

them it is as well to set out the Crown contentions that were advanced at the hearing before Judge Browne in the Native Land Court and before the six Judges who sat in the Native Appellate Court. Judge Browne sets them out as :—

1. Native custom did not recognize exclusive ownership of the beds of rivers such as the Wanganui :
2. Native custom relates solely to rights of fishing, navigation, and ordinary domestic uses of waters :
3. These rights which are admitted by the Crown do not confer rights of ownership upon which freehold orders can be made :
4. At the time of the Treaty of Waitangi land meant land in the common acceptance of the term and not in the highly legal sense.
5. That the rights of sovereignty mean rights of ownership of access over country and its navigable water.

The evidence adduced by the Crown, Judge Browne said, referred to the use made of the river in recent years (the hearing before Judge Browne was in September, 1939) and but little referred to its use in 1840. Consequently, Judge Brown said, he was asked to infer—

1. That the conditions were at that time the same as in recent years.
2. That there was not, and never had been, any exclusive ownership of the river-bed.
3. That the river was in the nature of a main highway over which any one had a right to travel.

Before dealing in detail with the Crown contentions, Judge Browne said :—

There are two main facts, which, in the Court's opinion, cannot be disregarded in dealing with this case, namely :—

1. That the bed of a lake or the bed of a river is merely land covered with water.
2. That every foot of land in New Zealand at the time of the Treaty of Waitangi, apart from such as may have been alienated, belonged to some Maori tribe or hapu.

The boundaries of the land of each tribe or hapu were well defined and the members of that tribe or hapu had the exclusive right in common to everything within those boundaries including rivers and lakes. There were no rights-of-way or public roads through their territory either by river or in any other way, and if one tribe wanted to pass through the territory of another, permission had to be obtained, or if permission were not granted the tribe wanting to pass would be compelled to face the opposition of the owners and to force its way through.

Before the Native Appellate Court the grounds for the appeal on behalf of the Crown were :—

1. That prior to the Treaty of Waitangi custom and usage did not recognize exclusive Native ownership of beds of navigable rivers nor that the bed of a river or lake was land covered with water.
2. It is not a fact that every foot of land in New Zealand apart from such as may have been alienated belonged to some tribe or hapu.

At the hearing, however, Crown counsel's submissions were :—

1. That Native custom did not recognize ownership of the beds of rivers such as Wanganui.
2. That Native customs relate only to rights of fishing, navigation, and ordinary domestic use, and that these rights which are admitted by the Crown do not confer rights of ownership upon which freehold orders can issue.
3. That the right of navigation on the river was a right in common enjoyed by all Natives and not only the Wanganui Natives provided the right was exercised for peaceful purposes.
4. That not all land in New Zealand is customary land, even if the definition of land is extended to include river-beds.
5. The bed of the Wanganui River from the Crown purchases boundary in 1848, to Raorikia, was abandoned by claimants in this case.

It will be observed that the third contention that the right of navigation was enjoyed by all Natives and not only the Wanganui Natives and the fifth contention that the bed of the river from a Crown purchase boundary in 1848 to Raorikia, was abandoned, are questions dependent on facts.