

The view taken by the counsel for the Crown of the origin and status of the sovereignty of the Crown in these islands forms the basis of the arguments on which the prerogative is urged as entirely inconsistent with, and utterly destructive of, all claims of this character. Our first endeavour must therefore be to determine the true basis of the sovereign authority, and at what date and under what circumstances it originated. And in pursuing this investigation the very fluctuating and contradictory character of the acts of State done by the English authorities will appear very clearly, and suffice to explain the anomalous position that the question has occupied, and the embarrassment and doubt which may be traced through the whole career of legislative and executive action respecting it.

The rules which have been recognised as international law, by which civilised nations or nations possessing an organised form of government may validly assert the right of acquisition of territories inhabited by savages, must, in Courts of Law, be deduced not simply from those principles of abstract justice which the Creator of all things has impressed on the mind of His creature man, and which are admitted to regulate in a great degree the rights of civilised nations whose perfect independence is acknowledged, but from those principles also which partly derived from necessity, partly founded on force, have been acknowledged as good by civilised States, and in particular have been adopted by our own Government and given to us as the rules for our guidance.

The principle which all civilised States agreed to acknowledge as the law by which the right of acquisition, which they all asserted, shall be regulated as between themselves is, that discovery gave title to the Government by whose subjects or by whose authority it was made, against all other Governments, which title might be consummated by possession (*Johnson v. McIntosh*, *Wheaton*, "Reports of the Supreme Court, United States," Vol. 8). The relations which were to exist between the discoverers and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interfere between them (*id.*).

Acting upon this rule, Captain Cook, under a commission from the Crown of England, in the year 1769, discovered, circumnavigated, and took possession of the Islands of New Zealand, in the name of his Majesty George III. This act was performed in the most formal manner, and was published to the world. Tasman, the Dutch navigator, had previously sighted the North Cape, but it does not appear that he did any international act with the view of establishing a title.

In the year 1787 a Royal Commission was granted to Captain Philip, appointing him Captain-General and Governor-in-Chief in and over the territory of New South Wales and its dependencies. This territory was described in the Commission as "extending from Cape York, latitude 11-37 south, to the South Cape, latitude 43-30 south; and inland to the westward as far as 135° east longitude; comprehending "all the islands adjacent in the Pacific Ocean within the latitudes of the above-named capes." Norfolk Island, Van Diemen's Land, and the islands of New Zealand as far south as Akaroa, are clearly within the prescribed limits.

In 1814 the Governor and Captain-General of New South Wales and its dependencies, acting on the representation of the Crown, by public proclamation declared New Zealand to be a dependency of his government, and by regular commission of *dedimus potestatem* appointed Justices of the Peace to act there. Amongst these were three Hokianga chiefs, aboriginal natives of the country—Ruatarua, Hongi, and Korokoro. In 1819 Governor Macquarrie appointed other English magistrates in New Zealand, amongst them the Rev. M. Butler, a member of the Church Mission. These Justices, or some of them, exercised the authority bestowed upon them, by apprehending offenders and sending them for trial to the seat of Government in New South Wales.

About 1822 a company was formed in the British Islands for the colonisation of part of New Zealand, and the purchase of a large tract of country was effected for the purpose. And during the whole of these periods, as well as subsequently, New Zealand was frequently visited by the Royal ships of war, which, to a certain extent, enforced the authority of the Crown, and administered or caused to be administered a sort of justice. Considerable numbers of the subjects of the Crown also settled permanently at the Bay of Islands and elsewhere, purchased land for themselves, and carried on a thriving trade, so much so that in the year 1836 no less than 151 ships visited the Bay of Islands. If the history of the transactions of the English Government and people ended here, it would seem that the undoubted title established by Captain Cook might be deemed to have been consummated by possession, and that the sovereignty of the Crown of England had been established by the acts of its own authorised officers, together with the unauthorised proceedings of its subjects, which would enure for its benefit.

On the other hand, however, we find statutory enactments which contain almost a recognition by the King, Lords, and Commons of Great Britain that New Zealand was not part of the British dominions.

The Act 57 George III, cap. 53, is entitled, "An Act for the More Effectual Punishment of Murders and Manslaughters Committed in Places not in his Majesty's Dominion's." The preamble is—"Whereas grievous murders and manslaughters have been committed at the settlement in the Bay of Honduras, in South America, &c., and the like offences have also been committed in the South Pacific Ocean, as well on the high seas as on land in the islands of New Zealand and Otaheite, and in other islands, countries, and places not within his Majesty's dominions, by the masters and crews of British ships, and other persons who have for the most part deserted from or left their ships, and have continued to live and reside amongst the inhabitants of those islands, &c. The Act then provides for