Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Nireaha Tamaki v. *Baker, from the Court of Appeal of New Zealand; delivered the* 11*th May* 1901.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
SIR HENRY DE VILLIERS.

[*Delivered by Lord Davey.*]

This is an Appeal by an aboriginal inhabitant of New Zealand against an Order of the Court of Appeal in that Colony dated the 28th May 1894 in which questions of great moment affecting the status and civil rights of the aboriginal subjects of the Crown have been raised by the Respondent. In order to make these questions intelligible it will be necessary to review shortly the course of legislation on the subject in the Colony.

The Treaty of Waitangi (the 6th February 1840) is in the following words:—

"ARTICLE THE FIRST.

"The Chiefs of the Confederation of the United Tribes of "New Zealand, and the separate and independent Chiefs who "have not become members of the Confederation, cede to Her "Majesty the Queen of England, absolutely and without "reservation, all the rights and powers of Sovereignty which "the said Confederation or Individual Chiefs respectively "exercise or possess, or may be supposed to exercise or to "possess, over their respective territories as the sole sovereigns "thereof.

"ARTICLE THE SECOND.

"Her Majesty the Queen of England confirms and "guarantees to the Chiefs and Tribes of New Zealand, and to "the respective families and individuals thereof, the full, "exclusive, and undisturbed possession of their Lands and

16093. 100.—5/1901. [18] A

" Estates, Forests, Fisheries, and other properties which they " may collectively or individually possess, so long as it is their " wish and desire to retain the same in their possession; but " the Chiefs of the United Tribes and the individual Chiefs " yield to Her Majesty the exclusive right of pre-emption " over such lands as the proprietors thereof may be disposed to " alienate, at such prices as may be agreed upon between the " respective proprietors and persons appointed by Her Majesty " to treat with them in that behalf.

" ARTICLE THE THIRD.

" In consideration thereof, Her Majesty the Queen of " England extends to the Natives of New Zealand Her Royal " protection, and imparts to them all the rights and privileges " of British subjects."

By the 2nd section of the Land Claims Ordinance of 1841 (repealing the New South Wales Act 4 Vict. No 7) it was—

" Declared enacted and ordained that all " unappropriated lands within the Colony of " New Zealand, subject however to the rightful " and necessary occupation and use thereof by " the aboriginal inhabitants of the said Colony— " are and remain Crown or domain lands of " Her Majesty Her heirs and Successors and " that the sole and absolute right of pre-emption " from the said aboriginal inhabitants vests in " and can only be exercised by Her said Majesty " Her Heirs and Successors."

No doubt this Act of the Legislature did not confer title on the Crown but it declares the title of the Crown to be subject to the "rightful " and necessary occupation" of the aboriginal inhabitants and was to that extent a legislative recognition of the rights confirmed and guaranteed by the Crown by the second article of the Treaty of Waitangi. It would not of itself however be sufficient to create a right in the native occupiers cognisable in a Court of law.

In the year 1852 New Zealand which up to that time had been a part of New South Wales received a constiution as a self-governing Colony. By the New Zealand Constitution Act of that year (15 & 16 Vict. c. 72) Section 72 the Assembly was empowered to make laws for the

sale disposal and occupation of waste lands of the Crown and lands wherein the title of natives shall be extinguished as thereafter mentioned and (Section 73) it was made unlawful for any person other than Her Majesty to purchase or accept from aboriginal natives land of or belonging to or used by them in common as tribes or communities or to accept any release or extinguishment of the rights of such aboriginal natives in any such land. By Section 8 of 25 & 26 Vict. c. 48, power was given to the General Assembly to repeal Section 73 of the previous Act.

By the "Native Rights Act 1865" of the Colonial Legislature (29 Vict. No. 11) it was enacted (Section 2) that every person of the Maori race within the Colony of New Zealand whether born before or since New Zealand became a dependency of Great Britain should be taken and deemed to be a natural-born subject of Her Majesty to all intents and purposes whatsoever (Section 3) that the Supreme Court and all other Courts of Law within the Colony ought to have and have the same jurisdiction in all cases touching the persons and the property whether real or personal of the Maori people and touching the titles to land held under Maori custom or usage as they have or may have under any law for the time being in force in all cases touching the persons and property of natural-born subjects of Her Majesty (Section 4) that every title to and interest in land over which the native title shall not have been extinguished shall be determined according to the ancient custom or usage of the Maori people so far as the same can be ascertained. And (Section 5) that in any action involving the title to or interest in any such land the Judge before whom the same shall be tried shall direct issues for trial before the Native Land Court.

By the "Native Lands Act, 1865" (29 Vict. No. 71) after a recital that it was expedient to amend and consolidate the laws relating to lands in the Colony which were still subject to Maori proprietary customs and to provide for the ascertainment of the persons who according to such customs were the owners thereof and to encourage the extinction of such proprietary customs and to provide for the conversion of such modes of ownership into titles derived from the Crown and for other purposes therein mentioned it was enacted (Sec. 2) that "native land" should mean lands in the Colony which were owned by natives under their customs or usages (Sec. 5) that the Native Land Court (which had been established under earlier legislation) should be a Court of Record for (amongst other purposes) the investigation of the titles of persons to native lands (Sec. 21) that any Native claiming to be interested in a piece of native land might apply for the investigation of his claim by the Court in order that a title from the Crown might be issued to him (Sec. 23) that the Court (after certain notices had been given) should ascertain the right title or interest of the applicant and all other claimants to or in the land in question and order a certificate of title to be issued specifying the names of the persons or of the tribe who according to native custom own or were interested in the land describing the nature of such estate or interest and describing the land comprised in such certificate. By Sec. 25 it was provided that no order for a certificate of title should be made unless a survey of the lands in question made by a duly licensed surveyor was produced during the investigation and it should be proved that the boundaries had been distinctly marked out on the ground. It is from the neglect of this very useful provision that the whole difficulty of fact has arisen in the present litigation. By Sections

46 to 48 provision is made for the issue of Crown grants to the persons mentioned in any certificates and to purchasers from them which latter grants were to be as valid and effectual as if the lands had been ceded by "the native proprietors" to Her Majesty.

By the Native Land Act 1877 (41 Vict. No. 91) Section 6 power was given to the Native Minister to apply to the Native Land Court to ascertain and determine what interest in any plot of land had been acquired by or on behalf of Her Majesty and all lands declared in any order made on such application to have been so acquired should from the date of the Order be deemed to be absolutely vested in Her Majesty. This section has been repealed but is re-enacted in a subsequent Act.

The Native Land Act 1865 has been repealed by the Native Land Act, 1873, but was in force at the date of the Orders made by the Native Land Court on the 13th September 1871, hereafter mentioned. The provisions of the earlier Act with some alterations and additions were re-enacted in the Act of 1873. The only sections to which reference need be made for the present purpose are Sections 101 and 102 by which the Native Land Court is directed to hear and determine any reference from the Supreme Court under the Native Rights Act 1865 and the effect of the decision of the Land Court thereon is defined and Section 105 by which it is enacted that any notification published in the New Zealand Gazette and purporting to be made by or by the authority of the Governor and stating that the native title over any land therein described was extinguished previously to a date therein specified shall for all purposes be received as conclusive proof that the native title over the land described in such notice was extinguished at some time previously to the date therein specified

and that such land on such date ceased to be native land within the meaning of the Act.

Their Lordships do not think it necessary to review the series of "Land Acts" which were passed prior to 1892 for the purpose of enabling the Government to sell and dispose of Crown lands discharged from native claims. The Act in force at the commencement of the present action was the Land Act of 1892 No. 37. By Section 3 of that Act Crown lands are defined to mean and include (amongst other things)—

"All native lands which have been ceded to "Her Majesty by the natives or have been pur- "chased or otherwise acquired in freehold from "the natives on behalf of Her Majesty or have "become vested in Her Majesty by right of her "prerogative."

By Sections 22 and 26 provision was made for the constitution of ten land districts (of which the Wellington Land District is one) with a Commissioner of Crown Lands for each district and by Section 28 the powers and duties of the Commissioners were defined. By Section 106 Crown lands were divided into three classes :— (1) Town land, (2) Suburban land, and (3) Rural land. By Section 136 the Governor was empowered by notification in the Gazette to declare that any rural land within the Colony (with an immaterial exception) should be open for sale or selection in the manner and upon the conditions mentioned in the Act. By Section 250 it is enacted that whenever the Governor is satisfied that any native lands acquired by Her Majesty in any way or purchased out of moneys authorised to be expended on purchase of lands in the North Island are free from native claims and any difficulties in connection therewith he shall by proclamation ordain such lands to be Crown lands subject to be sold and disposed of and thereupon such lands so proclaimed shall become subject to

the provisions of the laws in force regulating the sale and disposal of Crown lands.

On the 13th September 1871 three orders were made by the Judge of the Native Land Court.

The first order was for the issue of a certificate of title under the Native Land Acts 1865 and 1869 to certain natives (not including the Appellant) in respect of a block of land containing about 22,000 acres known as and called Kaihinu No. 1 when a proper survey of the said land should have been furnished to the satisfaction of the Chief Judge. And it was further ordered that whenever a Crown grant should be made of the said land the legal estate therein should vest in the grantees on the 13th September 1871.

The second was a similar order in all respects as to a block of land containing about 19,000 acres and called Kaihinu No. 2 in favour of certain natives (also not including the Appellant).

The third was again a similar order in all respects as to a block of land containing 62,000 acres and called Mangatainoka Block in favour of certain natives (including the Appellant) and all others (if any) of the members of the Rangitane tribe. By subsequent proceedings certain parts of this block (not including the areas in dispute) have been detached and have been ceded to the Crown.

By a deed dated the 10th October 1871 various blocks of land (including Kaihinu No. 1 and Kaihinu No. 2 but not including the Mangatainoka Block) were surrendered by the natives interested to the Crown. The boundaries of these blocks were not mentioned in this deed but there is a plan on the deed the accuracy and effect of which are in controversy.

By a proclamation dated the 2nd July 1874 the then Governor of the Colony "being satisfied "that the lands described in the schedule hereto "are free from native claims and all difficulties "in connection therewith in pursuance and

" exercise of the power and authority vested in " me by the Immigration and Public Works Act " 1873 " proclaimed the said lands to be waste lands of the Crown subject to be sold and dealt with in accordance with the provisions of the laws in force. The schedule includes all the blocks of land ceded by the deed of the 10th October 1871 as the same are particularly delineated on the plan drawn in the margin of the deed.

On the 13th July 1893 the Respondent by public notice offered a block of land called Kaiparoro 20,000 acres in extent and containing portions of Kahinu No. 1 and Kaihinu No. 2 and part of an area of 5,184 acres the title to which is in dispute in this action for sale or selection " in terms of Section 137 of the Land Act 1893 " and he subsequently advertised the intended sale in the local newspapers. It is stated in the Respondent's case in this Appeal that a previous notification was made by the Governor pursuant to Section 136 of the Act of 1892 and published in the Gazette declaring open for sale the block called Kaiparoo, but there is no mention of such document in the statement of claim or the defence and it is not referred to in the judgment of the Court nor does it appear to their Lordships to be material to the questions which they have to decide on this Appeal.

The Appellant thereupon commenced the present action. The allegations in the amended statement of claim are confused, and some of them are irrelevant, and the prayer certainly goes beyond any relief which in the most favourable view of his case, he can be entitled to. He sets out the several documents, the effect of which has been already stated. He does not in terms allege his title to Block Mangatainoka, or that he and the other members of his tribe are enjoying the use and occupation of the lands in dispute, but he sets out the order relating to that block, and in paragraph 36 alleges that no licence

has been granted to any other person to occupy the lands in dispute. Their Lordships think that for the present purpose they are not bound to scan the sufficiency of the allegations too closely, and they must assume that the Appellant has alleged or can by amendment allege a sufficient title of occupancy in himself and the other members of his tribe to raise the questions in controversy on this Appeal.

The substance of the Appellant's case appears to be that no proper or sufficient surveys of Blocks Kaihinu No. 1, Kaihinu No. 2, or Mangatainoka have ever been made and that the respective boundaries between the last two blocks have never been ascertained, and that a certain triangular block of 5,184 acres and another piece of land are not parts of Kaihinu No. 2 (as claimed by the Respondent) but parts of Mangatainoka and that the native title in those portions of the last-named block has never been extinguished by cession to the Crown or otherwise. By paragraph 36 of the statement of claim the Appellant submits that the said triangular piece of land and the other piece of land still remain land owned by himself and other aboriginal natives under their customs and usages whether under the said order of the Native Land Court or otherwise. His prayer is—

1. For a declaration in the terms of his previous submission.

2. That the pieces of land form part of the Mangatainoka Block.

3. For a perpetual injunction to restrain the Respondent from selling the two pieces of land or from advertising the same for sale or disposal as being the property of the Crown, and for further relief.

Their Lordships observe that the order of the Land Court not being completed by a certificate does not confer any title on the Appellant, but

they think it is evidence of his title and the Act does not appear to make the obtaining of the certificate a condition precedent to the assertion of a native title. In fact no certificates were issued in respect of blocks Kaihinu No. 1 and Kaihinu No. 2.

The issue of fact between the parties is whether the pieces of land in question were parts of Kaihinu No. 2 or of Mangatainoka. But if the action comes to trial there will be another question whether the pieces of land have in fact even if erroneously been included in the deed of cession of Kaihinu No. 2 or in some proclamation or other act of the Governor which by the Acts in force is made conclusive evidence against the Appellant.

Their Lordships however have not now to deal with the merits of the case or to say whether the Appellant has or ever had any title to the pieces of land in question or whether such title (if any) has or has not been duly extinguished or to express any opinion on the regularity or otherwise of the Respondent's proceedings. The Respondent has pleaded amongst other pleas that the Court has no jurisdiction in this proceeding to inquire into the validity of the vesting or (? the) non-vesting of the said lands or any part thereof in the Crown.

An order was made for the trial of four preliminary issues of law of which two only (the 3rd and 4th) were dealt with in the Order now under Appeal. They are in these terms :—

"3. Can the interest of the Crown in the "subject-matter of this suit be attacked by this "proceeding ?

"4. Has the Court jurisdiction to enquire "whether as a matter of fact the land in dispute "has been ceded by the native owners to the "Crown?" Both questions were answered by the Court of Appeal in the negative.

Their Lordships are somewhat embarrassed by the form in which the third question is stated. If it refers to the prerogative title of the Crown the answer seems to be that that title is not attacked the native title of possession and occupancy not being inconsistent with the seisin in fee of the Crown. Indeed by asserting his native title the Appellant impliedly asserts and relies on the radical title of the Crown as the basis of his own title of occupancy or possession. If on the other hand the unencumbered title alleged by the Respondent to have been acquired by the Crown by extinguishment of the native title be referred to, it is the same question as No. 4 and the answer to it must depend on a consideration of the character of the action and the nature of the relief prayed against the Defendant. As the Court of Appeal point out what they had to determine was in the nature of a demurrer to the Statement of Claim. The substantial question therefore is whether the Appellant can sue and whether if the allegations in the statement of claim are proved he will be entitled to some relief against the Respondent. It is not necessary for him to show in this proceeding that he will be entitled to all the relief which he seeks.

The learned Judges in the Court of Appeal thought that the case was within the direct authority of *Wi Parata* v. *The Bishop of Wellington* 3 N.Z.J.R. N.S. S.C. 72 previously decided in that Court. They held that "the mere assertion of the "claim of the Crown is in itself sufficient to oust "the jurisdiction of this or any other Court in the "Colony. There can be no known rule of law" they add "by which the validity of dealings in "the name and under the authority of the "Sovereign with the native tribes of this "country for the extinction of their territorial "rights can be tested." The argument on behalf of the Respondent at their Lordships' Bar proceeded on the same lines.

Their Lordships think that the learned Judges have misapprehended the true object and scope of the action and that the fallacy of their judgment is to treat the Respondent as if he were the Crown or acting under the authority of the Crown for the purpose of this action. The object of the action is to restrain the Respondent from infringing the Appellant's rights by selling property on which he alleges an interest in assumed pursuance of a statutory authority the conditions of which (it is alleged) have not been complied with. The Respondent's authority to sell on behalf of the Crown is derived solely from the Statutes and is confined within the four corners of the Statutes. The Governor in notifying that the lands were rural land open for sale was acting and stated himself to be acting in pursuance of the 136th Section of the Land Act 1892 and the Respondent in his notice of sale purports to sell in terms of Section 137 of the same Act. If the land were not within the powers of those sections (as is alleged by the Appellant) the Respondent had no power to sell the lands and his threat to do so was an unauthorised invasion of the Appellant's alleged rights.

In the case of the *Tobin* v. *The Queen* 16 C. B. N.S., 310 a naval officer purporting to act in pursuance of a statutory authority wrongly seized a ship of the Suppliant. It was held on demurrer to a petition of right that the statement of the Suppliant showed a wrong for which an action might lie against the officer but did not show a complaint in respect of which a petition of right could be maintained against the Queen on the ground (amongst others) that the officer in seizing the vessel was not acting in obedience to a command of Her Majesty but in the supposed performance of a duty imposed upon him by Act of Parliament and in such a case the maxim *respondeat superior* did not apply. On the same general principle it was held in *Musgrave* v. *Pulido* 5 A. C. 102 that a

Governor of a Colony cannot defend himself in an action of trespass for wrongly seizing the Plaintiff's goods merely by averring that the acts complained of were done by him as "Governor" or as "acts of State." It is unnecessary to multiply authorities for so plain a proposition and one so necessary to the protection of the subject. Their Lordships hold that an aggrieved person may sue an officer of the Crown to restrain a threatened act purporting to be done in supposed pursuance of an Act of Parliament but really outside the statutory authority. The Court of Appeal thought that the Attorney-General was a necessary party to the action but it follows from what their Lordships have said as to the character of the action that in their opinion he was neither a necessary nor a proper party. In a constitutional country the assertion of title by the Attorney-General in a Court of Justice can be treated as pleading only and requires to be supported by evidence.

But it is argued that the Court has no jurisdiction to decide whether the native title has or has not been extinguished by cession to the Crown. It is said and not denied that the Crown has an exclusive right of pre-emption over native lands and of extinguishing the native title. But that right is now exercised by the constitutional Ministers of the Crown on behalf of the public in accordance with the provisions of the Statutes in that behalf and there is no suggestion of the extinction of the Appellant's title by the exercise of the prerogative outside the Statutes if such a right still exists. There does not seem to be any greater difficulty in deciding whether the provisions of an Act of Parliament have been complied with in this case than in any other or any reason why the Court should not do so. In so saying their Lordships assume (without deciding) that if it be shown that

by an act of the Governor done pursuant to the Statutes the land has been declared free from native claims it will be conclusive on the Appellant.

A more formidable objection to the jurisdiction is that no suit can be brought upon a native title. And the first paragraph of the prayer was referred to as showing that the Appellant sought a declaration of his title as against the Crown. Their Lordships however do not understand that paragraph to mean more than that the native title has not been extinguished according to law. The right it was said depends on the grace and favour of the Crown declared in the Treaty of Waitangi and the Court has no jurisdiction to enforce it or entertain any question about it. Indeed it was said in the case of *Wi Parata* v. *Bishop of Wellington* which was followed by the Court of Appeal in this case that there is no customary law of the Maoris of which the Courts of Law can take cognizance. Their Lordships think that this argument goes too far and that it is rather late in the day for such an argument to be addressed to a New Zealand Court. It does not seem possible to get rid of the express words of the 3rd and 4th Sections of the Native Rights Act 1865 by saying (as the Chief Justice said in the case referred to) that "a phrase in a "Statute cannot call what is non-existent into "being." It is the duty of the Courts to interpret the Statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them by evidence. By the 5th Section it is plainly contemplated that cases might arise in the Supreme Court in which the title or some interest in native land is involved and in that case provision is made for the investigation of such titles and the ascertainment of such

interests being remitted to a Court specially constituted for the purpose. The legislation both of the Imperial Parliament and of the Colonial Legislature is consistent with this view of the construction and effect of the Native Rights Act and one is rather at a loss to know what is meant by such expressions "native title" "native lands" "owners" and "proprietors" or the careful provision against sale of Crown lands until the native title has been extinguished if there be no such title cognizable by the law and no title therefore to be extinguished. Their Lordships think that the Supreme Court are bound to recognise the fact of the "rightful possession and occupation of the natives" until extinguished in accordance with law in any action in which such title is involved and (as has been seen) means are provided for the ascertainment of such a title. The Court is not called upon in the present case to ascertain or define as against the Crown the exact nature or incidents of such title but merely to say whether it exists or existed as a matter of fact and whether it has been extinguished according to law. If necessary for the ascertainment of the Appellant's alleged rights the Supreme Court must seek the assistance of the Native Land Court but that circumstance does not appear to their Lordships an objection to the Supreme Court entertaining the Appellant's action. Their Lordships therefore think that if the Appellant can succeed in proving that he and the members of his tribe are in possession and occupation of the lands in dispute under a native title which has not been lawfully extinguished he can maintain this action to restrain an unauthorised invasion of his title. The question whether the Appellant should sue alone or on behalf of himself and the other members of his tribe on an allegation that they are too numerous to be conveniently made Co-Plaintiffs is not now before their Lordships

but it does not seem to present any serious difficulty.

If all that is meant by the Respondent's argument is that in a question between the Appellant and the Crown itself the Appellant cannot sue upon his native title there may be difficulties in his way (whether insurmountable or not it is unnecessary to say) but for the reasons already given that question in the opinion of their Lordships does not arise in the present case.

In the case of *Wi Parata* v. *The Bishop of Wellington* already referred to the decision was that the Court has no jurisdiction by *scire facias* or other proceeding to annul a Crown grant for matter not appearing on the face of it and it was held that the issue of a Crown grant implies a declaration by the Crown that the native title has been extinguished. If so it is all the more important that natives should be able to protect their rights (whatever they are) before the land is sold and granted to a purchaser. But the dicta in the case go beyond what was necessary for the decision. Their Lordships have already commented on the limited construction and effect attributed to the third section of the native Rights Act 1865 by the Chief Justice in that case. As applied to the case then before the Court however their Lordships see no reason to doubt the correctness of the conclusion arrived at by the learned Judges.

In an earlier case of *The Queen* v. *Symonds* (Parliamentary Papers relative to the affairs of New Zealand Dec. 1847 page 67) it was held that a grantee from the Crown had a superior right to a purchaser from the natives without authority or confirmation from the Crown which seems to follow from the right of pre-emption vested in the Crown. In the course of his judgment however Mr. Justice Chapman made some observations very pertinent to the

present case. He says (p. 35) "Whatever may "be the opinion of jurists as to the strength or "weakness of the native title it cannot be too "solemnly assserted that it is entitled to be res- "pected that it cannot be extinguished (at least "in times of peace) otherwise than by the free "consent of the native occupiers." And while affirming "the Queen's exclusive right to extinguish it" secured by the right of pre-emption reserved to the Crown he holds that it cannot be extinguished otherwise than in strict compliance with the provisions of the Statutes.

Certain American decisions* were quoted in the course of the argument. It appears from the cases referred to and others which have been consulted by their Lordships that the nature of the Indian title is not the same in the different States and where the European settlement has its origin in discovery and not in conquest different considerations apply. The judgments of Chief Justice Marshall are entitled to the greatest respect although not binding on a British Court. The decisions referred to however being given under different circumstances do not appear to assist their Lordships in this case. But some of the judgments contain *dicta* not unfavourable to the Appellant's case.

Their Lordships are therefore of opinion that the order of the Court of Appeal should be reversed and a declaration should be made in answer to the third and fourth issues of law as follows: that it not appearing that the estate and interest of the Crown in the subject matter of this suit subject to such native titles (if any) as have not been extinguished in accordance with law is being attacked by this proceeding the Court has jurisdiction to enquire whether as a matter of fact the land in dispute has been ceded by the native owners to the Crown in accordance with law and the Respondent should be ordered to

* *Cherokee Nation* v. *State of Georgia*, 5 Peters U.S. p. 1.
Worcester v. *State of Georgia*, 6 Peters U.S. 515.
Fletcher v. *Peek*, 5 Cranch 87.
Johnson v. *Mackintosh*, 8 Whea. 543.

pay the costs of the hearing before the Court of of Appeal and they will humbly advise His Majesty accordingly.

Their Lordships observe that the declaration asked for by the Statement of Claim is too wide in its terms and if the Appellant succeeds in the action he can at the most be entitled to a declaration that the native title in the lands in dispute has not been or is not shewn by the Respondent to have been duly extinguished according to law (which is probably what is meant) and the injunction asked for should be limited by omitting the word "perpetual" and inserting "until the native title in the said lands has been "duly extinguished according to law," or some similar words. Their Lordships of course say nothing as to the other defences and express no opinion on the question which was mooted in the course of the argument whether the native title could be extinguished by the exercise of the prerogative which does not arise in the present case.

By the Order in Council of the 8th July 1895 leave is given to the Appellant to appeal from the judgment of the Court of Appeal of the 13th July 1894. It is not denied by the Respondent and the Appeal has been argued on the assumption on both sides that the Order of the 28th May 1894 was intended and that leave to appeal from that order was intended to be given. Their Lordships therefore will humbly advise His Majesty that the Order in Council should be read and have effect as if the words "the Judgment of "the Court of Appeal of New Zealand of the 28th "May 1894" were substituted therein instead of the words "the said judgment of the Court of "Appeal of New Zealand of the 13th July 1894."

The Respondent will pay the costs of this Appeal.