

"Judges and Judging in Colonial  
New Zealand: 1846-1912"

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"Judges and Judging"  
18th British Legal History  
Conference, Oxford 2007  
Session 2c

Ko te tuatoru. Hei wakaripunga mai hoki tena mo te waka aotanga ki te Kawanatai  
 ka tiakina e k. Amiri o Sugarani nga tangata maori katoa o Ku Tirani. Ka hokua  
 tikanga katoa rite tahi ki ana ma ki nga tangata o Sugarani.

By His Excellency's Command William G. Hall  
 Colonial Secretary

Ka he matou ko nga tangata e k. Makarunga o nga Napu o Ku Tirani ka hiki  
 ko matou hoki ko nga tangata o Ku Tirani, ka hiki nei i te ripunga o enei kupu ka  
 wakaatia katoa e matou. Kaia ka takuanga ai e matou i nga o matou katoa.  
 Ka matia heni ki Waitangi, i te eno o nga ra o Ppure, i te tau hokahi mano, e  
 eua takau, o te tau o Awhi.

Signed before us at  
 Auckland 20<sup>th</sup> March 1840

Wm. L. Symonds  
 James H. Williams

his  
 Ko te Kawau  
 Mark  
 his  
 Ko te Tinana  
 Mark  
 Ko te Reweti

James Waller  
 Kauri April 28 - 1840  
 John Whiteley

Ko Rawiri his mark

May 21<sup>st</sup> 1841

Ko te Kauriwa his  
 Ko Tariki his mark

June 25<sup>th</sup>

Ko Haukoria his mark  
 Ko Te Maru his mark

June 13<sup>th</sup>

Ko Tuumui his mark


Aug 24<sup>th</sup>







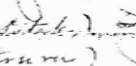



Ko Hone Waitere his  
 Ko Te Matenga his  
 mark  
 Ko Te Mahape

Sep 3<sup>rd</sup>

Ko Ngamotu his mark  
 Ko Marekawa his mark


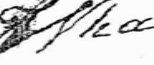

extends to the Nations of New Zealand Her royal protection and imports to them all the Rights  
 United Tribes of New Zealand being assembled in Congress at Victoria in Waikato and We the Separat  
 over the Tribes and Territories which are specified after our respective names, having been made fully  
 and enter into the same in the full spirit and meaning thereof in-witness of which we have  
 dates respectively specified. \_\_\_\_\_  
 year of Our Lord one thousand eight hundred and forty. \_\_\_\_\_



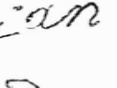

W. H. Wilson Secretary and Governor 

Kotitohu o tekeha (Ngatinako tekeha)   
 Ko te tohu te Wanganui (Ngatitike Te Wanganui)   
 Kotitohu te Kanana (   )   
 Ko te tohu o te Whata Ngahipa Wanganui   
 Ko te tohu o te Whata (  )   
 Ko te tohu o Peehi (  ) 

The preceding names have been obtained by us at this Harbour & embrace all as we conceive with the  
 exception of two the names of the provinces of Waikato

April 11. 1840 Warkah Heads  
 B. Mansell  
 B. Ashwell

Ko te tohu o Wairua, Ngawaro  
 Ko te tohu o Hone Kingi  } (Ngatetiati)  
 Ko te tohu o  

Ko te tohu o Tamati   
 Ko te tohu o Rabata Waiti   
 Ko te tohu o Te Awarahi   
 Ko te tohu o Rehurehu 

Signed before me April  
 W. J. Symonds

6<sup>th</sup> - 1840  
 and

# 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]
- Martin CJ & Chapman J: *A-G v Whitaker* (1846); *R v Taylor* (1849).
- 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-Rākohā 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