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

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Ko te tuatoru. . Kei wakarihuga mai hoki koui mo te wakaaetanga ki te Kawanatanga
ka tiakina e te Muini o Ingarani nga taugata maori katoa o Nu Tirani. ka herea k
[illegible]

By the Lieutenant's Command Willoughby Shortland
Colonial Secretary

Na ko matou ko nga Rangatira o te Wakaminenga o nga Nupi o Nu Tirani ka huihui
ko matou hoki ko nga Rangatira o Nu Tirani ka [illegible]

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

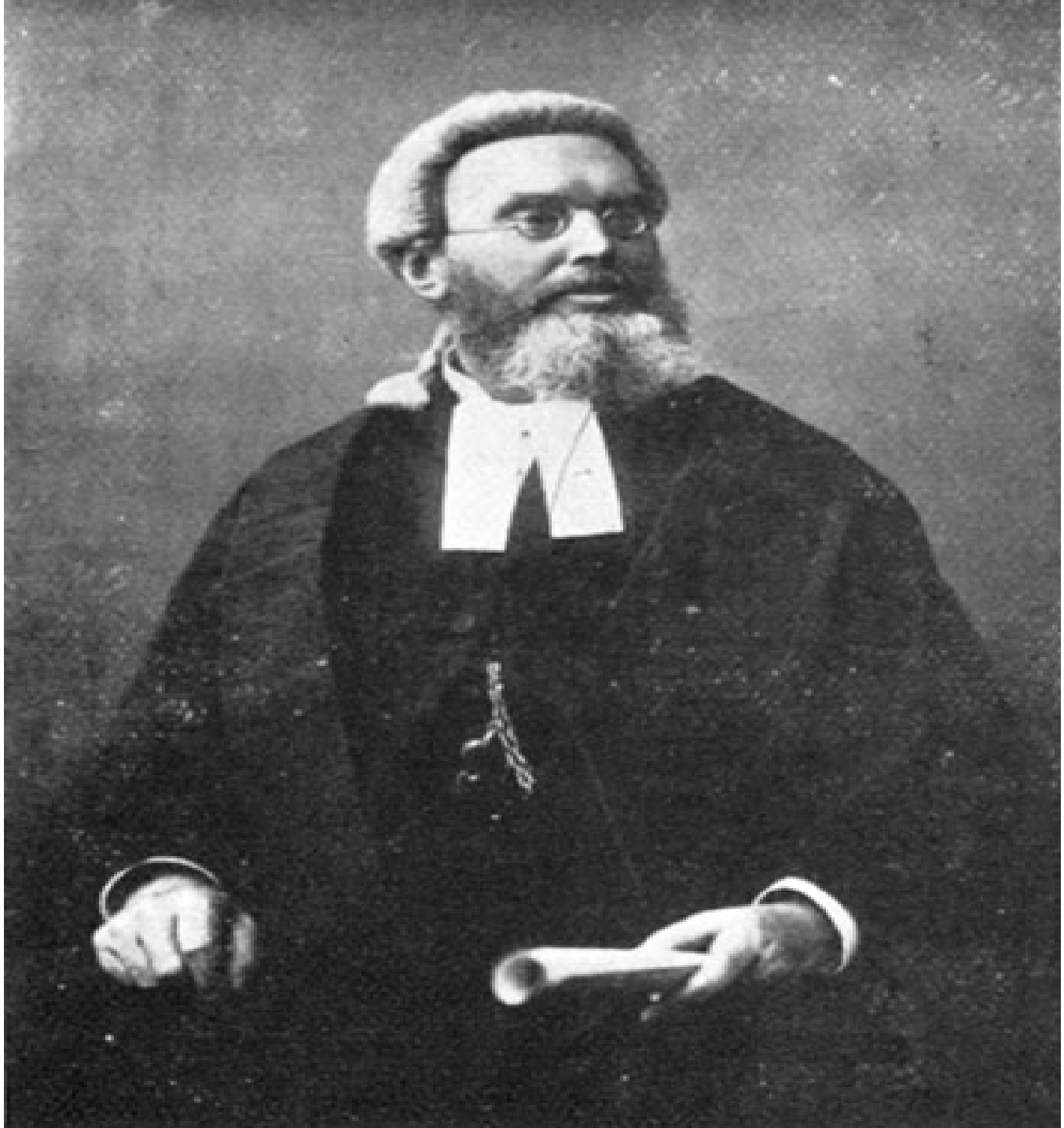
- “Until the [State-owned Enterprises Lands case in the Court of Appeal, 1987], Mäori people had not won a case since 1847. You had a sort of judicial scoreboard - Settlers: 60, Mäori: 1.”

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 Mäori property rights could readily fade into a voiceless backdrop for intra-Päkehä disputes



Parata v Bishop of Wellington (1877)

- ‘notorious’, ‘infamous’
- Of the Treaty of Waitangi as an instrument of cession - ‘a simple nullity’
- Of Mäori 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 Mäori
- Neither case applied the Marshall CJ US Supreme Court case law as a reading of those judgments might suggest