



## **Centre of Full Employment and Equity**

**Working Paper No. 03-05**

### **The New Zealand Court of Appeal and the Statutory Recognition of Native Title**

John W. Tate<sup>1</sup>

April 2003

Centre of Full Employment and Equity  
The University of Newcastle, Callaghan NSW 2308, Australia  
Home Page: <http://e1.newcastle.edu.au/coffee>  
Email: [coffee@newcastle.edu.au](mailto:coffee@newcastle.edu.au)

## Introduction

*Tamihana Korokai v Solicitor-General*<sup>2</sup> was a case involving the assertion of native title claims against the Crown. The plaintiffs asserted that the land in question was not in the exclusive possession of the Crown but was subject to (among other things) Maori customary title.<sup>3</sup> The plaintiff wished to put this claim before the Native Land Court, in order to determine if the land was subject to native title, but the Crown insisted that it had a right to conclude the matter simply by declaration that the land in question was Crown land to which no surviving native title attached, thereby precluding any case going before the Native Land Court.<sup>4</sup> The issue was brought before the New Zealand Court of Appeal.

The case was therefore a clear instance of native title rights being asserted *against* the Crown, and as such was a direct challenge to the principle which emanated from the precedent set by *Wi Parata v Bishop of Wellington*<sup>5</sup> - that native title matters involving the Crown fell within the prerogative powers of the Crown and so were outside the jurisdiction of the municipal Courts, and that a mere declaration by the Crown that native title was extinguished on any piece of land was legally binding on the Courts and sufficient to oust any legal challenge to the Crown.<sup>6</sup> But how was it possible that such a judicial challenge asserting native title rights against the Crown

---

1. The author would like to thank the following library personnel for their assistance in the research process associated with this paper. Ann Stokes, Auchmuty Library, University of Newcastle, Australia. Ruth Talbot-Stokes, Leone Clough, and Melda Shay, Auchmuty Law Library, University of Newcastle, Australia. Alan Edwards, Law Librarian, University of Otago. Margaret Greville, Law Librarian, University of Canterbury, Christchurch N.Z.

<sup>2</sup> (1912) 32 NZLR 321 (CA).

<sup>3</sup> C.f. *Tamihana Korokai v The Solicitor-General* (1912) 32 NZLR 321, at 328-31.

<sup>4</sup> C.f. *ibid*, at 331-32, per Solicitor-General. C.f. *ibid*, at 329.

<sup>5</sup> (1878) 2 NZ Jur. (N.S.) S.C. 72.

<sup>6</sup> Hence Chief Justice Prendergast refers in *Wi Parata* to the Crown's "prerogative right.....of conclusively determining when the native title has been duly extinguished....." (*Wi Parata v Bishop of Wellington* (1878) 2 NZ Jur. (N.S.) S.C. 72, at 80). Concerning the claim that the Courts cannot interfere with this prerogative, Prendergast states: "Upon such a settlement as has been made by our nation upon these islands, the sovereign of the settling nation acquiring on the one hand the exclusive right of extinguishing the *native title*, assumes on the other the correlative duty, as supreme protector of aborigines, of securing them against any infringement of their right of occupancy.....The obligation thus coupled with the right of pre-emption, although not to be regarded as properly a treaty obligation, is yet in the nature of a treaty obligation. It is one, therefore, with the discharge of which no other power in the State can pretend to interfere. The exercise of the right and the discharge of the correlative duty, constitute an extraordinary branch of the prerogative, wherein the sovereign represents the entire body-politic, and not, as in the case of ordinary prerogative, merely the Supreme Executive power." (*ibid*, at 78-79).

could arise in 1912, given that the wording of s. 84 of the *Native Land Act* (1909) seemed to bar any such proceeding? As s. 84 states:

"Save so far as otherwise expressly provided in any other Act the Native customary title to land shall not be available or enforceable as against His Majesty the King by any proceedings in any Court or in any other manner."<sup>7</sup>

The answer is that an undertaking was entered into by the parties to this case, prior to the passing of the *Native Land Act* (1909), whereby the Solicitor-General agreed to wave ".....any objection or defence which might be based on the provisions of section 84 of that Act.....except in so far as these provisions may be held to be merely declaratory of the law as existing *before* the passing of the said Act."<sup>8</sup>

### **The Facts of the Case**

This case involved a native title claim to the bed of Lake Rotorua. As pointed out in the notes to the case: "From time immemorial the Native tribes occupying land adjoining the lake have habitually fished in the lake as of right."<sup>9</sup> Indeed, it was claimed by the plaintiff "...that defined portions of the lake have from time immemorial been exclusively appropriated and occupied as fishing-grounds by particular tribes, communities, or individuals."<sup>10</sup>

The plaintiffs in the case claimed, as one of their grounds of ownership, that the bed of the lake was subject to Maori customary title.<sup>11</sup> In response, the Crown denied

---

<sup>7</sup> *Native Land Act* [1909] 9 Edw. VII. No. 15, s 84, in *The Statutes of the Dominion of New Zealand* (1909) (Wellington, 1909), p. 181.

<sup>8</sup> *Tamihana Korokai v The Solicitor-General*, at 326. My emphasis.

<sup>9</sup> *Ibid.*, at 323.

<sup>10</sup> *Ibid.*

<sup>11</sup> Indeed, three separate claims to the bed of the lake were associated with the plaintiff's case, only one of which was concerned with Maori customary title. Firstly, there was the claim (1) that ".....the bed of the lake is customary native land in respect of which the Native Land Court has jurisdiction to make freehold orders under the Native Land Act, 1909...." (*ibid.*, at 324). However the plaintiff also claimed that members of his tribe also owned the bed of the lake as an extension to their freehold holdings on the shore of the lake (*ibid.*). The basis of this freehold title, he claimed, was as follows. Prior to 1881, most of the land adjoining the bed of the lake was Native customary land (*ibid.*, at 322). However: "At various times between the years 1881 and 1886 the title to most of the land adjoining the bed of the lake was investigated by the Native Land Court, and certificates of title under the Native Land Court Act, 1880, were issued in respect of the several parcels the title to which was so ascertained." (*ibid.*). Then: "In the year 1894, on the coming into operation of the Native Land Court Act, 1894, the land in respect of which Native Land Court certificates of title had been so issued became, by virtue of section 73 of that Act, Native freehold land vested in the persons who were immediately prior to the passing of that Act the Native owners according to Maori custom as determined by the said certificates of title." (*ibid.*). Although there is no mention in these certificates of title that the acreage of freehold land

".....that the lake or the bed thereof is customary Native land, or that any Natives possess in respect thereof, by virtue of Native custom or otherwise, any proprietary right or any right of user other than such rights of navigation and other user as are possessed by Natives in common with all of His Majesty's subjects."<sup>12</sup> The Crown insisted that ".....if Native customary title at any time extended to the bed of the lake such title has been extinguished by implied surrender, abandonment, or cession."<sup>13</sup>

There were numerous questions submitted for the decision of the Court, but the main one concerned whether the Court itself had jurisdiction to hear the case.<sup>14</sup> This question centered on the validity of the *Wi Parata* precedent, which insisted that native title was outside the jurisdiction of the municipal Courts, falling within the prerogative powers of the Crown.<sup>15</sup> Under this rule, the declaration of the Crown alone that native title had been extinguished was binding on the Courts and sufficient to oust any legal challenge to the Crown.<sup>16</sup> The result was that, in terms of the *Wi Parata* precedent, native title claimants had no rights enforceable against the Crown.

---

extends to the bed of the lake (*ibid*). nevertheless a claim also arose that (2) ".....the bed of the lake or some part thereof is land held in freehold tenure by those Natives as accessory to their freehold title to land adjoining the bed, and is included by implication of law in the Native Land Court certificates of title which have been issued as aforesaid, and in the freehold titles obtained by virtue of these certificates of title...." (*ibid*, at 324). Thirdly, there was the claim to (3) certain usufructary rights to the lake, insisting that "....the lake is subject to certain customary and exclusive rights of fishing, navigation, and other user vested in those Natives, and that those rights are capable in some manner of legal recognition and enforcement by this Court or by the Native Land Court." (*ibid*, at 325).

<sup>12</sup> *Tamihana Korokai v The Solicitor-General*, at 324.

<sup>13</sup> *Ibid*.

<sup>14</sup> The question of jurisdiction in this case was never a question of whether the Court of Appeal or any other municipal Court had jurisdiction to determine the issue of native title *themselves*. Under various statutes since the 1860s, native title questions had been exclusively reserved for the Native Land Courts. Consequently, the question of jurisdiction for the Court of Appeal in this case was whether it had jurisdiction to determine if the case could be submitted to the Native Land Court for decision (as claimed by the plaintiff). Justice Edwards clarified these issues as follows: "The Supreme Court has no jurisdiction to inquire into purely Native titles, nor can it investigate questions arising out of the procedure and practice of the Native Land Court so long as that Court confines itself within the limits of its peculiar jurisdiction. The Supreme Court has, however, jurisdiction to interpret the statutes to which the Native Land Court owes its existence and its jurisdiction; to confine that Court within the limits of that jurisdiction if it is being exceeded; and to compel that Court to exercise its jurisdiction if, for some fancied reason not arising out of Native customs and usages, it refuses or fails to do so." (*ibid*, at 349, per Edwards J.).

<sup>15</sup> See note 6 above.

<sup>16</sup> See note 6 above. Subsequent New Zealand judicial decisions certainly interpreted *Wi Parata* as giving rise to such a rule. As Justice Richmond, delivering the judgment of the Court of Appeal, put it in *Nireaha Tamaki v Baker* (1894): ".....the case is within the direct authority of *Wi Parata v The Bishop of Wellington*. We see no reason to doubt the soundness of that decision.....According to what is laid down in the case cited, the mere assertion of the claim of the Crown is in itself sufficient to oust the jurisdiction of this or any other Court in the colony. There can be no known rule of law by which the validity of dealings in the name and under the authority of the Sovereign with the Native tribes of

Rather, as Chief Justice Prendergast put it in the *Wi Parata* case, the Crown would be the "sole arbiter of its own justice" on native title issues.<sup>17</sup>

These principles emanating from *Wi Parata* assumed the status of authoritative precedent and guided subsequent New Zealand judicial judgments on native title.<sup>18</sup> However the *Wi Parata* precedent was fundamentally challenged by two Privy Council judgments dealing with New Zealand native title matters on appeal. The Privy Council's judgment in *Nireaha Tamaki v Baker*<sup>19</sup> and *Wallis v Solicitor-*

---

this country for the extinction of their territorial rights can be tested." (*Nireaha Tamaki v Baker* (1894) 12 NZLR 483, at 488, per Richmond J.).

<sup>17</sup> As Chief Justice Prendergast put it: "But in the case of primitive barbarians, the supreme executive Government must acquit itself, as best it may, of its obligation to respective native proprietary rights, and of necessity must be the sole arbiter of its own justice. Its acts in this particular cannot be examined or called in question by any tribunal, because there exist no known principles whereon a regular adjudication can be based." (*Wi Parata v Bishop of Wellington*, at 78).

<sup>18</sup> See note 16 above. See also *The Solicitor-General v The Bishop of Wellington and Others* (1901) 19 NZLR 665, at 685-86, per Williams J.; *Hohepa Wi Neera v The Bishop of Wellington* (1902) 21 NZLR (CA) 655 at 667, per Stout C.J.; and *ibid*, at 671-72, per Williams J.; "*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", [1840-1932] NZPCC Appendix, 730, at 732, per Stout C.J.

There were, however, some minor exceptions which departed from the *Wi Parata* precedent. Hence in *Mangakahia v The New Zealand Timber Company* (1882), far from following Chief Justice Prendergast and dismissing the Treaty as a "simple nullity" (c.f. *Wi Parata v Bishop of Wellington*, at 78), Justice Gillies went so far as to base native title rights on the Treaty. As Gillies J. states: "Theoretically the fee of all lands in the colony is in the Crown, subject nevertheless to the 'full, exclusive and undisturbed possession of their lands', guaranteed to the natives by the treaty of Waitangi which is no such 'simple nullity', as it is termed in *Wi Parata v Bishop of Wellington*.....quoted in argument in this case." (*Mangakahia v The New Zealand Timber Company* (1881) 2 NZLR (SC) 345 at 350, per Gillies J.). Gillies' suggestion that the Treaty is a legal guarantee of native rights is a position not only at odds with Prendergast in *Wi Parata*, but also with most subsequent New Zealand judicial authority which argued that the Treaty (and the rights it embodied) had no force in law independent of the Treaty's embodiment in statute (c.f. "*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", [1840-1932] NZPCC Appendix, 730, at 732, per Stout C.J.; *Tamihana Korokai v The Solicitor-General* (1912) 32 NZLR 321 (CA), at 354-55, per Chapman J.; *Te Heuheu Tukino v Aotea District Maori Land Board* [1941], NZLR, 590, at 596-97). Nevertheless, almost twenty years later, Justice Edwards affirms this conclusion of Gillies J. (c.f. *Mueller v The Taupiri Coal-Mines (Limited)* (1900) 20 NZLR 89 (CA), at 122, per Edwards J.). Indeed, Edwards J. goes further and argues that the rights embodied in the Treaty of Waitangi, referring to the "full, exclusive, and undisturbed possession" of land, had actually received legislative recognition in the Native Lands Act, 1862 and the Native Rights Act, 1865 (*ibid*). The clear implication of this claim is therefore that these native title rights, because of their legislative basis, are binding on the Crown. Consequently, it is somewhat contradictory for Edwards J., later in the same paragraph, to also affirm the precedent of *Wi Parata*, that native title is subject to the prerogative power of the Crown and so is not binding upon it. Nevertheless he does so as follows: "No doubt.....transactions with the Natives for the cession of their title to the Crown are to be regarded as acts of State, and are therefore not examinable by any Court; and any act of the Crown which declares, or, perhaps, merely assumes, that the Native title has been extinguished is conclusive and binding upon all Courts and for all purposes." (*ibid*, at 123, per Edwards J.).

However these qualified departures from the *Wi Parata* precedent are minor ones, because the main line of New Zealand judicial authority, and certainly the one that reached the Privy Council in *Nireaha Tamaki v Baker* (1900-01) [1840-1932] NZPCC 371 and *Wallis v Solicitor General for New Zealand* [1903] AC 173, fully affirmed *Wi Parata* as the authoritative precedent on native title in New Zealand.

<sup>19</sup> (1900-01) [1840-1932] NZPCC 371.

*General*<sup>20</sup> undermined the certainty which *Wi Parata* had provided for New Zealand judicial deliberations on native title.<sup>21</sup>

Concern over this uncertainty, including claims that any departure from the *Wi Parata* precedent would undermine the stability and security of land title in New Zealand, soon emanated from the New Zealand Court of Appeal, thus demonstrating the strength of their commitment to the *Wi Parata* precedent.<sup>22</sup> Indeed in 1903, the New Zealand Court of Appeal made an official Protest against the Privy Council. While this Protest ostensibly concerned the injudicious use of language and the imputation of improper motives to the Court of Appeal in the Privy Council's judgment in *Wallis v Solicitor-General* (1903), nevertheless it is evident that much of the sub-text of the Protest was a criticism of the Privy Council's departure from the *Wi Parata* precedent.<sup>23</sup>

---

<sup>20</sup> [1903] AC 173.

<sup>21</sup> Although reserving judgment on the question of the Crown's prerogative powers, the Privy Council in *Nireaha Tamaki v Baker* (1900-01) held that if Crown officers are exercising statutory authority in their dealings with native title, they are subject to the jurisdiction of the municipal Courts (c.f. *Nireaha Tamaki v Baker* (1900-01) [1840-1932] NZPCC 371, at 380-82). This was clearly recognised by the New Zealand Bench as giving rise to the possibility that existing Crown grants could be subject to native title challenge, if the Crown was found to have been acting under statutory authority. As Chief Justice Stout said of the Privy Council's decision in *Nireaha Tamaki v Baker* (1900-01): "If the dicta in that case were given effect to, no land title in the Colony would be safe." (*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", [1840-1932] NZPCC Appendix, 730, at 746, per Stout C.J.). In its next decision in *Wallis v Solicitor-General* (1903), the Privy Council didn't even reserve judgment on the issue of prerogative, but rather insisted that all Crown declarations concerning native title were subject to the jurisdiction of the Courts, and had to be treated in evidence like any other claim (c.f. *Wallis v Solicitor General for New Zealand* [1903] AC 173 at 187-88). This was a clear rejection of the *Wi Parata* precedent which held that a mere declaration by the Crown that native title was extinguished was sufficient to oust the jurisdiction of the Courts.

<sup>22</sup> For instance, as we saw in the note above, Chief Justice Stout argued that if the dicta of the Privy Council in *Nireaha Tamaki v Baker* (1901) were given effect to, "...no land title in the Colony would be safe." (*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", at 746, per Stout C.J.). Justice Edwards articulates a similar sentiment, insisting that the Privy Council's position on native title (involving the rejection of the *Wi Parata* precedent) places New Zealand land settlement in jeopardy: "It would be easy by reference to numerous decisions of the Court of Appeal and of the Supreme Court of this Colony, and to statutes which, passed after such decisions, recognising their validity, have virtually confirmed them, to show still further that the interpretation which their Lordships have put upon the laws relating to Native lands in this Colony is subversive of the law which has prevailed from its foundation; and that if that interpretation were acted upon, and carried to its legitimate conclusion in future cases, the titles to real estates in this Colony *would be thrown into irretrievable doubt and confusion.*" (*Ibid*, at 757, per Edwards J. My emphasis).

<sup>23</sup> That the defence of *Wi Parata* was a subtext of the Protest is evident in the concerns expressed by the Court of Appeal judges during the Protest regarding what they perceived as a threat to the stability and security of land title in any departure by the Privy Council from the *Wi Parata* precedent (see note 21 and 22 above). However Stout C.J. was even more explicit in his defence of the *Wi Parata* precedent in his Protest, stating that "...many of the statements of fact and of law in the judgment of the Privy Council have been made without a knowledge of our legislation." (*ibid*, at 732, per Stout C.J.). He goes on to defend the *Wi Parata* precedent limiting the Court's jurisdiction on native title, stating: "The root of title being in the Crown, the Court could not recognise native title. This has been

However it seems that this uncertainty produced by the Privy Council's departure from the *Wi Parata* precedent was soon put to rest, as the provisions of the *Native Land Act*, 1909 make abundantly clear that their purpose is to resurrect the principles of *Wi Parata*, upholding the Crown's immunity from native title claims, although this time on a statutory rather than a common law basis.<sup>24</sup> In particular, as we saw above,

---

ever held to be the law in New Zealand: see *Reg v Symonds*, decided by their Honours Sir William Martin C.J., and Mr. Justice Chapman in 1847...; *Wi Parata v Bishop of Wellington*, decided by their Honours Sir J. Prendergast and Mr. Justice Richmond in 1877...and other cases. Nor did the Privy Council in *Nireaha Tamaki v Baker*...entirely overrule this view, though it did not approve of all the dicta of the Judges in *Wi Parata's* case." (*ibid*, at 732, per Stout C.J.).

<sup>24</sup> The evidence that the *Native Land Act* (1909) was intended to reverse the Privy Council's departure from the *Wi Parata* precedent is provided by the Solicitor-General in *Tamihana Korokai v The Solicitor-General* (1912). In presenting the evidence for the Crown, the Solicitor-General stated that the provisions of the *Native Land Act* (1909) would ensure that the decision of the Privy Council in *Nireaha Tamaki v Baker* [1901] AC 561, could no longer apply, because the relevant piece of legislation which the Privy Council had relied upon for upholding native title claims in that case [the *Native Rights Act*, 1865] had been overturned by the *Native Land Act*, 1909 [c.f. *Tamihana Korokai v The Solicitor-General* (1912), at 332, per Solicitor-General]. Indeed, he goes further and argues that the Privy Council's decision would now be "prohibited" by section 88 of the *Native Land Act*, 1909 (*ibid*). This indicates the extent to which the *Native Land Act*, 1909 was widely perceived as reversing the trend on native title which had been established by the Privy Council decisions in *Nireaha Tamaki v Baker* (1900-01) and *Wallis v Solicitor-General* (1903), and instead re-asserting the authority of the Crown over all native title claims, as had originally been guaranteed by Prendergast C.J. in *Wi Parata v Bishop of Wellington* (1878). It is in this respect, therefore, that we can perceive the *Native Land Act*, 1909 as a re-assertion of the *Wi Parata* precedent in statutory form.

However this 1909 legislation was not the first attempt by the New Zealand Parliament to enshrine the principles of *Wi Parata* in statutory form. As Paul McHugh points out, the *New Zealand Land Titles Protection Act* (1902) was the first legislative attempt on the part of the New Zealand Parliament to circumvent the impact of the Privy Council decisions which departed from the *Wi Parata* precedent (c.f. Paul McHugh, *The Maori Magna Carta. New Zealand Law and the Treaty of Waitangi*. Auckland: Oxford University Press, 1991, p. 118). This 1902 legislation was passed in response to the Privy Council's decision in *Nireaha Tamaki v Baker* (1900-01) which held that Crown officials could be subject to the jurisdiction of the Courts on native title matters if they were exercising statutory authority, as opposed to Crown prerogative powers (see note 21 above). This in turn meant that the Crown could be subject to native title challenge. That this was a concern animating the 1902 legislation is evident in its long title, which says that it is "An Act to protect the Land Titles of the Colony from Frivolous Attacks in certain Cases." (*Lands Titles Protection Act*, 2 Edw. VII. 1902, No. 37, cited in *The Statutes of the Dominion of New Zealand* (1902) Wellington, 1902, p. 169). Yet s. 2(1) of this Statute provides the Crown with exactly the same guarantee against native title suits as the 1909 legislation. As s. 2(1) states: "In the case of native land or land acquired from Natives, the validity of any order of the Native Land Court, Crown grant, or other instrument of title purporting to have been issued under the authority of law which has subsisted for not less than ten years prior to the passing of this Act shall not be called in question in any Court, or be the subject of any order of the Chief Judge of the Native Land Court under section thirty-nine of 'The Native Land Court Act, 1894', unless with the consent of the Governor in Council first had and obtained; and in the absence of such consent this Act shall be an absolute bar to the initiation of any proceedings in any Court calling in question the validity of any such order, Crown grant or instrument of title, or the jurisdiction of the Native Land Court to make any such order, or the power of the Governor to make and issue any such Crown grant." (*Land Titles Protection Act*, 1902, s. 2(1)). In other words, like the 1909 legislation, the 1902 legislation attempted to uphold the *Wi Parata* precedent barring judicial challenges to Crown grants on the basis of native title, by giving it a statutory authority, thereby making it safe from Privy Council challenge.

*The Land Titles Protection Act*, 1902 was 'consolidated' into the *Land Titles Protection Act*, 1908, which in turn was repealed by the *Native Land Act*, 1909 (my thanks to Alan Edwards, Law Librarian at the University of Otago, for this legislative history). As such, the Crown was not entitled in the

s. 84 of the Act follows *Wi Parata* in holding that native title claims are not enforceable against the Crown.<sup>25</sup> Section 85 also upholds this precedent in stating that a declaration by the Crown that native title on any piece of land is extinguished shall be binding on the Courts:

"A Proclamation by the Governor that any land vested in His Majesty the King is free from the Native customary title shall in all Courts and in all proceedings be accepted as conclusive proof of the fact so proclaimed."<sup>26</sup>

The Act therefore guaranteed the security of all Crown grants and other Crown titles from native title challenge. As s. 86 states:

"No Crown grant, Crown lease, or other alienation or disposition of land by the Crown, whether before or after the commencement of this Act, shall in any Court or in any proceedings be questioned or invalidated or in any manner affected by reason of the fact that the Native customary title to that land has not been duly extinguished."<sup>27</sup>

While the Solicitor-General in *Tamihana Korokai* agreed to waive any defence based on s. 84 of the *Native Land Act* (1909), nevertheless in his statement to the Court, the Solicitor-General (in person) still relied on the *Wi Parata* precedent itself as the basis of the Crown's defence. He stated:

"The nature of Native customary title has been considered in many cases, the most important being *Wi Parata v Bishop of Wellington* (3 NZ Jur NS SC 72) and *Nireaha Tamaki v Baker* [ 12 NZ LR 483]. It is true that the judgement in the second case was reversed by the Privy Council, but the principle the basis of the decisions was unaffected by the judgment of the Privy Council, and we ask the Court to confirm and ratify the principle acted on in those cases. That principle is - Native title is not

---

present case to appeal to the 1902 legislation in order to oust the jurisdiction of the Court, because the 1902 legislation was no longer in force.

<sup>25</sup> See note 7 above.

<sup>26</sup> *Native Land Act* [1909] 9 Edw. VII. No. 15, s 85, in *The Statutes of the Dominion of New Zealand* (1909) (Wellington, 1909), p. 181.

<sup>27</sup> *Ibid*, s. 86, pp. 181-82. However the *Native Land Act* (1909) did not nullify the legal possibility of native title itself, which would have produced a *terra nullius* outcome. Rather, native title was recognised within the statute. The statute simply held that native title was not effective against the Crown in any instance where the Crown decided to refuse native title claims (see note 26 above). This recognition of native title is evident in section 90 of the Act, which followed previous Acts in reserving to the Native Land Court the ".....exclusive jurisdiction to investigate the title to customary land, and to determine the relative interests of the owners thereof." (*Native Land Act*, 1909, s. 90).



available in any manner and for any purpose against the Crown. As against the Crown it is not a legal title at all."<sup>28</sup>

Therefore, the Solicitor-General concluded:

"The conclusiveness of a claim by the Crown extends to all cases, whether the claim is based on cession, abandonment, confiscation, or any other ground, and the claim is not examinable by this Court."<sup>29</sup>

Consequently, the Court of Appeal in *Tamihana Korokai v Solicitor-General* (1912) were once again faced with the legacy of *Wi Parata* - in particular, its insistence that native title fell within the prerogative powers of the Crown and so outside the jurisdiction of the Courts. In relation to the question of the Court's jurisdiction, the following question was submitted for the Court's determination:

"Is Native customary title a ground on which any action can be instituted in this Court, whether for a declaration of title or for any other relief?"<sup>30</sup>

On the issue of Crown prerogative, the questions fell into two parts. First, whether the Courts had jurisdiction to enforce a native title claim against the Crown; and second, whether the declaration of the Crown on native title matters was binding on the Courts. Hence the two questions concerning Crown prerogative submitted for the determination of the Court were as follows:

"Has this Court any jurisdiction to determine as against the Crown that any land claimed by the Crown as being Crown land free from Native customary title is nevertheless Native customary land?"<sup>31</sup>

And:

"Is the claim by the Crown that the bed of the lake is Crown land free from Native customary title or from any other customary right of Native user conclusive in this Court and in this action that no such Native customary title or customary right of Native user exists?"<sup>32</sup>

---

<sup>28</sup> *Tamihana Korokai v The Solicitor-General*, at 331, per Solicitor-General.

<sup>29</sup> *Ibid* at 334-35, per Solicitor-General.

<sup>30</sup> *Ibid*, at 325.

<sup>31</sup> *Ibid*.

<sup>32</sup> *Ibid*.

Parliamentary legislation in New Zealand had long established the Native Land Court as the statutory authority to deal with all native title claims.<sup>33</sup> However in his *Wi Parata* judgment, Chief Justice Prendergast had insisted that the Crown itself was not bound by the legislation (*Native Rights Act*, 1865) which first insisted that all native title claims must be determined by the Native Land Court. As he put it:

“The Crown, not being named in the statute, is clearly not bound by it; as the Act, if it bound the Crown, would deprive it of a prerogative right, that namely of conclusively determining when the native title has been duly extinguished.....If this prerogative be left intact, and we hold it is, the issue of a Crown grant must still be conclusive in all Courts against any native person asserting that the land therein comprised was never duly ceded.”<sup>34</sup>

Consequently, Chief Justice Prendergast explicitly reserved the Crown’s prerogative power to unilaterally determine native title issues by mere declaration as binding even on the Native Land Court. The circumstances of the present case meant that the Court of Appeal was called on once again to determine the validity of this *Wi Parata* precedent. In so far as this case involved an attempt by the Crown to preclude the plaintiffs from bringing a claim before the Native Land Court, the Court of Appeal was called upon to determine whether, in the face of a declaration by the Solicitor-General that the land in question was not subject to native title, the matter could still fall within the jurisdiction of the Native Land Court; or whether a declaration by the Solicitor-General to this effect terminated all native title claims.<sup>35</sup>

---

<sup>33</sup> As Chief Justice Stout put it in an earlier native title case: "There has since 1865 ever been a Native Land Court to investigate Native title; and the uniform rule has been, until such investigation was determined the Supreme Court did not recognise the title of any Native to sue for possession of land uninvestigated by the [Native Land] Court." (*Hohepa Wi Neera v The Bishop of Wellington* (1902) 21 NZLR (CA) 655, at 665, per Stout C.J.).

<sup>34</sup> *Wi Parata v Bishop of Wellington*, at 80.

<sup>35</sup> Indeed Chief Justice Stout simplified the matters raised in this case to this issue alone, stating: "The point in dispute between the parties is a narrow one. The plaintiff contends that he has a statutory right to go to the Native Land Court claiming under the Native Land Act a freehold title. The Solicitor-General contends that if he, as Solicitor-General, says the land - that is, the bed of Lake Rotorua - is Crown land, that concludes the matter, and the Native Land Court cannot proceed to make any inquiries as to whether the land is Native customary land. That is the matter in contention, and it appears to me that it is the only question that this Court has at present to decide." (*Tamihana Korokai v The Solicitor-General* (1912), at 338, per Stout C.J.).

## Stout C.J's "Olive Branch" to the Privy Council

Among the Court of Appeal judges presiding in this case was Chief Justice Stout, who several years earlier, in the Court of Appeal's Protest against the Privy Council's decision in *Wallis v Solicitor-General* (1903), had vigorously defended the New Zealand precedents on native title against any Privy Council departure.<sup>36</sup> However the Chief Justice took a much more conciliatory line on native title in the present case, even going so far as to affirm the status of the Treaty of Waitangi as the moral (if not legal) foundation for Maori rights in New Zealand. Hence in the context of discussing the priority of the Crown's radical title over both freehold and native lands, Stout C.J. states:

"It is not necessary to point out that if the Crown in New Zealand had not conserved the Native rights and carried out the treaty a gross wrong would have been perpetrated. Since the recognition of the Native rights so often made there may have been interference by legislation with Native lands, both before and after the ascertainment of title. If, however, there were such interferences, they have been based on the theory of eminent domain.....Native lands and freehold lands belonging to persons of the white race have also been taken under such a theory, when it appeared it was for the interest of the State to do so. In such cases compensation has been awarded. To interfere with Native lands merely because they are Native lands and without compensation would, of course, be such an act of spoliation and tyranny that this Court ought not to assume it to be possible in any civilised community."<sup>37</sup>

The theory of "eminent domain" refers to the "inherent right of the government to acquire private property for public purposes".<sup>38</sup> In claiming that the "interference" with "Native lands" by the Crown was guided by this theory, rather than by a prerogative right to unilaterally extinguish native title, Stout C.J. was effectively claiming that land subject to native title had equal rights under the law to land which was subject to freehold rights. Indeed, he argues that for the Crown to claim a right to "interfere" with Native lands "merely because they are Native lands" (i.e. on the grounds that "native title" is a lesser title to land than any other title) would be "such

---

<sup>36</sup> See note 23 above.

<sup>37</sup> *Tamihana Korokai v The Solicitor-General*, at 343-44, per Stout C.J.

<sup>38</sup> C.f. Peter E. Nygh and Peter Butt (eds) *Butterworths Australian Legal Dictionary* (Sydney: Butterworths, 1997), p. 412.

an act of spoliation and tyranny that this Court ought not to assume it to be possible in any civilised community". Yet it was precisely because it was always assumed that native title was a "lesser title" to land than freehold or other titles, because it did not "derive" from the Crown, that it was widely assumed in common law that native title could be unilaterally extinguished by the Crown in a manner in which these other titles could not.<sup>39</sup> In his statement above, by basing Crown extinguishment of native title on the basis of "eminent domain" rather than prerogative powers, Stout C.J. is assigning to native title far greater protection against extinguishment by the Crown than was usually accorded to it under common law.

Consequently, this statement carries Stout C.J. a long way from the spirit of Prendergast C.J.'s judgement in *Wi Parata v Bishop of Wellington*, and a long way from his own position in the Court of Appeal Protest in 1903 which had sustained support for that precedent.<sup>40</sup> In the first place, his statement above upholds the Treaty as a necessary instrument to avoid the perpetuation of a "gross wrong" by the Crown against the natives. While such a claim does not go any further than Prendergast C.J. in its unwillingness to ascribe to the Treaty the force of law, nevertheless the moral onus which each judge places on the treaty is very different. Prendergast C.J. dismissed the Treaty as a "simple nullity" in so far as it purported to be an instrument

---

<sup>39</sup> Hence it was on these grounds that Prendergast C.J. assumed that a Crown grant automatically extinguished native title, independent of the consent of the native title holders themselves (c.f. *Wi Parata v Bishop of Wellington*, 78, 80). Indeed, even more recent native title decisions, such as the *Mabo* judgment in Australia, have reserved for the Crown a right to unilaterally extinguish native title independent of the consent of the native title holders, so long as the Crown exhibited a "clear and plain intention" to do so (c.f. *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at 64-65, 69-70, per Brennan J.; *ibid* at 89-90, per Deane and Gaudron JJ.). Such a right of unilateral extinguishment, independent of the consent of the title holders, did not extend to other property titles, which therefore had greater legal protection against Crown encroachments (c.f. *ibid*, at 63-64, per Brennan J.).

However in an earlier New Zealand Supreme Court judgment, *The Queen v Symonds* (1847), Justice Chapman insists that native consent is required as a precondition for the Crown's extinguishment of native title (see note 42 below). Interestingly, in the *Mabo* judgment, Justice Toohey also expressed reservations about the distinction between native title and all other titles when it came to Crown extinguishment, suggesting that native title had similar protection from Crown extinguishment on an equal footing with the titles to land deriving from the Crown. As he put it: "Furthermore, even assuming the power of extinguishment to be a power to act unilaterally, it is not easy to discern the basis for such a proposition. There are suggestions in decided cases that it may be a concomitant of an assertion of sovereignty....But to say that, with the acquisition of sovereignty, the Crown has the power to extinguish native title does not necessarily mean that such a power is any different from that with respect to other interests in land. The Crown has the power, subject to constitutional, statutory or common law restrictions, to terminate any subject's title to property by compulsorily acquiring it...." (*Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at 193-94, per Toohey J.).

<sup>40</sup> See note 23 above.

of cession, whereas Stout C.J. clearly insists that the Treaty is a source of moral constraint upon the Crown in its dealings with Maori.<sup>41</sup>

Yet while departing from the moral outlook of *Wi Parata*, Stout C.J. insists that he is not departing from that case in any legal sense. Referring to his statement above concerning the status of the Treaty and the Crown's obligations to Maori concerning land, Stout C.J. states:

"The decision of *Wi Parata v The Bishop of Wellington* does not derogate from that position [above]. It only emphasised the decision in *Reg v Symonds* that the Supreme Court could take no cognisance of treaty rights not embodied in a statute, and that Native customary title was a kind of tenure that the Court could not deal with. In the case of *Nireaha Tamaki v Baker* [ (1901) A.C. 561] the Judicial Committee of the Privy Council recognised, however, that the Natives had rights under our statute law to their customary lands."<sup>42</sup>

---

<sup>41</sup> For Prendergast C.J.'s dismissal of the Treaty as a "simple nullity", in so far as it "purported to cede the sovereignty" from Maori to the Crown, see *Wi Parata v Bishop of Wellington*, at 78.

<sup>42</sup> *Tamihana Korokai v The Solicitor-General*, at 344, per Stout C.J. My addition. In aligning *Wi Parata* with the much earlier case of *Reg v Symonds* (1847), and insisting that both exclude native title from the jurisdiction of the Courts, Stout C.J. is insisting that New Zealand Courts have, from the beginning, adopted a uniform opinion on native title. Such a position is also evident in his earlier judgments. In particular, in a 1902 judgment, Stout C.J. made clear that his belief expressed above that "Native customary title was a kind of tenure that the Court could not deal with", was due to his reading of the Supreme Court decision in *Reg v Symonds* which, he said, "...held that the Supreme Court could not recognise any title not founded on the Queen's patent as the source of private title." (*Hohepa Wi Neera v The Bishop of Wellington* (1902) 21 NZLR 655 (CA), at 665-666, per Stout C.J.; c.f. "*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", [1840-1932] NZPCC Appendix, 730, at 732, per Stout C.J.). In other words, Stout C.J. insisted that the decision of *Reg v Symonds* excluded native title from the Courts by limiting Court jurisdiction to only those titles deriving from the Crown.

However this attempt to align the New Zealand Supreme Court's judgment in *Reg v Symonds* with its later judgment in *Wi Parata* by insisting that both exclude native title from the Courts, is based on a misreading of *Reg v Symonds*. On the one hand, in line with Chief Justice Stout's comments above, Justice Chapman clearly states in *R v Symonds* that "...the colonial Courts have invariably held (subject of course to the rules of prescription in the older colonies) that they cannot give effect to any title not derived from the Crown (or from the representative of the Crown, duly authorised to make grants), verified by letters patent" (*The Queen v Symonds* (1847) N.Z.P.C.C. (SC), 387, at 388, per Chapman J.). However as the following will show, Chapman J. intends such a statement to only apply to non-native settlers, who are bound by the Crown's exclusive right of pre-emption over native lands.

Both Justice Chapman and Chief Justice Martin were at pains to defend the Crown's exclusive right of pre-emption in *Reg v Symonds*, insisting that the Courts would refuse to recognise any settler's title to land deriving from direct purchase from the Maori tribes themselves, independent of confirmation by Crown grant (c.f. *ibid*, at 389-90, 391, per Chapman J.; *ibid*, at 393-95, per Martin C.J.). Hence in regard to settlers claims to land title, both judges insisted that the Courts would only recognise titles deriving from the Crown, as consistent with the Crown's exclusive right of pre-emption over native lands (*ibid*). It is in this context that their statement above must be read – as a statement defending the Crown's exclusive right of pre-emption over native lands by insisting that the Courts would only recognise title to land deriving from this source.

The last sentence in this statement is significant. Stout C.J. merely states that the Privy Council had determined, in the *Nireaha Tamaki* decision, that "the Natives had rights under our statute law to their customary lands." He does not criticise this view or reflect on it further. It is presented as a statement of fact and, referring to judgment from a superior Court, presumably also a statement of law. Yet in his judgment in *Hohepa Wi Neera v Bishop of Wellington* (1902), and more openly in his formal Protest against the Privy Council in 1903, Stout C.J. was critical of the Privy Council's decision in *Nireaha Tamaki v Baker*. The Court of Appeal's judgment in *Hohepa Wi Neera* was conducted under the shadow of the Privy Council's ruling, and any overt criticism of the ruling was muted. However in *Hohepa Wi Neera*, Stout C.J. does criticise the Privy Council's interpretation of the *Native Rights Act*, 1865 (the very statute upon which the Privy Council had based their recognition of Native rights) by saying that their interpretation of this statute in *Nireaha Tamaki* "...may have an effect not dreamed of by the Legislature that passed [the Act], nor understood by the Judges of the Supreme Court since it was enacted."<sup>43</sup> In his Protest, Stout is far more explicit, arguing that if the dicta of the Privy Council in *Nireaha Tamaki v Baker* were given effect to, "...no land title in the Colony would be safe."<sup>44</sup>

---

But it is a statement applying only to those who are subject to the Crown's exclusive right of pre-emption – the settlers themselves. In relation to native tribes, Chapman J. states that the Crown's exclusive right of pre-emption leaves them "...to deal among themselves, as freely as before the commencement of our intercourse with them..." (*ibid*, at 391, per Chapman J.). Consequently, since the native tribes are not subject to the Crown's exclusive right of pre-emption (it operating "only as a restraint upon the purchasing capacity of the Queen's European subjects" – *ibid*) Chapman J. insists that in relation to native claimants, the Courts will take cognisance of sources of land title not deriving from the Crown, by which he means native title. As Chapman J. states: "Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It follows from what has been said, that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice any thing new and unsettled." (*ibid*, at 390, per Chapman J.). Justice Chapman's judgment in this respect was fully accorded with by Chief Justice Martin (c.f. *ibid*, at 393, per Martin C.J.).

Consequently we see that Stout C.J.'s claim above that the Supreme Court's judgment in *Reg v Symonds* provides authority for excluding native title from the jurisdiction of the Courts was based on a very selective reading of that judgment. It ignores the very different situation regarding Court jurisdiction which Chapman J. held to apply to native applicants.

<sup>43</sup> *Hohepa Wi Neera v The Bishop of Wellington* (1902), at 667, per Stout C.J. My addition.

<sup>44</sup> "*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", at 746, per Stout C.J.

The Solicitor-General representing the Crown in the *Tamihana Korokai* case continued to reflect this hostile view toward the Privy Council's decision in *Nireaha Tamaki v Baker* (1901) when he stated: "In *Nireaha Tamaki v Baker* the Privy Council were of opinion that the extinguishment of Native title was regulated by statute, which is not the case, and so any general observations of the Privy Council upon the force or validity of Native title are of little moment."<sup>45</sup>

Yet despite Stout C.J.'s critical statements concerning the Privy Council precedent made some years earlier, in the present case Stout C.J. is clearly affirming the Privy Council's decision concerning the statutory recognition of native title in *Nireaha Tamaki v Baker*, in so far as he does not challenge it (as he had done previously). In the ten years since his judgment in *Hohepa Wi Neera*, and the nine years since his Protest in 1903, it is clear that Stout C.J. has come to terms with *Nireaha Tamaki v Baker* (1901) and its statutory recognition of native title in New Zealand. Indeed, this acquiescence becomes even more evident below when Stout C.J. himself asserts a statutory foundation for the recognition of native title in New Zealand.

### **Stout C.J. and the Unilateral Declarations of the Crown**

However we can detect further evidence in Stout C.J.'s judgment of the extent to which he has reconciled himself to the Privy Council decisions which moved against the *Wi Parata* precedent almost ten years before. This concerns his interpretation of the *Wi Parata* principle that a mere declaration of the Crown that native title has been extinguished on any piece of land is binding on all Courts and sufficient to oust any native title claim against the Crown. As we have seen, the *Native Land Act* (1909) was clearly intended to uphold this principle. The wording of s. 85 of the Act (quoted above) certainly indicates that the Parliament intended that a declaration by the Crown that specified land was free of native title would be authoritative in the Courts or, as s. 85 puts it, "conclusive proof of the fact so proclaimed."<sup>46</sup> Certainly the Solicitor-General, in his statements to the Court in the *Tamihana Korokai* case, believed that a declaration by the Crown was sufficient to nullify all native title claims. He said:

"...Native title is not available in any manner and for any purpose against the Crown. As against the Crown it is not a legal title at all. If, therefore, any dispute exists as to

---

<sup>45</sup> *Tamihana Korokai v The Solicitor-General* (1912), at 332, per Solicitor-General.

<sup>46</sup> *Native Land Act* [1909], s 85, in *The Statutes of the Dominion of New Zealand* (1909), p. 181.

whether the land is native customary land or Crown land the *ipse dixit* of the Crown is conclusive and the question cannot be litigated in this or any other Court. This is the principle that has dominated all Native land law since the foundation of the colony: See *Wi Parata v Bishop of Wellington* [3 NZ Jur NS SC 72 at p. 78]; *Nireaha Tamaki v Baker* [12 NZ LR 483 at p. 488]."<sup>47</sup>

The Solicitor-General however, apparently believed that his own *ipse dixit*, as the Law Officer of the Crown, was sufficient to determine the matter for the Crown. In other words, it appears from the record of the case that he was asserting that *his* declaration that the land in question was Crown land free from native title would (as representative of the Crown in this matter) nullify the contending native title claims in this case.<sup>48</sup> Stout C.J. rejected this claim as follows:

"The Native land Act, 1909, has various sections dealing with the customary land of the Maoris - viz., sections 84, 85, 86, and 87. What was the need of such sections if a mere declaration by a Law Officer of the Crown was all that was necessary to say that the land claimed as Native customary land was Crown land?"<sup>49</sup>

He continues:

"I know of no statutory authority that the Attorney-General as Attorney-General, or the Solicitor-General as Solicitor-General, has to declare that land is Crown land. The Attorney-General and the Solicitor-General are both high officers of State. They are legal officers, and they can appear as solicitors or counsel for the Crown, but there their functions and powers end. Their statement as to what is Crown property, unless made in accordance with some statutory power, is of no avail. If in an action they put

---

<sup>47</sup> *Tamihana Korokai v The Solicitor-General*, at 331, per Solicitor-General. An *ipse dixit* is "a dogmatic assertion made on the unsupported authority of the speaker." (*Butterworths Australian Legal Dictionary*. Sydney: Butterworths, 1997, p. 636). In other words, the Solicitor-General is claiming that the mere assertion by the Crown (in this case, as represented by the Solicitor-General) ought to be sufficient to legally determine that a disputed piece of land is Crown land unencumbered by native title.

<sup>48</sup> Williams J. asserted that this was the position of the Solicitor-General in this case, as follows: "The contention of the Solicitor-General is that in all cases where land is claimed by Natives to be held by them under their customs and usages, and they seek to have their titles ascertained by the Native Land Court.....the Solicitor-General, by virtue of the prerogative right of the Crown, and apart from any statutory authority, could at any time step in and prevent proceedings being taken or continued." (*Tamihana Korokai v The Solicitor-General* (1912), at 346, per Williams J.). See also *ibid*, p. 348-49, 351-52 per Edwards J; *ibid*, at 358, per Chapman J.

<sup>49</sup> *Tamihana Korokai v The Solicitor-General* (1912), at 344, per Stout C.J.



in a plea to that effect it would have to be proved like any other pleading of a party to the action."<sup>50</sup>

In coming to this conclusion, Stout C.J. is following the argument of the Privy Council in *Nireaha Tamaki v Baker* (1900-01), where Lord Davey, delivering the judgment of the Court, rejected the argument that the Commissioner of Crown Lands, as an officer of the Crown, was capable, on behalf of the Crown, of declaring that native title had been extinguished and so concluding the issue in a manner binding on the Courts.<sup>51</sup> Although reserving judgment on whether the Crown itself still had prerogative power to do this, the Privy Council insisted that officers of the Crown no longer exercised this prerogative power. Rather, they said, such officers exercised their functions under the authority of statute, which placed their actions *within* the jurisdiction of the Courts. As Lord Davey put it:

“But it is argued that the Court has no jurisdiction to decide whether the Native title has or has not been extinguished by cession to the Crown. It is said and not denied that the Crown has an exclusive right of pre-emption over native lands and of extinguishing the Native title. But that right is now exercised by the constitutional Ministers of the Crown on behalf of the public in accordance with the provisions of the statutes in that behalf, and there is no suggestion of the extinction of the appellant’s title by the exercise of the prerogative outside the statutes if such a right still exists.”<sup>52</sup>

---

<sup>50</sup> *Ibid*, at 345. See also *ibid*, p. 346, per Williams J.; *ibid*, at 358, per Chapman J.

<sup>51</sup> Lord Davey insisted that the Commissioner for Crown Land was not exercising Crown prerogative powers, but rather statutory powers: “Their Lordships think that the learned Judges have misapprehended the true object and scope of the action, and that the fallacy of their judgment is to treat the respondent as if he were the Crown or acting under the authority of the Crown for the purposes of this action. The object of the action is to restrain the respondent from infringing the appellant's rights by selling property on which he alleges an interest in assumed pursuance of a statutory authority the conditions of which (it is alleged) have not been complied with. The respondent's authority to sell on behalf of the Crown is derived solely from the statutes and is confined within the four corners of the statutes. The Governor in notifying that the lands were rural land open for sale was acting and stated himself to be acting in pursuance of s. 136 of the Land Act, 1892, and the respondent in his notice of sale purports to sell in terms of s. 137 of the same Act. If the land were not within the powers of those sections (as is alleged by the appellant), the respondent had no power to sell the lands, and his threat to do so was an unauthorised invasion of the appellant's alleged rights.” (*Nireaha Tamaki v Baker* (1900-01), at 380-81).

<sup>52</sup> *Ibid*, at 381-82.

Far from the unilateral declarations of Crown officers on behalf of the Crown being sufficient to oust the jurisdiction of the Courts, the Privy Council insisted that these declarations were subject to proof of evidence just as any other claim:

“The Court of Appeal thought that the Attorney-General was a necessary party to the action, but it follows from what their Lordships have said as to the character of the action that in their opinion he was neither a necessary nor a proper party. In a constitutional country the assertion of title by the Attorney-General in a Court of Justice can be treated as pleading only and requires to be supported by evidence.”<sup>53</sup>

Consequently we see how closely Stout C.J.’s decision in the present case above, rejecting the capacity of the Solicitor-General to unilaterally declare on behalf of the Crown that native title had been extinguished, follows the reasoning of the earlier decision of the Privy Council in *Nireaha Tamaki v Baker* (1900-01), without actually citing it.<sup>54</sup> We can also see the extent to which Stout C.J.’s conclusion moves beyond existing New Zealand precedent on this matter. For instance, the Court of Appeal in 1901, in *obiter dicta* attached to its judgment in *Solicitor-General v Bishop of Wellington*<sup>55</sup> came to an entirely contrary ruling. On the strength of a mere suggestion by the Solicitor-General in an amended statement of defence that obligations had arisen between the Crown and a particular Maori tribe involving the cession of land, the Court suggested that it had no jurisdiction to interfere.<sup>56</sup> In other words, it concluded that such a declaration alone was sufficient to oust the jurisdiction of the Court. As Justice Williams put it, delivering the judgment of the Court:

---

<sup>53</sup> *Ibid*, at 381.

<sup>54</sup> However Justice Chapman, in coming to the same conclusion in the present case, directly quotes the Privy Council’s decision as authority for his view – c.f. *Tamihana Korokai v The Solicitor-General* (1912), at 358, per Chapman J.

<sup>55</sup> (1901) 19 NZLR 665.

<sup>56</sup> The amended statement of defence was as follows: "The defendant by Hugh Gully, Crown Solicitor for the Wellington District, further amends his statement of defence filed herein by adding thereto the following paragraph: "That the terms of cession to the Crown by the aboriginal Natives of the lands comprised in the grants were such as to preclude the Crown from consenting to the application of the said lands and rents and profits thereof to any other purposes or objects than those expressly mentioned in the grant. And that the Crown has a duty to observe the terms of the cession to itself and the trust thereby confided by the aboriginal Natives in the Crown. And that the Executive Government has determined, so far as the matter is one for the determination of the Crown, that any departure from the precise terms of the grant by the application *cy-près* of the said lands and funds without the consent of the Parliament of the Colony would contravene the terms of the said cession and be a breach of the trust thereby confided in the Crown." [cited in "*Wallis and Others v Solicitor-General*. Protest of Bench and Bar, April 25, 1903", at p. 741].

“What the original rights of the native owners were, what the bargain was between the natives and the Crown when the Natives ceded the land, it would be difficult, if not impossible, for this Court to inquire into, even if it were clear that it had jurisdiction to do so.”<sup>57</sup>

It was precisely this conclusion by the Court of Appeal that led to scathing criticism by the Privy Council in their judgment on appeal in that case. The Privy Council responded as follows:

“[O]n the hearing of the appeal the Solicitor-General applied for and obtained leave to amend his defence. A formal order for the amendment was afterwards obtained on the ground that such amendment was necessary ‘to more clearly define the grounds of defence of the Crown’. But the amendment only made the confusion worse. It was a medley of allegations incapable of proof and statements derogatory to the Court. But the Court accepted it, and treated it with extreme deference. The learned judges intimate pretty plainly that if they had not been able to find satisfactory reasons for deciding in favour of the Crown, the amendment would of itself have prevented their making an order in favour of the trustees. The amendment divides itself into two parts. In the first place, it asserts that the Crown has come under some undefined and undisclosed obligations to the natives. The Court seems to think that this assertion must place the Court ‘in a considerable difficulty’. Why? Why should a Court which acts on evidence and not on surmise or loose suggestions pay any attention to an assertion which, if true, could not have been proved at that stage of the proceedings, and which the evidence in the cause shews to have been purely imaginary?.....The view of the Court of Appeal is to be found in a passage towards the end of their judgment, which runs thus: ‘What the original rights of the native owners were, what the bargain was between the natives and the Crown when the natives ceded the land, it would be difficult if not impossible for this Court to inquire into, even if it were clear that it had jurisdiction to do so’. Their Lordships are unable to follow this observation.....”<sup>58</sup>

The Privy Council then goes on to confirm its position, first articulated two years earlier in *Nireaha Tamaki v Baker* (1900-01), that officers of the Crown are in no

---

<sup>57</sup> *The Solicitor-General v The Bishop of Wellington and Others* (1901) 19 NZLR 665, at 686.

<sup>58</sup> *Wallis v Solicitor General for New Zealand* [1903] AC 173, at 187-88.

position to make unilateral declarations concerning native title capable of ousting the jurisdiction of the Courts. Indeed it seems to go even further and suggest that *any* claim on behalf of the Crown concerning these matters must be subject to the jurisdiction of the Courts (thereby imputing an absence of Crown prerogative powers over native land):

“[I]f the Crown seeks to recover property and to oust the present possessors, it must make out its case just like any other litigant. All material allegations must be proved or admitted. Allegations unsupported go for nothing. Notwithstanding the doubts expressed by the Court of Appeal, it is perfectly clear that the Court has jurisdiction to deal with a claim to property made on behalf of the Crown when properly brought forward. It has no right to decline jurisdiction. Still less has it a right to stay its hand at the instance of a claimant who may present a case into which it may be difficult, if not impossible, for the Court to inquire, even though that claimant be the Crown.”<sup>59</sup>

The Court of Appeal took extreme umbrage at the Privy Council statements above. As we shall see below, it argued that these statements implied that the Court of Appeal was too willing to submit to the demands of the Executive, and was therefore lacking in dignity and independence. In the context of its judgment above, the Privy Council had indeed said that the willingness of the Court of Appeal to limit its jurisdiction in response to the claims of the Crown was “certainly not flattering to the dignity or the independence of the highest Court in New Zealand”<sup>60</sup>. In response, the Court of Appeal took the unprecedented step of issuing a formal Protest against the Privy Council. The Protest referred specifically to the criticisms of the Privy Council cited above, and complained of the Privy Council’s injudicious use of language and imputation of improper motives to the Court of Appeal. As Justice Williams put it in his Protest:

"The decision of the Court of Appeal of New Zealand in the case of the *Solicitor-General v Wallis* has recently been reversed by the Judicial Committee of the Privy Council. Their Lordships have thought proper, in the course of their judgment, to use language with reference to the Court of Appeal of a kind which has never been used by a superior Court with reference to an inferior Court in modern times. The judgment of their Lordships has been published and circulated throughout the Colony. The

---

<sup>59</sup> *Ibid*, at 188.

natural tendency of that judgment, emanating as it does from so high a tribunal, is to create a distrust of this Court, and to weaken its authority among those who are subject to its jurisdiction."<sup>61</sup>

The two other Court of Appeal judges issuing a Protest, Chief Justice Stout and Justice Edwards, also made claims along similar lines.<sup>62</sup>

Despite the tenor of the Court of Appeal's Protest against the Privy Council, nevertheless some nine years later, in *Tamihana Korokai v Solicitor-General* (1912), Stout C.J. (and his brother judges) all follow the reasoning of the Privy Council which had given rise to that Court's criticism of the Court of Appeal all those years before. In other words, all the Court of Appeal judges in *Tamihana Korokai* reject the

---

<sup>60</sup> *Ibid.*

<sup>61</sup> "*Wallis and Others v Solicitor-General*. Protest of Bench and Bar, April 25, 1903", at 747, per Williams J.

<sup>62</sup> Hence the Chief Justice of the Court of Appeal, Sir Robert Stout, begins his address by stating: "In the judgment in a recent case before the Lords of the Judicial Committee of the Privy Council – *Wallis v Solicitor-General* – a direct attack has been made upon the probity of the Appeal Court of New Zealand." (*ibid.*, p. 730). Although he was not party to the actual judgment of the Appeal Court, he argued that ".....when the Court of which I have the honour to be President is attacked by such a body as the Privy Council, it is my duty to explain the position to my fellow-colonists." (*ibid.*, p. 745, per Stout C.J.). It was primarily the imputation that the Court of Appeal lacked dignity, and was willing to deny justice, by submitting to undue pressure from the executive, which most aroused the indignation of its judges. As Justice Williams states: "I have had the honour of being a Judge of this Court for more than twenty-eight years. I have seen Governments come and go, but never have I known any Government attempt in the slightest degree to interfere with the independence of the Court. Nor have I ever heard it suggested that this Court, in the exercise of its judicial functions, has shown a want of independence or a subservience to the Executive Government.....No suggestion of the kind has ever been made here. It has been reserved for four strangers sitting 14,000 miles away to make it." (*ibid.*, at 755-56, per Williams J.). Williams J. concludes: "Had we ever spoken of a Judge of an inferior Court in the terms their Lordships have spoken of the Judges of this Court, it would be ourselves and not the Judge who would have stood condemned." (*ibid.*, at 756, per Williams J.). Justice Edwards points to the unprecedented nature of the aspersions cast by the Privy Council when he states: "Never before has it happened that the ultimate appellate tribunal of the Empire has charged the Judges of any colonial Court, as their Lordships have now charged the Judges of this Court, with want of dignity, and with denying or delaying justice at the bidding of the Executive. If there were any foundation in charges so grave, then the learned Judges against whom they are leveled ought to be removed from the high office which they would have shown themselves unworthy to occupy.....Yet such charges have been made by the Judicial Committee against the Judges of the Appellate Court of this Colony; and they have been made without the slightest foundation in fact, and based only upon assumptions of law which to every trained lawyer in the Colony must appear, at the least, astonishing and absurd." (*ibid.*, p. 757, per Edwards J.). Justice Edwards ultimately concludes in ringing tones: ".....I feel that the protest against such imputations should be unanimous and unequivocal; and in the interests of justice, liberty, and decency, and of the unity of that great Empire which can only be held together by the mutual respect of its kindred communities, I do protest against them." (*ibid.*, p. 759, per Edwards J.). Chief Justice Stout also appealed to the "unity of Empire", suggesting that this had been placed in danger by what he saw as the Privy Council's intemperate criticisms. He states: "The matter is really a serious one. A great Imperial judicial tribunal sitting in the capital of the Empire, dispensing justice even to the meanest of British subjects in the uttermost parts of the earth, is a great and noble ideal. But if that tribunal is not acquainted with the laws as it is called upon to interpret or administer, it may unconsciously become the worker of injustice. And if such should unfortunately happen, that Imperial spirit that is the true bond of union amongst His Majesty's subjects must be weakened." (*ibid.*, p. 746, per Stout C.J.).

capacity of Crown officers to make unilateral declarations on behalf of the Crown ousting the jurisdiction of the Courts.<sup>63</sup>

We therefore see that despite its Protests almost ten years before, the Court of Appeal has ultimately come around to the point of view expressed by the Privy Council in *Nireaha Tamaki v Baker* (1900-01) and *Wallis v Solicitor-General* (1903) – a view which fundamentally departed from the *Wi Parata* precedent concerning declarations of the Crown on native title, a precedent upheld in the Court of Appeal's earlier judgment in *Solicitor-General v Bishop of Wellington* (1901).

### **Stout C.J. and the Statutory Recognition of Native Title**

In denying the authority of the Solicitor-General to determine the issue of native title merely by his own declaration, Stout C.J. insists that there are only a specified number of ways that native title claims against the Crown can be "nullified", thereby preventing any further investigation into the native title:

"There are, in my opinion, only three things that can prevent the Native Land Court entering on an inquiry as to such customary title - 1, a Proclamation of the Governor under a statute, such as has been provided in many Acts, and is so provided in section 85 of the Native Land Act, 1909; 2, a prohibition by the Governor under section 100 of the native Land Act, 1909; 3, proof that the land has been ceded by the true owners, or that a Crown grant has been issued."<sup>64</sup>

Given that none of these grounds were established by the Crown in this case, Stout C.J. concluded that there was not sufficient proof to determine that the native title had been extinguished. Consequently, he argued, the claimants had a right to take their case to the Native Land Court to determine the status of the native title. As Stout C.J. puts it:

"What the customary title to the bed of Lake Rotorua may be must be considered and determined by the only Court in New Zealand that has jurisdiction to deal with Native titles - the Native Land Court.....[T]he plaintiff and his people have a right to go to

---

<sup>63</sup> C.f. *Tamihana Korokai v The Solicitor-General* (1912), at 345, per Stout C.J.; *ibid*, at 346, per Williams J.; *ibid*, at 358, per Chapman J.

<sup>64</sup> *Ibid*, at 345, per Stout C.J. Similarly, both Edwards and Cooper JJ. argue that if the Crown wishes to nullify native title claims against the Crown, the Crown must either resort to the procedure under s. 85 of the *Native Land Act* (1909) or else provide substantive proof (beyond a mere declaration) that the land in question is Crown land. See *ibid*, p. 352, per Edwards J.; *ibid*, p. 354, per Cooper J.

the Native Land Court to have their title investigated, and that the Native Land Court can only be prevented from performing its statutory duty, first, under the Native Land Act; or, second, on proof in that Court that the lands are Crown lands freed from the customary title of the Natives; or third, that there is a Crown title to the bed of the lake."<sup>65</sup>

With this statement, Stout C.J. is effectively recognising the altered situation on native title produced by the Privy Council's ruling in *Nireaha Tamaki v Baker* that "...the Natives had rights under our statute law to their customary lands."<sup>66</sup> Stout C.J. still upholds the *Wi Parata* principle that in terms of common law, "...Native customary title was a kind of tenure that the Court could not deal with."<sup>67</sup> Yet it is clear that he now assumes, in line with the Privy Council, that there is a statutory basis for native title in New Zealand. This is evident in his statements above, where Stout C.J. uses the *Native Land Act* (1909) both as a source of statutory recognition of native title, and as a limit on the capacity of the Crown to extinguish native title claims except under the strict terms of the Act or other specified procedures. In other words, Stout C.J. uses the *Native Land Act* (1909) as the statutory authority to enforce native title claims against the Crown. No longer is there any suggestion that these matters fall entirely within Crown prerogative, and therefore outside the jurisdiction of the Courts. At one point in his judgment, Stout C.J. leaves no doubt of his views concerning the statutory basis of native title rights in New Zealand, stating:

"I am of opinion that the Native Land Act recognises that Natives have a right to their customary titles."<sup>68</sup>

Such a conclusion is certainly contrary to the parliamentary intentions which lay behind the *Native Land Act* (1909) which, as we saw, was clearly meant to protect the Crown from native title claims by upholding the *Wi Parata* precedent that the Crown

---

<sup>65</sup> *Ibid* at 345-46, per Stout C.J.

<sup>66</sup> *Ibid* at 344, per Stout C.J.

<sup>67</sup> *Ibid*.

<sup>68</sup> *Ibid*, at 345. However earlier in his judgment, Stout C.J. states that s. 73 of the *New Zealand Constitution Act* (1852) "recognised the Native title" (*ibid*, at 341). Needless to say, such a recognition precedes the *Native Land Act* (1909) by more than half a century. However s. 73 of the *New Zealand Constitution Act* is a recognition of the Crown's exclusive right of pre-emption over the native title, rather than an explicit recognition of native title rights against the Crown (although the former does imply the latter), and so it is questionable whether Stout C.J. conceives s. 73 as capable of enforcing these rights against the Crown. It seems clear in *Tamihana Korokai* that Stout C.J. limits such possibilities to the *Native Land Act* (1909).

was "the sole arbiter of its own justice" in native title matters. Therefore, Stout C.J.'s judgment is somewhat ironic in that he uses the *Native Land Act* (1909) to reach conclusions contrary to the intentions of the Act itself. He insists that the Act establishes strict procedures for the extinguishment of native title claims by the Crown, and then argues that because the Crown has not abided by these procedures in the present case, native title claims can be instituted against the Crown in the Native Land Court. The Act which was therefore supposed to provide blanket protection for the Crown against native title claims has instead been used by Stout C.J. as the instrument for producing precisely the opposite outcome. In other words, Stout C.J. uses the Act to produce a result which the Act had clearly been designed to avoid, thereby hoisting the Crown on its own petard.<sup>69</sup>

### Healing the Breach

However the *Native Land Act* (1909) serves another purpose for Stout C.J. It allows him to heal the breach that emerged between the Court of Appeal and the Privy Council in the Protest of 1903. As we saw, despite the ostensible reasons for the Protest, its underlying rationale was the divergent views which the New Zealand Courts and the Privy Council had reached on native title - in particular, concerning the authority of *Wi Parata*.<sup>70</sup> The Privy Council had claimed in *Nireaha Tamaki v Baker* (1901) that native title claims had a statutory basis in New Zealand law, stretching back to the *Native Rights Act*, 1865, and this ensured that native title claims were cognisable by New Zealand municipal Courts.<sup>71</sup> It was this claim that drew heated protest from Stout C.J. and Williams and Edwards J.J. in their Protest. Indeed, Stout C.J. went so far as to claim in the Protest that "...in *Nireaha Tamaki v Baker*, the

---

<sup>69</sup> Williams J. sees nothing ironic in the use of the *Native Land Act* (1909) to bind the Crown, despite any intentions among the legislators of the Act to the contrary. He states: "I agree.....with the conclusion arrived at by His Honour [in the Supreme Court] that rights given to Natives by statute to have their customary titles determined can only be divested in the manner prescribed by statute. The rights given to Natives by sections 90 to 93 inclusive of the Native Land Act, 1909, to have a legal estate in fee-simple in possession vested in the persons found to be entitled, are rights expressly given against the Crown. If these sections do not bind the Crown they are meaningless and inoperative. The Crown is a party to the statute. It is difficult to see how, when rights which expressly affect pre-existing rights of the Crown are created by statute, the Crown, upon the passing of the statute, can disregard the rights so created and exercise its pre-existing rights as if the statute had not been passed." (*Tamihana Korokai v Solicitor-General*, at 348, per Williams J. My addition).

<sup>70</sup> See note 23 above.

<sup>71</sup> C.f. *Nireaha Tamaki v Baker* (1900-01), at 382.



[Privy] Council was ignorant of.....the Ordinances, Acts, and Charters regarding Native lands."<sup>72</sup>

What the 1909 Act allowed Stout C.J. to do was accept the view of the Privy Council in *Nireaha Tamaki v Baker* concerning the statutory foundation of native title in New Zealand, but to do so in a way that allowed him to avoid directly contravening his earlier opinion in the Protest which claimed the contrary.<sup>73</sup> By focusing on an Act promulgated in 1909 as the source of native title - an Act which *post-dates* his Protest against the Privy Council in 1903 - Stout C.J. is able to affirm the position of the Privy Council that there is a statutory basis for New Zealand native title, but to do so in a way that does not contradict his claims to the contrary in 1903.<sup>74</sup> Paul McHugh has pointed to this face-saving manoeuvre by Stout C.J. as follows:

"Ignoring the possibility that earlier statutes affecting Maori traditional lands could have provided a basis for this 'statutorily recognised' title, Stout held it to have been created by the 1909 legislation. Here Stout had extricated himself, in so far as the choice of the 1909 legislation cast no shadow upon his earlier decisions."<sup>75</sup>

---

<sup>72</sup> "*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", at 746, per Stout C.J. My addition.

<sup>73</sup> And yet much of the early part of Stout C.J.'s judgment indicates that previous statutes *did* recognise native title. As he states: "That the Crown in New Zealand recognised that it could not treat the Native land - that is, the land over which the Natives had not given up their rights of cession - as Crown land in the fullest sense is plain from various things done." (*Tamihana Korokai v The Solicitor-General*, at 342, per Stout C.J.). He then points to a succession of Acts which clearly recognised the existence of native title (c.f. *ibid*, at 342-43). So although Stout C.J. explicitly asserts that the *Native Land Act* (1909) is the statutory foundation for native title, the earlier part of his judgment suggests an even closer convergence to the earlier view of the Privy Council in *Nireaha Tamaki v Baker* (1901) that statutes prior to this had also provided this foundation.

<sup>74</sup> A similar belated acquiescence of the Privy Council's decisions on native title can be seen in Justice Edwards' judgment in the present case. In the course of his Protest against the Privy Council in 1903, Justice Edwards had claimed that "...the interpretation which their Lordships have put upon the laws relating to Native lands in this Colony is subversive of the law which has prevailed from its foundation [in the colony]....." ("*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", at 757, per Edwards J. My addition). The Privy Council interpretations that Edwards J. was referring to were those in *Nireaha Tamaki v Baker* (1900-01) and *Wallis v Solicitor-General* (1903). Yet nine years later, in *Tamihana Korokai v Solicitor-General* (1912), Edwards J. refers to *Nireaha Tamaki v Baker* (1900-01) in a positive light, stating that it is this precedent which is the source of the New Zealand Courts' jurisdiction over native title (c.f. *Tamihana Korokai v The Solicitor-General*, at 349-50, per Edwards J. See also *ibid*, at 352, per Edwards J.). This is a position contrary to the *Wi Parata* precedent and one which, in 1903, Edwards J. had referred to as "subversive" of the law in New Zealand (see above). Therefore we can see that Edwards J. performs the same move as Stout C.J. in retrospectively embracing a Privy Council decision which, some years earlier, had been the subject of his vehement protest.

<sup>75</sup> McHugh, *The Maori Magna Carta*, p. 121.

In his judgment in *Tamihana Korokai v Solicitor-General*, Stout C.J is therefore able to heal the breach between the Court of Appeal and the Privy Council on native title, finally making peace with the Privy Council decisions in *Nireaha Tamaki* (1900-01) and *Wallis v Solicitor-General* (1903).

All of the other judges in the *Tamihana Korokai* case substantially agreed with Stout's judgement, though Chapman J. followed the Privy Council in *Nireaha Tamaki v Baker* (1900-01) in perceiving the statutory basis of native title in New Zealand as preceding the 1909 Act.<sup>76</sup>

### **The Fate of *Wi Parata***

As such, in its convergence with the Privy Council decisions of a decade earlier which had rejected the *Wi Parata* precedent, the judgment of the Court of Appeal in *Tamihana Korokai v Solicitor-General* (1912) is definitely a new departure in New Zealand jurisprudence on native title, not least because it is a final break with *Wi Parata*. By insisting that the *Native Land Act* (1909) allowed, under certain specified conditions, for native title claims to be enforceable against the Crown, thereby forcing the Crown to submit to the jurisdiction of the Native Land Court, the Court of Appeal was clearly moving against the *Wi Parata* precedent that all such matters fell exclusively within the prerogative powers of the Crown, and so outside the jurisdiction of the Courts.

As in *Tamihana Korokai*, so in *Wi Parata* the claim arose that there was a statutory foundation for native title rights in New Zealand. It was held by the claimant in that case that the Crown was bound by the *Native Rights Act*, 1865, to submit all native title questions to the Native Land Court, and was bound by the decision of that statutory authority.<sup>77</sup> As we have seen, Chief Justice Prendergast fundamentally denied that the Crown was so bound by this statute, on the grounds that it was not named within it.<sup>78</sup> Prendergast therefore insisted that the Crown retained its full prerogative powers over native title and so could unilaterally declare its

---

<sup>76</sup> C.f. *Tamihana Korokai v The Solicitor-General*, at 355-56, 357, per Chapman J.

<sup>77</sup> C.f. *Wi Parata v Bishop of Wellington* at 75, per G.E. Barton for the plaintiff.

<sup>78</sup> See note 34 above.

extinguishment on any piece of land, thereby forestalling any claims in the Native Land Court.<sup>79</sup>

Consequently we see that the Court of Appeal judges in *Tamihana Korokai* fundamentally broke with the *Wi Parata* precedent in 1912 by simply recognising what *Wi Parata* had denied – a statutory basis for native title claims in New Zealand which, under specified conditions, bound the Crown to submit to the Native Land Court on issues of native title.

### **The Fate of *The Queen v Symonds* (1847)**

However despite the Court of Appeal's break from *Wi Parata* in this case, its judgment by no means goes as far as the Supreme Court's decision on native title in *The Queen v Symonds* some sixty-five years before. In *The Queen v Symonds* (1847), both Chapman J. and Martin C.J. had affirmed the status of native title in New Zealand common law, rather than statutory law, and had therefore argued that native title is cognisable in the municipal Courts on this common law basis.<sup>80</sup>

The Court of Appeal in *Tamihana Korokai* did not recognise the existence of native title in common law, and only acknowledged that native title is cognisable by the Courts because of its recognition in statute law. In arriving at this conclusion

---

<sup>79</sup> See note 6 above. Indeed, Prendergast C.J. denies that the Crown is bound by the *Native Rights Act*, 1865, precisely because this would deny the Crown's prerogative powers over native title. As Prendergast put it: "...the Act, if it bound the Crown, would deprive it of a prerogative right, that namely of conclusively determining when the native title has been duly extinguished...." (*Wi Parata v Bishop of Wellington*, at 80).

<sup>80</sup> Justice Chapman in *The Queen v Symonds* gave a ringing endorsement of the common law status of native title as follows: "The intercourse of civilised nations, and especially of Great Britain, with the aboriginal Natives of America and other countries, during the last two centuries, has gradually led to the adoption and affirmation by the Colonial Courts of certain established *principles of law* applicable to such intercourse. Although these principles may at times have been lost sight of, yet animated by the humane spirit of modern times, our colonial Courts, and the Courts of such of the United States of America as have adopted the *common law of England*, have invariably affirmed and supported them; so that at this day, a line of judicial decision, the current of legal opinion, and above all, the settled practice of the colonial Governments, have concurred to clothe with certainty and precision what would otherwise have remained vague and unsettled. These principles are not the new creation or invention of the colonial Courts. They flow not from what an American writer has called the 'vice of judicial legislation'. They are in fact to be found among the earliest *settled principles of our law*; and they are in part deduced from those higher principles, from charters made in conformity with them, acquiesced in even down to the charter of our own Colony; and from the letter of treaties with Native tribes, wherein those principles have been asserted and acted upon." (*The Queen v Symonds* (1847), at 388, per Chapman J. My emphasis. See also *ibid*, at 390, per Chapman J.). Note that Chief Justice Martin stated in his own judgment that he fully accorded with Justice Chapman's views on the Crown's relationship to native title in this case, stating that "...[t]he very full discussion of this subject in the judgment of my learned brother, Mr. Justice *Chapman*, renders it superfluous for me to enter further upon the question." (*ibid*, at 393, per Martin C.J.).

therefore, they affirmed the Privy Council's position in *Nireaha Tamaki*, not the New Zealand Supreme Court's decision in *The Queen v Symonds*.

According to some authorities, it would not be until some seventy-four years later, in the High Court decision of *Te Weehi v Regional Fisheries Officer*<sup>81</sup> that New Zealand judicial authorities would return to the position of Chapman J. and Martin C.J. in *The Queen v Symonds* (1847) and finally recognise the doctrine of native title in common law.<sup>82</sup>

---

<sup>81</sup> [1986] 1 NZLR 682.

<sup>82</sup> C.f. Paul McHugh, "Aboriginal Title Returns to the New Zealand Courts", *New Zealand Law Journal*, February 1987, pp. 39-41. However Frederika Hackshaw argues that *Te Weehi v Regional Fisheries Officer* (1986) still didn't fully overturn the statutory prohibition preventing native title claims against the Crown, which effectively undermined native title rights in New Zealand common law. As we saw, this statutory bar was originally incorporated in the *Land Titles Protection Act* (1902) and the *Native Land Act* (1909), and was an attempt to enshrine the *Wi Parata* precedent in legislation, protecting the Crown from native title claims (see note 24 above). However by the time of *Te Weehi*, this statutory bar was embodied in part XIV of the *Maori Affairs Act* (1953). Hackshaw points out that this statutory bar applies to native title claims regarding land, whereas the *Te Weehi* case referred to native customary rights within the sea (the claimant having been convicted in the District Court of gathering undersize paua) (Frederika Hackshaw, "Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi", in I.H. Kawharu (ed) *Waitangi. Maori and Pakeha Perspectives of the Treaty of Waitangi*. Auckland: Oxford University Press, 1989, p. 115). Hackshaw points out that Mr. Justice Williamson noted ".....that in the instant case [*Te Weehi v Regional Fisheries Officer*] the customary rights contended for were not based on ownership of land. The statutory bar which prevails against claims based on aboriginal title to land did not, therefore, apply, and on the evidence before the Court, His Honour was satisfied that the appellant had exercised a customary fishing right within the meaning of s. 88(2) of the Fisheries Act." (*ibid*, p. 116). Consequently, Hackshaw suggests that the only reason why customary native title rights were capable of being judicially recognised in *Te Weehi* is that the statutory bar which applied to native title claims on land did not apply to the sea. She concludes: "In so far as *Te Weehi* represents a dramatic reversal of judicial attitudes, the case is an important landmark. The finding does not, however, affect the statutory bar which operates against the enforcement of customary rights based on aboriginal title to land, because fishing rights do not come within the ambit of part XIV of the Maori Affairs Act 1955 [*sic*]." (*ibid*).