“Judges and Judging in Colonial New Zealand: 1846–1912”

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“Judges and Judging”
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We thank you and your kind people for the kindness of you to the Kanakanui, Ha Pakena, and the people of Tasarani. We have now arrived.

By the Command of

Colonial Resident

[Signature]

W. L. Ayres

No le Hawaii

No le Tinana

No le Hawke

James Walker

Kaurua. April 28th.

John McEwan

Aug. 21st.

[Signature]

No le Rawiri

No le Kanawa

No le Taranaki

No le Hawke

No le Makarua

No le Salsbury

[Signature]

Aug. 29th.

M. Gamble

Sep. 2nd.

[Signature]
conclude to the Nations of New Zealand. See royal ordinances and impress to them all the rights.

[Signature]

Governor

United States of New Zealand being assembled in the house at Victoria in Wairarapa, and the Second
over the tribes and Territories which are subject after our respective names, having been made fully
and enter into the same in the full spirit and meaning known in deeds of which we have
stated respectively specified

year of our Lord one thousand eight hundred and fifty.

[Signature]

Kotahi o Teina (Arotomate to here) [handwritten]
Ko te tohu o Taranaki (Kaitire Taranaki) [handwritten]
Kotahi o Teina [handwritten]
Ko te tohu o White Oakura Trig [handwritten]
Ko te tohu o Pahia (Omakau Pahia)
Ko te tohu o Paki (Omakau Paki)

The foregoing names have been obtained by us all, the habitant tribes, as in our council with the
reception of two the names of the former said treaty witnesses

April 11, 1860

[Signature]

Captain

[Handwritten]

Ko te tohu o Waimate Ngawaro
Ko te tohu o Zeal Kingi o (Ngatitahi)
Ko te tohu la (Shake)
Ko te tohu o Pahia (Pahia)
Ko te tohu o Waiti (Waiti)
Ko te tohu o Se Avarahia
Ko te tohu o Rahurehu (Rahurehu)

Signed before us. April 11

[Signature]
Five colonial judges
(years in judicial office)

• Martin CJ (1841-1857)
• (H S) Chapman J (1843-1852; 1864-1875)
• Prendergast CJ (1875-1899)
• (C W) Richmond J (1861-1895)
• Stout CJ (1899-1926)
R v Symonds (1847)

Supreme Court: Martin CJ & Chapman J

• “It cannot be too solemnly asserted that [Native title] is entitled to be respected”

• “in solemnly guaranteeing the Native title ... the Treaty of Waitangi does not assert either in doctrine or practice any thing new and unsettled.”

• “It is everywhere assumed that where Native owners have fairly and freely parted with their lands the same at once vest in the Crown.”

• “as to the true meaning of the Treaty,
Chief Judge Durie, 1989
Chairperson, Waitangi Tribunal
• “Until the [State-owned Enterprises Lands case in the Court of Appeal, 1987], Māori people had not won a case since 1847. You had a sort of judicial scoreboard – Settlers: 60, Māori: 1.”
The other 1840s Cases

- Privy Council: *R v Clarke* (1849–1851)
- Supreme Court [now High Court]
- Chapman J: *Scott v Grace*
Dr Mark Hickford ""Settling some very important principles of colonial law": Three “forgotten” cases of the 1840s’ (2004) 35 VUWLR 1

• A ‘strong’ view of the prerogative as exercised via the colonial Governor.

• The initially large question of extinguishing Māori property rights could readily fade into a voiceless backdrop for intra-Pākehā disputes.
**Parata v Bishop of Wellington**
*(1877)*

- ‘notorious’, ‘infamous’
- Of the Treaty of Waitangi as an instrument of cession - ‘a simple nullity’
- Of Māori custom - ‘a phrase in a statute cannot call what is non-existent into being’
- ‘In the case of primitive barbarians’ the government ‘must be the sole arbiter of its own justice’
Privy Council doubts; colonial responses

- *Tamaki v Baker* (1901)
- Land Titles Protection Act 1902
- *Wallis v Solicitor-General* (1903)
- Protest of Bench & Bar, 1903
- Statutory discontinuance of Nireaha Tamaki’s litigation, 1904
- Native Land Act 1909
‘healing the breach’?

• *Korokai v Solicitor-General* (1912)
• John William Tate
• FM (Jock) Brookfield
• Paul McHugh
• Source of aboriginal title in statutory recognition or in “common law”?
Law in history

• John Phillip Reid
• J G A Pocock
• “What to a historian is now an ‘old’ rule, to the lawyer is the ‘erroneous’ rule”
• ‘Forensic historians’ do not “turn to constitutional history or to legal records with open minds”
Perhaps ....

- The original ‘errors’ may be traced to *Symonds* - not to *Parata*
- Both cases bolstered the Crown’s position and both marginalised Māori
- Neither case applied the Marshall CJ US Supreme Court case law as a reading of those judgments might suggest