

159. As regards the extent to which the Treaty may have reserved to the Natives the title to land covered by non-tidal water—i.e., “land” within the meaning of the Acts—and the manner in which these rights, if any, may be ascertained, the following extract from the judgment of Edwards, J., in *Tamihana Korokai v. the Solicitor General*, 15 G.L.R. at page 108, is particularly instructive :—

In support of his contention that the bed of the lake cannot be the subject of a Native title under Maori customs and usages, the *Solicitor-General* relies upon the inherent improbability that there was any intention, either by the Treaty of Waitangi or by the statutes relating to Native lands, to recognise any such right. To hold that there is such a right would be, the *Solicitor-General* contends, to destroy the right of navigation in all non-tidal waters to the great detriment of the public. Such considerations might well have induced those responsible for the Treaty of Waitangi to have so framed that document as to preclude any claim by Natives to the exclusive possession of land covered by navigable non-tidal waters. It may even be suggested that the words of the Treaty which guarantee to the Maoris “the full exclusive and undisturbed possession of their lands and estates, forests, fisheries, and other properties” were intended to reserve to the Natives merely the right to fish in non-tidal waters, without recognising in them any property in the land covered by such waters. It is quite possible—indeed not improbable—that there never was any Maori custom or usage which recognised any greater right in land covered by navigable non-tidal waters than this. That is a question which neither the Supreme Court nor this Court can determine. If there never was any such custom or usage prior to the Treaty of Waitangi, then the Crown will get the advantage of that when that question has been determined by the Native Land Court, or in the last resort by the Judicial Committee of the Privy Council. But if there was such a custom or usage the Treaty, so far as it is effective, is sufficient to preserve it. The Treaty, like every other instrument must be construed in accordance with the plain legal significance of the words used, and the Courts cannot speculate as to whether or not those words were used in another sense not apparent upon the face of the instrument, or necessarily to be inferred from the subject with reference to which they are used. A lake, in contemplation of the English law, is merely land covered by water, and will pass by the description of land : *Bristow v. Comican*, 3 A.C. 641; *Johnston v. O'Neill*, 1911 A.C. 552. Whatever rights were reserved to the Maoris by the Treaty of Waitangi were fully recognised by the Native Lands Act, 1862, which recited the Treaty, and was enacted with the declared object of giving effect to it.

All the subsequent Native Lands Acts have in turn given to the Maoris the right to invoke the jurisdiction of the Native Land Court for the purpose of investigating their claims to lands alleged by them to be owned under Maori customs and usages. If it can be established that under those customs and usages there may be a separate property in the bed of a lake, I cannot doubt that the jurisdiction of the Native Land Court with respect to Native lands extends as much to the land covered with water as it does to lands covered with forest.

160. I quote also the judgment of Chapman, J., in the same case as illustrating the inherent rights of the Maori people to have ascertained their titles to lands over which their customary title has not been extinguished :—

I agree with the judgments which have been read. It has been argued that the Treaty of Waitangi was an international treaty entered into with chiefs having the sovereignty. The contrary opinion was pronounced by the Supreme Court in *Wi Parata v. The Bishop of Wellington*, 3 N.Z. Jur. N.S. 72. The terms employed and the mode of execution of the treaty leave it at least an open question whether it was so regarded at the time. It professes to be made with certain federated chiefs and certain chiefs who are not federated, but it does not state over what territories they exercised authority though the text of the treaty seems to suggest that it was contemplated that it should be made with several chiefs who might possibly be regarded and were provisionally and hypothetically treated as sovereigns of their respective territories. Later it became a matter of general knowledge derived I presume from maps prepared pursuant to section 21 of “The Native Land Act, 1873” that there are eighteen or twenty tribes in New Zealand. If that be so the numerous signatories of the Treaty of Waitangi can hardly be described as sovereign chiefs. I agree that if they had been explicitly so declared by Her Majesty’s government or had been so treated in a course of political transactions that would have been sufficient to make them so and that their numbers and their individual unimportance would not have rendered this impossible provided that in each case there was a sovereign to a territory : *Hemchand Deechand v. Azam Sakaral Chhotamlal*, 1906 A.C. 212. The whole current of authorities shows, however, that the question of the origin of the sovereignty is immaterial in connection with the rights of private persons professing to claim under the provisions of the treaty of cession : *Cook v. Sprigg*, 1899 A.C. 572. Such a treaty only becomes enforceable as part of the municipal law if and when it is made so by legislative authority. That has not been done. The sense in which the treaty has received legislative recognition I will refer to later.

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