

not seem to be any greater difficulty in deciding whether the provisions of an Act of Parliament have been complied with in this case than in any other, or any reason why the Court should not do so. In so saying, their Lordships assume, without deciding, that if it be shown that by an act of the Governor done pursuant to the statutes the land has been declared free from Native claims, it will be conclusive on the appellant.

151v. A more formidable objection to the jurisdiction is that no suit can be brought upon a Native title. And the first paragraph of the prayer was referred to as showing that the appellant sought a declaration of his title as against the Crown. Their Lordships, however, do not understand that paragraph to mean more than that the Native title has not been extinguished according to law.

The right, it was said, depends on the grace and favour of the Crown declared in the Treaty of Waitangi, and the Court has no jurisdiction to enforce it or entertain any question about it. Indeed, it was said in the case of *Wi Parata v. Bishop of Wellington*(1), which was followed by the Court of Appeal in this case, that there is no customary law of the Maoris of which the Courts of law can take cognizance.

151w. Their Lordships think that this argument goes too far, and that it is rather late in the day for such an argument to be addressed to a New Zealand Court. It does not seem possible to get rid of the express words of the 3rd and 4th sections of the Native Rights Act 1865, by saying (as the Chief Justice said in the case referred to) that "a phrase in a statute cannot call what is non-existent into being." It is the duty of the Courts to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them by evidence. By the 5th section it is plainly contemplated that cases might arise in the Supreme Court in which the title or some interest in Native land is involved, and in that case provision is made for the investigation of such titles and the ascertainment of such interests being remitted to a Court specially constituted for the purpose. The legislation both of the Imperial Parliament and of the Colonial Legislature is consistent with this view of the construction and effect of the Native Rights Act; and one is rather at a loss to know what is meant by such expressions "Native title," "Native lands," "owners," and "proprietors," or the careful provision against sale of Crown lands until the Native title has been extinguished, if there be no such title cognizable by the law, and no title therefore to be extinguished. Their Lordships think that the Supreme Court are bound to recognize the fact of the "rightful possession and occupation of the Natives" until extinguished in accordance with law in any action in which such title is involved, and (as has been seen) means are provided for the ascertainment of such a title. The Court is not called upon in the present case to ascertain or define as against the Crown the exact nature or incidents of such title, but merely to say whether it exists or existed as a matter of fact, and whether it has been extinguished according to law. If necessary for the ascertainment of the appellant's alleged rights, the Supreme Court must seek the assistance of the Native Land Court; but that circumstance does not appear to their Lordships an objection to the Supreme Court entertaining the appellant's action.

(1) 3 N.Z.J.R. (N.S.)
S.C. 72.