

"Held" here does not mean wrongfully retained, but held and retained under the same customs that were declared to be valid if existent by the Imperial statute of 1846 already referred to and the later enactments, Imperial and Colonial. That this is not inconsistent with such lands being Crown lands is shown by section 88, which specially declares that they shall be regarded as Crown lands while recognizing that this is for the protection of the interests of Natives. To say that these customs are not cognizable by the Supreme Court and that the Supreme Court does not know the nature of the customs and the resulting tenure does not dispose of the legally ascertained fact that the tenure exists. If forced to undertake the task, the Supreme Court might have to ascertain them by means of evidence: *Nireaha Tamaki v. Baker* (at page 577).

Though section 24 is only expressed to give power to ascertain titles as between Natives, the resulting judgment produces the consequence of the Native becoming the owner as against all the world, including the Crown. It is not necessary to refer to particular sections. I rely as the Privy Council relied, on the whole plan of the statutes. *Nireaha Tamaki v. Baker* is an authority which obliges us to say that though this Court does not know and cannot recognize the nature of the Native title it at least amounts to a right to have the nature of that title ascertained.

Then is there any way by which that right can be met and defeated by the Crown. The practice from the foundation of the Colony has been for the Crown to acquire land by Deed of Cession. These instruments were formerly very imperfect in form. They are usually based upon the assumption that the land is actually vested in the Crown, and that what has to be ceded is the Native right. It is evident that unless some finality can be produced the title of the Crown is always liable to be disturbed by Natives coming in from time to time and making claims. To settle all such questions the Legislature has given the Crown power now expressed in section 85 of "The Native Land Act, 1909," to declare that the Native title is extinguished. It is presumed that that power will be honestly exercised, but when it is exercised the exercise is final.

On behalf of the Crown it is now virtually claimed that there is another mode of producing the same result, namely, by the assertion by the Attorney-General or Solicitor-General in the Native Land Court that the land is the property of the Crown. It is clear, however, that whether the Crown has or has not a prerogative right to defeat this claim it cannot be defeated by the act of the Attorney-General. It is pointed out by the Judicial Committee that neither the Attorney-General nor any other state functionary represents the Crown in this sense: "In a constitutional country the assertion of title by the Attorney-General in a Court of Justice can be treated as a pleading only, and requires to be supported by evidence," *Nireaha Tamaki v. Baker* (at p. 576). What evidence then is required? The evidence must at least show some formal and deliberate act in exercise of the prerogative. That case appears to leave open the question whether such an act would be effectual. In the case of *R. v. Clarke*, 7 Moo. P.C. 77, the Judicial Committee did not expressly decide that prerogative was entirely merged in statutory provisions relating to the alienation of Crown lands. It may, however, be regarded as questionable whether there is any other mode of putting an end to the jurisdiction of the Native Land Court than a proclamation under section 85. The question is immaterial as in this case as in that there has been no exercise of the prerogative. It is within the power of a Colonial Legislature to limit the prerogative or to direct how it shall be exercised and perhaps it has done so by section 85. The question does not seem to me to be material. It is sufficient to say that it cannot be exercised in the manner suggested.

160. I have purposely delayed setting out the outline of the case for the Natives as presented by Mr. Ellison and his replies to the cases of the Crown and Harbour Board, respectively, until this point in my report for what seems to me to be a good reason. He has covered the ground so comprehensively as to make it necessary, I think, that one should have all available facts on record and have studied them before attempting to examine the soundness of his claims.

The case for the petitioners and their replies to the Crown and Harbour Board cases are set out hereunder. Each is reproduced in full, although it will be noted a certain amount of repetition exists:—

CASE FOR THE PETITIONERS AS PRESENTED BY MR. D. ELLISON

Te Whanganui-o-Rotu (Inner Harbour) has been from time immemorial known as Te Maara-a-Tawhao (the Garden of Tawhao) owing to its fertility. It