MILIRRPUM AND THE MAORIS: THE SIGNIFICANCE OF THE MAORI LANDS CASES OUTSIDE NEW ZEALAND

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Though the litigation which ultimately resulted in the judgment in the *Gove Land Rights* case, *Milirrpum* v. *Nabalco Pty. Ltd.*,[1] may well have been the first attempt by aboriginal Australians to assert their rights in their ancestral lands in a white man's court,[2] the main issue of law in the case has often been dealt with in the courts of what used to be called the British Empire. This issue was whether the common law recognizes existing customary law rights in land on the establishment of a British colony; or, as Blackburn J. usually put it in *Milirrpum* v. *Nabalco Pty. Ltd.*, whether the common law contained a doctrine of "communal native title."[3] On this issue, Blackburn J. did not seek to show that there was a peculiarly Australian common law. His Honour examined a congeries of cases from a number of jurisdictions, including New Zealand, before concluding that they did not support the proposition that the common law recognized "native" customary rights in land.[4] As so many of the judgments from common law countries other than Australia actually do recognize and enforce indigenous customary law interests in land, it was necessary for Blackburn J. to distinguish them. For the most part he did this by saying that where "native" rights in land had been recognized in the First and Second British Empires this recognition resulted from statute, or executive policy, rather than from the importation of the common law.[5]

In this paper, I am commenting on the significance of some of the New Zealand cases dealing with the status of Maori interests in land, for land rights litigants, outside New Zealand, faced with the task of achieving recognition of their traditional titles.[6] There shall be some

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[The author is indebted to Mr John Little, of the Melbourne bar, for drawing his attention to the significance of the constitutional and historical links between Australia and New Zealand, and to some differences between the status of American Indians and British subjects indigenous to British colonies, particularly after the passing of the Abolition of Slavery Act, 1833. Mr Little's mastery of this whole subject, and his enthusiasm for the aboriginal cause, for which he has so courageously fought in and out of the courts, has encouraged the author to revise substantially this paper, which, in its original form, was presented at a Symposium on aboriginal land rights held at Hobart, in August 1972, as part of the annual conference of the Australasian Universities' Law Schools Association. Nevertheless, the errors of this paper are its author's errors, and his alone; while it may well be that not all of its conclusions would be shared by Mr Little.]

1 (1971) 17 F.L.R. 141.
2 *Ibid.*, at pp. 150 and 199.
3 *Ibid.*, at p. 198.
4 *Ibid.*, at pp. 207-8 and 262.
5 *Ibid.*, at p. 262.
6 While "recognition" can itself be but a prelude to alienation, as in New Guinea, even this has not yet been achieved in Australia and some other parts of the British Commonwealth: c.f. *Calder v. Attorney-General for British Columbia, Supreme Court of Canada*, unreported, 31 January 1973.

reference to the use made of the New Zealand cases in *Milirrpum* v. *Nabalco Pty. Ltd.*[7] In that case, Blackburn J. ultimately held that the New Zealand authorities were of little assistance. This was largely because he took the view that after 1865 Maori rights in land were recognized by statute,[8] and that no statutory recognition existed in respect of aboriginal traditional interests. Therefore the common law governed the question whether, in Australia, aboriginal rights were legally recognized,[9] while in New Zealand this question did not really arise.

Though most of the cases, well known outside New Zealand, which deal with Maori rights in land, were decided after 1865, there still remains the question as to whether, since then, Maori rights depend, for their recognition, entirely on statute. Furthermore, there was one important decision of the New Zealand Supreme Court, in 1847, which dealt with Maori rights in land in the period before Blackburn J. considered they had attained complete statutory recognition. This case was *R.* v. *Symonds*,[10] which was approved by the Privy Council in *Nireaha Tamaki* v. *Baker*,[11] many years later, in 1901.

Prima facie, the reasoning in *Symonds'* case is inconsistent with the finding in the *Gove Land Rights*[12] case that the common law does not recognize indigenous interests in land in a British colony. Although Maoris were not parties to the suit, the judgments delivered depend on premises that their rights in land were legally recognized proprietary interests.

Symonds' case is of great interest in Australia, not only because it appears to base the recognition of Maori customary rights in land on common law principles, but also because, in the eighteen thirties and eighteen forties, there were some significant links between Australia and New Zealand in real property and constitutional law.

Following the assertions of British sovereignty over New Zealand, it was administered for a time as part of New South Wales by the New South Wales government.[13] The despatch from Governor Gipps to the then Colonial Secretary, Lord John Russell, dated 16 August 1840,[14] and its enclosures, provides strong evidence of the then contemporary view that the same common law principles governed the respective rights of the Crown, the indigenous inhabitants, and the settlers, in both Australia and New Zealand. This despatch dealt with the attempt of W. C. Wentworth to buy twenty million acres of land from the Maoris of the South Island, for an annual payment of £200.[15] Gipps argued that the same principles governed this purported transaction as that of Batman, who, with others, had attempted to buy land at Port Phillip and Geelong, and been refused recognition of his title by the Crown. He told the Legislative Council of New South Wales that neither

7 (1971) 17 F.L.R. 141.
8 *Ibid.*, at pp. 239-240.
9 *Ibid.*, at pp. 149, 240 and 198.
10 (1847), N.Z.P.C.C. 387.
11 [1901] A.C. 561.
12 (1971) 17 F.L.R. 141, at p. 262.
13 C.f. New South Wales Acts 3 Victorian No. 28, and 4 Victorian No. 7, in Callaghan's *Acts And Ordinances of The Governor and Council of New South Wales*, Vol. II, pp. 890-894.
14 *Commons Papers*, 1841, vol. 17.
"Correspondence Respecting The Colonisation of New Zealand", pp. 63 *et seq.*
15 *Ibid.*, pp. 63 and 78.

Batman nor Wentworth could assert a valid title against the Crown; not because the local inhabitants had no title to grant, but because British subjects were prohibited, at common law, from acquiring titles to land in settled colonies, and places not under British sovereignty, which were not based on a Crown grant.[16] The Crown had a monopoly of extinguishing the native title in these places. Gipps relied heavily on American precedent, but assured the Legislative Council that ". . . the law which prohibited individuals from purchasing land from the natives was English law before it was American law."[17]

Symonds'[18] case is completely consistent with Gipps' view. It decided that a settler title based on a purchase direct from the Maoris was invalid, and must give way to title over the same land, which, though later in time, was based on a Crown grant in due form, issued after the valid extinction of the Maori title.[19] The judgments of the members of the Supreme Court in *Symonds'* case recognized the strength of Maori titles, subject to one qualification: that they could not be alienated save to the Crown.[20]

Another interesting comparison between the legal history of Australia and New Zealand is to be found in the recognition given to indigenous interests in land in the constitutional instruments establishing South Australia as a Province in 1836, and New Zealand as a separate colony in December 1840. In the New Zealand Charter it was provided that:

> . . . nothing in the said Charter contained shall affect or be construed to affect the rights of any aboriginal natives in the said colony to the actual occupation or enjoyment in their own persons or in the persons of their descendants, of any land in the said colony then actually occupied or enjoyed by such natives.[21]

Earlier, in 1836, the Letters Patent establishing the Colony of South Australia were expressed in almost identical terms.[22] Thus, apart from the issue of common law recognition of indigenous rights in New Zealand and Australia, if it can be shown that the New Zealand Charter contributed to, or was declaratory of, the recognition of Maori rights in land, then a similar argument might well succeed in respect of South Australia in this period.

There is a further link. It is unfashionable to regard New Zealand as a colony acquired by cession. Notwithstanding the application of the Treaty of Waitangi to substantial portions of New Zealand, the view that it was a settled colony, following the establishment of British sovereignty, now seems to be preferred.[23] If this is correct, then there is another constitutional comparison between the Australian states and New Zealand; they were all originally settled colonies.[24] If the New Zealand cases show common law recognition of indigenous rights in New Zealand, then it would be impossible to say that this recognition is a result of it having a different constitutional status to the Australian colonies.

16 *Ibid.*, pp. 64, 65 and 68.
17 *Ibid.*, p. 68.
18 (1847) N.Z.P.C.C. 387.
19 *Ibid.*, pp. 387, 390-1.
20 *Ibid.*, pp. 390-1, 395.
21 Ordinances of New Zealand, 1841-1849, p. 4.
22 Discussed in 17 F.L.R. 141 at pp. 274 *et seq.*
23 Roberts-Wray, *Commonwealth Amd Colonial Law*, pp. 101-4, 630.
24 *Cooper v. Stuart* (1889), 14 App. Cas. 286; *Milirrpum v. Nabalco Pty Ltd* (1971), 17 F.L.R. 141 at p. 243.

It is not my purpose here to explore these constitutional and historical links between Australia and New Zealand any further. I mention them only to emphasise the interest the Maori cases have for Australian lawyers concerned with aboriginal land rights.

Returning to *Symonds'* case, what enabled the grantee from the Crown to succeed in the contest with an earlier title by direct purchase from the Maoris was the rule that settler titles in New Zealand must be based on Crown grants in due form.[25] Martin C. J. was quite clear that it was the incapacity of the European settler to acquire a valid title against the Crown that governed his decision, rather than the existence of a defect in the Maori title. He emphasised that the Maori title must be extinguished ". . . fairly and freely" by Crown purchase, before a Crown grant could be made.[26] Though he recognized that the Land Claims Ordinance of 1841 supported this proposition, he nevertheless seems to have relied more on common law principles of constitutional and real property law in concluding that:

> This rule then does in substance and effect assert that, whenever the original Native right is ceded in respect of any portion of the soil of these Islands, the right which succeeds thereto is not the right of any individual subject of the Crown, not even of the person by whom the cession was procured, but the the right of the Crown on behalf of the whole nation, on behalf of the whole body of subjects of the Crown . . .[27]

In a pamphlet attributed to Martin C. J. and written after the decision in *Symonds'* case, as a contribution to the controversies of the period as to the validity of the Treaty of Waitangi, and the rights of the Maoris, it is interesting to note that the argument in favour of the view that Maori rights were recognized at law was based on ". . . the Common Law of the British Colonies" as well as on a number of other grounds.[28]

In his judgment in *Symonds'* case, Martin C. J. did not consider this insistence in the necessity for a valid alienation from the indigenous owners before land could vest in the Crown, was at all inconsistent with a contemporaneous New South Wales decision, *Attorney-General* v. *Brown*,[29] which he cited in support of his reasoning.[30] However, Blackburn J. relied on *Attorney-General* v. *Brown* for an entirely different proposition: namely, to support his conclusion in the *Gove Land Rights* case that the establishment of British sovereignty in New South Wales extinguished all aboriginal rights in land within the bounds of the colony.[31] In the circumstances, it is curious that Blackburn J. thought that Martin C. J. had 'confined himself to the principle that acquisition from natives could be only for the Crown, and to the validity of the purported waiver of the Crown's rights in the case before him."[32]

Associated with this insistence that settler titles be based on Crown grants was the related doctrine that the Crown had a right of pre-emption in respect of Maori land. Both judges in *Symonds'* case took

25 (1847) N.Z.P.C.C. 387 at p. 393.
26 *Ibid.*, at p. 394.
27 *Ibid.*, at p. 396.
28 "England And The New Zealanders", pp. 19 and 29.
His Honour's name, as author, is pencilled in on the front cover of the copy in the National Library, Canberra.
29 (1847) 1 Legge 312.
30 (1847) N.Z.P.C.C. 387 at p. 395.
31 17 F.L.R. 141 at p. 247.
32 *Ibid.*, at p. 239.

the view that Maori land could only be validly alienated, out of Maori control, to the Crown.[33] The assertion of this right of pre-emption itself necessarily involved recognition of Maori proprietary rights in land; but it also involved the denial of a normal incident of rights in property, as conceived by Englishmen, but by no means every society, the right to alienate one's land to whomsoever one pleases.

Chapman J., who sat in the Court on *Symonds'* case with Martin C. J., conceded that ". . . the exclusive right of the Queen to extinguish the Native title" was ". . . no doubt incompatible with that full and absolute dominion over the land which they occupy, which we call an estate in fee."[34] But he argued that in practice the Maoris had ". . . all the enjoyments from the land which they had before our intercourse, and as much more as the opportunity of selling portions, useless to themselves, affords."[35]

Chapman J. did not hold the view that customary law interests in British colonies were unenforceable rights depending on the grace and favour of the Crown, to be extinguished at the whim of the state. He considered that:

> The practice of extinguishing Native titles by fair purchases is certainly more than two centuries old. It has long been adopted by the Government in our American colonies, and by that of the United States. It is now part of the law of the land, and although the Courts of the United States, in suits between their own subjects, will not allow a grant to be impeached under pretext that the Native title has not been extinguished, yet they would certainly not hesitate to do so in a suit by one of the Native Indians[36] . . . . 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, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it. It follows from what has been said, that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the colony, does not assert either in doctrine or in practice any thing new and unsettled.[37]

Though it would seem that Chapman J. felt that the undertakings in the Treaty of Waitangi were quite consistent with these common law principles, he believed that Maori rights were not created by the Treaty, but existed independently of it.

Chapman J. did not argue that Maori rights in land were recognized because New Zealand was a ceded colony. His judgment is silent as to the constitutional status of New Zealand. Insofar as he refers to the Treaty of Waitangi, it is to say that the common law requires recognition of Maori land rights quite independently of the words of the Treaty. Indeed, he put common law recognition of land rights as a rule applicable irrespective of the means by which British sovereignty was acquired. Recognition, in his argument, flowed from the adoption of the common

33 (1847) N.Z.P.C.C. 387 at pp. 395-6 and 389.
34 *Ibid.*, at p. 391.
35 *Ibid.*
36 C.f. *Johnson v. McIntosh* (1823), 8 Wheaton 543 at pp. 574 and 592; *Buttz v. Northern Pacific Railroad* (1886), 119 U.S. 55 at p. 66; *United States v. Shoshone Tribe* (1937), 304 U.S. 111 at p. 116; and *Cramer v. United States* (1923), 261 U.S. 219.
37 (1847), N.Z.P.C.C. 387 at p. 390.

law.[38] Therefore, as the common law applies in settled colonies, even if Chapman J. actually did hold the unexpressed view that New Zealand was a ceded colony, the validity of his argument on common law recognition of Maori rights is not destroyed, even if there is no longer a basis for saying that New Zealand was originally a colony acquired by cession.

In the *Gove Land Rights* case, Blackburn J. considered this judgment at length, and came to the conclusion that Chapman J. could only be correct in his conclusions about the strength of Maori title, were New Zealand a colony acquired by conquest or cession, which he felt it was not.[39] Much reliance seems to have been placed both by counsel and the Court in the *Gove Land Rights* case on the proposition that the status of indigenous land rights was governed by the constitutional category of the colony concerned. If it was a settled colony, then its establishment extinguished existing rights, and the Crown's title in demesne was held free of previous Native interests. But if it was a ceded or conquered colony, then, relying in *Campbell* v. *Hall*, existing rights were preserved until the new sovereign chose to modify them.[40]

It is submitted that a preferable view is that the constitutional fact of the establishment of a colony over a particular territory has no effect whatever on existing private property rights, unless some specific provision is made in this respect. Otherwise, they are presumed to remain as before.[41] Nor does the adoption of the common law automatically extinguish the rights of British subjects, whatever their racial origins. Rather, it is submitted that the correct view is that actually expressed by Chapman J. in *Symonds'* case; namely, that the colonial common law recognizes, rather than destroys, indigenous rights in land. The recognition of these private property rights is not determined by the constitutional and political category of the territory in which they are enjoyed.

The foregoing is consistent with the opinion of the Judicial Committee in *Nireaha Tamaki* v. *Baker*,[42] which approved the dicision in *Symonds'* case. The view of Chapman J. that the Maori title was "entitled to be respected" and could not "be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers", notwithstanding the Crown's preemptive rights, was cited with approval by Lord Davey, on behalf of a strong Board.[43]

This approval is a significant endorsement of the principle of common law recognition of Maori title, because it followed a passage in which their Lordships concluded that, in the eighteen forties, the partial ". . . legislative recognition of the rights confirmed and guaranteed by the Crown by the second article of the Treaty of Waitangi . . . would not of itself . . . be sufficient to create a right in the native occupiers cognizable in a Court of Law."[44] Nor does it appear to have been the view of the Judicial Committee in *Nireaha Tamaki* v. *Baker* that the Maoris could rely directly on the Treaty's provisions dealing with their rights in land, to found a cause of action in the municipal courts of

38 *Ibid.*, at pp. 388 and 390.
39 (1971), 17 F.L.R. 141 at p. 237.
40 (1774), 1 Cowp. 204.
41 Roberts-Wray, op. cit., p. 636; *Amodu Tijani v. Secretary, Southern Nigeria* [1921] 2 A.C. 399 at pp. 407 and 410.
42 [1901] A.C. 561.
43 *Ibid.*, at p. 579.
44 *Ibid.*, at p. 567.

New Zealand; a view later the basis of another decision of the Privy Council in *Hoani Te Heu Heu Tukino* v. *Aotea District Maori Land Board*.[45]

The main issue in *Nireaha Tamaki* v. *Baker* was whether, in a contest between Maori land owners and the Crown as to whether Maori land had been validly alienated, ". . . the mere assertion of the claim of the Crown is in itself sufficient to oust the jurisdiction . . ." of the New Zealand courts.[46] The Court of Appeal of New Zealand had followed *Wi Parata* v. *The Bishop of Wellington*[47] in deciding that the dispute was not justiciable, on the main ground that:

> There can be no known rule of law by which the validity of dealings in the name and under the authority of the Sovereign with the Native tribes of 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 is inapplicable to them. The Crown is under the 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.[48]

However, in the Privy Council it was held that the issue of whether the Maori title had been extinguished in accordance with the law was indeed justiciable. The view of the Judicial Committee was that

> . . . if the appellant can succeed in proving that he and the members of his tribe are in possession and occupation of the land in dispute under a Native title which had not been lawfully extinguished, he can maintain this action to restrain an authorised invasion of title.[49]

Although there was an extensive review of the statutes dealing with Maori rights in the judgment in *Nireaha Tamaki* v. *Baker*,[50] nowhere does it seem to have been held that the Maori right depended solely on statute; although the Judicial Committee was explicit that the Crown's rights and duties in respect of the alienation of Maori land, as well as its rights of pre-emption, were purely statutory.[51] And so it may be, that even when *Nireaha Tamaki* v. *Baker* was decided at the turn of the century, there was still some common law support for Maori title; the statutes being in part declaratory of its strength, rather than the source of its recognition.

But from the point of view of litigants outside New Zealand in jurisdictions lacking comprehensive statutory support for customary law titles, *Nireaha Tamaki* v. *Baker* is more significant for its endorsement of *R.* v. *Symonds* and the judgment of Chapman J. in that case,[52] which explicitly relied on the common law to demonstrate the strength of Maori title.

Chapman J. had himself, of necessity, relied on American precedent, particularly the judgments of Marshall C. J. in the United States Supreme Court,[53] who had said, in *Johnson* v. *M'Intosh*,[54] a similar type of case to *Symonds'*,[55] in that it involved the conflict between two settler titles, the later and stronger being a Government grant, that:

45 [1941] A.C. 308.
46 [1901] A.C. 561 at p. 575.
47 (1877) 3 N.Z. Jurist 72.
48 [1894] 12 N.Z.L.R. 483 at p. 488.
49 [1901] A.C. 561 at p. 578.
50 *Ibid.*, at pp. 567 *et seq.*
51 *Ibid.*, at p. 575.
52 *Ibid.*, at p. 579.

> . . . the Indian title, . . . although entitled to the respect of all Courts until it should be legitimately extinguished, was . . . not . . . absolutely repugnant to a seisin in fee on the part of the state.
> This opinion conforms precisely to the principle which has been supposed to be recognized by all European Governments, from the first settlement of America. The absolute ultimate title has been considered as acquired by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring. Such a right is no more incompatible with the seisin in fee than a lease for years, and might as effectually bar an ejectment.[56]

Now it might be thought that the American judgments were not directly in point, as the Maoris were British subjects entitled to the civil rights of Britons, while the American Indians were in a sense aliens, living in domestic dependent nations. But as Marshall C. J. put it in *Johnson* v. *M'Intosh*:

> They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as Independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied . . .[57]

Notwithstanding their absence of full citizenship the American Indians' rights to their land appear to have been recognized by the Marshall Supreme Court as legally enforceable interests. And this recognition appears to have been largely based on the common law, which followed the international law rule that, on a change of sovereignty, existing private rights in land are required to be respected by the new sovereign.[58]

It is obvious that, having the status of British subjects, the Maoris were in a far better position than the American Indians to have their rights in their ancestral lands enforced in the municipal courts of New Zealand. And once the reasoning in *Symonds'* case was approved by the Judicial Committee in *Nireaha Tamaki* v. *Baker*,[59] the *imprimatur* of the highest court in the Empire was placed upon the rule that indigenous interests in land in a British colony are protected by the common law.

Some two years after its consideration of *Nireaha Tamaki* v. *Baker*, the Judicial Committee, in *Wallis* v. *Solicitor-General for New Zealand*,[60] recognized the strength of Maori title prior to the legislation of 1865. This decision, which does not appear to have been cited by Blackburn J. in the *Gove Land Rights* case;[61] seems quite inconsistent with his conclusion that it was ". . . quite clear that in the law of New Zealand the doctrine of communal Native title has application only under the special statutory provisions providing for the recognition and enforcement of Maori customary law."[62]

53 These precedents are relied on generally at N.Z.P.C.C. p. 388. *Cherokee Nation v. State of Georgia* (1831), 5 Peters 1 is cited at p. 390.
54 (1823) 8 Wheaton 543.
55 (1847) N.Z.P.C.C. 387.
56 (1823) 8 Wheaton 543 at p. 592.
57 *Ibid.*, at p. 574.
58 Franciscus de Victoria (sometimes referred to as Vitoria), *De Indis* (1532) (tr. J. P. Bate c. 1913, Wildy and Sons Ltd, London; reprinted 1964, Oceana Inc., New York) Sect. I, p. 128, Sect. II, pp. 138-148; *Worcester v. State of Georgia* (1832), 6 Peters 515 at pp. 543-544; D. P. O'Connell, *International Law*, 2nd edn, 1970, Vol. I, pp. 377-8.
59 [1901] A.C. 561 at p. 579.
60 [1903] A.C. 173 at p. 180 and 187-8.
61 (1971) 17 F.L.R. 141.
62 *Ibid.*, at p. 242.

Lord MacNaughten, who had been a member of the Board which heard *Nireaha Tamaki* v. *Baker*,[63] delivered its opinion in *Wallis'* case. He said that, in 1848,

> . . . as the law then stood under the Treaty of Waitangi, the chiefs and tribes of New Zealand, and the respective families and individuals thereof, were guaranteed in the exclusive and undisturbed possession of their lands so long as they desired to possess them, and they were also entitled to dispose of their lands if they pleased subject only to a right of pre-emption in the Crown.[64]

The Judicial Committee upheld the validity of a trust created over Maori lands for the purpose of endowing a college. Maoris were not parties at any stage of the proceedings, but the nature of their customary law interests in land in 1848 was directly in issue. The appellants were trustees of the lands in question. They had begun the original suit, seeking a direction that the trust be administered *cy-pres*, since no college had been erected, as originally envisaged, when the trust was created. It was finally held that there had been an express gift for charitable purposes that had not been invalidated by the failure to erect the school, and that the doctrine of *cy-pres* did apply to the trust.[65] In making this finding, the Judicial Committee overruled the Court of Appeal of New Zealand, which had held that the land and the income derived from it had reverted to the Crown.[66] Their Lordships concluded that the Maori chiefs, being the owners of the land in 1848, were the sole founders of the charity. Although the Government of the day had issued a Crown Grant to the Bishop of Wellington, Bishop Selwyn, over the lands in question, it was made clear by the Judicial Committee that ". . . the Crown had no beneficial interest to pass . . ." the Crown Grant being ". . . only a question of conveyancing, as to which the Native owners were very possibly not consulted."[67] The function of the Government was merely to evidence the waiving of its right of pre-emption, which was ultimately done by the issue of the Crown Grant.

A pronouncement as to the strength of Maori title in 1848, and the source of that strength, was required of the Judicial Committee in *Wallis'* case, because of the findings of the New Zealand Court of Appeal that the lands the subject of the trust had reverted to the Crown. This finding had been justified in two ways: firstly, on the surprising basis that Queen Victoria had been deceived in her Grant, a matter on which it was ultimately held there was no evidence at all; and, secondly, on the grounds of the trust had come to an end.[68] Both of these justifications for the finding of the Court of Appeal rested on the assumption that the source of the interest taken by Bishop Selwyn was the Crown, rather than the Maoris. In overruling the Court of Appeal, the Judicial Committee emphasised that the only qualification on Maori title in 1848 was the Crown's right of pre-emption. The source of this right of pre-emption was held to be the Treaty.[69]

It is not surprising that the Judicial Committee found it unnecessary to deal at length with the basis of the recognition of Maori title so soon after its lengthy discussion of this subject in *Nireaha Tamaki* v. *Baker*.[70]

63 [1901] A.C. 561.
64 [1903] A.C. 173 at p. 179.
65 *Ibid.*, at pp. 173, 182 and 189.
66 *Ibid.*, at p. 183.
67 *Ibid.*, at p. 180.
68 *Ibid.*, at pp. 183, 186 and 188.
69 *Ibid.*, at pp. 179 and 187-8.
70 [1901] A.C. 561.

Nevertheless, its conclusion that, in 1848, ". . . the rights of the Natives in their reserves depended solely on the Treaty of Waitangi . . ."[71] is not immediately reconcilable with the judgment of Chapman J. in *Symonds'* case, approved in *Nireaha Tamaki* v. *Baker,* which based the recognition of Maori rights more on the common law than the Treaty of Waitangi.[72]

It remains to be asked whether the decision in *Wallis* v. *Solicitor-General for New Zealand*[73] was, in effect, overruled by implication in 1941 in *Hoani Te Heu Heu Tukino* v. *Aotea District Maori Land Board,*[74] which decided, inter alia, that the provisions of the Treaty of Waitangi could not, of themselves, found a cause of action in municipal law, in circumstances where they were in any event in conflict with a statute, validly enacted by the New Zealand Legislature, which imposed a charge on certain Maori land.[75] It was implicit in the view of the Judicial Committee in *Hoani Te Heu Heu Tukino* v. *Aotea District Maori Land Board* that the Treaty of Waitangi could not found a cause of action because it functioned outside the municipal law, in the area of international relations. As Lord Denning M. R. put it in the Court of Appeal in *Nissan* v. *Attorney-General*:

> If anyone seeks to sue the British Government and has to rely on the treaty, annexation, or conquest to found his cause of action, he fails on the simple ground that it is an act of state not cognisable in the municipal courts.[76]

Denning K. C., as he then was, who appeared for the respondent Land Board in *Tukino's* case, was only called upon to deal with the constitutional question of whether the statute under which the Maori lands were charged was ultra vires the New Zealand Legislature.[77] He did not argue that the Maoris had no rights in the land, following the establishment of British sovereignty. Rather, his submission was that, following the Treaty, the radical title was in the Crown, while the usufructuary rights in their lands remained with the Maoris.[78] Concentrating on Article 1 of the Treaty, which was an absolute cession of sovereignty to the Crown, his argument was that the Treaty placed no limitation on the right of the sovereign to legislate. It followed that the legislation in question could not be attacked in the ground that it was ultra vires the Treaty. He then went on to submit that the Statute was intra vires the Acts of Parliament defining the powers of the New Zealand legislature.[79]

While it is not asserted that all the opinions expressed by the members of the Privy Council in *Wallis'* and *Tukino's* cases can be completely reconciled, the cases are distinguishable. There was no conflict between Treaty and statute in *Wallis'* case, as in *Hoani's,* while in the earlier case there was no attempt to found a cause of action on the provisions of the Treaty. Though the examination of the Treaty

71 [1903] A.C. 173 at pp. 187-8.
72 (1847), N.Z.P.C.C. 387 at pp. 388, 390 and 393-5.
73 [1903] A.C. 173.
74 [1941] A.C. 308.
75 *Ibid.,* pp. 324 and 327.
76 [1967] 3 W.L.R. 1044 at p. 1054. C.f.
[1969] 2 W.L.R. 926 at p. 940.
The author's views on the Act of State Doctrine in relation to indigenous land rights are summarised in (1972) 5 F.L.R. at pp. 103 *et seq.*
77 [1941] A.C. 308 at p. 315.
78 *Ibid.*; and c.f. [1901] A.C. 561 at p. 574.
79 [1941] A.C. 308 at p. 316.

of Waitangi in *Wallis'* case is less than complete, the actual conclusions in that case as to the strength of Maori title in 1848, and the use of Crown grants as mere conveyancing devices evidencing indigenous interests, would seem to be supportable by reasoning analogous to that used in *Amodu Tijani* v. *Secretary, Southern Nigeria,*[80] where the Judicial Committee considered the effect of the cession of Lagos on the property or rights of the local inhabitants of that colony.

The Lagos Treaty of Cession was not, of course, used to found a cause of action, but, as in *Wallis'* case, it was treated as relevant to the determination of rights in land in the colony in a situation where a complete scheme of statutory recognition was lacking. As in the case of New Zealand, their Lordships held that:

> No doubt there was a cession to the British Crown, along with the sovereignty, of the radical or ultimate title to the land, in the new colony, but this cession appears to have been made on the footing that the rights of property of the inhabitants were to be fully respected. This principle is a usual one under British policy and law when such occupations take place. The general words of the cession are construed as having related primarily to sovereign rights only.[81]

They went on to say that:

> . . . A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are prima facie to be construed accordingly. The introduction of the system of Crown grants which was made subsequently must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing.[82]

Although it would be not unreasonable to presume that the Privy Council, in the three New Zealand appeals that have been considered in this paper, favoured the view that those parts of New Zealand covered by the Treaty of Waitangi were acquired by cession, rather than by occupation and settlement, it does not seem that any of these three decisions turn on this point. There is no application of the continuity of laws rule in *Campbell* v. *Hall.*[83] *Wallis'* case, where the Treaty was considered to be a source of rights in municipal law, seems consistent, at least as to its result, with the *Amodu Tijani* line of authority, which, some considerable time after the decision in *Tukino's* case, was approved by the Privy Council in *Oyekan* v. *Adele.*[84]

It is appreciated that some later New Zealand decisions, which have not been the subject of review by the Judicial Committee, are not entirely consistent with either *Nireaha Tamaki* v. *Baker*[85] or *Wallis* v. *Solicitor-General for New Zealand.*[86] Indeed, the *Wallis* decision was not at all popular in New Zealand, where its swingeing criticism of the judiciary and the then Solicitor-General led to a self-righteous "Protest of Bench and Bar", immured for the edification of posterity in *New Zealand Privy Council Cases.*[87]

80 [1921] 2 A.C. 399.
81 *Ibid.*, at p. 407.
82 *Ibid.*, at pp. 407-8.
83 (1774), 1 Cowp. 204 at p. 208.
84 [1957] 2 All. E.R. 785.
85 [1901] A.C. 561.
86 [1903] A.C. 173. But c.f. *Tamihana Korokai v. Solicitor-General* (1912), 32 N.Z.L.R. 321 at pp. 352-353.
87 At pp. 730 *et seq.*

And so we find, in the judgment of T.A. Gresson, J. in *In Re The Ninety Mile Beach,*[88] delivered in 1963, reliance placed on the passage in the judgment of Prendergast C. J. in *Wi Parata* v. *Bishop of Wellington,* where it was said that the obligation of the executive to protect Maori rights was not justiciable.[89] As in *Wallis'* case, there had been, in *Wi Parata's* case, an assurance of lands from the Maori owners to Bishop Selwyn, as trustee, in order to endow the college that was, regrettably, never erected. The successors of the original owners, rather than the trustees, began the litigation in *Wi Parata's* case, seeking a declaration that the Crown Grant, wihch had been made without their knowledge and consent in respect of the lands in question, was void and ultra vires, as the Maori title had never been lawfully extinguished. Prendergast C. J., in delivering a judgment redolent with ethnic chauvinism, that regrettably, does not seem to have been the subject of an appeal to the Judicial Committee, said that the rights and obligations in the Treaty of Waitangi in respect of Maori land were not justiciable, because:

> . . . 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.[90]

On this, as well as other, grounds the court rejected the Maori claim. The uninitiated outsider might have thought that the decision of the Judicial Committee in *Wallis'* case, which was quite inconsistent with much of the reasoning behind the *Wi Parata* judgment, coupled with the criticism of it in *Nireaha Tamaki* v. *Baker,*[91] would have inhibited New Zealand courts in the twentieth century from placing much reliance on the *Wi Parata* decision.

The approval of the judgment in *Wi Parata* in *Re The Ninety Mile Beach,* followed a passage in which it was said that it was ". . . immaterial whether sovereignty was assumed by virtue of the Treaty of Waitangi in 1840, or by settlement or annexation before this date . . ." since, after 1840, ". . . all titles had to be derived from the Crown, and it was for the Crown to determine the nature and incidents of the title which it would confer."[92] This view seems quite inconsistent with any recognition of the Treaty of Waitangi, or the common law, as creating or being declaratory of Maori customary law rights in land.

In the same case, North J. said that:

> . . . it necessarily follows that on the assumption of British sovereignty—apart from the Treaty of Waitangi—the rights of the Maoris to their tribal lands depended wholly on the grace and favour of Her Majesty Queen Victoria, who had an absolute right to disregard the Native title to any lands in New Zealand, whether above high-water mark or below high-water mark. But as we all know, the Crown did not act in a harsh way and from earliest times was careful to ensure the protection of Native interests and to fulfil the promises contained in the Treaty of Waitangi . . .[93]

88 [1963] N.Z.L.R. 461 at p. 475.
And c.f. *Waipapakura v. Hempton* (1914), 33 N.Z.L.R. 1065; *In Re The Bed of the Wanganui River,* [1962] N.Z.L.R. 600 at 623.
89 (1877) 3 N.Z. Jurist 72 at p. 78.
90 *Ibid.,* at p. 78.
91 [1901] A.C. 561 at pp. 577-9.
92 [1963] N.Z.L.R. 461 at p. 475.
93 *Ibid.,* at p. 468.

This approach was not without its relevance to the actual decision in the case, which excluded the possibility of any reliance on non-statutory sources of Maori rights in a claim to lands between the high- and low-water marks.

Nevertheless, outside New Zealand, those judgments of its Supreme Court which are inconsistent with the pronouncements of the Judicial Committee on the strength of Maori title — apart from statute — are of comparatively little practical inconvenience to land rights litigants. Furthermore, in jurisdictions like the Australian states and territories and British Columbia, where the recognition of indigenous customary interests in land has yet to be declared by the courts, the New Zealand cases dealing with the application and interpretation of the statutory scheme reflecting this recognition have, as yet, little applicability. It may well be that the New Zealand cases of the greatest assistance to land rights litigants outside New Zealand have somewhat lesser significance for Maori litigants in New Zealand itself.

Conclusion

Taking into account the elaborate scheme of statutory intervention in the area of Maori land law, one might have thought that the New Zealand cases that have been cited in this paper, would have given unqualified support to the dictum of Blackburn J. that wherever local customary law rights in land have been recognised in a British Colony it has been either by statute of executive policy. But this is not so. Neither *Symonds'* case, which bases its recognition of the strength of Maori title on the common law, nor *Wallis'* case, which relies on the strength of the guarantees of land rights in the Treaty of Waitangi, conforms to the Blackburnian model.