

CHAPMAN J. AND THE SYMONDS CASE

BY DR P.R. SPILLER B.A., LL.B(Natal), LL.M, M.Phil.(Cantab), Ph.D(Natal)*

Senior Lecturer in Law, University of Canterbury

I INTRODUCTION

In 1847, in the Supreme Court at Auckland, Chief Justice William Martin recited his judgment and that of his puisne judge, Henry Chapman, in the case of *R. (at the suit of McIntosh) v. Symonds*.¹ The subject-matter in dispute in the case was insignificant: it concerned the title to a tiny rocky island in the Thames area. But the decision touched a major point of principle in early New Zealand land tenure, and the judgments which were given have played a significant role in subsequent disputes concerning Maori property rights. Historical evidence shows that it was Chapman J. who was the prime mover behind the decision given in the case, and his judgment in particular has played a significant role in subsequent litigation in this area. I propose to analyse the nature and significance of the judgment in the context of an understanding of the life and career of Chapman J.

II CHAPMAN'S LIFE AND CAREER (TO 1847)²

Henry Samuel Chapman (1803-1881) was born in Surrey, England. He was the son of an English civil servant and the grandson of a merchant trader who had conducted an extensive trade with North America. Chapman was raised in a family with a high regard for education but with limited financial means, and so his formal schooling lasted only until the age of sixteen. Chapman then entered employment as a clerk in a London business. In 1823, Chapman was sent by his employer to Quebec. There he soon established his own merchant business, which he was to maintain for ten years, and, during this time, he forged many links with Canadian and American figures. He developed a growing interest in, and support for, the popular French movement in Lower Canada. In 1833 he abandoned his mercantile career, moved to Montreal, and established the first daily newspaper in British North America, in support of the Radical cause. Here, while not attending to his editorial tasks and political concerns, he read for the Canadian bar, acquiring knowledge of Roman and French law.

In December 1834, Chapman was appointed as the London spokesman of the liberal majority in the Lower Canadian Assembly. His ensuing eight-and-a-half-year career in London was spent in a variety of pursuits. In particular, Chapman fostered his links (established earlier when he was based

* I am grateful to Dr D. Williams of the University of Auckland for his helpful comments on my text.

¹ *Cases in the Supreme Court of New Zealand 1844-1852 (Cases)*, newspaper cuttings, C.P. 104 (Hocken Library), 33-37; and (1847) N.Z.P.C.C.387.

² Unless otherwise indicated, this survey is drawn from F.R. Chapman, *Outline of the life of Henry Samuel Chapman* (unpublished manuscript, Rosenberg Collection, 1929), and F.R. Chapman, *Memoranda of conversations with Henry Samuel Chapman* (unpublished manuscript, Rosenberg Collection). The Rosenberg Collection is held in the Christchurch home of Ann Rosenberg, who is the great-granddaughter of Henry Chapman.

in Canada) with the movement known as the philosophic radicals. This group, which featured such figures as John Stuart Mill and Arthur John Roebuck, advocated the creation of a democratic constitution, the rationalisation of all matters of government and law, the establishment of legal and educational systems to which all members of the community could have equal access, and economic growth to be brought about by capital accumulation and free trade. Chapman wrote extensively in support of these ideals. He declared that the “object of Reform is to obtain good government, . . . that which secures to the great body of the People the greatest aggregate of happiness”. He lauded the United States of America as the “great federal democracy” which had “proved that a people which has once governed themselves can never afterwards be ruled” and where “real improvement is most rapid in its progress”.³ By 1837, Chapman’s official appointment by the Canadian Assembly had lapsed, and he decided to complement his journalistic work with a return to the study of the law. In March 1837, he entered the Middle Temple, and here his prodigious capacity for work earned him the maxim “Chapman studet diligenter” amongst his colleagues. In June 1840, he was called to the bar, and then commenced a career in London and on the Northern Circuit which was moderately successful despite the disadvantages of a late start and the absence of capital. By this stage he had developed yet another field of interest: the promotion of plans for the colonisation of New Zealand. From 1840 to 1843, Chapman was the editor of the *New Zealand Journal*, and here he expounded the advantages of colonisation in general and in New Zealand in particular. He wrote of New Zealand as “this fine country” with land sufficient for a hundred times its existing population, and an indigenous race which, by its energetic character, “made it worth our while to civilise, rather than to destroy”.⁴

By the summer of 1842, Chapman had decided to leave England for New Zealand. This decision was as a result of a number of factors. Chapman had by this stage married and fathered one child, and there was the prospect of more children to come. Chapman summed up his plight in England when he said: “I am at least ten years too late at the bar, I cannot live without a painful amount of labour, and if I remain here I may have a family too large to educate”. On the other hand, New Zealand was a pleasant prospect, made even more attractive by letters from New Zealand settlers suggesting that he might make a considerable income from practice at the local bar.⁵ On 30 July 1842, Chapman wrote to the Colonial Secretary on the inadequate state of the administration of justice in New Zealand. He suggested the erection of a Supreme Court in Wellington, which, he said, was “the metropolis of a producing and commercial population”.⁶ It was as a result of this that the office of judge at Wellington was created, and Chapman, as a result of his sound legal reputation and established New Zealand connections, was appointed to the post. On 27 June 1843, Chapman left England with his

³ J.A. Roebuck (ed.), *Pamphlets for the People* (Charles Ely, 1835), volume I, pamphlet 22, 11; and H.S. Chapman (H.S.C.), *Essays and Articles* (Rosenberg Collection), volume II, “Transatlantic Travelling” 400 and 416.

⁴ H.S.C., above n.3, volume III, 90.

⁵ H.S.C. to Fanny Chapman, summer 1842 (this, and the letters referred to below, are in the Rosenberg Collection).

⁶ H.S.C. to Lord Stanley, 30 July 1842, 12–20.

wife and family, and reached Auckland nearly six months later (en route, he devoted three hours each day to the study of the law, and two hours each day to the study of the Maori language).⁷ On 26 December 1843, at Auckland, Chapman was sworn in as judge of the Supreme Court of New Zealand, before an assembly of colonists and Maori chiefs. On 1 February 1844, Chapman finally arrived in Wellington, where he was to remain for the ensuing eight years.⁸

In the exercise of his judicial duties in Wellington, Chapman J. displayed his characteristic sanguine temperament, thorough dedication to duty, and belief in his own qualities. He declared that “no one can have taken more pains to fill his office faithfully than I have done”, that he endeavoured to do his work as well as his faculties and legal experience permitted, and that he guarded himself “publicly and privately from any act or demeanour unbecoming” his station.⁹ He genuinely delighted in analysing and expounding the law from his colonial bench. He declared that “[i]t is decidedly the pleasantest as well as the most important of my functions to settle the application of the law of England [in the colonial context] and whenever I have any case of the kind I generally go over the field of Continental and American law so as to make my judgment as instructive as I am capable of doing”.¹⁰ Crucial here was the development of his library of law books: he declared that “[t]hese are our tools — they are expensive but they do not wear out like some expensive machines and do not eat like horses and men servants”. Chapman dedicated himself to a systematic plan of gradually building up “an excellent working library” by supplementing his holdings of recent reports, statutes, legal texts, and other British and foreign law books (totalling about 240 volumes), with other reports and treatises of English, foreign and international law.¹¹ Beneath his carefully controlled judicial exterior, Chapman remained committed to his philosophic radical ideas. He said that he would dispassionately but firmly adhere “to what I believe to be my duty and repel the least attempt at Executive interference with my perfect independence”.¹² He continued to profess himself to be of the “New School”, one who rejoiced in the 1848 revolts as a “wonderful change working in Europe” and one who hoped that the French revolution settled itself “into a well working republic”.¹³ At the local level, he did what he could to promote the “only institution here for the improvement of the people” by becoming president of the mechanics’ institute.¹⁴

III THE SYMONDS JUDGMENT

In 1847, Chapman J. was given the opportunity to display his talents, industry and ideas when he was asked to give judgment in a series of cases relating to land ownership in New Zealand. By the time of Chapman J.’s

⁷ H.S.C. to Henry Chapman (H.C.) (H.S.C.’s father), 12 August 1843 and 29 September 1843.

⁸ H.S.C. to H.C., 3 February 1844 and 25 April 1852.

⁹ H.S.C. to H.C., 21 August 1847.

¹⁰ H.S.C. to H.C., 17 March 1849.

¹¹ H.S.C. to H.C., 15 June 1847.

¹² H.S.C. to H.C., 17 June 1849.

¹³ H.S.C. to H.C., 10 October 1848, and to Aunts, 18 May 1844.

¹⁴ H.S.C. to H.C., 20 August 1848.

arrival in the colony, the question of land ownership had become an extremely complex and vexed issue. By late 1839, Europeans had bought substantial areas of land from the Maori, and many of the transfers were for trivial amounts and backed by questionable documentary titles. In January 1840, Governor George Gipps of New South Wales (having extended New South Wales jurisdiction to cover New Zealand) proclaimed that title to New Zealand land would be valid only if derived from or confirmed by the Crown, and that any further purchases would be null and void. In February 1840, the Treaty of Waitangi was signed by the new Lieutenant-Governor of New Zealand, Captain William Hobson, and local Maori chiefs. The English text guaranteed the Maori possession of their lands, subject to a pre-emption clause to the effect that the Crown had the sole right of buying Maori land. Late in 1840, New Zealand was separated from the temporary jurisdiction of New South Wales and became a fully-fledged colony, but the substance of the New South Wales proclamation concerning land claims was re-enacted in ordinances of the New Zealand Legislative Council. In December 1843, Captain Robert Fitzroy became Governor of New Zealand. By this stage considerable opposition had been voiced, amongst Maori and European settlers, to the pre-emption clause in the Treaty of Waitangi (in particular, would-be Maori sellers of land found that they were unable to sell their land to the Government, or asked to sell at an unfairly low price). In response to this opposition, Fitzroy issued two proclamations waiving the Crown's pre-emptive rights over Maori land. The second of these, issued in October 1844, permitted certain lands to be bought direct from the Maori, on payment of a fee of a penny per acre to the Crown. The result of these and other actions was that, by the time of Fitzroy's recall in 1845, there was much uncertainty as to title to land in the colony, and many of those who had acted according to Fitzroy's waiver certificates were seen to have claims of strong moral but questionable legal validity.¹⁵

In 1847, the case of *R. (at the suit of McIntosh) v. Symonds* was brought to court. This case was prompted by the action of Governor George Grey (Fitzroy's successor), who wished to test the legal validity of land purchases made under his predecessor's "penny proclamation". According to Chapman, Grey selected the strongest claim he could find among the "penny an acre" claimants.¹⁶ This was the claim of Charles McIntosh, a secretary to the Land Commission. He had (in December 1844) obtained Fitzroy's waiver of the Crown's right of pre-emption over a one-and-half acre rocky island in the Firth of the Thames, and had (in January 1845) duly bought the island from the Maori owners. McIntosh made it known that he was willing to be a party to contrived proceedings to test the validity of Fitzroy's waiver. On 22 April 1847, Grey made a deed of grant of this island, from the Crown, to Captain J.J. Symonds, Grey's private secretary. McIntosh then obtained leave from the Government to use the Queen's name to sue out a writ of *scire facias*, to repeal or avoid the grant, thus placing the validity of his title squarely before the court. The case was argued on 4 May 1847, at Auckland before Chief Justice Martin, by Attorney-General Swainson for the defendant

¹⁵ See C. Orange, *The Treaty of Waitangi* (Allen and Unwin, Wellington, 1987) 34 and 94-105; and J.S. Marais, *The Colonisation of New Zealand* (Oxford University Press, London, 1927) 275-284.

¹⁶ H.S.C. to H.C., 15 June 1847.

and Bartley for the plaintiff.¹⁷ Martin C.J. reserved judgment in order to consider the issues and to obtain the judgment of Chapman J. On 20 May the government ship arrived in Wellington, with the pleadings and a report of the arguments, on 23 May Chapman J. began work on the case, and on 28 May the government ship sailed for Auckland with Chapman J.'s judgment and "a great number of notes and some books" relating to the issue, for Martin C.J.'s attention.¹⁸ On 9 June 1847, Martin C.J. read out Chapman J.'s and his own concurring judgments.¹⁹

Chapman J. began by crystallising the issue which the court had to determine: namely, whether the claimant McIntosh acquired by the certificate from Fitzroy, and the subsequent purchase, such an interest in the land, as against the Crown, as invalidated a grant made to another subsequent to the certificate and purchase. Chapman J. noted that, as the issue involved "principles of universal application to the respective territorial rights of the Crown, the aboriginal natives, and the European subjects of the Queen" and as the decision thereon "may affect larger interests than even this Court is up to this moment aware", it was incumbent on the Bench to enunciate the principles on which its conclusion was based "with more care and particularity" than usual. He then declared that:²⁰

The intercourse of civilized nations, and especially of Great Britain, with the aboriginal natives of America and other countries, during the last two centuries, has gradually led to the adoption and affirmation by the Colonial Courts of certain established principles of law, applicable to such intercourse. . . . animated by the humane spirit of modern times, our colonial courts, and the courts of such of the United States of America as have adopted the common law of England, have invariably affirmed and supported them. . . . These principles . . . are in fact to be found among the earliest settled principles of our law; and they are in part deduced from those higher principles, from charters made in conformity with them, acquiesced in even down to the charter of our own colony; and from the letter of treaties with native tribes, wherein those principles have been asserted and acted upon.

Chapman J. asserted that a fundamental maxim of the English common law, one which "pervades and animates the whole of our jurisprudence in relation to the tenure of land", was that the Crown was the only legal source of private title. As a corollary, colonial courts had invariably held that they could not give effect to any title not derived from the Crown or its duly authorised agent, verified by letters patent under the public colonial seal. Here Chapman J. referred to the royal charter of New Zealand which authorised the Governor to make grants of waste lands "under the public seal of the Colony". Chapman J. noted that the defendant had a grant from the Governor which complied in all respects with the law and which had not been impeached on any valid ground; but that the plaintiff founded his claim on an instrument not under the seal of the colony and therefore complied neither with the common law nor with the charter of the colony.²¹

Chapman J. stated that, under ordinary circumstances, he would have concluded his judgment at this point. However, he felt compelled to go further, and examine the intrinsic merits of the plaintiff's claim, in view of the fact

¹⁷ *Cases*, 33.

¹⁸ H.S.C. to H.C., 15 June 1847.

¹⁹ *Cases*, 35.

²⁰ *Cases*, 36.

²¹ *Ibid.*

that the plaintiff claimed under an instrument of the late Governor of the colony, “whose acts ought to be supported, if not repugnant to the law of the land”, and that this instrument had been issued in conformity with a proclamation with which the plaintiff had faithfully complied. Chapman J. stated that, because the Crown was the only source of title, it enjoyed “the exclusive right of acquiring new found or conquered territory, and of extinguishing the title of any aboriginal inhabitants to be found thereon”. He noted that the power of the Crown to oust subjects who attempted to retain possession of any lands they had acquired had often been exercised. In particular, he claimed that the courts of the United States “would certainly not hesitate” to impeach a grant in a suit by one of the native Indians, on the ground that the native title had not been extinguished. He referred to the case of the *Cherokee Nation v. The State of Georgia*, where the Supreme Court of America “threw its protective decision over the plaintiff-nation, against a gross attempt at spoliation” (here Chapman J. cited Kent’s *Commentaries* as his reference). He then continued, with reference to New Zealand:²²

Whatever may be the opinion of jurists as to the strength or weakness of the native title, whatsoever may have been the past vague notions of the natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected; that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers. But for their protection, and for the sake of humanity, the government is bound to maintain, and the courts to assert, the Queen’s exclusive right to extinguish it. It follows from what has been said, that in solemnly guaranteeing the native title, and in securing what is called the pre-emptive right, the Treaty of Waitangi, confirmed by the charter of the colony, does not assert either in doctrine or in practice any thing new or unsettled.

Chapman J. then rejected the assertion made by counsel for the claimant that the right of pre-emption which the Treaty of Waitangi enshrined was simply a right of first refusal of the land. Chapman J. said that the word pre-emption “is not the one which ought to have been chosen” but that the court had to look to the legal import of the word and not its etymology, and this clearly affirmed the exclusive right of extinguishing native title. Chapman J. conceded that this right was incompatible with “full and absolute dominion” over land, but, founded as it was “on the largest humanity” (the desire to afford the indigenous population protection and security), it was “entitled to respect on moral grounds, no less than to judicial support on strictly legal grounds”. He considered that it was not necessary to decide precisely what estate the Queen had in the land previous to the extinction of the native title. Whether it was “an actual seisin in fee as against her European subjects” or a “mere possibility of seisin” he considered it “not a fit subject of Waiver either generally by proclamation, or specially by such a certificate as Mr McIntosh holds”. Chapman J. concluded by noting that, even in the absence of a grant to the defendant, the claimant’s case would have failed for want of compliance with the formalities required by the Australian Waste Lands Act (which required that the waste lands of the Crown had to be disposed of by auction and not below a certain price). He therefore gave judgment for the defendant.²³

²² *Cases*, 36–37.

²³ *Cases*, 37.

Chapman J. was well satisfied with his judgment in the *Symonds* case. He declared that he had “exhausted the whole subject” in “a very full opinion in which was stated the whole of the law on the respective rights of the Crown, the natives and the European subjects to the soil of New Zealand”. He hoped that his judgment and that of Martin C.J. would “be a lesson as well to the public as Governors”.²⁴ Chapman J.’s judgment certainly revealed him to be a scholar of wide learning and historical sense. His expanding library was put to good use, as indicated by his references to English cases and texts, Kent’s *Commentaries on the Law of America*, Mazer’s *Quebec Commissions*, the *Collection of Indian Treaties*, and Vattel’s *Law of Nations*. His facility with words is evident from the above excerpts from his judgment, and he interspersed his comments with the occasional apt quote. In his explanation of how the Queen’s exclusive right to extinguish Maori title was (while incompatible with “full and absolute dominion”) in the best interests of the Maori, he commented:²⁵

the great mass of the Natives, if sales were declared open to them, would become the victims of an apparently equitable rule; so true it is, that “it is possible to oppress and destroy under a show of justice”: *Hawtress*.

The judgment also revealed the intriguing mix of elements in Chapman J.’s judicial personality. The main thrust of the judgment was an assertion of the notion of the Queen as the exclusive source of private title, and this Chapman J. scrupulously and thoroughly outlined. Further, it was partly his respect for the authority of a past Governor that caused him to balk at overturning Fitzroy’s grant to the plaintiff. Here Chapman J. revealed himself to be the sober, colonial judge, who upheld the sovereignty of the British monarch in her overseas colonial possessions. But a subsidiary theme of the judgment was a sympathetic and benevolent treatment of the property rights of the Maori. This treatment was heavily dosed with notions of respect for rights, justice and “humanity”, an optimistic sense of the “humane spirit of modern times”, and an undiminished respect for the democratic notions he perceived in American jurisprudence. Here Chapman J. indicated that the liberal, philosophic radical spirit within him still survived.²⁶

Chapman J. believed that his judgment would advance his reputation as a colonial judge and lawyer. This belief proved to be well-founded. Governor Grey caused the judgments of Martin C.J. and Chapman J. to be printed in the government *Blue Books* for general information, and described Chapman J.’s judgment as “an able and important judgment which will long continue a record of the law upon the subject”.²⁷ Sir Alfred Stephen, Chief Justice of New South Wales, ensured that Chapman J.’s judgment was published in the *Sydney Morning Herald* as “well deserving the compliment” and the introduction in this newspaper said that “it contained much research and learning not always met with in colonial courts”.²⁸

²⁴ H.S.C. to H.C., 15 June 1847.

²⁵ (1847) N.Z.P.C.C. 391.

²⁶ F. Hackshaw notes that Chapman J. followed “the natural law based interpretation of aboriginal title applied by Chief Justice Marshall in the Supreme Court of the United States”: “Nineteenth Century Notions of Aboriginal Title” in I.H. Kawharu, *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi* (1989) 92.

²⁷ H.S.C. to H.C., 14 April 1848.

²⁸ H.S.C. to H.C., 21 August 1847.

IV SUBSEQUENT INFLUENCE OF CHAPMAN J.'S JUDGMENT

In subsequent years, Chapman J.'s judgment was sometimes criticised, frequently applauded, and often used in cases concerning Maori property rights. By 1938, such was the importance of the *Symonds* judgements in New Zealand constitutional law, so extensive was their usage, and so great was the need for them to be rendered accessible, that the publishers of the *New Zealand Privy Council Cases* decided to include them in their work.²⁹

It is interesting to note the differing usages made of Chapman J.'s pronouncements in cases where the rights of the Crown and the Maori were in opposition to each other. While more conservative New Zealand judges of the 1870s through to the 1960s quoted Chapman J.'s assertion of the sovereignty of the Crown in land tenure, judges more sympathetic to the assertion of Maori rights (in the Privy Council and very recently in New Zealand courts) stressed Chapman J.'s benevolent attitude to these rights. In *Wi Parata v. The Bishop of Wellington & the Attorney-General*, the Wellington Supreme Court in 1877 held that land, formerly held by a Maori tribe, and granted by the Crown to a church in terms of a trust which was not executed for thirty years, should revert to the Crown. The Court held that the Treaty of Waitangi affirmed rights and obligations which already vested in the Crown according to the law of nations, and here it referred to the *Symonds* case, where "both Judges cite and rely upon the American authorities to which we have referred".³⁰ However, the court rejected Chapman J.'s statement that the American courts would allow a grant of land to be impeached by a native Indian, on the basis that the Indian title had not been extinguished. The court said that this was not a legitimate inference from the *Commentaries of Kent*, "we believe it would be impossible to find authority for it", and thus it was "clear that the learned Judge was mistaken in this particular".³¹

However, in *Nireaha Tamaki v. Baker*, the Privy Council in 1901 quoted with approval the "very pertinent" observations of Chapman J. in the *Symonds* case. Here the Privy Council decided that it had jurisdiction to enquire whether as a matter of fact certain land had been ceded by the Maori owners to the Crown. In the course of his speech, Lord Davey held that the New Zealand Supreme Court was bound to recognise the fact of the rightful "possession and occupation" of the Natives in accordance with law in any action in which such title was involved; and that if the (Maori) appellant could prove that he and the members of his tribe were in possession and occupation of the lands in dispute under a Maori title which had not been lawfully extinguished, he could maintain an action to restrain an unauthorised invasion of his title. The statements of Chapman J. which were quoted were to the effect that Maori title was entitled to be respected and that it could only be extinguished by the free consent of the Maori occupiers and in strict compliance with the provisions of the statutes.³²

In *Re the Ninety-Mile Beach* (decided in 1963), the New Zealand Court of Appeal also quoted with approval from Chapman J.'s judgment, but it

²⁹ N.Z.P.C.C., Introduction, x.

³⁰ (1877) 3 N.Z. Jurist (N.S.) S.C. 72 at 78.

³¹ At 80-81.

³² (1901) N.Z.P.C.C. 371 at 384.

did this to rather different effect. Here the court decided that the title to certain Maori customary land between high and low water marks remained vested in the Crown. North J. adopted, almost word for word, Chapman J.'s statement that the notion of the Queen as the only legal source of title was fundamental to New Zealand law of land tenure. He continued:³³

This topic was most exhaustively examined in the classic judgement of H.S. Chapman in that case [*Symonds*], and assisted as I am by what that learned Judge had to say, in my opinion it necessarily follows that on the assumption of British sovereignty — apart from the Treaty of Waitangi — the rights of the Maoris to their tribal lands depended wholly on the grace and favour of Her Majesty Queen Victoria, who had an absolute right to disregard the Native title to any lands in New Zealand, whether above high-water mark or below high-water mark.

In *Keepa v. Inspector of Fisheries* (decided in 1964), Hardie Boys J. of the Auckland Supreme Court held that customary Maori fishing rights on the foreshore between high and low water marks at a particular place are extinguished when title is granted in respect of the land bordering the sea at that place. Hardie Boys J. reasserted the prerogative right of the Crown, referred to North J.'s quotation from Chapman J.'s judgment, and proceeded to quote from the above passage from North J.'s judgment.³⁴

However, most recently, in *Te Weehi v. Regional Fisheries* (decided in 1986), Williamson J. of the Christchurch High Court returned to the "benevolent and even protective attitude towards Maoris" in Chapman J.'s judgment. Here Williamson J. held that the appellant was exercising a Maori fishing right and so was exempted from the penal provisions of the Fisheries Act. He quoted in full Chapman J.'s statement that Maori title was entitled to be respected, and that it could be extinguished by the Queen only with the free consent of the Maoris.³⁵

V CONCLUDING REMARKS

It is intriguing to consider what stance Chapman would have adopted in situations where Crown and Maori claims opposed each other. Some indication may be gleaned from his later political and legal pronouncements. These clearly indicate that Chapman (at least in his later life) may aptly be described as a "conservative reformer" who maintained an intellectual commitment to liberal notions and reform but was also emotionally rooted in many aspects of the established British order. In Victoria (where Chapman lived from 1854 to 1864), his activity in politics marked him out as a liberal. Here, by 1861, a democratic government had taken office, and Chapman found himself in the hitherto uncharacteristic position of attacking policies (on issues such as economic protection and free trade) which were to the left of his political stance. Chapman declared his bemusement: "[t]he adherence to certain opinions which not many years since marked a man as an Ultra Radical is here deemed the sign of Conservatism".³⁶

Of more specific relevance to Chapman's views on Maori claims in relation to Crown rights in New Zealand, is a surviving "lecture to the students [at]

³³ [1963] N.Z.L.R. 461 (C.A.) at 468.

³⁴ [1965] N.Z.L.R. 322 at 326.

³⁵ [1986] 1 N.Z.L.R. 680 at 687.

³⁶ *The Times*, 17 October 1861: letter dated 26 August 1861.

Melbourne University” entitled “Status of Native races considered in relation to the Sovereignty”. This was given during his period as law lecturer at the University of Melbourne (1857–1864), and probably dates from 1861.³⁷ In this lecture Chapman resoundingly reaffirmed the sovereignty of the Crown in New Zealand. He specifically rejected the notion that the Waitangi Treaty was the foundation of the British Crown’s sovereignty over New Zealand. He stated repeatedly that the British Crown had overall sovereignty in New Zealand “by right of discovery and occupation”. This sovereignty gave the Crown rights in relation to “its own subjects and other European powers” which could not be impeded by the indigenous inhabitants. Further, the Crown had the right to regard as “void ab initio . . . such of the native laws and customs as are repugnant of the Christian morality”. In particular, he upheld the right of the Crown (“a right founded in humanity and sanctioned by the comity of nations”) to suppress murder and cannibalism. Chapman argued that the sovereignty which the Crown had by right of discovery and possession was backed by another principle which prevented the “Native chiefs” from disputing the exercise of the Queen’s authority. This principle was that:³⁸

the sovereign de facto is to be obeyed even to the exclusion of the rightful sovereign while out of possession of the throne. It has been found necessary to maintain this doctrine in every country in Europe. Otherwise, in a struggle for the throne, as each party obtained the ascendancy, the extermination of a portion of the population might have been judicially effected under colour of attainder for treason. On the restoration of Charles II for instance, to have held that obedience to the sovereign de facto was treasonable would have made the whole population criminal, and the late Duke of FitzJames or the late Cardinal York would have had a better title to our allegiance than the 5th or 6th sovereign of the House of Hanover. Upon this principle, the mere declaration of the Queen’s sovereignty over these islands is binding and conclusive on all persons who owe her allegiance and supposing there had been any previous sovereignty in the islands it would not be entitled to obedience while out of possession.

Chapman accepted that the local inhabitants retained a limited sovereignty “inter se until they have parted with it by treaty”. This enabled them to retain their “national character in relation to each other and to the discovering nation except in so far as such sovereignty impairs the sovereignty of the discovering and occupying nation in relation to its own subjects and other European powers [and the right to suppress murder and cannibalism]”. Chapman saw that it was “this modified sovereignty which the Natives of New Zealand part with by the Treaty of Waitangi”.³⁹

In 1864, Chapman returned to the New Zealand bench, and served in Dunedin until his retirement in 1875. Chapman’s private correspondence indicates that he continued to uphold his liberal, reformist notions, but at the same time he “joined in the general exaltation over the triumphs of Disraeli which have placed England at the head of the whole world without a blow”.⁴⁰ No record survives of his personal views of Maori rights in relation to the Crown. However, he was a member of the Court of Appeal which considered the case *In Re The Landon and Whitaker Claims Act*, 1871.⁴¹ One of the points at issue was whether or not “Native Lands” could be said to be “Crown

³⁷ Rosenberg Collection.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ F.R. Chapman, *Notes* 30 August 1878 (Rosenberg Collection).

⁴¹ (1872) N.Z. 2 C.A. 41.

Lands” for the purposes of the Crown Grants Act, 1866. Arney C.J., who delivered the judgment of the Court, reiterated the orthodox position that “all title to land by English tenure must be derived from the Crown” and that “the fee-simple of the whole territory of New Zealand [including “Native lands] is vested and resides in the Crown, until it be parted with by grant from the Crown”. But, Arney C.J. noted, consistent with this doctrine is that “the fullest measure of respect” be afforded to Native proprietary rights. He declared (without Chapman J.’s dissent):⁴²

[t]he Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right. Whatever the extent of that right by established Native custom appears to be, the Crown is bound to respect it.

These statements clearly echoed the views which Chapman J. had expressed in the *Symonds* judgment. They suggest that Chapman J., notwithstanding his commitment to the sovereignty of the Crown, continued to believe in the need to honour Maori rights to the fullest possible extent.

⁴² At 49.