

by the Legislature and the Courts, that it is for the Crown alone to decide whether the title of Natives to lands in the colony has or has not been extinguished, has become the foundation of all titles to land in the colony, and it would be unjust and contrary to principle that that view, even if erroneous, should now be upset. Notwithstanding the complicated proceedings in this case, the issue is very simple, whether there is a right to sue the Crown and a jurisdiction to entertain the suit; and under all the circumstances it should be held that the appellant was not entitled to sue to have it declared that what was practically an act of the Crown and of the State was unauthorized: see *Wi Parata v. Bishop of Wellington*(1). Reference was also made to *Cherokee Nation v. State of Georgia*(2); *Worcester v. State of Georgia*(3); *Fletcher v. Peck*(4); *Johnson v. Mackintosh*(5). Cohen, Q.C., replied, citing *Reg. v. Hughes*(6); *Rogers v. Rajendro Dutt*(7).

- (1) 3 N.Z.J.R. (N.S.) S.C. 72.
  - (2) (1831) 5 Peters, U.S. 1.
  - (3) (1832) 6 Peters, U.S. 515.
  - (4) (1810) 6 Cranch, 87.
  - (5) (1823) 8 Wheaton, 543.
  - (6) (1865) L.R. 1 P.C. 81.
  - (7) (1860) 13 Moo. P.C. 209.
1901. May 11.

151F. The judgment of their Lordships was delivered by Lord Davey: This is an appeal by an aboriginal inhabitant of New Zealand against an order of the Court of Appeal in that colony, dated May 28, 1894, in which questions of great moment affecting the status and civil rights of the aboriginal subjects of the Crown have been raised by the respondent. In order to make these questions intelligible it will be necessary to review shortly the course of legislation on the subject in the colony.

The Treaty of Waitangi (February 6, 1840) is in the following words:—

#### *Article the First*

The Chiefs of the Confederation of the United Tribes of New Zealand, and the separate and independent Chiefs who have not become members of the Confederation, cede to Her Majesty the Queen of England, absolutely and without reservation, all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess, over their respective territories as the sole sovereigns thereof.

#### *Article the Second*

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand, and to the respective families and individuals thereof, the full, exclusive, and undisturbed possession of their Lands and Estates, Forests, Fisheries and other properties which they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of pre-emption over such lands as the proprietors thereof may be disposed to alienate, at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf.

#### *Article the Third*

In consideration thereof, Her Majesty the Queen of England extends to the Natives of New Zealand Her Royal protection, and imparts to them all the rights and privileges of British subjects.

151G. By the 2nd section of the Land Claims Ordinance of 1841 (repealing the New South Wales Act, 4 Vict., No. 7) it was—

Declared enacted and ordained that all unappropriated lands within the 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.