The Queen v *Symonds reconsidered*

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In this paper Dr Williams presents a critical analysis of the case The Queen *v* Symonds *and mades an appeal for the analysis of all cases in their political, economic, geographical, and historical contexts.*

I INTRODUCTORY REMARKS

The topic of the plenary session at which this paper was first delivered was entitled "developing aboriginal rights". I expressed my reservations about the wording of the topic. It is true that in the last few years there has been a developing awareness in New Zealand legal circles of the importance of the common law doctrines concerning the rights of indigenous peoples upon the annexation of a territory as a British possession. This is nowhere more apparent than in the contributions by Pakeha legal academics to the recently published book *Waitangi. Maori & Pakeha Perspectives of the Treaty of Waitangi* edited by Sir Hugh Kawharu.[1] Dr J Hookey published a seminal article on aboriginal rights in 1973[2] but interest quickened greatly in 1986 after Williamson J upheld Maori fishing rights relying on common law decisions discussed in the writings of Dr Paul McHugh: *Te Weehi* v *Regional Fisheries Officer*.[3] Yet it is strange to speak of "developing" rights embodied in common law doctrines on annexation as we approach the sesquicentenary of that annexation. Moreover the doctrines were central to a Supreme Court decision handed down in 1847. The main focus of this paper is on that decision: *The Queen* v *Symonds*.[4] One of the most striking historical facts about the case is that, far from initiating a significant body of "developing" case law, the influence of the judgments by Martin C J and Chapman J waned, suffered a long period of total eclipse and only now in these latter days have waxed once again.

The term "aboriginal" like "native" suffers shifts of meanings. A "New Zealand Natives" rugby team which toured Britain in the 1880's included some Pakeha who were *born* in New Zealand. Early New Zealand legislation did include references to the aboriginal inhabitants of the Colony and aboriginal tribes inhabiting the

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1 I H Kawharu (ed) *Waitangi Maori & Pakeha Perspectives of the Treaty of Waitangi* (OUP, Auckland, 1989).

2 J Hookey "*Milirrpum* and the Maoris: The Significance of the Maori Land Cases Outside New Zealand" (1973) 3 Otago L Rev 63.

3 [1986] 1 NZLR 680.

4 (1847) NZPCC 387.

Colony: eg, Land Claims Ordinance 1841, section 2. In modern parlance however "aboriginal" connotes the indigenous peoples of Australia and it is often used in racist invective. This makes it difficult to refer to "aboriginal rights" in a non-pejorative manner in the Aotearoa context. In general it is preferable, in my view, for us to use the Maori self-description of themselves as tangata whenua when referring to their status as the first and indigenous peoples of this land. Indeed, the legislature has now incorporated that concept into legal usage in the Town and Country Planning Act, section 6(2)(e) (as amended in 1987) which provides for "A representative of the tangata whenua of the region" on regional planning committees. Consistent with the spirit of the Ture o te Reo Maori 1987/Maori Language Act 1987 the term tangata whenua is neither translated nor defined. It is a matter for nga tikanga Maori/Maori law to define who are the relevant tangata whenua for each region.

Even the word "rights" raises a hornets' nest of difficulties. *The* most controversial point of New Zealand legal history on the doctrines of aboriginal rights is whether or not they confer justiciable legal rights. One persuasive view has been that these rights are at best some species of moral obligation binding, if at all, only upon the honour of the Crown. In the famous words of Prendergast C J in *Wi Parata* v *Bishop of Wellington*:[5]

> But in the case of primitive barbarians, the supreme executive Government must acquit itself, as best it may, of its obligations 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.

II VIEWS AND APPROACHES

There were neither official nor unofficial law reports in 1847. These did not begin to appear until the 1870's with *Court of Appeal Reports* for 1867-1871 edited by Johnston J and published in 1872 by the Government Printer. *Macassey's Reports* of Otago and Southland cases appeared in 1873 followed by the *New Zealand Jurist Reports* in 1874 and the *Colonial Law Journal* in 1875. *The Queen* v *Symonds*, however, was well-known for reasons which will be discussed shortly. It was published in the official *New Zealand Gazette* in 1847[6] and it appears in the *British Parliamentary Papers Relative to the Affairs of New Zealand* as the enclosure in the Despatch from Governor Grey to Earl Grey dated July 5, 1847.[7] It is the only Supreme Court judgment included by Butterworth & Co in their 1938 publication of *New Zealand Privy Council Cases, 1840-1932* which inclusion was justified, according to the publishers, "by its importance in New Zealand

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5 (1877) 3 NZ Jur Rep (NS) 72, 78.

6 [1847] NZ Gazette 63.

7 British Parliamentary Papers *Papers Relative to New Zealand (Dec 1847)* (Irish University Press Microforms, Shannon, 1969; Colonies New Zealand Vol 6) 64.

constitutional law, by the reference made to it in several judgments in the *Reports* and in this present volume, and by its previous difficulty of location".[8]

Judging by much recent comment it seems that Martin C J and Chapman J have now been installed in a pantheon of illustrious lawyers famed for their vindication of Maori rights. A selection of recent paeans of praise follow:

(i) Any doubt about the validity and force of the Treaty was settled (so it seemed) in 1847 by the case of *Reg* v *Symonds* when the Chief Justice, Sir William Martin and Mr Justice Richmond (sic) together declared in ringing tones that the Treaty was valid and binding. Their judgments on the legal relationship created by treaties between the Crown and native people are still much quoted in North America today.

P B Temm QC[9]

(ii) Until the Court of Appeal decision two years ago which halted the transfer of assets to state-owned enterprises, Maori people had not won a case since 1847.

You had a sort of judicial scoreboard - Settlers: 60, Maori: 1.

Chief Judge E T Durie[10]

(iii) Earlier New Zealand judges beginning in 1847 with Martin C J and H S Chapman J in *R* v *Symonds* got it right, correctly (at least in essentials) interpreting and following a persuasive line of authority from the United States Supreme Court that recognized aboriginal land rights...

Professor F M Brookfield[11]

(iv) *[R* v *Symonds* was] within a period when a benevolent and even protective attitude towards Maoris prevailed among British settlers.

Williamson J[12]

It is my purpose in this paper to offer a critique of the views expressed in the above quotations. I should clarify my own assumptions in tackling this task.

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8 [1840-1932] NZPCC.

9 NZ Law Society Seminar *The Treaty of Waitangi* (April 1989) 2.

10 NZ Herald, March 14, 1989; Section 1, p20.

11 F M Brookfield "The New Zealand Constitution: the search for legitimacy" in Kawharu (ed), above n 1, 10.

12 [1986] 1 NZLR 680, 687.

With David Kairys I would reject the notion that there is a distinctly legal mode of reasoning which provides us with "correct" outcomes to litigated issues:[13]

> The problem is not that courts deviate from legal reasoning. There is no legal reasoning in the sense of a legal methodology or process for reaching particular, correct results. There is a distinctly legal and quite elaborate system of discourse and body of knowledge, replete with its own language and conventions of argumentation, logic, and even manners... . But in terms of a method or process for decision making - for determining correct rules, facts, or results - the law provides only a wide and conflicting variety of stylized rationalizations from which courts pick and choose. Social and political judgments about the substance, parties, and context of a case guide such choices, even when they are not the explicit or conscious basis of decision.

As Gerald E Frug wrote in the inaugural issue of the *Legal Education Review*:[14]

> every time lawyers reason from precedent, or apply legal principles to specific facts, or combine arguments based on policy with arguments based on legal doctrine, they present a contestable view both of the nature of law and of social life.

III THE QUEEN (ON THE PROSECUTION OF C H MCINTOSH) V J J SYMONDS

The historical background to the initiation of these proceedings is clearly set out in a series of official despatches from the Governor, Captain George Grey, to the Colonial Secretary in London, Earl Grey (no relation). This case was a politically contrived piece of litigation between two officials of the colonial government which was brought in order to resolve a bitter wrangle within the circles of the settler community. It needs to be stressed that on the understanding of the law which was set out in the Acts and Ordinances then in force, which was articulated in the official despatches and which was confirmed subsequently by the Supreme Court, no Maori hapu or individual would have been affected one way or the other by the outcome of this case. The claimant in the suit upon a writ of *scire facias* was C Hunter McIntosh, Secretary to the Land Commission during the period when the previous Governor, Captain Robert FitzRoy, had sanctioned what were known as Pre-emption Certificates. The certificates "By command of His Excellency" over the signature of the Colonial Secretary stated:[15]

> I Certify that His Excellency the Governor has consented - on behalf of Her Most Gracious Majesty the Queen- to waive the right of pre-emption over not more than [x] acres of land situated at [rough description of boundaries].

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13 D Kairys (ed) *The Politics of Law. A Progressive Critique* (Pantheon Books, New York, 1982) 3.

14 G E Frug "A Critical Theory of Law" (1989) 1 Legal Educ Rev 43.

15 Above n 7, 31-32.

McIntosh was thoroughly familiar with these certificates as it was his official task to copy and register them.[16] Significant areas of land were obtained in direct purchase dealings between the holders of such certificates and Maori who purportedly owned the land described, and McIntosh himself was one of these pre-emption purchasers. On 19 April 1847 Governor Grey reported to Earl Grey that very few certificate holders had availed themselves of compensation in colonial debentures in lieu of land pursuant to the Land Claims Ordinance 1846 (New Ulster). They were holding out for Crown Grants to the land they claimed and[17]

> nothing less than [a Supreme Court] decision, formally given, will satisfy many of the claimants they have not obtained legal rights over certain districts of land, which they can compel the Government to recognise, and, if necessary, to enforce.

The contrived nature of the proceedings is obvious from the advice given on 21 April by the Attorney-General, William Swainson:[18]

> After mature consideration as to the best mode of proceeding with a view to a decision of the general question, whether the right of pre-emption obtained by the Crown under the Treaty of Waitangi can be waived by the Governor for the time being, I beg to suggest that the following course be adopted, viz.:-
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> That a Crown grant be issued to *some third person* of a portion of the land comprised within one of these certificates; that the holder of this certificate (being a person willing to try the right) then petition the Governor that the grant be set aside, on the ground that the petitioner had acquired a prior title, and that a *scire facias* may be sued out in the name of the Crown. In the pleadings it would be averred by the holder of the certificate, that the Crown's right of pre-emption over the land comprised in the grant had been waived in his favour by Governor FitzRoy, and that he had become the purchaser of the land from the natives before the issue of the grant. In support of the grant, it would be maintained that the certificate of Governor FitzRoy, purporting to receive the Crown's right of pre-emption, did not in fact waive the Crown's right, and that this right vests in and can be exercised by the Crown alone, thus the precise point would be put in issue.
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> If this suggestion be approved by His Excellency, I will prepare drafts of the necessary documents as speedily as possible.

The "third person" to whom a Crown Grant was issued was John Jermyn Symonds who on 1 July 1846 had been appointed "Native Secretary and Protector of Aborigines".[19] I should note in passing that it is sometimes incorrectly assumed that the defendant was Captain William C Symonds,[20] an unattached British army

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16 Above n 7, 31-32

17 Above n 7, 30.

18 Above n 7, 35.

19 A H McLintock *Crown Colony Government in New Zealand* (Govt Printer, Wellington, 1958) 203, fn3.

20 Mrs Hackshaw seems to have made this error: F Hackshaw "Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of

officer who was entrusted with and witnessed the English language copy of the Treaty of Waitangi when signatures were obtained at Manukau.[21] This copy is now the official English text in the Schedule to the Treaty of Waitangi Act 1975. Swainson, who acted as counsel for the defendant, and Grey did indeed act speedily. On 22 April 1847 Grey issued the Crown Grant to Symonds. The case was argued on 4 May before Martin C J in Auckland. The Chief Justice obtained the views of Chapman J (in Wellington) and on 9 June their judgments were delivered by Martin C J.[22] Copies of the judgments were then despatched by the Governor to the Colonial Office on 5 July.

Pakeha v *Pakeha*

It was the following paragraphs in the Memorandum by the Chairman of the 1948 Royal Commission on Surplus Lands which alerted me to the fact that the *Symonds* case was entirely a dispute between Pakeha without any direct benefit flowing to the Maori hapu whose lands had been dealt with pursuant to the pre-emption certificates:[23]

> 13 Fortunately, there is no doubt or dispute as to the legal position. It is briefly, and for practical purposes correctly, stated in a memorandum of the 25th April, 1887, written by Mr John Curnin, who was then, or subsequently became, Parliamentary Law Draftsman. The statement is as follows:-
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> By international law all the territory in a country which becomes conquered by or ceded to a nation belongs to the nation and not to its individual members, or, as it is generally said, vests in the Sovereign of the nation as part of the estate of the Crown.
>
> This was the case in New Zealand, saving as modified by the Treaty of Waitangi, which conserved to the Natives their lands - that is to say, the lands in their possession at the time of making the Treaty.
>
> If at the time of that Treaty it could be proved that they had parted with any of their lands, those lands at once belonged to the Crown.
>
> The question of surplus lands must not be debated in relation to the Natives, but really in relation to the Crown. For it is indisputable that all lands bought by individuals from Natives in New Zealand became absolutely the property of the Crown on the Treaty of Waitangi, or even before that; and that it was out of the just bounty and

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Waitangi" in Kawharu (ed), above n 1, 105. In any case she is incorrect in describing J J Symonds as Grey's private secretary, in stating that the Governor filed the proceedings, and in stating that he did so on the prosecution of Symonds.

21 See C Orange *The Treaty of Waitangi* (Allen & Unwin/Port Nicholson Press, Wellington, 1987) 68-70. He was also the Government agent who failed to persuade Waikato rangatira, including Te Wherowhero, to adhere to the Maori text of the Treaty (at 68).

22 P Spiller "Henry Chapman : first Supreme Court judge of Wellington" (1989) 19 VUWLR 267, 276.

23 [1948] AJHR, G-8, 39-40.

equity of the Crown that the old land claimants were granted some land; which no doubt they had originally bought, but which equally without doubt belonged to the Crown by right of International Law.

14 Mr Cumin was only expressing the view which had been taken throughout by the British Government in and from the year 1839, when Captain Hobson was first commissioned to come to New Zealand. It was the view of English lawyers and of American authorities alike, as shown in a very lucid speech of Sir George Gipps, Governor of New South Wales, on the 9th July, 1840, on the second reading of the New South Wales Bill for appointing Commissioners to inquire into claims of grants of land in New Zealand. It was the view taken in 1847 by the Supreme Court of New Zealand (Chief Justice Sir William Martin and Mr Justice H S Chapman) in *The Queen v Symonds,* the judgment in which case is published in the *New Zealand Gazette*, 1847, page 63, and is also reported in *New Zealand Privy Council cases* at page 387. The material part of the headnotes to the report, so far as present purposes are concerned, is as follows:-

Purchases of land by subjects from Natives are good against the Native seller - sc., subject to legislative provisions - but not against the Crown.

Such purchases, therefore, as the Judges point out, are not absolutely null and void at law, but only null and void *as against the Crown.* The Judges also point out that this is the law that has always been applied, and Mr Justice Chapman says: "The early settlements of Port Philip are equally in point. The opinions of eminent lawyers were without exception against the claims of the purchasers, and, as in New Zealand, the claimants were glad to take a Crown grant of a portion of their acquisitions, *leaving a large portion of territory in the hands of the Crown.*

Neither party to the *Symonds* litigation sought to impugn the proprietary rights of Maori to their land, nor was there any suggestion that the sale and purchase agreements should be set aside. Quite the contrary. Both parties recognized Maori title to the land in question and both accepted as valid the direct purchase sale. No one questioned whether any Maori hapu, rangatira or individual had the right to dispose of collective tenure land. No one inquired as to the actual or apparent authority of the Maori vendors. The only question was, who was to benefit from the sale? Was the settler who was the actual purchaser entitled to a Crown Grant or was the Crown the true legal owner and able to dispose of the land as the Governor thought fit? The outcome of the case was that the Crown (which had expended no money and indeed had received some revenue from issuing certificates) was nevertheless the absolute owner of the pre-emption certificate lands. This litigation was a re-run of the bitter though erudite debate between the Governor of New South Wales, Sir George Gipps and William Charles Wentworth in 1840. The full texts of speeches by these two protoganists is contained in Dr Edward Sweetman's most interesting publication for the New Zealand centenary: *The Unsigned New Zealand Treaty.*[24] At the time New Zealand was a dependency of

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24 E Sweetman *The Unsigned New Zealand Treaty* (Arrow Printery, Melbourne, 1939) ch IV - VI.

New South Wales - a seldom remembered historical fact[25] - and the Claims to Grants of Land in New Zealand Bill was before the New South Wales Legislative Council. The frontspiece illustration in Sweetman's book describes Wentworth as "a distinguished lawyer, politician, and constitutional reformer". He was also, more to the point, the leader of the private purchase speculators who hoped to profit greatly from the forthcoming colonization of New Zealand by purchasing land from the Maori and then selling to the incoming settlers. In addition to trading insults, Gipps and Wentworth both cited copious and lengthy quotations to bolster their respective positions from the works of the Swiss jurist Emeric de Vattel whose views on the law of discovery and settlement were influential at the time, from the writings of the American commentators Storey and Kent, from the judgments of Marshall C J in the United States Supreme Court (especially of course from *Johnson* v *McIntosh*[26] and *Worcester* v *Georgia*[27]), from Lord Mansfield C J's judgment in *Campbell* v *Hall*[28], and from many other learned authors besides. At the end of the acrimonious debate the Bill became law as 4 Vic No 7 upon the principle of imperial policy stressed by Gipps "that Englishmen cannot found colonies without the consent of the Crown, and can obtain no titles to land in colonies but from the Crown".[29]

Section 1 of this Act unequivocally declared:

> That all titles to land in New Zealand which are not or may not hereafter be allowed by Her Majesty are and shall be absolutely null and void.

It empowered the Governor to appoint Commissioners (section 2) and decreed that the Commissioners in considering claims "shall be guided by the real justice and good conscience of the case" (section 5). The Act did not leave the discretion as to "real justice" entirely in the hands of the Commissioners however. The relevant principles of political economy were spelt out in section 5 when it was provided that although the Commissioners should inquire into the price or valuable consideration actually paid to the 'chiefs, tribes or aboriginal inhabitants', yet nevertheless they were strictly bidden *not* to take into consideration the price which may have been paid by any subsequent purchaser. Thus the value of land for subsequent purchasers, who would be likely to be actual settlers, was taken to be of a quite different order from the pittance which need be expended to obtain

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25 See D V Williams "The Annexation of New Zealand to New South Wales in 1840: What of the Treaty of Waitangi?" (1985) 2 (2) Aust J of L & Soc 41.

26 (1823) 8 Wheat 543.

27 (1832) 6 Pet 515.

28 (1774) Loftt 655.

29 British Parliamentary Papers *Correspondence Relative to New Zealand (11 May 1841)* (Irish University Press Microforms, Shannon, 1970; Colonies New Zealand Vol 3)74. The wording was not in the original speech but appeared in the published text which was despatched to London. Wentworth in a reply caustically referred to "an authentic form" of Gipps speech "by which I mean - not as he actually delivered it in Council, but as he now wishes that he had delivered it" (Sweetman, above n 24, 133).

possession from the tangata whenua. Indeed a precise scale was laid down in Schedule D to assist the Commissioners and their "good conscience":

Time when the Purchases were made:				Per acre			
				s	d	s	d
From 1st January 1815 to 31st December 1824 ...						0	6
"	1825	"	1829	0	6 to	0	8
"	1830	"	1834	0	8 to	1	0
"	1835	"	1836	1	0 to	2	0
"	1837	"	1838	2	0 to	4	0
"	1839	"	1839	4	0 to	8	0

And fifty per cent above these rates for persons not personally resident in New Zealand or not having a resident agent on the spot. Goods when given to the natives in barter for land to be estimated at three times their selling price in Sydney at the time.

Shortly after the proclamation that New Zealand had been erected into a separate colony the New South Wales Act was repealed and replaced by the Land Claims Ordinance, 1841 (Sess 1, No 2). Much of the Ordinance was *in pari materia* with the previous legislation - section 5 of the Act became section 6 of the Ordinance, and Schedule D of the Act was re-enacted as Schedule B of the Ordinance. There was however an addition of the utmost significance in section 2 of the Ordinance which read:

> 2 And whereas it is expedient to remove certain doubts which have arisen in respect of titles of land in New Zealand, be it therefore declared enacted and ordained, that all unappropriated lands within the said Colony of New Zealand, subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants of the said Colony, are and remain Crown or Domain Lands of Her Majesty, her heirs and successors, and that the sole and absolute right of pre-emption from the said aboriginal inhabitants vests in and can only be exercised by Her said Majesty, her heirs and successors, and that all titles to land in the said Colony of New Zealand which are held or claimed by virtue of purchases or pretended purchases gifts or pretended gifts conveyances or pretended conveyances leases or pretended leases agreements or other titles, either mediately or immediately from the chiefs or other individuals or individual of the aboriginal tribes inhabiting the said Colony, and which are not or may not hereafter be allowed by Her Majesty, her heirs and successors, are and the same shall be absolutely null and void: ...

The conventional view, as expressed by Lord Davey for the Privy Council in *Nireaha Tamaki* v *Baker*, was that this statutory provision was "a legislative recognition of the rights confirmed and guaranteed by the Crown by the second article of the Treaty of Waitangi".[30] It is submitted that it was nothing of the sort. The text of the Treaty confirmed to the Maori "te tino rangatiratanga o ratou wenua [= whenua] o ratou kainga me o ratou taonga katoa" which literally translates as a confirmation of "the entire chieftainship of their lands, their

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30 [1840-1932] NZPCC 371, 373.

villages, and all their property". The Ordinance, however, drew a distinction between unappropriated lands and appropriated lands, and between legal title and possession or occupation. As to the first distinction, the Maori perspective was clear beyond all doubt. It has been summarized by Dr Peter Adams, quoting from various sources, in these words:[31]

> The realities of Maori land ownership and land values were these: 'It may fairly be stated that, in pre-European days, there was no area of land that was not claimed by some tribe.' 'There is not an inch of land in the Islands which is not claimed, nor a hill, nor valley, stream, nor forest, which has not a name.' The Maoris 'claim and exercise ownership over the whole surface of the country; and there is no part of it, however lonely, of which they do not know the owners. Forests in the wildest part of the country have their claimants. Land, apparently waste, is highly valued by them. Forests are preserved for birds; swamps and streams for eel-weirs and fisheries. Trees, rocks and stones are used to define the well-known boundaries.' 'The value of land, therefore, not only for its produce, but also for dignity and rank that was attached to its ownership, was very great, and its possession was coveted beyond all other things...'

Wiremu Parker expresses his people's viewpoint more eloquently:[32]

> For ever so long land has been central in Maori thought. The source of his physical sustenance, of his very blood from time immemorial, the object of deep emotional attachment in song, poetry and oratory, the prized heritage of tribe and family, land lay at the very core of a people's mana. Land was for ever.
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> He rarangi maunga tu te ao, tu te po!
> He rarangi tangata ka ngaro, ka ngaro!
> (A row of hills and mountains can be seen by day and night!
> A row of people disappears, disappears!)
> Whatu ngarongaro he tangata
> Toitu he whenua!
> (Man perishes,
> But land is permanent!)

Thus *all land* was appropriated to the *iwi* and *hapu* of the Maori. As to the notion that there were "Crown or Domain Lands of Her Majesty" and that the rights of the Crown were subject only to "necessary occupation and use" by the Maori - such a notion was incomprehensible without divisions of labour, and either feudalist or capitalist notions of private property. In effect the Land Claims Ordinance 1841 imposed upon New Zealand the basic principles of English land law, as expressed in the notion "Nulle terre sans seigneur" (No land without a lord) irrespective of the "entire chieftainship" which the Crown's Consul had purported to confirm and guarantee. Far from being a legislative recognition of the

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31 P Adams *Fatal Necessity, British Intervention in New Zealand 1830-1847* (Auckland/Oxford U P, Auckland, 1977) 176-177.

32 W Parker "The Substance That Remains" in I. Wards (ed) *Thirteen Facets; Essays to Celebrate the Silver Jubilee of Queen Elizabeth the Second* (Govt Printer, Wellington, 1978) 170.

Treaty rights, therefore, the Ordinance failed to take account of the economic and ideological ramifications of rangatiratanga and Maori perceptions concerning land, and established a framework for a state monopoly over all transactions relating to obtaining land for settlement.

The essential political issue at stake in the Gipps/Wentworth debates and in *The Queen* v *Symonds* related to the extent of Crown control over the profits to be made in the process of extinguishing Maori title and making land available to incoming settlers. In addition to the colonial statutes discussed above there was an imperial enactment, the Australian Waste Lands Act 1842, which applied in New Zealand (section 22) at the time of the FitzRoy pre-emption waivers. Section 1 stipulated that "waste lands of the Crown" shall be disposed of only in the manner to be prescribed. The pre-emption certificates were not issued in accordance with the forms and solemnities referred to in section 5. Those who uphold the *Symonds* case as an affirmation of Maori rights and the Treaty of Waitangi must not have read the penultimate paragraph of Chapman J's judgment which finds in favour of the Crown on the basis that the McIntosh purchased lands were waste lands of the Crown. It reads:

> I am also of opinion, after very carefully considering the statement of Mr *Bartley*, and the apparent admission of the Attorney-General, that the want of compliance with the Australian Waste Lands Act, until lately in force in this Colony, would, even in the absence of a grant to the defendant, be a fatal defect in Mr McIntosh's claim, and this on two grounds: First, notwithstanding the words "waste lands of the Crown" may seem to import lands the title to which was complete, I think the language of s5, extending the formalities prescribed by the Act to "any less estate or interest," would be sufficient to include that interest which the Crown has in all the lands of the Colony; and that, consequently, a Proclamation made in evasion of the Act of Parliament cannot legally be acted upon; secondly, by Mr McIntosh's purchase (assuming it to be a complete extinguishment of the title of all Native claimants) the land vests in the Crown, and so becomes part of the waste lands of the Crown, even in contemplation of the Attorney-General's distinction; and as such could only be alienated (so long as the 5 & 6 Vict, c 36, was in force here) in strict compliance with its provisions.

The outcome of *Symonds* therefore confirmed the Crown's rights over the so-called "surplus lands" which were the subject of the 1948 Royal Commission Report - that is to say, the considerable acreage of land held by Commissioners to have been duly purchased from the tangata whenua but then retained as Crown land rather than being granted as freehold title to settlers.

IV THE MERITS OF CROWN PRE-EMPTION

It seems generally to be accepted that Crown pre-emption was a "good thing" and the judges' emphatic affirmation of that doctrine is a reason to praise the *Symonds* decision. However Maori hapu in the nineteenth century must have had very mixed feelings about the "protective" nature of the Crown's monopoly purchase rights. Indeed, as the *Orakei Report* of the Waitangi Tribunal shows, Crown pre-emption has continued to be used as a means to dispossess Maori of

their ancestral land up until very recent times.[33] So we should not be surprised that the FitzRoy pre-emption waivers were in part prompted by formal addresses to the Governor by Maori "embodying the subject of their numerous grievances since the establishment of British authority. They particularly dwelt on the injustice of preventing them from selling their lands to Europeans, as well as that of the Crown resuming the surplus lands of the old settlers, or land-claimants".[34] These addresses need not be dismissed as naive, because by late 1843 Maori were well aware of the manner in which the Crown made vast quick profits from its monopoly position in respect of the initial Waitemata purchases.[35] This was strictly in accordance with Lord Normanby's instructions to Captain Hobson:[36]

> It will be your duty to obtain, by fair and equal contracts with the natives, the cession to the Crown of such waste lands as may be progressively required for the occupation of settlers resorting to New Zealand. All such contracts should be made by yourself, through the intervention of an officer expressly appointed to watch over the interests of the aborigines as their protector. The re-sales of the first purchases that may be made, will provide the funds necessary for future acquisitions; and, beyond the original investment of a comparatively small sum of money, no other resource will be necessary for this purpose. I thus assume that the price to be paid to the natives by the local government will bear an exceedingly small proportion to the price for which the same lands will be re-sold by the Government to the settlers. Nor is there any real injustice in this inequality. To the natives or their chiefs much of the land of the country is of no actual use, and, in their hands, it possesses scarcely any exchangeable value.

By 1847 the good faith of the Crown as to its claim to protect Maori property rights was in very serious question. The 1846 Royal Instructions to Grey stipulated that no claim by 'Aboriginal inhabitants' to land should even be considered unless it was shown that they:[37]

> ...have been accustomed to use and enjoy the same, either as places of abode, or for tillage, or for the growth of crops, or for the depasturing of cattle, or otherwise for the convenience and sustention of life, by means of labour expended thereon.

As Hackshaw has pointed out, Earl Grey admitted to being strongly influenced by Dr Arnold of Rugby in insisting that the right of property to land derived only from expending labour upon it - "a right which God has inseparably united with industry and knowledge."[38] Rumours spread rapidly of the impending imposition of this monocultural assumption as to the sanctity of English agricultural uses of land, with the consequence that huge areas of Maori land would by law automatically be deemed to be demesne lands of the Crown, and they caused

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33 *Report of the Waitangi Tribunal on the Orakei Claim* (*Wai-9*) (Nov 1987) 64.
34 [1948] AJHR, G-8, 29 (quoting *Martin's New Zealand, 183*).
35 *Orakei Claim* (*Wai -9*) 21.
36 BPP *Correspondence Relative to New Zealand* (*8 April 1840*), above n 7 (Vol 3), 87.
37 *The Ordinances of New Zealand 1841-1849* (Colonial Govt, Wellington, 1850) 40, 61.
38 Kawharu (ed), above n 1, 104.

immense consternation in Maori circles. The land guarantees of the Treaty were put at the forefront of widespread Maori protests in 1847. This concerted Maori agitation brought many rangatira of rival tribes together for the first time:[39]

> Large meetings, involving Nene, Kawiti, Te Rauparaha and Te Wherowhero, were held at Te Wherowhero's cottage in the Auckland Domain. In November, Te Wherowhero and four other major Waikato Chiefs presented Grey with a letter to the Queen which expressed their disquiet at the rumours and requested that the Queen herself confirm the repeated assurances given them by her governors.

It is to be noted that not only was this an early example of pan-tribal protest, but also that Te Wherowhero-te Arikinui of Waikato now embraced the Treaty although he had resolutely refused to sign it in 1840. Earl Grey, in reply, directed Governor Grey to assure Maori again that the Treaty should be 'most scrupulously and religiously observed'.[40]

Moreover, it was not merely the persuasiveness of political agitation by powerful chiefs which Governors had to bear in mind. In 1844 a House of Commons Select Committee resolved that measures should be taken to obtain for the Crown a title to all land not actually occupied or enjoyed by the Maori. News of this resolution added fuel to the flames of Hone Heke's defiance of the Queen and her flagstaff. As Professor Sorrenson put it:[41]

> This seemed to confirm all that disgruntled Europeans at the Bay [of Islands] had been saying: Maori lands were under threat, a threat that came from the Governor. Heke became a rebel with a cause; something of a Maori patriot.

The Heke uprising in Tai Tokerau was suppressed only with difficulty and after military reverses which proved just how vulnerable British settlements were. Indeed, the Government had to recruit Maori from neighbouring rival hapu in order to bring the uprising to an end.

This extremely delicate political situation provided the historical context in which Martin C J and Chapman J were working. In my view it has to be said that their decision was a considerable assistance to the two Greys. For them Crown pre-emption was now seen more as a device to maintain Crown control over colonization than to protect Maori interests. Adams' careful study of colonial policy to 1847 contains this important observation:[42]

> By 1847 the Colonial Office had come to agree with the [New Zealand Company's] contention that, as a matter of principle, the Treaty of Waitangi and colonization were incompatible. Since there was no question of halting colonization, even if that

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39 Orange, above n 21, 128.

40 See above n 39.

41 M P K Sorrenson "Maori and Pakeha" in W H Oliver & B R Williams (eds) *The Oxford History of New Zealand*(Clarendon/OUP, Oxford/Wellington, 1981) 178-9.

42 Adams, above n 31, 209.

> were within the power of the Government, the land guarantee had to be nullified. How could this be done without breaking faith and provoking a war?
>
> The Treaty of Waitangi itself provided the answer. The problem ... was that Britain had inadvertently recognized Maori rights to all the land in New Zealand, waste or occupied. The solution, as it dawned upon Earl Grey and Governor Grey, lay in the concession which the Crown had procured from the Maori of a monopoly right to buy their land. If the pre-emption monopoly was used extensively and rigorously, it would effectively neutralize the wide recognition of Maori land rights.

Expertly guided by Donald McLean, Native Land Purchase Officers did succeed in obtaining large tracts of the country. Within ten years, however, the new policy was failing to serve the interests of settler expansion. Many hapu defied the "protection" of Grey's Native Land Purchase Ordinance 1846, which made it an offence for settlers to make any land deals directly with Maori. These hapu preferred an 'unsystematic' colonization by dealing directly with 'squatters'. Thus a hui at Taupo in 1856 is reported to have decided as follows:[43]

> ... it is to be proposed to put an immediate stop to all sales of land to the Government, and to use every possible means to induce squatters to settle with flocks ... in the interior ... to occupy the position of vassals to the Chiefs under whose protection they may live ... and to whom they are to afford a revenue, by way of rent for their runs, to assist in maintaining the power and influence of their landlords.

Faced with such defiance, the Crown pre-emption policy of 1847 no longer worked as the Government desired. An 1858 Act to waive pre-emption was disallowed, but the Native Lands Acts 1862 and 1865 did achieve that result. The new policy of assimilating Maori land 'as nearly as possible to the ownership of land according to British law' under the aegis of the Native Land Court was, if one believes the preamble to the 1862 Act, a waiver of Crown pre-emption in the Treaty 'in favor *[sic]* of the Natives'. However, one ought not to believe all that one reads in a statute! At any rate, it is submitted that there is no warrant for viewing the *Symonds* doctrine of Crown pre-emption as necessarily consistent with the land guarantees of the Treaty of Waitangi.

V WAS THE LEGAL REASONING "CORRECT"?

As indicated above, I have difficulty with the notion that legal reasoning produces "correct" results. Many Australasian law teachers and students of Legal Method/Legal Process courses have studied *Donoghue* v *Stevenson*.[44] I have yet to be convinced that the speeches of Lords Atkin and Macmillan are "correct" whilst the convincing reasoning of Lord Buckmaster somehow "misunderstood the law". I am likewise unconvinced by Professor Brookfield's assertions that "eminent judges from Sir James Prendergast to Sir Alfred North ... did indeed get it wrong" whilst

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43 A Ward *A Show of Justice* (Auckland/Oxford UP, Auckland, 1974) 97.
44 [1932] AC 562.

the *Symond's* judges "got it right".[45] Rather, it seems to me, there were a number of threads in the common law or, to use Dr Brian Slattery's preferred term "imperial constitutional law",[46] which could and indeed have led eminent judges to arrive at different conclusions from an assessment of the same core of legal material. As Hamar Foster has disarmingly put it:[47]

> In the nineteenth century [the common law] was an amalgam of colonial practice and imperial policy, an uneasy compromise between acknowledging that aboriginal people ought to enjoy some rights to their traditional lands and a much more powerful belief that industrial, capitalist civilization would improve everything it touched, especially the bank-balances of those who were in its vanguard.

It is of some considerable interest to read the views of Begbie C J - first Chief Justice of British Columbia who, in the same decade as the *Wi Parata* judgment, brusquely dismissed the notion of Indian rights except by "the grace and intelligent Benevolence of the Crown." He concluded:[48]

> ... the right of a civilized power - England, France, the US - to occupy and settle in a country utterly barbarous, inhabited only by a sparse population of separate petty tribes more or less nomadic without any approach to any formal government, will not be disputed.

The potential for diverging lines of legal reasoning can be easily shown by a careful analysis of William Blackstone's seminal views and Lord Mansfield's purported application of them in *Campbell* v *Hall*. In 1765 Blackstone wrote in an oft-quoted passage:[49]

> ... our more distant plantations in America, and elsewhere, are also in some respects subject to the English laws. Plantations, or colonies in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it is held, that if an uninhabited country be discovered and planted by the English subjects, all the English laws are immediately there in force. For as the law is the birthright of every subject, so wherever they go they carry their laws with them. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the antient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.

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45 Kawharu (ed), above n 1, 10.

46 B Slattery "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev 727, 737.

47 H Foster "Measures Essentially Unjust. English 'Law' and Native 'Custom' in New Zealand, Vancouver Island and British Columbia, 1769-1871" (MJur thesis, University of Auckland, 1989) 23-4.

48 Above n 47, 145.

49 W Blackstone *Commentaries on the Laws of England, Book 1* (Oxford, 1765) 104-5.

In the frequent quotations of the passage, however, little or no regard has been paid to Blackstone's own views concerning the application of his doctrines. He clearly drew a distinction between deserted and uncultivated territories on the one hand, and cultivated plantations gained by conquest or ceded by treaty on the other hand. The legal validity of such a distinction was upheld by the Court of Kings Bench in the cause of the island of Grenada (which was decided during Blackstone's lifetime whilst he himself was on the bench in the Court of Common Pleas). *Campbell* v *Hall* was very elaborately argued before Lord Mansfield and his Kings Bench brethren and the considered judgment of Lord Mansfield was the unanimous opinion of the Court. The island of Grenada was formerly a French possession which had surrendered upon capitulation to British arms in 1762. The issue in the case was whether there had been lawful authority to impose a duty upon sugar exports. The result of the case depended upon whether or not legislation (either by a local Assembly or by the Imperial Parliament) was required in order to impose such a duty. In fact the duty had purportedly been imposed by an exercise of royal prerogative powers in the form of letters patent issued in London and later duly registered and publicly announced in Grenada. The plaintiff sought to recover from His Majesty's collector the monies paid under this impost. He succeeded. It was held that the King had no power, without the concurrence of a legislative body, to alter the old or to introduce new laws in a ceded country. Lord Mansfield contrasted the situation of Grenada with that which, according to him, had obtained in Jamaica. He said:[50]

> It is not to be wondered that an adjudged case in point is not to be found; no dispute ever was started before upon the King's legislative right over a conquest: It never was denied in a court of law or equity in Westminster Hall, never was questioned in Parliament. Lord Coke's report of the arguments and resolution of the judges in *Calvin's* case lays it down as clear. [*Calvin's* case, 7 Co. Rep. 17b quoted from ...] In 1722, the assembly of Jamaica refusing the usual supplies it was referred to Sir Philip Yorke and Sir Clement Worge, what was to be done if they should persist in their refusal.
>
> Their answer is - 'that if Jamaica was still to be considered as a conquered country, the King had a right to lay taxes upon the inhabitants; but if it was to be considered in the same light as the other colonies, no tax could be imposed upon the inhabitants, but by an assembly of the island, or by an act of parliament.'
>
> The distinction in law between a conquered country and a colony they held to be clear and indisputable; ... [Lord Mansfield then considered certain historical facts about Jamaica, and remarked:] And therefore all the Spaniards having left the island, or having been killed or driven out of it, the first settling was by an English colony, who under the authority of the King planted a vacant island, belonging to him in right of his crown ... [Various proclamations and letters patent relative to Grenada were considered, and the decision arrived at was:] We therefore think ... that the subordinate legislation over the island should be exercised by the assembly with the governor and council, in like manner as in the other provinces under the King.

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50 (1774) Loftt 655, 744-7.

The terminology of Lord Mansfield does not coincide with Blackstone's usage. It seems clear however that Jamaica - here referred to as 'a conquest' and 'conquered country' as well as a 'vacant island' first settled by the English - should be within Blackstone's 'uncultivated' category, whereas Grenada 'was under subjection to his most Christian Majesty' [ie the King of France] whose 'antient laws' remained and thus it came within Blackstone's 'cultivated' category of conquered or ceded countries. It was to be this usage which was later regularly accepted in authoritative decisions in some common law jurisdictions. The leading case was *Cooper* v *Stuart*[51] - a Privy Council decision on appeal from New South Wales which considered whether the English rule of perpetuities applied to render void a reservation of land for public purposes in a Crown grant of land to a settler. Their Lordships felt that Blackstone's "often quoted observations ... have a direct bearing upon the present case". The Board's relevant findings for present purposes were:[52]

> The extent to which English law is introduced into a British Colony, and the manner of its introduction, must necessarily vary according to circumstances. There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class.

And:

> There was no land law or tenure existing in the Colony at the time of its annexation to the Crown; and, in that condition of matters, the conclusion appears to their Lordships to be inevitable that, as soon as colonial land became the subject of settlement and commerce, all transactions in relation to it were governed by English law, in so far as that law could be justly and conveniently applied to them.

Cooper v *Stuart* was of course followed in 1971 in *Milirrpum* v *Nabalco Pty Ltd*,[53] the case which stirred Hookey to blaze the trail we are on now. I notice in a recent issue of the *Aboriginal Law Bulletin* that one Denis Walker of Stradbroke Island has put the High Court on the spot in arguing that Australian courts have no jurisdiction to deal with sovereign Aboriginal peoples. There is more than a hint of Kelsen's so-called "pure theory" in the Court's response as reported by Justin Malbon:[54]

> The Court observed that the British claim of sovereignty; *raises the issue of how it is that judges and others in Queensland apply ... these laws to Stradbroke Island; and, conversely, why the Nunukel people, who in times long past once exercised sovereignty*

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51 (1889) 14 App Cas 286.
52 (1889) 14 App Cas 286, 291-2.
53 (1971) 17 Fed L R 141.
54 (1989) 2/37 Aboriginal Law Bulletin 14.

> *over Stradbroke Island are without any formal displacement of their own legal system, now expected and obliged to submit to laws not of their own making.*
> The Court avoided any adequate answer to that question by simply asserting that "*the fundamental fact, be it historical, political or social, is that we as judges recognize the authority in Queensland of laws having their source in the Imperial, Colonial, State and Commonwealth statutes to which I have referred.*"
> The rationale for this assertion appears to be on the basis that "*courts transfer their allegiance to a new legal order when they recognize that the old order has been effectively overthrown, a process described as revolution, which may be violent or peaceful or a combination of both*".

In view of this line of Australian authority it is perhaps of some interest to note Blackstone's own statements after he had set out his distinction between uncultivated territories, to which Englishmen carry their common law birthright, and already cultivated countries which have been conquered by or ceded to the King. He continued:[55]

> Our American plantations are principally of this latter sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present enquire) or by treaties. *And therefore the common law of England, as such, has no allowance or authority*; they being no part of the mother country, but distinct (though dependent) dominions. They are subject, however to the control of the parliament; though (like Ireland, Man and the rest) not bound by any acts of parliament, unless particularly named. [Emphasis added]

If it was the case that the American plantations were not 'uninhabited' nor 'uncultivated' in Blackstone's own view, then it is difficult to understand why the Australian colonies should have been held to be in the other category.

Obviously it is not my purpose in this paper to argue that the *Johnson* v *McIntosh*, *The Queen* v *Symonds*, *Te Weehi v Regional Fisheries Office* cases "correctly" interpret and apply *Campbell* v *Hall* or Blackstone's *Commentaries*. Nor would I wish to argue that *Cooper* v *Stuart*, *Milirrpum* etc "misunderstood the law". Rather I would invite legal historians and others to situate all cases within their historical, social, political and economic contexts. I think that, for example, Joseph C Burke's study of Marshall C J's Cherokee cases[56] deserves more than a footnote reference if one wishes to understand and apply the legal reasoning of those United States cases in a legal system such as ours with different constitutional structures and a different history. In this paper I have begun an attempt to put *The Queen* v *Symonds* into its own time, place and circumstances rather than to go along with the somewhat romantic admiration of Martin C J and Chapman J which seems to be so common at the present time.

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55 Blackstone, above n 49, 105.

56 J C Burke "The Cherokee Cases: A Study in Law, Politics, and Morality" (1969) 21 Stanford Law Rev 500.