 1820s, another generation discovered that the surveys done in the certified township of Springfield, under the Compromise law, were inaccurate and titles were defective.⁵⁷ Another whole round of title verification and surveys followed. It seemed as if the land controversy between Connecticut settlers and Pennsylvania would never be put to rest.

Despite the fact that the Connecticut-Pennsylvania land controversy pitched colonist against colonist rather than colonist against native, there are several similarities with the Mabo Decision. Connecticut claimants based their titles on the natives' prior right to soil and, therefore, the natives' right to sell and deed the soil to new owners. Although the Trenton Decision disallowed the Susquehanna Company deed with the Indians, the court side-stepped the issue of native ownership. Similarly, the Mabo Decision 'did not directly address the question of whether Aboriginal peoples were sovereign prior to and at the time of settlement.' Instead, the Australian High Court said that 'sovereignty was acquired by settlement.'⁵⁸ Settlement was also one of Connecticut's major arguments. Her claimants had occupied and cultivated and brought laws and social organization to northeastern Pennsylvania. The Trenton Decision, however, hinged on the proof of prior intention to settle, that is, the priority of colonial charters, and left the problem of individual land titles to the occupants to solve. So too, the Mabo Decision leaves the burden of proving title to the land to the one who can demonstrate a connection with the land from a 'community or society' existing at the time of settlement.⁵⁹

Is it possible that Australia is heading in the same direction as the Connecticut claimants in Pennsylvania? Will a legal maze result after years of free reign for the concept of *Terra Nullius*? How many adjustments will need to be made to the current Mabo legislation and how many court cases will be heard? Won't those who control and use the land eventually achieve legal title to it? (6)

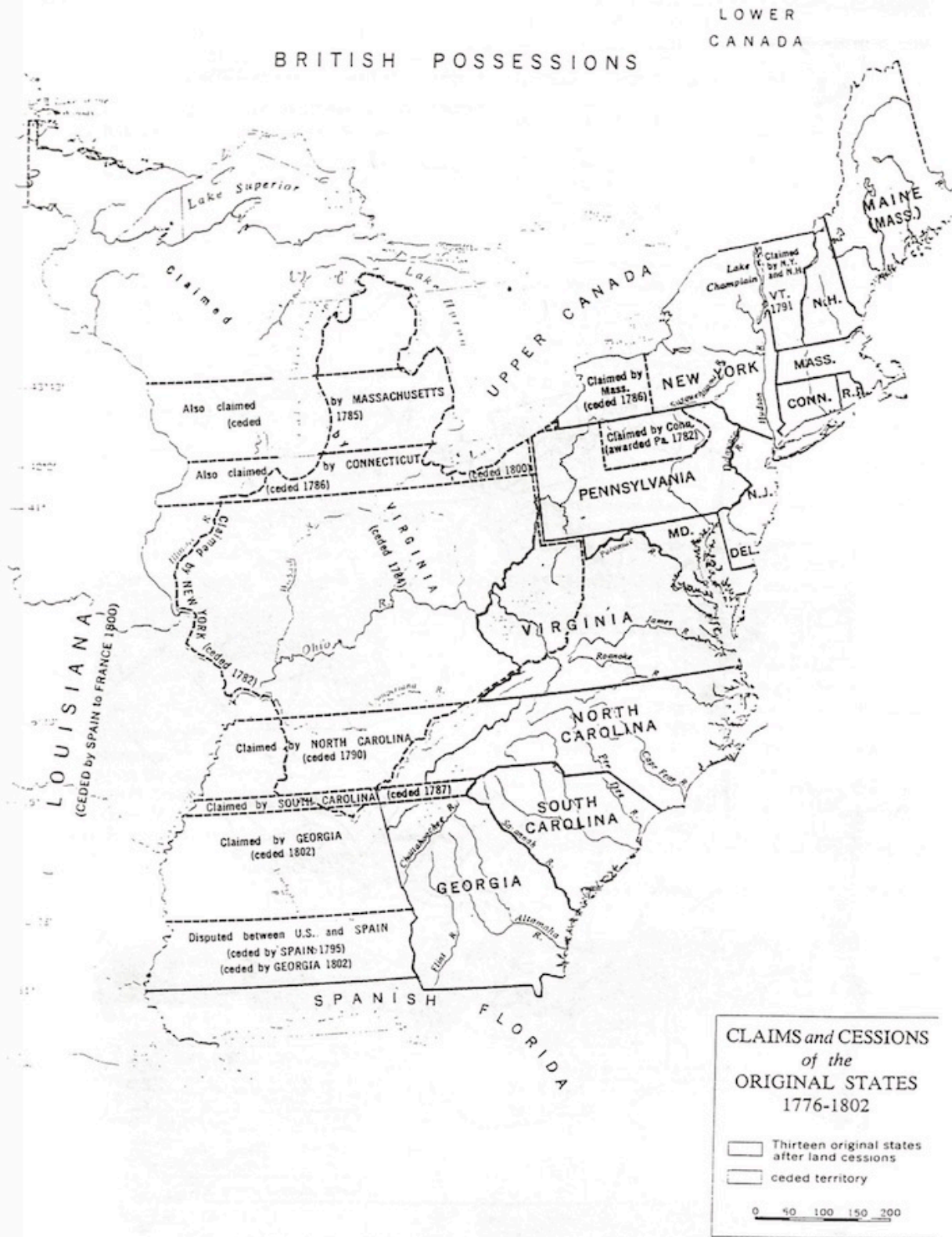


Figure 2: Claims and Sessions of the Original States

Western lands claimed by the thirteen colonies and the Susquehanna Company's claim within Pennsylvania. (American Heritage Pictorial Atlas of United States History, 1966, p. 118).

Notes

- 1 . Richard H. Bartlett, *The Mabo Decision* (Butterworth's; 1993): xi.
- 2 . *Ibid.* The case is reported at (1823) 8 Wheat 543 at 592 [21 US 240, at 261].
- 3 . Julian P. Boyd and Robert J. Taylor, eds, *The Susquehanna Company Papers* (Ithaca: 1971), 7: no. 70, 74, 78, 79.
- 4 . *Connecticut Archives, Town and Lands*, ser. 1, 8: 313 .
- 5 . *Ibid.*
- 6 . *Ibid.*, ser. 1, 8: 317.
- 7 . *Ibid.*, ser. 1, 10: 323.
- 8 . For the standard work on the evolution of New England society and its problems see Richard L. Bushman, *Puritan to Yankee: Character and the Social Order in Connecticut, 1690-1765* (Cambridge, Massachusetts: 1967).
- 9 . Susquehanna Company Records, Vol I, Articles of Agreement & Minutes of Meetings. Original, Connecticut Historical Society (CHS), Hartford CT hereinafter Susq. Co. Min. Bk. See also, Julian P. Boyd and Robert J. Taylor, eds., *The Susquehanna Company Papers*. 11 Vols. (Ithaca: 1967-1971).
- 10 . Donna Bingham Munger, *Pennsylvania Land Records, A History and Guide to Research* (Wilmington, Delaware: 1991).
- 11 . Max Savelle, 'The Rights of Native Populations,' *The Origins of American Diplomacy* (New York: 1967): 201-5.
- 12 . Susq. Co. Min. Bk., Jan 9, 1754. Missionary Timothy Woodbridge, selected to transact business with the Indians, had delegated the task to John Lydius.
- 13 . William Penn's sons Thomas, John and Richard, became the proprietors of Pennsylvania in 1732 when their father's will was settled. After 1741, they administered the colony from England through appointed administrative officials. John Penn, son of Richard, was the appointed governor 1763-1771 and 1773-1776.
- 14 . Deed at Albany July 6, 1754 for lands on the west side of Susquehanna River, etc. in *Early American Indian Documents: Treaties and Laws, 1607-1789. Vol. 2, Pennsylvania Treaties, 1737-1756.* ed., Donald H. Kent (Washington, D.C.: 1984).
- 15 . Deed from Indians of the Six Nations to the Susquehanna Company, Penn Papers, Connecticut Claims, I: 1. Historical Society of Pennsylvania (HSP), Philadelphia Pennsylvania.
- 16 . *Connecticut Colonial Records*, 10: 292-94.
- 17 . Susq. Co. Min. Bk., Nov. 20, 1754.
- 18 . William Samuel Johnson Papers, IV: 2-3, CHS.
- 19 . Susq. Co. Min. Bk., May 1755.
- 20 . Report of Lewis Gordon and Others to James Hamilton. Penn Papers, Connecticut Claims, 5: 65, HSP.
- 21 . Minutes, Supreme Executive Council, Nov. 13, 1760, *Pennsylvania Colonial Records*, 8: 507-8.
- 22 . Susq. Co. Min. Bk., May 19, 1762.
- 23 . Contemporary lists of settlers and affidavits for court corroborate these statements. Oscar J. Harvey, *A History of Wilkes-Barre* (Wilkes-Barre: 1909) 1: 402-3.
- 24 . Minutes of a Treaty with the Delawares, Sir William Johnson Papers, 3: 760-91, CHS.
- 25 . For correspondence dealing with the issue see *The Susquehanna Company Papers*, II.
- 26 . Susq. Co. Min. Bk., May 24, 1763.
- 27 . Harvey, *A History of Wilkes-Barre*, 1: 430-33.
- 28 . Susq. Co. Min. Bk., Dec. 28, 1768.
- 29 . Munger, *Pennsylvania Land Records*, 79-84.
- 30 . *The Susquehanna Company Papers*, 3: 57-93.
- 31 . Harvey, *History of Wilkes-Barre*, 2: 658-9.
- 32 . *The Susquehanna Company Papers*, 8: no. 168.
- 33 . *Ibid.*, 5: nos. 108 and 201.
- 34 . *Connecticut Colonial Records*, 14: 217-8.
- 35 . The 24th regiment consisted of nine regular companies from each of nine settled townships and two alarm companies. It was assigned to the 6th Connecticut Brigade. *Connecticut Colonial Records*, 15:13. Harvey, *History of Wilkes-Barre*, 1: 911, 921, 978-80.
- 36 . *The Susquehanna Company Papers*, 6: 347.
- 37 . *Ibid.*, 6: nos. 237 and 240.
- 38 . *Ibid.*, 7: 23-4.
- 39 . Harvey, *History of Wilkes-Barre*, 2: 890-907.
- 40 . *Ibid.*, 2: 1006-1032.
- 41 . Daniel M. Friedenber, *Life, Liberty and the Pursuit of Land* (Buffalo: 1992): 187-199.
- 42 . Merrill Jensen, *The Articles of Confederation* (Madison, Wisconsin: 1966): 198-9.
- 43 . Edward P. Alexander, *A Revolutionary Conservative, James Duane of New York* (New York: 1938), 110-111.
- 44 . The arguments are presented in documents reprinted in *The Susquehanna Company Papers*, 7: 181-216.
- 45 . See note 33.
- 46 . *Pennsylvania Archives*, ser. 1, 10: 550-553.
- 47 . Donna Bingham Munger, 'Following Connecticut Ancestors to Pennsylvania: Susquehanna Company Settlers,' *The New England Historical and Genealogical Register*, Vol. 139 (April, 1985): 112-125.
- 48 . Charles Smith, ed., *Laws of the Commonwealth of Pennsylvania* (Smith's Laws), March 28, 1787.
- 49 . Connecticut Claimants, Vol.1 (Binding No. 71), microfilm no. 25.32, Pennsylvania State Archives, Harrisburg, Pennsylvania.
- 50 . Van Horne's Lessee v. Dorrance, *Susquehanna Company Papers*, 10: 354-7.
- 51 . Susquehanna Company Account Books, Liber C, 399. CHS.
- 52 . *Susquehanna Company Papers*, 10: 567-77.
- 53 . Smith's Laws, 3: 362-69.
- 54 . Donna Bingham Munger, 'Six Steps to Susquehanna Company Settlers,' *The Pennsylvania Genealogical Magazine* (1991, No. 2) 37: 125-134.
- 55 . Smith's Laws, 4: 411-12.
- 56 . *Ibid.*, 5: 127-31.
- 57 . Munger, *Pennsylvania Land Records*, 135-40.
- 58 . Bartlett, *The Mabo Decision*, x.
- 59 . *Ibid.*, xv.