“Judges and Judging in Colonial New Zealand: 1846–1912”

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Session 2c
He be hunter. We wakamingea mai bebe kuwa me le wakamungo bi lo Nawanakwa.

Ku hakina ko kubinii o Ingari ngi langata maci kater o Nafrani. Na likina le

By His Excellency, Command Kolonialist

Colonial Secretary

Na ki mufi ki nga Kongohira e de Nabaminu nga ngi Mafa eto Tiri. Na likina le ma.

He mufi kuwa nga Kundcina e lo Nawanakwa o lo Franci le likina le ma.
subscribe to the Native of New Zealand. As royal representatives and custodians to them, all the Chiefs.

United States of New Zealand being assembled in Conferences at Victoria in Waitangi and McIndoe's.

over the soils and Territories which are shown, after our respective names, having been made fully.

and entered into the names in the full spirit and meaning thereof, in witness of which we have

dates respectively specified.

year of Christ our thousand eight hundred and forty.

Kotahua, te Ruru, (Kaituna to here)

Koto te tohu Turangia (Kaituna Turangia)

Kotahua Taupua (Pa)

Kotahua Te Ruru Ngati kaha to Toi

Kotahua te Whata Ngati Peiapiapi

Ko te tohu o Paiki (Otangawhiti) 

The foregoing names have been taken by us at this historic conference, in concurrence with the

witness of two the names of the former old men witnesses:

Aroha, 11th June 1840, Waitangi.

T. B. H. Hunter

Ko te tohu o Wharanui, Ngawaro

Ko te tohu o Te Ruru Kingi o

Ko te tohu o Tamati (Ngatiwhaiti)

Ko te tohu o Ratawhaiti
Five colonial judges
(years in judicial office)

- Martin CJ (1841-1857)
- (H S) Chapman J (1843-1852; 1864-1875)
- Prendergast CJ (1875-1899)
- (C W) Richmond J (1861-1895)
- Stout CJ (1899-1926)
R v Symonds (1847)
Supreme Court: Martin CJ & Chapman J

• “It cannot be too solemnly asserted that [Native title] is entitled to be respected”

• “in solemnly guaranteeing the Native title ... the Treaty of Waitangi does not assert either in doctrine or practice any thing new and unsettled.”

• “It is everywhere assumed that where Native owners have fairly and freely parted with their lands the same at once vest in the Crown.”

• “as to the true meaning of the Treaty...
Chief Judge Durie, 1989
Chairperson, Waitangi Tribunal

• “Until the [State-owned Enterprises Lands case in the Court of Appeal, 1987], Māori people had not won a case since 1847. You had a sort of judicial scoreboard — Settlers: 60, Māori: 1.”
The other 1840s Cases

• Privy Council: *R v Clarke* (1849–1851)

• Supreme Court [now High Court]

• Martin CJ & Chapman J: *A–G v Whitaker* (1846); *R v Taylor* (1849).

• Chapman J: *Scott v Grace*
Dr Mark Hickford ‘“Settling some very important principles of colonial law”: Three “forgotten” cases of the 1840s’ (2004) 35 VUWLR 1

• A ‘strong’ view of the prerogative as exercised via the colonial Governor.

• The initially large question of extinguishing Māori property rights could readily fade into a voiceless backdrop for intra-Pākehā disputes.
Parata v Bishop of Wellington (1877)

- ‘notorious’, ‘infamous’
- Of the Treaty of Waitangi as an instrument of cession - ‘a simple nullity’
- Of Māori custom - ‘a phrase in a statute cannot call what is non-existent into being’
- ‘In the case of primitive barbarians’ the government ‘must be the sole arbiter of its own justice’
Privy Council doubts; colonial responses

- *Tamaki v Baker* (1901)
- Land Titles Protection Act 1902
- *Wallis v Solicitor-General* (1903)
- Protest of Bench & Bar, 1903
- Statutory discontinuance of Nireaha Tamaki’s litigation, 1904
- Native Land Act 1909
‘healing the breach’?

- *Korokai v Solicitor-General* (1912)
- John William Tate
- FM (Jock) Brookfield
- Paul McHugh
- Source of aboriginal title in statutory recognition or in “common law”? 
Law in history

• John Phillip Reid
• J G A Pocock
• “What to a historian is now an ‘old’ rule, to the lawyer is the ‘erroneous’ rule”
• ‘Forensic historians’ do not “turn to constitutional history or to legal records with open minds”
Perhaps ....

- The original ‘errors’ may be traced to *Symonds* - not to *Parata*
- Both cases bolstered the Crown’s position and both marginalised Māori
- Neither case applied the Marshall CJ US Supreme Court case law as a reading of those judgments might suggest