

ABORIGINAL TITLE IN NEW ZEALAND COURTS

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I INTRODUCTION

The purpose of this article is to set the stage for a subsequent assessment of Maori rights over land below tidal water (see "The Legal Status of Maori Fishing Rights in Tidal Waters" (1984) 14 VUWLR 247) — an inquiry prompted by the controversy over the Government's proposal to install a sewage outfall over traditional Maori fisheries at the Motunui Reef in Taranaki. This later article finds that the Maori people continue to enjoy at law, fishing rights, proprietary in character, which cannot be taken away other than by specific expropriatory legislation. The consequences of such a finding for traditional Maori fishing rights, such as those over the Motunui Reef are obvious. The argument's success depends, however, on a receptive judicial climate. The modest aim of this article is, hopefully, to assist in the development of such a legal climate wherein the Maori might obtain legal recognition, some might say vindication, of their common law (the words are carefully chosen) rights.

"Aboriginal rights" are those rights which the Maori people enjoyed at law immediately subsequent to British acquisition of territorial sovereignty to New Zealand. Broadly speaking these rights can be classified under two heads: First, there existed the right to the use of their customary laws *inter se* except in respect of dealings with European peoples and serious crimes. In these cases English law prevailed. Secondly, there existed the natives' right to the continued use and occupation of their traditional lands. This second right has been variously called "aboriginal title", "native title", "right of occupancy" and, in North America, "Indian title". It should be distinguished at the outset from the Maori's "customary" title recognised in New Zealand by the Maori land legislation.¹ The label used hereinafter to describe this second right will be "aboriginal title".

Plainly these two rights are or rather, were, inter-related in some way. The right to the continued use of traditional law *inter se* necessarily implied, for example, the validity of native rules of succession and title to land (save those, such as title by conquest, repugnant to England law). These rules should be distinguished from those later applied by the Native (today Maori) Land Court in its regulation of native land and transformation of the Maori's aboriginal title into a tenancy in common.² The distinction

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¹ The Maori Affairs Act 1953, (1981) NZRS Vol. 8, section 2 defines "customary land" as "land which, being vested in the Crown, is held by Maoris or the descendants of Maoris under the customs and usages of the Maori people". After reading this article the reader may come to the conclusion that 'customary' and 'aboriginal' title are one and the same thing. Certainly this is true to the extent that for the most part the two labels describe the same set of rights. However, at a later date it will be argued that 'aboriginal title' exists over land which cannot be considered subject to a 'customary title'.

² These rules, which were extrapolations from and interpretations of Maori custom by the Native Land Court Judges, are outlined in N. Smith's monograph *Maori Customs Affecting Land* (1955). This process was a variation and transformation rather than application of Maori custom: see P. McHugh "The Constitutional and Legal Position of Maori Customary Land from 1840 to 1865" in *Maori Land Laws of New Zealand* (1983) at pp. 31-34.

between the two types of aboriginal rights is one which can be readily made as the continued viability of native laws *inter se* was in practice distinguished from the continuity of Maori laws affecting land, this latter set of laws being part and parcel of the Maori's aboriginal title. This preliminary point can be made clearer by a brief expansion upon the nature of this first aboriginal right to the continuity of indigenous laws *inter se*.

It was a presumption of common law that English acquisition of territorial sovereignty to inhabited lands brought no *ipso facto* abrogation of local laws and property rights.³ There had to be an 'act of state' during the process of acquisition making such a suspension or, if acquisition was complete, some lawful act (that was legislative in character) extinguishing native laws and/or property rights.⁴ These rules were easily applied when the territory acquired was inhabited by Europeans but did not apply so readily when the land was occupied by non-Christian souls. It was inconceivable to the common law mind that barbaric law and custom could possibly be employed for the British inhabitants of the newly-got territory. In *Calvin's Case*⁵ Coke had given a neat, off-hand remedy, stating that all infidels were *perpetui inimici* and, therefore, a principle of *ipso facto* abrogation of their laws and property rights applied. This was too much even for the most intemperate of common law minds and did not pass into the legal mainstream.⁶ Instead, at least as far as native laws *inter se* were concerned, the law held that the native laws would continue to regulate their dealings as amongst themselves but English law would apply amongst the European settlers and in the natives' dealings with these peoples. Their own 'civil' and 'criminal' laws and customs (so much as that distinction of English law might be employed) continued except, first, where the natives were taken to have brought themselves under English law as by coming into contact with white society; or, secondly, where serious crimes were involved; or, finally, where the native laws were repugnant to English law.⁷ In a relatively recent case, for example, *Sissons J.* upheld the rules outlined above in considering the legal validity of traditional Eskimo (Inuit) marriages and laws of succession. In the case before him he ruled that English law applied to the deceased's property for these reasons:

Noah had left his father's house and community and Eskimo society and had become part of another society and economy where different laws and customs prevailed. He accepted those laws and customs. He trained for a job, and he worked for wages and saved a

³ *Anonymous* (circa 1640), 1 Salk 46; 91 ER 46(CP); *East India Co. v Sandys* (1683-85), 10 St.Tr. 371, 546; *Blankard v Galdy* (1693), 2 Salk.4441; '*Privy Council Memorandum*' (1722) 2 P.Wms. 75; 24 ER 646; *Campbell v Hall* (1774), Lofft 655; 98 ER 848 (KB). See the discussion accompanying notes 27-32.

⁴ The question of extinguishment is dealt with *infra*, text accompanying notes 19-20, and, 141-158.

⁵ (1608) 7 Co.Rep. 1a; 77 ER 377.

⁶ *Calvin's Case* is discussed more fully, *infra* text accompanying notes 27-32.

⁷ In America see *Goodell v Jackson* (1823), 20 Johns Rep. 693 at 709-10 (NY Ct. Err.); *Holland v Pack* (1823) 1 Peck's Rep. 151 (Tenn. S.C. Err.); *Fisher v Allen* (1837) 2 Howard's R. 611 (Miss. H.C. Err.); and J. Kent *Commentaries on American Law* 9th ed. (1858), III at 381-5. In Canada see *Connolly v Woolrich* (1867) 11 LC Jur. 197 (Que.S.C.) and *Re Noah Estate* (1961) 32 DLR (2d) 185 (NWT Terr.Ct.). In Australia *R v Murrell* (1836) Legge 72 (NSW Sup.Ct. F.C.); *R v Peter* (29 June 1860) Argus (Newspr. Vic.) (Vic. Sup.Ct. F.C.); and *R v Jemmy* (7 September 1960) Argus (Newspr. Vic.) (Vic. Sup. Ct. F.C.). A New Zealand example would appear to be *Public Trustee v Loasby* (1908) 27 NZLR 801 (S.C.). Cf. *Halsbury's Laws of England* 4th ed. Vol. VI, para. 1197.

fair part of his wages and deposited this money in a bank to his credit for the use of himself and his own family. He did not make this money available to his father and the Eskimo community at Broughton Island.⁸

The key, then, to this first aboriginal right is largely the continued existence of a distinct native community living in a manner so as to indicate its isolation or, at least independence, from white society and continued wish to regulate their everyday lives according to traditional ways. The geography of New Zealand, its very smallness, made this native right impossible to survive beyond the first few decades of British rule though such colonial legislation as The Native Rights Act, 1865⁹ breathed legal life back into the Maori customary laws which the common law would have seen as dwindling away.

By way of aside it can be added that native peoples' claims in North America and, increasingly, Australia to an inherent right of self-government draw some sustenance from this aboriginal right to the continuity of their customary laws *inter se*. In New Zealand where native society has been unable to retain a distinct, geographical coherence this claim to self-government is necessarily diluted but evident, nonetheless, in Maori claims to some rights of 'self-determination'. In many ways this too is a residual effect of the long-gone aboriginal right to the continuity of their customary laws *inter se*.

II THE CROWN'S SOVEREIGN TITLE AND ABORIGINAL TITLE

According to feudal theory there is "nulle terre sans seigneur".¹⁰ This principle, as embodied in the doctrine of tenures, that the Crown is the sole source of title to land at common law, forms the basis of English land law. The principle is also a constitutional tenet of the highest order. The fundamental nature of the feudal principle was acknowledged by Salmond when he stated that the Crown's acquisition of a colony gave it a title not only territorial but proprietary in nature.¹¹ This feudal principle, applied in a rudimentary fashion, and undoubtedly assisted by Salmond's sponsorship, has had a deleterious effect upon New Zealand courts' understanding of the legal character of Maori traditional rights in and to their lands, forests and fisheries.

The common law principle viewing the Crown as paramount owner of

⁸ *Re Noah Estate* (1961) 32 DLR (2d) 185 at 206 (NWT Terr.Ct.).

⁹ The Native Rights Act 1865, No. XI. Also of significance is the Imperial statute, the New Zealand Constitution Act 1852, 15 & 16 Vict. Cap. 72, which provided in section 71 "And whereas it may be expedient that the Laws, Customs, and Usages of the aboriginal or native Inhabitants of New Zealand, so far as they are not repugnant to the general principles of Humanity, should for the present be maintained for the Government of themselves, in all their Relations to and Dealings with each other, and that particular Districts should be set apart within which such Laws, Customs, or Usages should be so observed: It shall be lawful for Her Majesty, by any Letters Patent to be issued under the Great Seal of the United Kingdom, from time to time to make Provision for the Purposes aforesaid, any Repugnancy of any such native Laws, Customs or Usages to the Law of *England*, or to any Law, Statute, or Usage in force in *New Zealand*, or in any Part thereof, in anywise notwithstanding". This provision, which is still in force although its practical effect is usually taken to be spent, amounted to an Imperial codification of the first aboriginal right at common law.

¹⁰ *Co. Litt.* (1628), fol. 1b.

¹¹ J. Salmond, *Jurisprudence* 10th ed., App. IV, pp. 520-521.

all its territory is *feudal* in origin taking root in Anglo-Saxon feudalism though it only passed into real effect after the confiscations of William I had established the simplified Norman system of feudal rule.¹² The early writers on the common law recognised the feudal basis of the rule which saw the Crown as paramount owner of its territory and willingly admitted that in non-feudal legal systems lawful rights could accrue from an individual's use and occupation of land irrespective of a grant from his sovereign or ruler.¹³ This right arose from 'natural law'.

What was to be the position, then, when Britain acquired territory with non-feudal societies exercising their rights of use and occupation to their lands and fisheries? How was the feudal blend of *imperium* (the right of government) with *dominium* (the Crown's paramount ownership of its territory) to be reconciled with the 'natural law' rights of the indigenous inhabitants? The answer apparent from the earliest charters for North America was that the Crown took sovereign title to lands with an aboriginal population but its *dominium* was subject to the rights of use and occupation of the indigenous peoples. Never was land occupied by aboriginal people considered part of the 'royal waste'.

The early royal charters for North America together with colonial practice (viz. declarative colonial legislation) verify that the Crown's *dominium* was taken subject to traditional native rights, or what is known today as aboriginal title. The letters patent to Sir Humphrey Gilbert of 11 June 1578 for discovery in the New World, for example, give the grantee the faculty to acquire territory for the Crown not in the actual possession of any Christian prince.¹⁴ Thus the grantee "shall have, hold, occupy and enjoy . . . all the soil of such "remote heathen and barbarous" lands, Countries and Territories so to be discovered or possessed . . . and of all Cities, Castles, Towns, villages and places in the same".¹⁵ Significantly the words describing the title which the letters patent confer *in futuro* upon the grantees are of a sovereign nature rather than purporting to be made in the fullest, unencumbered sense. Later letters patent for North America maintain this pattern granting title to any "county, island, port, haven, city, creek, town or place" together with rights to treasure trove and minerals

¹² H.G. Richardson and G.O. Sayles *The Governance of Medieval England from the Conquest to Magna Carta* (1963), p. 116; T.F.T. Plucknett (ed.) *Taswell-Langmeads English Constitutional History from the Teutonic Conquest to the Present Time* 11th ed. (1960), pp. 29-30.

¹³ For example: Bracton *De Legibus et Consuetudinibus Angliae* (circa 1300) II, f.8; Fleta *Book III and Book IV* ed. and transl. H. G. Richardson and G. O. Sayles (1972) at p. 1; T. Digges (1568-9) "Arguments provinge . . . the Corone just and lawfull owners of all lands and salte shores wonne by any person . . . oute of the Seas" in S. A. Moore *A History of the Foreshore* (1888) at p. 185; J. Cowel *The Institutes of the Lawes of England* (1605-trans. 1651) at c.12 and c.23 and R. Callis *Reading . . . Upon the Statute of 23 H.8. Cap.5 of Sewers* (1622) p. 22.

¹⁴ This claim to being able to acquire lands not actually possessed by any Christian Prince was aimed at Iberian pretensions to rights of exclusive territorial acquisition consequent to the famous Papal Bulls of Pope Alexander VI in 1493 dividing the world between Spain and Portugal. Text of these Bulls in F.G. Davenport (ed.) *European Treaties bearing on the History of the United States and its Dependencies to 1648* (1917) pp. 56-62.

¹⁵ Text in M.E.E. Parker (ed.) *The Colonial Records of North Carolina* (1963), p. 5.

taken on behalf of the Crown.¹⁶ A *True Report* of Sir Humphrey Gilbert's voyage widely published in England subsequent to the expedition's return acknowledged that these letters patent were never considered as denying native title to their lands and fisheries subsequent to British acquisition.¹⁷ Rather, these rights conferred no more than that which the Crown was able to give (presupposing no act of confiscation during the process of acquisition): sovereignty to the land, this being the rights of *imperium* and *dominium* qualified by the native rights. In all, this boiled down to little more than the right to maintain exclusive relations with the native peoples and, for the purposes of municipal law, the capacity to abridge legally the continuity of their laws *inter se* and their traditional rights and claims to their lands. As well as in America this was also the case in the early Crown colonies in West Africa as this passage from the 1847 Madden Report on the Sierra Leone indicates:¹⁸

The second question goes to the consideration of the meaning that is attached to the term "sovereignty" of the country, for this is what Colonel Doherty proposes to purchase, and it seems to me that the bare privilege of preventing other powers from purchasing the soil or establishing themselves upon it, would be an unprofitable right without acquiring any property in the land, but, on the contrary, having the necessity of purchasing the latter whenever we thought fit to plant a settlement in the country after we had already paid for the worthless privilege of a veto on the question of sale or transfer to any other [European] power.

In other words British sovereignty over tribal peoples, in the absence of any act of extinguishment during the process of acquisition, although expressed in terms of *imperium* and *dominium* imported no *ipso facto* abrogation of traditional rights in land. These still had to be quieted by voluntary act of the native holders of these rights as by sale or cession. Alternatively, these rights could be extinguished legislatively according to the method prescribed in *Campbell v Hall*.¹⁹ In a 'settled' colony, being territory previously uninhabited or (as understood from the mid-eighteenth century onwards) land with native inhabitants with a system of law to which no Christian person could be expected to conform, the Crown enjoyed no prerogative legislative power to abridge aboriginal rights. In a 'conquered or ceded' colony a prerogative legislative power existed at least until the colony was promised an assembly under the Royal Seal. This meant that unilateral executive abridgement of aboriginal rights in ceded colonies was possible although rarely attempted. New Zealand was, however, considered a 'settled' colony²⁰ which meant that the Crown enjoyed no prerogative

¹⁶ Significantly later letters patent also carried the reservation that the title conferred was as ample only as for that "which wee by our lettres patents maie or cann graunte". This clause was inspired by lingering doubts over Indian rights: see J. Juricek "English Territorial Claims in North America under Elizabeth and the Early Stuarts" (1975) VII *Terra Incognitae* p. 7 at p. 18.

¹⁷ G. Peckham *A True Reporte, of the late discoveries, and possession, taken in the right of the Crowne of Englande, of the Newfoundlandes* (1583) fol. C.ii. This work was included in R. Hakluyt *The Principal Navigations Voyages Traffiques and Discoveries of the English Nation . . . within the compass of these 1600 years* 2nd edn. (1598–1600) (reprinted 1927), VI at p. 42.

¹⁸ *PP 1842*, XII App. 15 at p. 260.

¹⁹ (1774), Lofft 655; 98 ER 848 (KB).

²⁰ See the minute of James Stephen, Permanent Under-Secretary to the Colonial Office, dated 21 July, 1840 referred to in J.L. Robson (ed.) *New Zealand — The Development of its*

legislative capacity. It will be seen that the corollary of this was that no prerogative act could extinguish aboriginal rights (a point with which several New Zealand courts have disagreed).

III JUDICIAL THEORIES OF ABORIGINAL TITLE

(1) *The Marshall Court Decisions in the United States*

The best known and earliest authoritative cases upon aboriginal land rights are those of the United States Supreme Court handed down whilst Chief Justice Marshall was in office. This brace of decisions was well-known in the Colonial Office and amongst colonial legal circles during the early days of the Crown colony of New Zealand.²¹ As a package these decisions provided the guidelines towards American Indian aboriginal rights in the United States and, indeed, Canada.

Marshall C. J. first intimated the nature of Indian title in *Fletcher v Peck*²², a case in which the question of Indian rights was relevant but not directly in contention. Here Marshall mused that "the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state".²³ In a single sentence Marshall reconciled the feudal blend of *imperium* and *dominium* with recognition of aboriginal rights. In *Johnson v M'Intosh*²⁴ the nature of these rights received fuller consideration for the bald statement in *Fletcher v Peck* had left many questions open and Justice Johnson, who was later to change his mind completely, had delivered a stinging dissent, sharply disagreeing with Marshall's opinion.

This case concerned the title to large tracts of land once within the colony of Virginia and later ceded to the United States as part of the Northwest Territories. In 1773 and 1775 the Illinois and Piankeshaw nations sold lands directly to a group of land speculators. Subsequently they ceded these lands by treaty to a United States who granted a title to a portion of the lands to a William M'Intosh. An action of ejection was brought against M'Intosh by the devisees of the speculators' company who sought to establish title to the lands by right of the earlier sale of the Indians. At issue, then, was the nature of Indian title and the capacity of the Indians to pass a

Laws and Constitution 2nd edition (1967) pp. 3-4. At the time of acquisition New Zealand was considered to be a 'settled' colony although years later arguments waged over the colony's mode of acquisition, (*infra* n. 120). This is an arid argument so far as aboriginal title is concerned for the mode of acquisition had no bearing upon native land rights which survived (albeit in a modified form: *infra* text accompanying notes 31-36) British acquisition. Settlement of lands with a non-Christian population bore the hallmark of acquisition by 'conquest or cession' and of virgin, uninhabited territory in as much as settlers enjoyed English law in their dealings *inter se* whilst natives enjoyed the continuity of their laws *inter se* (subject to the qualifications seen earlier, text accompanying notes 1-9) and land rights. This hybrid form of 'settled' colony received judicial recognition in *Freeman v Fairlie* (1828), 1 Moo. Ind. App. 305, 2 St. Tr. (NS) 1000 and was undoubtedly the model had in mind by the colonial office in designating New Zealand a 'settled' colony.

²¹ James Stephen, Permanent Under Secretary of the Colonial Office referred to these American decisions in a minute located in C.O. 209/4. The American cases are also referred to by Chapman J. in *R v Symonds* (1847) [1840-1932] NZPCC 387 (SC).

²² (1810) 6 Cranch 87 (USSC).

²³ *Id.* at p. 142.

²⁴ (1823) 8 Wheat. 543 (USSC).

title which could be sustained at law. Central to Marshall's reasoning was his 'doctrine of discovery' according to which:

. . . discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it.²⁵

Once establishing exclusive rights in territory 'discovered', the European power claiming sovereign rights enjoyed the power to grant lands within the region to private individuals.

While the different nations of Europe respected the rights of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.²⁶

Marshall proceeded to indicate that the government enjoyed the sole right to extinguish native title. In the main this right, known in New Zealand as the 'pre-emptive right', derived from the feudal blend of *imperium* and *dominium* in that all land was held of the Crown with rights thereto depending upon a grant from the Crown. Aboriginal title, Marshall intimated, departed from this pattern in that it was a Crown-recognised rather than Crown-derived right.

In essence this legal acknowledgement of a Crown-recognised as opposed to Crown-derived title was simply applying to indigenous tribal peoples the presumption of continuity of local property rights which the common law had itself enjoyed subsequent to the Roman and Norman conquests and applied to European territory coming into the Crown's dominions during the Middle Ages.²⁷ This presumption so far as non-Christian peoples were concerned first caught judicial notice in *Calvin's Case*²⁸ where Coke using slim and mainly Biblical authority denied its applicability to infidel people who were *perpetui inimici*. This non-Christian view was contradicted by long-settled diplomatic practice,²⁹ by two cases — one of them decided by Coke — a year later,³⁰ and rejected outright by several cases later in the seventeenth century.³¹ Consequently, Coke's view did not pass into the

²⁵ *Id.* at 573.

²⁶ *Id.* at 574.

²⁷ See generally, A. F. McC. Madden "1066, 1766 and all that: the Relevance of English Medieval Experience of 'Empire' to later Imperial Constitutional Issues," in J. Flint and G. Williams (eds.) *Perspectives of Empire* (1973) at p. 9.

²⁸ (1608) 7 Co.Rep. 1a; 77 ER 377.

²⁹ The English had maintained relations with infidel powers for many years prior to Coke's dicta, a situation hardly consistent with a *perpetui inimici* status. In 1581, for example, a charter of Elizabeth I to the Levant Company authorised trade and intercourse with "the greate Turke", the Ottoman Empire. These privileges were extended and renewed in 1593 and 1606. See R. Hakluyt *Principal Navigations, supra*, n.17. at p. 64. Similarly see the letters patent of 1588 for trade to the River of Senega and Gambia issued to the Guinea Company, *id.* IV at p. 285.

³⁰ *The Case of Tanistry* (1608) Davies 208; 80 ER 516; *Michelborne v Michelborne* (1609) 2 Brownl. & Golds. 296; 123 ER 9521 (CB).

³¹ *Anonymous* (circa 1640) 1 Salk 46; 91 ER 46 (C.P.); *East India Co. v Sandys* (1683-85) 10 St. Tr. 371, 546; *Blankard v Galdy* (1693) 2 Salk. 411; '*Privy Council Memorandum*' (1722) 2 P.Wms. 75; 24 ER 646.

legal mainstream. Nonetheless it was inconceivable that the continuity of non-Christian laws and property rights could be as absolute as it was in, say, the Isle of Man or Channel Islands, for that would mean the potential subjection of British settlers to non-Christian laws. So far as the natives' property rights were concerned that would mean heathen and barbarous law would regulate the acquisition and transmission of property rights. This was taking the presumption of continuity and the natives' Crown-recognised title too far. The answer to this notional problem lay in the Crown's pre-emptive right to extinguish native title: as against the Crown or any Crown grantee a person purchasing directly from the natives enjoyed no rights recognisable in municipal law. This was the *ratio decidendi* of *Johnson v M'Intosh*.³²

The Crown's exclusive right to quiet the natives' rights to their land rested upon other grounds than the simple provision of a basis upon which to curb the consequences of the recognition of non-Christian land rights and to provide a mechanism to translate a Crown-recognised into a Crown-derived title. From the earliest days of the North American colonies this right was asserted in colonial legislation and practice³³ in order that the Crown could control the pace of settlement in the New World and exert some control over the settlers lest they deal willy-nilly with the Indians and so create all kinds of chaos. The Crown's pre-emptive right also had a strong mercantile tinge as its loud embodiment in the Royal Proclamation of 1763³⁴ indicated. In the later days of the late eighteenth and early nineteenth centuries with Wilberforce's influence at its height, the pre-emptive right also took a humanitarian flavour. Said Chapman J. in the New Zealand Supreme Court in 1847, the rule

... necessarily arises out of our peculiar relations with the Native race, and out of our obvious duty of protecting them, to as great an extent as possible, from the evil consequences of the intercourse to which we have introduced them, or imposed upon them. To let in all purchasers, and to protect and enforce every private purchase, would be virtually to confiscate the lands of the Natives in a very short time.³⁵

Johnson v M'Intosh is significant in that it recognised aboriginal title in the strongest of terms and declared that the Crown enjoyed the sole right of extinguishing this title by voluntary act of the natives or valid legislative extinguishment. The Marshall Court went on to hand down three further judgments fully recognising aboriginal land rights and consolidating the stance taken in *Johnson v M'Intosh*.³⁶

Later American case law continued this recognition of aboriginal rights. A post World War II trend tended to erode slightly the substantial body

³² (1823) 8 Wheat. 543 at 591 (USSC). See, also, Cohen's classic analysis in "Original Indian Title" (1947) 32 Minn. L. Rev. 28.

³³ Cohen, *supra*, n. 32, *passim*. Also P. Cumming and N. Mickenburg *Native Rights in Canada* 2nd ed. (1972) at pp. 66-68; I. Sutton *Indian Land Tenure* (1975) pp. 40-60 and sources referred to therein.

³⁴ RSC 1970, App. Vol., p. 123.

³⁵ *R v Symonds* (1847) [1840-1932] NZPCC 387 at 391 (NZSC).

³⁶ *Cherokee Nation v State of Georgia* (1831), 5 Peters 1; 8 L.Ed. 25; *Worcester v State of Georgia* (1832) 6 Peters 515; 8 L.Ed. 483; *Mitchel v United States* (1835) 9 Peters 711; 9 L.Ed. 283. The tragic aftermath of these cases, the dereliction of legal and moral obligation by the federal government, is described in J. C. Burke "The Cherokee Cases: a study in law, politics and morality" (1969) 29 Stan. L. Rev. 500.

which by then had grown upon the basis laid by the Marshall Court³⁷ insofar as a distinction between 'recognised' and 'unrecognised' aboriginal rights came to be made. Dissenting in *Tillamooks I* (1946) Reed J. (Rutledge and Burton JJ. concurring) stated that the "Indians who continued to occupy their aboriginal homes, without definite recognition of their right to do so are like paleface squatters on public lands without compensable rights if they are evicted".³⁸ Reed proceeded to make it plain that the distinction drew authority from the feudal principle that the acquisition of sovereignty brought with it full *imperium* and *dominium*. The Crown's *dominium* could only be taken to be limited insofar as it had recognised or granted certain rights to the aboriginal inhabitants. In *Tee Hit Ton*³⁹ the Supreme Court thought that this recognition could flow from legislative acknowledgement or treaty with the indigenous people. Given that, the American position is appropriately applied in New Zealand whether one takes the 'recognised'/'non-recognised' distinction or not. Clearly the Supreme Court of the United States, quite independent of the Constitution, would consider the Treaty of Waitangi to be sufficient recognition. Or, if it were to take the narrow approach of Reed J. and insist upon some legislative recognition this would be supplied by the Land Claims Ordinance 1841 which stated that all unappropriated lands within the colony were subject to "the rightful and necessary occupation and use thereof by the aboriginal inhabitants".⁴⁰

The position, then, is that United States case law would recognise the aboriginal title of the New Zealand Maori to their traditional rights in land. Certainly the New Zealand Supreme Court in *R v Symonds*⁴¹ considered the general principles given by the Marshall Court to be applicable to New Zealand. Along with the American cases decided shortly before it, the opinions in *Symonds* are usually taken to be amongst the classic expressions of native property rights subsequent to British acquisition. Nonetheless it is a case which has been widely misunderstood and misapplied within its own country.

³⁷ These cases are analysed in greater depth, though not always in terms with which the writer agrees, in D.G. Kelly Jr. "Indian Title — the rights of American natives in lands they have occupied since time immorial" (1975), 75 *Columb. L. Rev.* 655; J.Y. Henderson "Unravelling the Riddle of Aboriginal Title" (1977) 5 *Am. Ind. L.J.* 75. These writers connect aboriginal title with a former aboriginal sovereign status. This view is erroneous insofar as aboriginal title was generally recognised as independent of any (former) sovereign status though the first aboriginal right, viz. the right to the continuity of their law *inter se*, may have flowed from an original sovereign status. This misconnection of aboriginal title and sovereign status is a variation on the feudal obsession with the sovereign-derived basis of land rights. Instead, legal thought and practice applied in the New World followed Locke's view of property rights as anterior to civil government (or what may be called legal and political sovereignty): J. Locke *Second Treatise of Government* (1689) in Rev. ed. 1964, chapter V. In this work Locke drew heavily on the situation in America. An example of his influence there is seen in J. Bulkley "An Inquiry into the Right of the Aboriginal Natives to Lands in America, and the Titles derived from them" (1724) in *Collections Massachusetts Historical Society* 1st series (1810) at p. 159. Put simply: aboriginal title derives not from some former or residual sovereign status but from 'natural law', the use and occupation by tribal peoples of their ancestral lands since time immemorial. This rights precedes aboriginal sovereignty.

³⁸ *United States v Alcea Bank of Tillamooks* (1946) 329 US 49, 58.

³⁹ *Tee-Hit-Ton Indians v United States* (1955) 348 US 272, 99 L.Ed. 314, 75 S.Ct. 313.

⁴⁰ Land Claims Ordinance 1841, Sess. 1, No. 2, section 2.

(2) *R v Symonds*⁴¹

This case arose from much the same facts as *Johnson v M'Intosh*, albeit in a New Zealand setting. Early in his judgment Chapman J. eloquently declared the sources from which he proposed to extract the legal principles relevant to the matter before him.

The intercourse of civilized nations, and especially of 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 with certainty and precision what would otherwise have remained vague and unsettled. These principles 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 Natives tribes, wherein those principles have been asserted and acted upon.⁴²

This is a perceptive passage revealing Chapman's willingness to apply the relevant rules of colonial law which derived not only from basic principles of the common law proper but also from the established colonial practice of the Crown. This was a willingness which later New Zealand courts were not to share.

Chapman appreciated the fundamental maxim of the common law that the Crown is the original proprietor of land within its territory and hence the sole source of title in the colony. This was a maxim imported into New Zealand from which it followed that the title claimed by the person purchasing directly from the Maori was void, it not being based upon letters patent under the seal of the colony. Nonetheless the title of the Maori was upon a different footing. Although unprepared to define this title exactly, other than to say that its inalienability to Europeans rendered it less in nature to an estate in fee, Chapman held quite unequivocally that it was a right cognizable at law:

Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, and *it cannot be extinguished* (at least in times of peace) otherwise than by *the free consent of the native occupiers*.⁴³ (emphasis added)

Chapman saw native title, then, as subsisting at law and capable of abridgement only through the sale or cession by its native owners, confiscation during rebellion, or, one may add, legislative extinguishment.

Chapman's fellow judge, Martin, C. J. took much the same tack. He agreed that at law the Crown became the original proprietor of land within the colony, however he viewed the Crown's *dominium* as subject to the native title which the courts would recognise and enforce. Speaking of

⁴¹ (1847) [1840-1932] NZPCC 387 (NZSC).

⁴² *Id.* at p. 388.

⁴³ *Id.* at p. 390. It should be noted that Chapman J. considered aboriginal title to be vulnerable to legislative extinguishment and his words should be read subject to this qualification.

the Land Claims Ordinance 1841 which he clearly saw as declaratory in tone, he stated that it “everywhere assumed that where the Native owners have fairly and freely parted with their lands the same at once vest in the Crown, and become subject wholly to the disposing power of the Crown”.⁴⁴ Later in his judgment Martin also stated that “So soon, then, as the right of the Native owners is withdrawn, the soil vests entirely in the Crown for the behoof of the nation”.⁴⁵ Plainly, then, Martin saw the Crown’s title to land within the colony as subject to the aboriginal rights of the Maori which could only be removed through voluntary act by the native owners. At a later stage Martin appeared to indicate that a Crown grant of land subject to unextinguished native rights was taken subject to those rights⁴⁶ — a point upon which Chapman made no comment.

Given that on general legal principles Maori rights to their traditional lands were cognizable in law, what was the Court in *Symonds* to make of the Treaty of Waitangi? Here the Court found no problem whatsoever; the Treaty was merely declaratory of rules which would have applied in any event. Said Chapman:

It follows . . . that in solemnly guaranteeing the Native title, and in securing what is called the Queen’s pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice anything new and unsettled.⁴⁷

(3) *Aboriginal Title in New Zealand: the Prendergast Days*

The legal principles enunciated in the Marshall Court and, more particularly, *R v Symonds* were not to be observed in New Zealand courts over subsequent years. The denial of aboriginal title’s possession of any legal character began under Chief Justice James Prendergast who was appointed to the position in 1875. Prendergast, reputed in his time to be “a particularly sound real-property lawyer”⁴⁸, spent twenty years in office during which the basis was laid for later New Zealand decisions on aboriginal title.

In 1872, three years before Prendergast’s appointment, a full Court of Appeal, which included Chapman J. who had sat on *Symonds*, repeated the classic formulation of aboriginal title given in earlier cases. Speaking *In re “the Lundon and Whitaker Claims Act, 1871”* the Court said:⁴⁹

The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of native proprietary rights. Whatever the extent of that right by established native custom appears to be, the Crown is bound to respect it. But the fullest measure of respect is consistent with the assertion of the technical doctrine, that all title to land by English tenure must be derived from the Crown; this of necessity importing that the fee-simple of the whole territory of New Zealand vested and resides in the Crown, until it be parted with by grant from the Crown.

Five years later, however, with Prendergast at the helm the courts’ attitude had changed. In *Wi Parata v The Bishop of Wellington*⁵⁰ the Supreme Court considered the effect of a Crown grant issued to the Bishop of

⁴⁴ *Id.* at p. 394.

⁴⁵ *Id.* at p. 395.

⁴⁶ *Id.* at p. 398.

⁴⁷ *Id.* at p. 390.

⁴⁸ J. F. Jeffries in R. Cooke (ed.) *Portrait of a Profession* (1969) at p.44.

⁴⁹ (1872) 2 CA 41, 49.

⁵⁰ (1877) 3 NZ Jur. (NS) SC 72.

Wellington without prior extinguishment of native rights. In the course of judgment Prendergast referred approvingly to the Marshall Court decision, “the most complete exposition of this subject”,⁵¹ and *Symonds* but proceeded to give an opinion completely at odds with these cases. Prendergast drew a distinction between civilised laws (French law in Quebec, the Code Civil in Mauritius and Roman-Dutch law in Ceylon, for example) and those of “primitive barbarians”. This was a distinction valid insofar as it explained the ‘modified continuity’ of native rights subsequent to British acquisition — a modification which did not arise for ‘civilised peoples’ and which merely rendered the native title inalienable to anyone save the Crown. Nonetheless the distinction was never used to displace completely the presumption of continuity. Prendergast, however, stated:⁵²

In the case of primitive barbarians, the supreme executive Government must acquit itself, as best it may, of its obligation to respect 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”.

The Chief Justice proceeded to state that issue of a Crown grant “undoubtedly implies a declaration by the Crown that the native title over the land which it comprises has been extinguished”.⁵³ Since the Crown was the “sole arbiter of its own justice” this “implied fact” of extinguishment as a consequence of a Crown grant was one the Courts could not challenge.

This transformed the aboriginal title recognised in *Symonds* from one subsisting at law to one held on sufferance of the Crown. In this way Prendergast laid the basis for later New Zealand judges to build upon. It was a position quite at odds with earlier authority and contrary to the Crown’s general behaviour during the Crown colony period of government. The Chief Justice proceeded to state in *Wi Parata* that the Treaty of Waitangi could not transform the natives’ right of occupation into one of a legal character since so far as it purported to cede the sovereignty of New Zealand it was a “simple nullity” for “[n]o body politic existed capable of making cession of sovereignty”.⁵⁴ The Treaty, he proceeded, merely declared the rights and duties of international law which vested in and devolved upon the Crown consequent to its annexation of New Zealand. Prendergast clearly was of the opinion that only through a doctrine of ‘transformation’ could the international duties of the Crown declared in the Treaty of Waitangi attain a local legal effect. His confusion here was manifold. He viewed aboriginal title as a rule of international rather than colonial or constitutional law. He denied aboriginal sovereignty on the one hand yet seemed to restore it with the other. He later labelled Crown dealings with Maori traditional lands to be ‘acts of state’ beyond judicial purview despite the fact that on his erroneous reckoning New Zealand had been a British possession since 1786 when the colony of New South Wales, of which New Zealand was part for a short while, was founded. By 1877 the Maori’s status as

⁵¹ *Id.* at p. 77.

⁵² *Id.* at p. 78.

⁵³ *Id.*

⁵⁴ *Id.*

British subjects had been long fixed — how then could an ‘act of state’ be made by the Crown against its own subjects?⁵⁵

In *R v Niramoana*⁵⁶ the Court of Appeal recognised that Maori rights were a burden upon the Crown’s title but left open the question whether, on the authority of *Symonds*, this qualification existed at law or, following *Wi Parata*, at regal sufferance. An inconclusive negation of *Wi Parata* appeared the next year in 1882, in *Mangakahia v The New Zealand Timber Company* where Gillies J. said the following:

What title does legally recognised ownership according to native custom confer? I answer that no title known to English law is thereby conferred. A pre-existing right according to native custom is thereby recognised and declared — an exclusive right to occupation — a right to inherit . . . according to Maori custom — all these are recognised and declared, but though in many respects they are analogous to, they are not equivalent to a fee simple. If a recognised and declared native owner sells to a European the purchaser does not derive his title from the vendor, he merely extinguishes the vendor’s right of occupation, but derives his title from the Crown. 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 “simple nullity”, as it is termed in *Wi Parata*⁵⁷

These words would seem to be a strong assertion of the position taken in *Symonds*. They are, however, severely undermined by the decision on the facts of the case, for Gillies refused to enforce the aboriginal title of natives put out of possession by trespassers. So, in the end, despite his accommodating words, Gillies J. would only enforce property rights incidental to a Crown grant, a basis which the natives’ traditional rights lacks.

In 1889, in *Moore v Meredith* Prendergast C. J. had occasion to repeat his view of Maori aboriginal title as existing at sufferance of the Crown when he stated that the aboriginal claimants to a reserve set apart for them but for which no Crown grant had been issued had “no estate in the land known to the lay beyond, possibly, a tenancy at will, nor could they have compelled the Crown to grant them any estate”.⁵⁸ The final significant occasion in which Prendergast repeated his views of Maori aboriginal rights arose in 1894 when he delivered the Court of Appeal’s judgment in *Nireaha Tamaki v Baker*.⁵⁹ Here he held *Wi Parata* to be directly applicable:

. . . 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 the dealings in the name and under the authority of the Sovereign with the Native tribes of this country for the extinction of their territorial rights can be tested. Such transactions began with the settlement of these Islands; so that Native custom [i.e.

⁵⁵ Section 2 of the Native Rights Act 1865, No. XI, declared the Maori to be natural born subjects “to all intents and purposes whatsoever”. It is settled that as between the sovereign and a subject there can be no act of state on British territory: *Campbell v Hall* (1774) 1 Cowp. 204 at 108-10; 98 ER 1045; *Walker v Baird* [1892] AC at pp. 496-7(PC); *Johnstone v Pedlar* [1921] 2 AC 262 at p. 272, per Viscount Finlay (HL); *Attorney-General v Nissau* [1970] AC 179 per Lord Reid at pp. 207, 213; see also the comments of Lord Morris of Borth-y-Gest at p. 221, Lord Pearce at pp. 226-7; Lord Wilberforce at p. 235, and Lord Pearson at p. 240 (HL).

⁵⁶ (1880) OB & F (CA) 76.

⁵⁷ (1881) 2 NZLR (SC) 345.

⁵⁸ (1889) 8 NZLR 160 (CA).

⁵⁹ (1894) 11 NZLR 483 (CA).

Maori practices which had developed to regulate alienation] is inapplicable to them. The Crown is under a solemn engagement to observe strict justice in the matter, but of necessity it must be left to the conscience of the Crown to determine what is justice. The security of all titles in the country depends on maintenance of this principle.⁶⁰

This last sentence came close to acknowledging openly that the legal recognition of Maori aboriginal rights would produce inconvenient results in a colony enjoying rapid agricultural growth. This aspect — that Maori rights would not be allowed to stand in the way of the colony's progress, appeared also in the decisions of local courts under Sir Robert Stout as Chief Justice. These cases built upon the foundation laid by Prendergast.

(4) *The Protest of Bench and Bar: The Stout Days and 1909 Legislation*

The judgments in local courts during Stout's tenure as Chief Justice continued the trend of the Prendergast days. This resulted from a persistent and fundamental misconception which overlooked the rules of colonial law, applying instead the rules of feudal law in a rudimentary fashion: any rights over land had to proceed from a Crown grant before they could be recognised at law. Prendergast had felt the need to doff his judicial cap to colonial law for he gave the Marshall Court and *Symonds* cases a token reference. Stout's judges did not even feel this need. To them the matter of aboriginal title was largely one of first principle which simply harkened back to the feudal basis of English land law. The earnest, unsophisticated simplicity of the judgments concerning aboriginal title made during this period was not surprising given the judicial workload of the time.⁶¹ It was the simplistic appraisal of Stout which his contemporary brethren adopted and which ultimately brought the colonial bench and bar into an ugly and unprecedented conflict with the Privy Council.

Although a number of cases concerning aboriginal title came before the Supreme Court during the early days of Stout's tenure⁶² it was not until *Hohepa Wi Neera v The Bishop of Wellington*⁶³ that Stout C.J. and his fellow Judges in the Court of Appeal had occasion to consider the question fully. This case arose from the same facts as *Wi Parata*, being brought as a result of dicta in the Privy Council's advice in *Nireaha Tamaki*⁶⁴, dicta which was perfectly consistent with the Committee's attitude towards aboriginal title in other colonies.⁶⁵ That the Privy Council may have been in a better position to judge the legal principles upon which the British Crown acquired colonies with an aboriginal population seemed to escape Stout who slated the Committee's dicta with the frosty observation that "the Privy Council does not seem to have been informed of the circumstances of the colony".⁶⁶ Stout wrapped his conclusion in the authority of *Wi Parata* and, ostensibly, *Symonds* holding that local courts could not recognise any title not founded on the Queen's patent as the source of private title.

⁶⁰ *Id.* at p. 488.

⁶¹ Cooke (ed.) *supra* n. 48, p. 45.

⁶² *Mueller v Taupiri Coal Mines* (1900) 20 NZLR 89 (CA); *In re Application by Beare and Perry for Mining Area in the Arahura River* (1900) 2 GLR 242 (SC).

⁶³ (1902) 21 NZLR 655 (CA).

⁶⁴ (1900-01) [1840-1932] NZPCC 371.

⁶⁵ Discussed *infra*, texta accompanying notes 95-127.

⁶⁶ *Supra* n. 63 at p. 667.

His fellow judge Williams J. (Denniston J. concurring) took much the same line.⁶⁷

But the next year following the Privy Council's advice in *Wallis v The Solicitor General*⁶⁸ great controversy arose in New Zealand. In this case certain Maori chiefs ceded five hundred acres of their traditional lands in 1848 with the consent of the Crown, which had waived its right of pre-emption, to the Bishop of New Zealand in trust to build a college. The school was never built so the Maori chiefs sought the land back. The Crown argued that it had assigned its pre-emptive right to the Bishop and that the terms of the cession were an 'act of state' beyond judicial purview. Hence the Court could not enforce the terms of the cession against the Bishop. The Privy Council was appalled at this contention which it found "not flattering to the dignity or the independence of the highest court in New Zealand".⁶⁹ The Committee proceeded to uphold the applicability of *cy pres* doctrine. In essence, then, the whole thrust of the advice to *Wallis* was predicated upon the full legal recognition of aboriginal title.⁷⁰

This decision laid a gauntlet which no fiery colonial temperament could leave unchallenged and, indeed, the local reaction was little short of stunning. In a "Protest of Bench and Bar" dated 25 April 1903, the only recorded instance of New Zealand judges publicly flailing the Privy Council, local legal luminaries gathered in the Court of Appeal buildings in Wellington to deliver a public refutation of the Council's advice.⁷¹ Sir Robert Stout in his opening address recorded what local courts thought the proper law concerning aboriginal title to be. Relying on *Symonds* (but in misunderstood fashion) he stated that the "root of title being in the Crown, the Court could not recognize Native title."⁷² He proceeded to state that any cessions by the natives of their traditional lands were 'acts of state' beyond the cognizance and enforcement of the courts, an incredible position since it alleged that as against some of its subjects (not in rebellion) the Crown could perform an expropriatory act of state. In closing Stout pointed to several factual and legal errors made by the Committee in other matters and left open the question whether continued appeals to the Privy Council from New Zealand were worth the bother. Throughout, Stout's tone was one of self-righteous indignation. To be fair there was some basis for his complaints for the Committee did get the odd point wrong (such as the date when the Crown's pre-emptive right was first statutorily declared) but none of these errors went to substance. Also the Committee's comments had been needlessly provocative. Stout was followed by other members of his bench and bar, some of whom made similar comments concerning the non-justiciable nature of aboriginal title.⁷³ One wonders, though, whether

⁶⁷ *Id.* at pp. 670-1.

⁶⁸ [1903] AC 173.

⁶⁹ *Id.* at p. 188.

⁷⁰ See more fully the excellent analysis by J. Hookey "Milirrpum and the Maoris: the Significance of the Maori Land Cases outside New Zealand" [1972] O.L.Rev. 63.

⁷¹ The incident is recorded in [1840-1932] NZPCC, App. p. 730.

⁷² *Id.* at p. 732.

⁷³ *Id.* See the comments of Williams and Edwards J. J.

this incident deserved⁷⁴ to be portrayed in such a heroic light given that at least on their interpretation of the law affecting Maori traditional rights, the affronted members of the New Zealand legal profession were quite simply wrong.

The spectacle of members of the bench stepping into the political arena to castigate one another has never been a pretty sight so it was little wonder Sir John Salmond, a man acutely sensitive to the dignity of the law, moved to correct the position when as Solicitor-General he took the leading hand in drafting the legislation of 1909 concerning Maori land.⁷⁵ Correctly this legislation is praised as laying the basis for the modern regime for Salmond took an amorphous and often contradictory pile of statutes and reduced them into a simple, concise package.⁷⁶ Nonetheless, though this legislation is usually highly regarded it had an extremely ominous aspect in that it contained provisions codifying the decision in *Wi Parata* that as against the Crown the Maori could set up no claim to their "customary land". Section 84 of the Native Land Act 1909 provided that "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 matter". This legislation passed its Second Reading without any debate. During his speech moving the Bill to be read a second time the Attorney-General Dr Findlay acknowledged that this provision was designed to clarify for once and all the position of Maori land rights to their traditional lands within the colony.⁷⁷ The position chosen, not surprisingly, coincided with the feelings of local lawyers but, as we are about to see, was quite at odds with the position which the Privy Council had consistently taken and of which its advice in *Nireaha Tamaki* and *Wallis* was merely part of a general pattern.

(5) *Subsequent Developments in New Zealand Courts*

The 1909 legislation tried to remove any possibility of aboriginal title being given any recognition in New Zealand courts of its own right. Thus when *Tamihana Korokai v The Solicitor General*⁷⁸ came before the Court of Appeal in 1912 Stout reiterated the decision in *Wi Parata* which he said emphasised *Symonds* by holding that "the Supreme Court could take no cognizance of treaty rights not embodied in a statute and that Maori customary title was a kind of tenure that the Court could not deal with".⁷⁹ Nonetheless statutes could recognise the natives' traditional rights, said

⁷⁴ It is cited in R.B. Cooke (ed.) *supra* n. 48, p. 46 as an example of Stout's outstanding leadership and solid legal ability.

⁷⁵ Native Land Act 1909, No. 15. Salmond's "Preliminary Note" to this legislation was so highly regarded that it re-appeared in *N.Z. Stat. (Reprint) 1908-31, 1908-31, Vol. 6, at p. 87*. See also the praise of T. McCarthy (chairman) *Report of the Royal Commission of Inquiry into the Maori Land Courts* (1980) at p. 12.

⁷⁶ It can be noted, as an aside, that Salmond's aim of reducing the Maori land legislation into simple, coherent shape appears to have been forgotten. Today the legislation grafted onto the basis laid by Salmond is in dire need of the same type of rationalising exercise. McCarthy, *supra* n. 75 at p. 14, observes that the present "body of legislation . . . is a morass for the legal profession and leads to very great difficulties for the Maori people in dealing with their land".

⁷⁷ *NZPD* (1909) Vol. 148, at p. 1273.

⁷⁸ (1912) 32 NZLR 321.

⁷⁹ *Id.* at p. 341.

Stout, and where this was done the statute-recognised right became incapable of executive abridgement except pursuant to statutory authority. 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. However, in *Nireaha Tamaki* some years earlier, the Privy Council had suggested that a 'statutorily recognised' approach to Maori aboriginal title could date from the 1840s onwards. Reviewing the early colonial legislation commencing with the 1841 Land Claims Ordinance, the Privy Council stated that this body of legislation "plainly assumes the existence of a tenure of land under custom and usage which is either open to lawyers or discoverable by them in evidence".⁸⁰ Two of Stout's brethren in *Tamahina Korokai* took the narrow approach that whatever its original status Maori aboriginal title had since been recognised by the 1909 legislation and hence incapable of defeat by a mere Crown claim to title. The Crown claim had to be made in a manner observing the formalities specified in sections 85 and 86 of the Native Land Act 1909.⁸¹ These sections provided:

85. 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.

86. 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 has not been duly extinguished.

As the Crown had never made a formal act evidencing the extinguishment of native title over the land in question, in this case the bed of lake Rotorua, the Court held that the Maori Land Court had jurisdiction to determine the customary owners. The approach taken by the Court in *Tamihana* to base Maori aboriginal rights upon statutory recognition is significant in that it established the approach which later New Zealand courts were to apply consistently.

The judgment in *Tamihana* and one handed down a year later, *Waipapakura v Hempton*⁸² combined with the 1909 legislation's specification of the position of customary land for many years effectively put paid to Maori litigation seeking the judicial recognition of their traditional rights. There was a brief flurry when *Hoani Te Heu Heu Tukino v The Aotea District Maori Land Board*⁸³ went to the Privy Council. However this case despite its wide dicta was unexceptionable holding little more than that treaty rights could be statutorily amended or suspended.

In recent times it was the Maori claim to their traditional rights along the foreshore of Ninety Mile Beach and the riverbed of the Wanganui River which brought the question of Maori aboriginal rights back before New Zealand courts.

⁸⁰ *Supra* n 64 at pp. 383-84.

⁸¹ *Supra* n. 78 at p. 347 per Williams J., at p. 349 per Edwards J., at p.352 per Cooper J., and at p. 354 per Chapman J., who seems to imbue the Treaty of Waitangi with greater 'constitutive' effect than the other Judges. The position taken by this article is that the Treaty was *declarative* rather than constitutive of Maori rights at law.

⁸² (1914) 33 NZLR 1065 (SC).

⁸³ [1914] AC 308 (PC).

The Maori claim to the Wanganui River formally commenced in 1938 when an application was filed in the Maori Court to have the customary title to the riverbed investigated and a freehold order issued by the Court. The question of aboriginal title did not reach any conclusive determination until the Court of Appeal had delivered its second opinion in 1962.⁸⁴ Taken together the decisions concerning the bed to the Wanganui River held that the Maori enjoyed no aboriginal right to the riverbed in municipal law based either upon general principles of constitutional law or the Treaty of Waitangi. In this respect the opinions simply followed the misconceived trend initiated by *Wi Parata*. The Court of Appeal in its first decision held (F.B. Adams J. dissenting) that at the time of the British annexation of the Maori claimants 'owned' the riverbed as part of their territory which rights of ownership had been recognised by statute.⁸⁵ However, its second decision held that when the Maori Land Court issued freehold orders for the customary land adjoining the riverbed the *ad medium filum* presumption applied so that traditional rights attaching to the river were transformed into riparian rights such as those enjoyed by any freeholder with land fronting onto a river.⁸⁶ Effectively this ruling applied the *ad medium filum* presumption to deny the riverbed as a separate strip of land the title to which was ascertained independently to that of the adjoining land.

This line of reasoning was also applied against the claim by the Te Aupori and Te Rawara tribes to the foreshore of the Ninety Mile Beach. In the Supreme Court Turner J. held simply that section 150 of the Harbours Act 1950 excluded the Maori Land Court's jurisdiction to issue a freehold order, for this section required that any grant of the foreshore had to be by special Act.⁸⁷ The Court of Appeal, however, took the approach that it had taken in *Re the Bed of the Wanganui River*.⁸⁸ All judges agreed that the Maori enjoyed no right to enforce their aboriginal claims against the Crown other than by reliance on a statute which recognised their rights. Both North J. and T. A. Gresson J. (Gresson P. concurring) applied feudal principles in reaching this decision, the latter doing so a little more bluntly.⁸⁹ In other words the *Wi Parata* fixation with Crown-derived title continued. This was so despite North J.'s brief homage to Chapman J.'s "classic judgment"⁹⁰ in *Symonds* and his quoting the Privy Council in *Nireaha Tamaki* as saying "that the prerogative title of the Crown and the Native title of possession and occupation were not inconsistent with the seisin in fee of the Crown".⁹¹ As he had done in *Hira Tamati v The District Land Registrar*⁹² and *Re the Bed of the Wanganui River*⁹³, North J. along

⁸⁴ The two opinions are reported, respectively in [1925] NZLR 419 and [1962] NZLR 600.

⁸⁵ [1955] NZLR 419 at p. 427 per Hutchison J., at p. 433 per Cooke J. in agreement with North J. at p. 462 per North J.

⁸⁶ [1962] NZLR 600 at pp. 609-610 per Gresson P., at p. 618 per Cleary J. and at p. 623 per Turner J.

⁸⁷ [1960] NZLR 673 at pp. 676-7.

⁸⁸ [1963] NZLR 461.

⁸⁹ *Id.* at p. 468 per North J. and at pp. 475-6 per T.A. Gresson J.

⁹⁰ *Id.* at p. 468.

⁹¹ *Id.* at p. 469.

⁹² [1957] NZLR 231 (SC).

⁹³ *Supra* n. 85.

with his fellow Judges proceeded to find that statutes had long recognised the Maori right to lands within the colony held according to their ancient customs and usage. This meant that statute law had placed a burden upon the Crown's paramount title to all land within New Zealand. Hence the Maori Land Court was able to make a freehold order fixing the boundary of land fronting the sea at low-water mark. Where, however, the Court had not fixed the boundary as other than the sea the presumption was that the grant took effect to the high-water mark and that the foreshore remained with the Crown freed "from the obligation which the Crown had undertaken when legislation was enacted giving effect to the promise contained in the Treaty of Waitangi".⁹⁴ This was rather a backhanded way of avoiding the inconvenience of finding the presence of a surviving Maori right for most freehold orders simply named the sea as the boundary without addressing the suitability of making the grant to high or low water mark. In all, the decision had much the same effect as *Re the Bed of the Wanganui River* in that it denied the foreshore to be a separate strip of land the title to which was ascertained independently to that of the adjoining land.

It has been seen how New Zealand courts have tackled the question of aboriginal title and rights. The basic form which these cases have is to take feudal principle — that all land is held by the Crown, and apply it rigorously to the question of Maori traditional rights. As the Crown held the *imperium* and *dominium* to its colonies it followed on strict feudal thinking that no native claims to land could be enforced in municipal law, least of all against the Crown, until those rights received statutory recognition or some type of formal Crown grant.

This position was contrary to the received legal opinion of the early nineteenth century, as was seen with reference to the decisions in the Marshall Court and *Symonds*. Moreover, it was plainly out of step with the position taken by the Privy Council which is soon to be outlined. In the 'Protest of Bench and Bar' Stout and his colleagues had loudly complained of the Privy Council's views of aboriginal title in New Zealand. It did not occur to them that lawyers in London at the seat of the British Empire might be more aware of the legal principles upon which British colonial activity revolved than their colonial brethren. This, sadly, was the case.

(6) *The Privy Council and Aboriginal Title*

The first significant occasion upon which English judges considered the question of tribal land rights arose in *Saint Catherine's Milling and Lumber Company v The Queen*.⁹⁵ This Canadian case concerned a dispute between the federal and provincial governments over lands obtained by surrender from the Salteaux tribe of the Objibway Indians. Although Lord Watson delivering the advice of the Committee indicated an unwillingness to get into protracted discussion of the nature of Indian title, he stated that it "appears to their Lordships to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a *plenum dominium* whenever that title was surrendered or otherwise extinguished".⁹⁶ This simple sentence soon became engrained into Canadian jurisprudence concerning

⁹⁴ *Supra* n. 88 at p. 473 per North J.

⁹⁵ (1888) LR 14 App.Cas. 46.

⁹⁶ *Id.* at pp. 54-55.

Indian rights to their traditional lands, being reaffirmed by the Privy Council in *Attorney-General (Quebec) v Attorney-General (Canada)*.⁹⁷

Ten years later the Privy Council delivered its advice in *Cook v Sprigg*,⁹⁸ a case sometimes taken as denying the existence of any doctrine of aboriginal title. In this case the Committee held that the appellants as grantees of concessions made by the paramount ruler of Pondoland could not enforce these rights against the Crown after British annexation. During the course of its unanimous opinion the Committee, upon which Lord Watson was sitting, stated in wide terms that "according to the well-understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation".⁹⁹ The property rights alleged in this case were, however, of a contractual nature and so the case was soon seen despite its wide dicta as no more than an application of the rule that tribunals of a British possession have no jurisdiction in respect of claims against the Crown based upon its succession to the territory of another state against which such claims would have lain.¹

Indeed, the approach of the Privy Council in the years immediately after *Cook v Sprigg* confirmed that the decision laid down no presumption of an *ipso facto* abrogation of native laws immediately subsequent to British acquisition. In 1903 the Committee considered *Ontario Mining Company v Seybold*,² recollecting the advice it had given in *Saint Catherine's Milling and Lumber Co.*, whilst it also delivered its opinion in *Wallis v Solicitor-General*,³ to which reference has already been made. This last case may have been too much for the colonial legal mind to take but it was perfectly consistent with the stance taken in 1889. Likewise *The Vilander Concessions Syndicate v The Cape of Good Hope Government*⁴ was predicated upon a recognition of the legal character of aboriginal use and occupation. In *Attorney-General (South Nigeria) v John Holt & Co. Liverpool Ltd.* Lord Shaw speaking for the Committee agreed that sovereign title was proprietary in nature, that is a blend of *imperium* and *dominium*, but nonetheless the Crown's *dominium* was subject "to the condition that all rights of property existing in the inhabitants under grant or otherwise from King Docemo and his predecessors were to be respected".⁵

For present purposes, however, perhaps the most compelling advice given by the Privy Council soon after *Cook v Sprigg* was in *Nireaha Tamaki v Baker*.⁶ This case clearly revealed that the Committee considered the view of aboriginal title given in *Saint Catherine's Miller and Lumber Co.*

⁹⁷ [1921] 1 AC 401 at p. 408 per Lord Davey. For the Canadian position see B. Slattery *The Land Rights of Indigenous Canadian Peoples* (D. Phil. thesis, Oxford, 1979), and K. Lysyk "The Indian Title Question in Canada: An Appraisal in the light of Calder" (1973) 51 Can. Bar. Rev. 450.

⁹⁸ [1899] AC 572.

⁹⁹ *Id.* at p. 578.

¹ W.H. Moore *Act of State in English Law* (1906) at pp. 80-81.

² [1903] AC 73 at p. 79 per Lord Davey.

³ *Supra* n. 68 and accompanying text.

⁴ [1907] AC 186.

⁵ [1915] AC 599 at p. 609.

⁶ *Supra* n. 64.

to be applicable to New Zealand.⁷ Said the Committee, “the native title of possession and occupancy (is) not inconsistent with the seisin in fee of the Crown”. Indeed, the advice proceeded, “by asserting his native title, the appellant impliedly asserts and relies on the radical title of the Crown as the basis of his own title of occupancy and possession.”⁸ It is clear that the Committee considered the Maori aboriginal title to be rooted in general principle but, also, it referred to the host of local enactments giving recognition to the Maori’s aboriginal title, rejecting outright the lame *Wi Parata* approach that a statute could not call what was nonexistent (native title) into being. The advice proceeded to approve the decision in *Symonds* but left open the question whether native title could be extinguished by the prerogative.⁹ On this point their Lordships expressed doubt although the whole tenor of the report strongly suggested a negative answer.

The fullest general expression of the nature of aboriginal title given by the Privy Council came in 1921 with *Amodu Tijani v The Secretary, Southern Nigeria*.¹⁰ Two years previously *In re Southern Rhodesia*¹¹ the Committee had acted upon there being a continuity of native rights in their lands subsequent to British acquisition but had framed this in terms of a scale of civilization the right side of which the Matabele and Mashona tribes only just fell.¹² This gradation approach to native rights, or rather its possibility, never had any real chance to pass into the legal mainstream for Viscount Haldane speaking for the Committee in *Amodu Tijani* rejected it vigorously:

There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely . . . A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion

⁷ Curiously, though, the Privy Council considered the decisions of the United States Supreme Court under Marshall C.J. to be inapplicable because New Zealand was a ‘settled’ rather than ‘ceded’ colony, *id* at p. 383. It is hard to see the Committee’s reason for this distinction and the legal consequences flowing from it. Only one case, *Milirrpum v Nabalco Pty Ltd.* (1971) 17 FLR 141 (Aust. NTSC), draws any significance from this distinction so far as aboriginal title is concerned. The authorities do not countenance this distinction, which simply went to the question of identifying the body with the legislative capacity to abridge aboriginal title according to the rules in *Campbell v Hall* (1774) Lofft 655; 98 ER 848.

⁸ *Supra* n. 64 at p. 379.

⁹ *Id.* at p. 383.

¹⁰ [1921] 2 AC 399.

¹¹ [1919] AC 211.

¹² *Id.* at pp. 233-235. The recognition of aboriginal title and its apparent association with a “scale of social organization” (of which the natives of South Rhodesia approximated “rather to the lower than to the higher limit”) was not connected in any way with the full sovereign status of the Mashona and Matabele as recognised by the English Crown (*id* at pp. 215-6). In other words, aboriginal title was not associated with the particular tribes being accorded sovereign status but with tribal use and occupation since time immemorial according to indigenous laws and customs comprehensible to the English legal mind — sovereign status is not considered relevant to this inquiry. On the jurisprudential derivation of aboriginal title see the brief outline, *supra* n. 37.

of the mere analogy of English jurisprudence. Their Lordships have elsewhere explained principles of this kind in connection with the Indian title to reserve lands in Canada.¹³

Haldane proceeded to state that this assumption of legal continuity was "a usual one under British policy and law when such occupations [took] place."¹⁴

Three years after *Amodu Tijani* came *Vajesingji Joravasingji v Secretary of State for India*,¹⁵ a case occasionally viewed as supporting an abrogation approach.¹⁶ Here the following observation was made:

When a territory is acquired by a Sovereign State for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be cession following a treaty, or it may be occupation of territory hitherto unoccupied by a recognized ruler. In all cases the result is the same. Any inhabitants of the territory can only make good in the municipal courts such rights as that sovereign has through his officers recognized. Such rights as he had under the rule of his predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce those stipulations in the municipal courts. The right to enforce remains only with the high contracting parties.¹⁷

These words were much wider than necessary and cannot be taken as any departure from *Amodu Tijani*. Rather, the words have to be read in the context within which they arose. In *Vajesingji* the Crown (through its agents) had made an act of suspension of property rights during the process of acquisition and had coupled this suspension with a promise to clarify at a later stage the nature of local property rights. It was the promise attached to the suspension, an act of state, which the Committee refused to enforce. This situation is quite different to that where there has been no act of suspension during the process of acquisition.

This, indeed, was the understanding given *Vajesingji* by the Privy Council in *Oyekan v Adele*.¹⁸ Here Lord Denning referring to the above passage from *Vajesingji* and the Privy Council's decision in *Hoani Te Heu Heu Tukino*,¹⁹ acknowledged that local rights after British annexation could not be based for municipal law purposes solely upon rights conferred by treaty. This was the case in *Vajesingji*. Nonetheless whenever the Crown acquired territory the "courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected."²⁰ The import of this is that in the absence of any act of suspension during the process of acquisition the recognition of local property rights would

¹³ *Supra* n. 109 at p. 403.

¹⁴ *Id.* at p. 404.

¹⁵ (1924) LR 51 Ind. App. 357 (PC).

¹⁶ Notably: *Calder v Attorney-General (British Columbia)* (1971), 13 DLR (3d) 64 (BCCA) at pp. 71-72 per Tysoe JA., and pp. 103-4 per Maclean JA. This position was reversed upon appeal: (1973) 34 DLR (3d) 145 (SCC). *Milirrump v Nabalco Pty Ltd.* (1971) 17 FLR 141 (Aust. NTSC) at pp. 226-7 per Blackburn J. It has been said (*Calder v A-G(BC)*, *op.cit.*, p. 104 per Maclean JA) that the Privy Council took a like stance in the *Hoani Te Heu Heu Heu Tukino* case (n. 83). This case, looked at in the light of the facts upon which it arose, held no more, however, than that treaty rights could be legislatively abridged.

¹⁷ *Supra* n. 114 at p. 360.

¹⁸ [1957] 2 All ER 785.

¹⁹ *Supra* n. 83.

²⁰ *Supra* n. 117 at p. 788.

not depend solely upon the terms of a treaty guaranteeing those rights. The recognition emanates from a general presumption of law arising independently of (though capable of modification by) the terms of a treaty. Where the terms of the treaty suspend the operation of the presumption, as in *Vajesingji*, the courts could not give effect to any promises attached to the suspension other than give effect to its suspensory content. In short, a treaty (real or so-called) guaranteeing native title could hardly be the sole source of aboriginal title since by making the guarantee it declared what would have been the case in any event. This approach sits squarely with that taken in *Symonds* where the Treaty of Waitangi was seen as no more than declaratory of rules which would have ordinarily applied. Moreover, it matters not that the Treaty of Waitangi might not be a 'treaty' in the sense understood by international law.²¹

More recently aboriginal rights have been considered by the Supreme Court of Canada in *Attorney-General (British Columbia) v Calder*²² in which Hall J. laid down what is probably the most authoritative statement of the modern position, this being based largely upon the approach which the Marshall Court and *Symonds* had taken years earlier.²³ The judgment given by Blackburn J. in the *Milirrpum* case, although lengthy, does not merit close attention here since it was decided before the Supreme Court of Canada handed down its decision in *Calder*. Moreover, it has been shown to be gravely flawed in many respects.²⁴ First, Blackburn J. showed little awareness of the rules of colonial law which governed the situation. Secondly, he saw the presumption of continuity of local property rights as hinging upon a distinction between 'conquered and ceded' colonies (in which there

²¹ See the discussion in the following paragraph. As to the status of the Treaty of Waitangi in international law see K.J. Keith "International Law and Municipal Law" in J. Northey (ed.) *A.G. Davis Essays in Law* (1965) at p. 137 and W.A. McKean "The Treaty of Waitangi Revisited", in G. A. Wood and P. S. O'Connor (eds.) *W.P. Morrell: A Tribute*. Cf. K. Roberts-Wray *Commonwealth and Colonial Law* (1966) at p. 103; N. Foden *The Constitutional Development of New Zealand in the First Decade (1839-1849)* (1938) *passim*; and A. P. Molloy "the Non-Treaty of Waitangi" (1971) NZLJ 193. The cases are somewhat ambivalent as to whether the Treaty of Waitangi was an instrument of cession between two sovereign powers. The two most notable examples are seen in *Hoani Te Heu Heu Tukino*, *supra* n. 83, where the Privy Council treats the Treaty as though it were an instrument of cession in contrast to the judgment in *Wi Parata* *supra* n. 54, which sees the Treaty as devoid of any international law status. This article sees this controversy as infertile, at least for municipal law purposes, since the Treaty of Waitangi is argued to be declarative rather than constitutive of the Maori's aboriginal rights at law.

²² (1973) 34 DLR (3d) 145 (SCC).

²³ See the comments of I.ysyk, *supra* n. 97, *passim*.

²⁴ J. Hookey "The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?" (1972) 5 FLR 85, and B. Slattery *Judicial Theories of Aboriginal Title* (1981) at p. 21, where these observations are made about the *Milirrpum* case: "The court makes reference to the view that a common law doctrine recognising communal native title in Australia was impossible because it could not have existed in England in 1788, when the common law was received in the colony of New South Wales, or indeed at any time, the reason being that there were no aboriginals in England to whom it could apply. One might as well argue (we may observe) that it was impossible for English common law to secrete any rules governing the acquisition and status of overseas territories, because there were by definition no "overseas territories" within England. Such arguments do not make sense because they ignore the fact that a distinct body of common law developed from at least the seventeenth century onwards to govern the position of British acquisitions overseas and their native inhabitants, law derived principally from the practice of the Crown, as recognised (and curbed) by judicial decision".

was such a presumption) and 'settled' colonies (in which the native property rights depend upon statutory recognition). This type of reasoning was implicitly criticised by Hall J. in *Calder* when he indicated that the principles applied to 'conquered or ceded' territory applied *a fortiori* to 'settled' colonies with an aboriginal population.²⁵ This is sound sense since Blackburn's approach would mean that peoples in 'conquered or ceded' territory who often had been Her Majesty's enemies (until subdued) would enjoy stronger legal protection than aboriginal inhabitants in territory peacefully got by the Crown. Subsequent to *Calder* further Canadian decisions have injected added vigour into what is known there as the 'doctrine of aboriginal title'.²⁶

More recently in the English Court of Appeal Lord Denning, who had delivered the Committee's advice in *Oyekan v Adele*, recognised aboriginal rights as subsisting at law. Referring to *Saint Catherine's Milling and Lumber Co.* and later cases, he spoke of the Indian title as "a title superior to all others save in so far as the Indians themselves surrendered or ceded it to the Crown".²⁷

It can be noted in closing that none of the Privy Council cases discuss the Crown's pre-emptive right with quite the same attention as the Marshall Court and *Symonds* cases. This was not particularly necessary with reference to the African colonies since most of the land-buying was being undertaken by Crown Agents or chartered companies upon whom the Crown had bestowed pre-emptive land-buying rights. Similarly the Canadian cases needed no reference to the pre-emptive right, the right being well-entrenched and understood by virtue of the Royal Proclamation of 1763 which still applies in Canada.²⁸

IV THE NATURE OF ABORIGINAL TITLE

The above analysis has revealed that in some way the natives' rights were at law a burden upon the Crown's *dominium*. The cases upon aboriginal title do not provide much elaboration beyond that bare proposition and, indeed, there would appear to be little reason for such amplification to be attempted. It is clear, though, that aboriginal title cannot amount to a claim in common law to a fee simple right over traditional land despite the words of Justice Baldwin in the last major decision of the Marshall Court on Indian title that the "settled principle" of the Indian right to their lands "is sometimes as sacred as the fee simple of the whites".²⁹ Nonetheless aboriginal title is proprietary in character. When Lord Watson

²⁵ *Supra* n. 121 at p. 199.

²⁶ *R v Kruger and Manuel* (1974) 51 DLR (3d) 435 (B.C.Co.Ct. Yale) at pp. 43-446 recognising an aboriginal right to hunt for sustenance on unoccupied Crown land. This decision was reversed on appeal on the simple ground that this incident of aboriginal title had been legislatively extinguished: (1975) 60 DLR (3d) 144 (BCCA), [1978] 1 SCR 104 (SCC); *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) 107 DLR (3d) 513 (FCTD).

²⁷ *R v Secretary of State for Foreign and Commonwealth Affairs, ex p. Indian Association of Alberta* [1982] 2 All ER 118 at p. 127 (CA).

²⁸ *The King v Lady McMaster* [1926] Ex CR 68 at p. 72 per MacLean J.; *Calder v A-G(BC)* *supra*, n. 121, at p. 152-3 per Judson J. and at p. 203 per Hall J.; *Hamlet of Baker Lake v Ministry of Indian Affairs*, *supra* n. 125 at p. 541; and *R v Secretary of State* etc. *supra* n. 126.

²⁹ *Mitchel v United States* (1835) 9 Peters 711 (USSC) at p. 746.

spoke of it as “a personal and usufructuary right”³⁰ he did not mean that the ‘personal’ attribute took it out of the bounds of property rights into the general sphere of rights *in personam*. As Duff J. later explained in the Privy Council, this tag was applied simply to explain how aboriginal title was “in its nature inalienable except by surrender to the Crown”.³¹ English law had long recognised restraints on the alienation of property rights (such as the fee tail and conditional fee), it so happened that aboriginal title fell into the category of property rights with (a severely) curtailed alienability.

To this day it matters not what terminology one chooses to describe aboriginal title as certain features of it are clear besides the basic formulation that it is a ‘burden’ upon the radical title of the Crown. These characteristics will now be considered.

It has sometimes been argued that aboriginal title extends only to lands in the ‘actual occupation’ of the indigenous claimants. This argument, raised at various times in the early days of the North American colonies, found strained support in the Bible³² as well as more explicit authority in the likes of Vattel,³³ Locke³⁴ and More.³⁵ For instance, in 1665 the New England Commissioners appointed by the King to investigate the state of the Massachusetts colony commented upon the local legislation declaring Indian title to extend only to lands in the actual occupation of the Narragansett Indians which law the locals claims to be authorised by Scripture.³⁶ The Commissioners found that this law not only breached the King’s Instructions but made the following observations on its purported Biblical source:

... for it seems as if (the Indians) were dispossessed of their land by Scripture, which is both against the honour of God and the justice of the King; yet, in Gen. 1st, 28, ‘subdue the earth’ is but equivalent to ‘have dominion over the fish of the sea’; in Gen. 9.1, ‘replenish’ relates to generation, not husbandry; in Psa. 115.16, ‘children of men’ comprehends Indians as well as English; and no doubt the country is theirs till they give it or sell it, though it be not improved.³⁷

As the above extract indicates, the recognition of a limited extent of aboriginal title did not prevail. In *Mitchell v United States* Mr. Justice Baldwin stated:

³⁰ *St. Catherine’s Milling and Lumber Co. v The Queen*, *supra* n. 95.

³¹ *Attorney-General (Quebec) v Aggornev-Genera (Canada) (Re Indian Lands)* (1920) 56 DLR 373 at p. 377; [1921] 1 AC 401 at p. 408.

³² Gen. 1:28 and 9:1; Psalms 2:8 and 115:16.

³³ F. de Vattel *The Law of Nations (Le Droit des Gens)* (1758); Other publicists of international law taking a similar view were De Martens (1789), Ortolan (1845) and Phillimore (1879-1889). Lindley, *The Acquisition and Government of Backward Territory in International Law* (1926) at p. 17 concludes that none of these writers provide a “satisfactory foundation for the formulation of a rule of International Law”.

³⁴ *Supra* n. 37.

³⁵ W.E. Washburn *Red Man’s Land/White Man’s Law: A Study of the Past and Present Status of the American Indian* (1971) at p. 40.

³⁶ The Commissioners’ activities in relation to the colony’s Indian population is outlined in F. Jennings *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (1975) at pp. 282-88.

³⁷ N.B. Shurtleff (ed.) *Records of the Governor and Company of the Massachusetts Bay in New England* (1853), Vol. IV at p. 213.

Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals . . .³⁸

Similarly Chief Justice Martin speaking extra-judicially noted that every square mile of New Zealand was subject to some Maori claim, which claim was recognised by the local authorities.³⁹ Thus, aboriginal title extended to include hunting and fishing rights over lands not actually occupied or cultivated. This continues to be the case.

An additional, unique characteristic of aboriginal title is that its format in any given situation is idiosyncratic to the particular native claimants' situation. In the *Kruger and Manuel* case recently the Supreme Court of Canada did not delve into the question of aboriginal title, resting its decision on other grounds although the Court did make this observation:

Claims to aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of particular land is to be decided as a justiciable issue and not a political issue, it should be considered on the facts pertinent to that Band and to that land, and not on any global basis.⁴⁰

This means nowadays that a native claim to an aboriginal title will have to be decided in the light of specialist anthropological evidence and abundant native testimony. This evidence must show that the exercise of the native practices comprising the aboriginal title are woven into the traditional lifestyle. 'Traditional' is not used here in any archaic sense associated with the exact lifestyle pursued at the time of British acquisition of territorial sovereignty. Such a requirement would be ethnocentric in its denial of the dynamic nature of native culture and society and would render aboriginal title, like the first aboriginal right identified and discussed earlier, susceptible to gradual diminishment through the years of native/white contract. Rather, the native claimants must establish that the claim to an aboriginal title (say, a right to fish or hunt over certain Crown lands) is associated with the unique nature of their culture and is connected with the ongoing vitality and viability of that uniqueness. In practical terms this would mean, for example, the impossibility of maintaining a hunting right as an incident of aboriginal title (perhaps the sole incident) when the native claimants are hunting for commercial exploitation unrelated to the direct maintenance of the traditional lifestyle. That is, their aboriginal title would allow hunting for subsistence purposes and tribal occasions (such as a traditional marriage or funeral feast) but would not extend to commercial activity (even though that activity may eventually produce tribal funds disbursed in a 'traditional' manner).

Besides having to prove the traditional character of the rights being claimed as an aboriginal title, the aboriginal claimants have also to establish these elements given in the *Baker Lake* case⁴¹ as the constituent elements of an aboriginal title:

³⁸ *Supra* n. 128.

³⁹ W. Martin (1861) in a pamphlet reprinted in *Opinions of Various Authorities on Native Tenure* (1890) App. JHR PP G-1.

⁴⁰ *Kruger and Manuel v R* [1978] 1 SCR 104 at p. 109.

⁴¹ (1979) 107 DLR (3d) 513 (FCTD) at p. 542.

1. That they and their ancestors were members of an organised society;
2. That the organised society occupied the specific territory over which they claim the aboriginal title;
3. That the occupation was to the exclusion of other organised societies;
4. That the occupation was an established fact at the time sovereignty was asserted by the Crown.

Certain aspects of these criteria demand a little clarification. First, the 'occupation' required by the second criterion, as has been seen, is not 'actual occupation' in a sense used to exclude hunting and fishing rights. Secondly, the term 'organised societies' is not synonymous with individual tribes or sub-tribes. The context within which this criterion was formulated in the *Baker Lake* case was with reference to certain parts of the territory claimed by the Inuit people which might also have been subject to an Indian claim (viz. the fringes of the boreal forest). Clearly in the New Zealand context there has been no equivalent to the differences of racial stock present in the *Baker Lake* situation. Thirdly, it can be noted as an aside that these criteria would seem to harm the claims of nomadic aboriginal people and may be suspect to query on that account. This does not affect the utility of these criteria for the non-nomadic Maori of New Zealand. Finally, the general observation can be made that proof of these criteria requires native testimony well-supported by expert anthropological evidence.

V THE EXTINGUISHMENT OF ABORIGINAL TITLE

There are two considerations under this heading: first, the mode of valid extinguishment of aboriginal title and, secondly, the compensability of such extinguished rights.

(1) *The Mode of Extinguishment*

In *Nireaha Tamaki*⁴² the Privy Council left open the question whether exercise of the Crown's executive powers (viz. the power to make grants of its land) could be used to extinguish Maori aboriginal title though the tenor of the judgment strongly suggested a negative answer. By contrast, the New Zealand cases decided when Prendergast and Stout held the office of Chief Justice established that the Crown had such a power. If, however, one rejects these decisions, indeed the central finding of this article is to suggest that one is bound to do so, and accepts instead the general recognition of aboriginal title given in other jurisdictions, it follows that aboriginal title enjoys the same protection at common law as other property rights. This would mean that there is no general prerogative power to take away these rights unilaterally.⁴³ Such a power may be statutorily conferred in which case the capacity is better described as 'statutory executive' rather

⁴² *Supra* n. 64 at p. 383.

⁴³ Not even, it appears, for purposes of defence of the realm: *Bank Voor Handel en Scheepvaart N.V. v Administrator of Hungarian Property* [1954] AC 584 at 638; [1954] 1 All ER 969 at 995 (HL) per Lord Keith of Avonholm (his opinion was a dissent but this point was not in issue).

than 'prerogative'.⁴⁴ The New Zealand decisions recognising a prerogative power to extinguish Maori aboriginal title (and it should be borne in mind that the Maori had long been statutorily declared to have been a British subject since 1840), a power considered beyond judicial purview, are ominously reminiscent of the argument set up by the Stuart monarchy in *Entick v Carrington*.⁴⁵ This observation cannot be dismissed as the smugness of hindsight for it suggests that the decisions in the days of Prendergast and Stout C. J. J., were in violation of settled constitutional principle. As has been seen, this position was legislatively entrenched by the Native Land Act 1909 which provided that the title to "customary land" was not to avail against the Crown. The provision survives as section 155 of the Maori Affairs Act 1953.⁴⁶ Probably, then, the Crown in right of New Zealand enjoys a 'statutory executive' power to extinguish title to "customary land". Whether this power extends to land subject to an unextinguished Maori aboriginal title which is not "customary land" is another question.

What legislative format is necessary to constitute a valid extinguishment of aboriginal title? In *Calder Hall J.* observed that aboriginal title being a legal right "could not therefore be extinguished except by surrender to the Crown or by competent legislative authority, *and then only by specific legislation*".⁴⁷ Hall's inspiration was the opinion of Davis J. in the United States decision *Lipan Apache Tribe v United States* where it was said that in "the absence of a "clear and plain indication" in the public records that the sovereign "intended to extinguish all of the claimants' rights" to their property, Indian title continues".⁴⁸ This view regarding the interpretation of statutes affecting native land rights had been used also in *Choate v Trapp* (1912) where it was stated that "the rule of construction recognised without exception for over a century has been that "doubtful expressions" instead of being resolved in favour of the United States, are to be resolved in favour of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith".⁴⁹ This rule of interpretation originates from *Johnson v M'Intosh* where Marshall C.J. speaking of Indian treaties had said they "must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians".⁵⁰ Clearly the North American courts have considered that this canon used for Indian treaties applies also

⁴⁴ It is possible, of course, for aboriginal title to be extinguished by voluntary agreement of the Crown and native tribe (as by the treaty process used in North America by which land left as a 'reservation' was still considered subject to an unextinguished aboriginal title: *St. Catherine's Milling and Lumber Co. v The Queen*, *supra* n. 95). The appropriate New Zealand example of this bilateral extinguishment is where the Maori surrendered their native title for a Crown grant, the exchange of aboriginal for Crown-derived title coming subsequent to the Maori (then native) Land Court's ascertainment of the customary owners.

⁴⁵ (1765) 19 St. Tr. 1029.

⁴⁶ R.S. Vol. 8, p. 13.

⁴⁷ *Supra* n. 121 at p. 208. Emphasis added.

⁴⁸ (1967) 180 Ct Cl. 487 at 492.

⁴⁹ (1912) 224 US 665 at 675; See also *United States v Santa Fe Pacific Railroad Company* (1941) 314 US 339 at p. 347 (USSC).

⁵⁰ *Supra* n. 24.

to legislation affecting the Indians' traditional rights be it a law of a specific or general nature.

However, as Mahoney J. implied in *Baker Lake*,⁵¹ Hall J.'s requirement of *specific* legislation was a tightening in favour of aboriginal peoples of the "clear and plain indication" test. Judson J. appeared also to adopt this "clear and plain indication" test in *Calder* but unlike Hall he was prepared to find it established by implication of statute.⁵² This conflict was reconciled by Mahoney, J. in *Baker Lake* who gave what is probably the present day test for the interpretation of legislation affecting aboriginal title:

To say that the necessary result of legislation is adverse to any right of aboriginal occupancy is tantamount to saying that the legislator has expressed a clear and plain intention to extinguish that right of occupancy.⁵³

(2) *The Right to Compensation*

Cases in the United States have held quite independently of the Act of Congress constituting the (now defunct) Indian Claims Commission⁵⁴ that the extinguishment of aboriginal title brings with it a right to compensation. In *United States v Creek Nation* the Supreme Court stated that the federal government's power to control and manage the Indian people "did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render just compensation for them; for that "would not be an exercise of guardianship, but an act of confiscation".⁵⁵

This position is quite consistent with the recognition of aboriginal title as a right of property and the canon that an intention on the part of the legislature to deprive a person of his property without compensation is not to be imputed unless it is stated in express terms.⁵⁶ Thus, legislation extinguishing aboriginal title must also contain an express provision displacing the presumption of compensation.

It is quite possible to argue at times, however, that certain legislation

⁵¹ *Supra* n. 125 at pp. 550-52.

⁵² *Supra* n. 121 at p. 156 *et seq.*

⁵³ *Supra* n. 125 at p. 552.

⁵⁴ The history and operation of this body is described by Lysyk (1969) in Cumming and Mickenberg, *supra* n. 33 at pp. 243-264. The Commission was dissolved in 1978, the outstanding claims being transferred to the Court of Claims. For a comparative analysis of legal mechanisms in Australasia and North America for the resolution of Indian claims see E. Colvin *Legal Process and the Resolution of Indian Claims* (1981). It is interesting in the light of recent criticisms of the Treaty of Waitangi Tribunal's lack of adjudicative power that Colvin argues the adjudicative mode of dispute resolution to be inherently unsuitable to the 'polycentric' nature of native land claims.

⁵⁵ (1935) 295 US 103 at pp. 109-110. Also *Minnesota v Hitchcock* (1901) 185 US 373 (USSC). In *Baker Lake*, *supra* n. 125 at p. 545, Mahoney J. warns against reliance on American decisions decided since the creation of the Indian Claims Commission in 1946 for the Commission's brief included "claims based upon fair and honourable dealings that are recognized by any rule of law or equity" (Public Law 79-959, August 13, 1946). This warning has been heeded and no cases connected with this aspect of the Commission's brief have been cited.

⁵⁶ *Central Control Board (Liquor Traffic) v Common Brewery Co. Ltd.* [1919] AC 744 at p. 752 (HL) per Lord Atkinson; *Customs and Excise Cmsr. v Cure and Deeley Ltd.* [1962] 1 QB 340; *Halsbury's Laws of England*, 4th ed. Vol. 8 at p. 552. And see *Calder v A-G(BC)*, *supra* n. 121 at p. 173 per Hall J.

is not confiscatory in nature and therefore not subject to a right of compensation. Said Wright J. in *France Fenwick and Co. v The King*:

I think that the rule [of compensation] can only apply . . . to a case where property is actually taken possession of, or used by, the Government, or where, by the order of a competent authority, it is placed at the disposal of the Government. A mere negative prohibition, though it involves interference with an owner's enjoyment of property, does not, I think, merely because it is obeyed, carry with it at common law any right to compensation. A subject cannot at common law claim compensation merely because he obeys a lawful order of the state.⁵⁷

In *Kruger and Manuel* the aboriginal claimants charged with breach of the provincial Wildlife Act (1966) argued that the statute if interpreted to extinguish native hunting rights left intact the right to compensation. In the end the British Columbia Court of Appeal and Supreme Court of Canada did not decide anything on the question of aboriginal title as the federal Indian Act made provincial laws of general application applicable to the Indians. The Supreme Court, echoing but not citing *France Fenwick and Co.*, did however venture the following:

It has been argued that absence of compensation supports the proposition that there has been no loss or regulation of rights. That does not follow. Most legislation imposing negative prohibitions affects previously enjoyed rights in ways not deemed compensatory. The Wildlife Act illustrates the point. It is aimed at wild life management and to that end it regulates the time, place, and manner of hunting game. It is not directed towards the acquisition of property.⁵⁸

Whilst this dicta must be borne in mind in the interpretation of legislation affecting aboriginal title, one must also be mindful that in certain cases (as where the sole incident of the claimed aboriginal title is the right to hunt or fish) 'regulation' may often become confiscation. This appears to have been at the back of the mind of the Supreme Court of Canada in *Kruger and Manuel* for the opening paragraph of the Court's judgment notes that the Indians could have "readily" obtained and had obtained in the past the necessary permits required by the provincial Act.⁵⁹ In other words, 'regulation' under the Wildlife Act did not amount to a 'confiscation' of aboriginal title for the legislation had produced no disruption of the traditional lifestyle. One wonders, though, what would have been the case had the Wildlife Act produced a serious interference with the Indian lifestyle which in many regions of Canada is heavily reliant on subsistence hunting.

VI CONCLUSION

In conclusion the following set of propositions is offered with respect to aboriginal title in New Zealand

1. The Crown's acquisition of territorial sovereignty to New Zealand gave it a title expressed in feudal terms blending *imperium* and *dominium*. The Crown's radical title to all land was qualified or burdened, however, by the traditional rights of the Maori. This qualification has been called aboriginal rights.
2. The existence of aboriginal title at law has been recognised in many judicial forums, notably the opinions of the Marshall Court in the United

⁵⁷ [1927] 1 KB 458 at p. 467.

⁵⁸ *Supra* n. 139 at p. 108.

⁵⁹ *Id.* at p. 106.

States over the years 1823-1835, the New Zealand Supreme Court in *R v Symonds* and consistently in the advice given by the Privy Council. The New Zealand courts under Chief Justices Prendergast and Stout were fundamentally misconceived in approach, mainly by reason of their narrow application to feudal rules to the exclusion of colonial law. After the passage of the Native Land Act 1909 this misconception ceased to a large extent inasmuch as the legislation allowed a 'statutorily recognized' approach to Maori aboriginal title to emerge (albeit somewhat tardily). Significantly, though, this legislation provided that the Maori title to "customary land" was not to avail against the Crown. "Customary land" was defined as "land which, being vested in the Crown, is held by Maoris or the descendants of Maoris under the customs and usages of the Maori people".⁶⁰ This amounted to a statutory codification and elaboration of the decision in *Wi Parata*. By virtue of this legislation the Crown obtained a 'statutory executive' power to extinguish or, rather, to declare extinguished, the Maori aboriginal title to areas of "customary land".

3. Any legislative extinguishment of aboriginal title must make the intention to do so 'clear and plain' in the sense that the loss of native title (or incidents thereof) must be a necessary and unavoidable result of the legislation. All attempts must be made to read the legislation in favour of the native peoples.
4. As aboriginal title is proprietary in character, there exists a presumption of compensation unless the expropriation legislation specifically provides otherwise. No such presumption exists when the legislation in question 'regulates' rather than suspends or in some way expropriates the aboriginal title.

Some might think that the passage of the 1909 legislation and the workings of the Maori Land Court transforming the customary title into freehold title render much of what has gone before of historical interest only. To a large extent that impression would be correct. Haughey, for instance, has observed that the remaining areas of customary land in New Zealand consist "merely of small pockets of land situated in out of the way places and of little or no economic value, such as rocky islets lying off the coast".⁶¹ However, it can be argued that there is Crown land in New Zealand subject to an aboriginal title which has not been extinguished by legislation and which is not "customary land" (and hence not susceptible to defeat by executive proclamation). This land, it is concluded at a later date, lies below the tidal waters of New Zealand. Land subjacent to tidal regions comprises the remaining area over which the Maori's aboriginal title has yet to be considered authoritatively. If this is so then all the foregoing is of much greater interest than the academic: it has established a framework for the consideration of the legal position of Maori aboriginal rights over land below tidal water. This investigation could shed new light upon the Motunui controversy and, should the question come before local courts, should there be a judicial climate sensitive to the Maori claim and hostile to the *Wi Parata* line of cases, there may well be some vindication of the Maori belief that they must have enjoyed some legal rights to their traditional lands and fisheries subsequent to British annexation of New Zealand.

⁶⁰ This definition remains in Section 2, Maori Affairs Act 1953, *supra* n. 145.

⁶¹ E.J. Haughey "The Maori Land Court" (1976) NZLJ 203 at p. 209.



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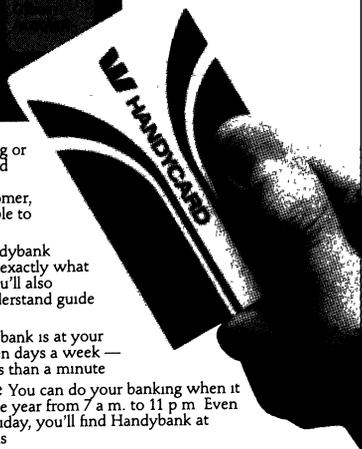
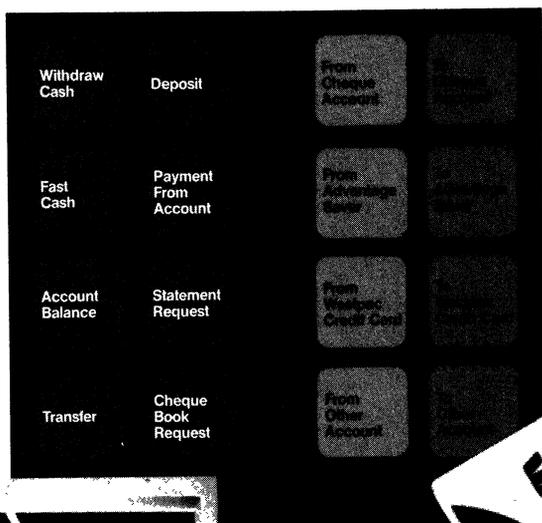
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