151x. Their Lordships, therefore, think that, if the appellant can succeed in proving that he and the members of his tribe are in possession and occupation of the lands in dispute under a Native title which has not been lawfully extinguished, he can maintain this action to restrain an unauthorized invasion of his title. The question whether the appellant should sue alone or on behalf of himself and the other members of his tribe on an allegation that they are too numerous to be conveniently made co-plaintiffs is not now before their Lordships, but it does not seem to present any serious difficulty.

If all that is meant by the respondent's argument is that in a question between the appellant and the Crown itself the appellant cannot sue upon his Native title, there may be difficulties in his way (whether insurmountable or not it is unnecessary to say); but, for the reasons already given, that question, in the opinion of their Lordships, does not arise in the present case.

151y. In the case of *Wi Parata* v. *Bishop of Wellington*(1), already referred to, the decision was that the Court has no jurisdiction by *scire facias* or other proceeding to annul a Crown grant for matter not appearing on the face of it, and it was held that the issue of a Crown grant implies a declaration by the Crown that the Native title has been extinguished. If so, it is all the more important that Natives should be able to protect their rights (whatever they are) before the land is sold and granted to a purchaser. But the dicta in the case go beyond what was necessary for the decision. Their Lordships have already commented on the limited construction and effect attributed to the 3rd section of the Native Rights Act, 1865, by the Chief Justice in that case. As applied to the case then before the Court, however, their Lordships see no reason to doubt the correctness of the conclusion arrived at by the learned judges.

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

In an earlier case of *Reg* v. *Symonds*(1) it was held that a grantee from the Crown had a superior right to a purchaser from the Natives without authority or confirmation from the Crown, which seems to follow from the right of pre-emption vested in the Crown. In the course of his judgment, however, Chapman, J., made some observations very pertinent to the present case. He says: "Whatever may be the opinion of jurists as to the strength or weakness of the Native title, it cannot be too solemnly asserted that it is entitled to be respected that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers." And while affirming "the Queen's exclusive right to extinguish it" secured by the right of pre-emption reserved to the Crown, he holds that it cannot be extinguished otherwise than in strict compliance with the provisions of the statutes.

(1) Parl. papers relative to the affairs of New Zealand, Dec., 1847, p. 67.

Certain American decisions(2) were quoted in the course of the argument. It appears from the cases referred to, and others which have been consulted by their Lordships, that the nature of the Indian title is not the same in the different States and where the European settlement has its origin in discovery and not in conquest different considerations apply. The judgments of Marshall, C.J., are entitled to the greatest respect, although not binding on a British Court. The decisions referred to, however, being given under different circumstances, do not appear to assist their Lordships in this case. But some of the judgments contain dicta not unfavourable to the appellant's case

(2) *Cherokee Nation* v. *State of Georgia*, 5 Peters, U.S. 1; *Worcester* v. *State of Georgia*, 6 Peters U.S. 515; *Fletcher* v. *Peck*, 6 Cranch, 87; *Johnson* v. *Mackintosh*, 8 Wheaton, 543.