may be so has been acknowledged in New Zealand (albeit with respect to "customary land" — a sub-category of land subject to an unextinguished aboriginal title) in *Tamihana Korokai* v. *Solicitor-General*[2] when the Court of Appeal accepted that "customary title" might arise by virtue of the exercise of fishing rights. This article aims to develop the themes presented in the previous paper through the ascertainment of the legal character of traditional Maori fishing rights over tidal waters by investigating how these rights might possibly be set within the framework of a doctrine of aboriginal title. Put another way, this article is intended to discover whether traditional Maori sea fishing rights (such as those over the Motunui reefs in Taranaki) can exist at law binding upon the Crown's ownership of the bed of tidal waters and, secondly, to find the extent to which those rights have been affected, if at all, by legislation affecting this land and the superjacent water.

The 'bed of the tidal waters' and 'tidal land' are used in this article as general catch-all phrases to embrace five different types of land associated with tidal water. Technically speaking such terminological generalisation is not totally accurate but it has been made for reasons of convenience. It should be noted that they are compendious terms encompassing a diverse range of territory. The general argument that this article makes concerns all these types of 'tidal land'. Any variation

the Treaty of Waitangi in guaranteeing Maori right to traditional lands and securing the Crown's pre-emptive right, did no more than state what would have been the case in any event.

New Zealand courts, with the exception of *R.* v. *Symonds* (1847) N.Z.P.C.C. 387 and *Re "The Lundon and Whitaker Claims Act, 1871"* (1872) 2 N.Z.L.R. 41, 49 were unaware of these rules due mainly to the crude judicial application of feudal theory: all title to land had to derive from a grant by the Crown. This was a complete inability to grasp the rules of colonial law which formulated the doctrine of aboriginal title in a manner consistent with the feudal fiction through reconciling native title with the Crown's paramount title and restricting its alienability. Had New Zealand courts been more sensitive to the decision in *Symonds* the cases under Chief Justices Prendergast and Stout denying aboriginal title's existence at law might have been decided differently. Those cases contain an erroneous view of Maori aboriginal title.

The Native Lands Act 1909 provided (s.84) that the Maori claim to "customary land" or "customary title" was not to avail against the Crown. It provided also (s.85) that the Crown could by proclamation declare the customary title over specified tracts of land to be extinguished. This legislation reversed the rules of aboriginal title in so far as the Crown thereby acquired the executive power to extinguish aboriginal title unilaterally, although local lawyers saw it as no more than a codification and slight elaboration of the decisions already given in local courts. On the whole, though, the Maori's aboriginal title to their "customary land" was being transformed into a tenancy in common, a Crown-derived basis, by virtue of the operation of the Native Land Court following its statutory brief of ascertaining the traditional owners and then making a 'freehold order' for the land, the equivalent of a Crown grant.

That is the general position of Maori aboriginal title in New Zealand today. For the most part the few remaining tracts of land subject to an unextinguished aboriginal title comprise "customary land". That position notwithstanding, any land in New Zealand subject to an unextinguished aboriginal title and not "customary land" within the meaning of the Maori Affairs Act 1953 would not be affected by the Maori Affairs Act but would be subject to the Common Law rules of aboriginal title.

2 (1912) 32 N.Z.L.R. 321 (C.A.). See also *Re the Ninety Mile Beach* [1963] N.Z.L.R. 461 (C.A.).

arising for a particular type of tidal land will be apparent from the text's reversi to use of the precise term for the particular area to which the discussion at th moment applies. The first type of tidal land is the foreshore, being land be twe the high and low-water mark which is exposed when the tide is at its lowest e but covered at high tide. The next two types concern tidal lands always cover by water. First there is the seabed which comprises harbours, bays, estuaries, a land-locked tidal waters subjacent to the internal waters of New Zealand. Th land is subjacent to the sea and tidal regions on the landward side of the basel of the territorial sea of New Zealand delimited by reference to the Territorial S and Exclusive Economic Zone Act 1977.[3] The third type of tidal land comprises navigable rivers to the extent that they are affected upstream by the flow of t tide. This land is the navigable tidal riverbed. The fourth type is the non-navigab tidal riverbed. Finally there is the territorial seabed which is subjacent to the se on the seaward side of the baseline of the territorial sea.[4]

II. SOURCES OF CROWN TITLE

Though title to tidal land in all its forms is vested in the Crown, the various sources of Crown title need identification.

Title to the foreshore is vested in the Crown by virtue of a prerogative title at Common Law.[5] This probably is also the case with the Crown's title to the navigable tidal riverbed though there is authority for the view that this title derive from section 261 of the Coal Mines Act 1979.[6] Title to the non-navigable tidal riverbed is also in the Crown at Common Law[7] though it is possible for a land owner with property dissected or bounded by a tidal river to obtain a title by adverse possession.[8] Similarly the Crown has title to the bed of the internal waters by right of what Salmond called a "presumption of annexation" arising at the time Britain acquired territorial sovereignty over New Zealand.[9] The source of the Crown's title to the territorial seabed is less clear. It may originate from a Common Law rule imported into the colony or it may derive from a rule of international

3 Sections 5 and 6.
4 Idem.
5 *Raven* v. *Keane* [1920] G.L.R. 168; *Re the Ninety Mile Beach*, supra n.2, at 4 7 5-7 per T. A. Gresson J. For this rule of Common Law in England see *A.-G.* v. *Emerson* [1891] A.C. 649 at 653 (H.L.) per Lord Herschell and *Halsbury's Laws of England* (4th ed.) vol. 8, para. 1418.
6 Discussed below, text accompanying notes 12-16.
7 *Halsbury's Laws of England* (3rd ed.) vol. 39, paras. 664 and 775.
8 See Brookfield "Prescription and Adverse Possession" in G. W. Hinde (ed.) *Th New Zealand Torrens System Centennial Essays* (Butterworths, Wellington, 1971) 162 203-205. The comment is made at 203 that the possibility of obtaining a title by adverse possession is "greater where the creek flows inland through the holding of a registered proprietor. In such a case the original Crown grant may well be found to be ambiguous as to whether the creek is included in the grant or not."
9 J. W. Salmond "Territorial Waters" (1918) 34 L.Q.R. 235 at 247. Salmond calls these waters the "enclosed sea", terminology which this article has avoided since Salmond's use of the term is different to that of international law: United Nations Convention on the Law of the Sea. Done at Montego Bay, December 10, 1982. XXI:6 I.L.M. 1261, article 122. New Zealand is a signatory nation but has yet to ratify this Convention (p. 1477).

law which has obtained effect in municipal law. Nonetheless, whatever its source, this title is confirmed by the local legislation setting up the extent of the country's territorial sea.[10]

Despite what local courts have said, the essence of the doctrine of aboriginal title is that it places a qualification upon the Crown's title to land vested in it by right of its sovereign status. Given this, those areas of tidal land vested in the Crown by the Common Law at the time of British annexation will be susceptible to the doctrine. There is a fundamental point which New Zealand courts have almost uniformly overlooked since *Wi Parata* v. *The Bishop of Wellington*:[11] the Common Law defines not only the *existence* but the content of the Crown title and colonial law is a part of that Common Law. This means that the Crown's title to the foreshore, tidal riverbed and bed of the internal waters can be analysed in terms of the doctrine of aboriginal title since the source of the Crown's title is the Common Law.

Preliminary discussion is needed however of the two areas of tidal land in respect of which the source of Crown title is unclear. These areas are the navigable tidal riverbed and territorial seabed.

Section 261 of the Coal Mines Act 1979 provides:[12]

> Save where the bed of a navigable river is or has been granted by the Crown, the bed of such river shall remain and shall be deemed to have always been vested in the Crown and, without limiting in any way the rights of the Crown thereto, all minerals (including coal) within such bed shall be the absolute property of the Crown.

In *The King* v. *Morison,* the first in the series of judicial considerations of the Maori claim to the bed of the Wanganui River, Hay J. ruled that the effect of the forerunners of section 261 was to vest title to the navigable riverbed in the Crown absolutely, unqualified by a Maori claim.[13] The word "granted" in subsection (1) was interpreted as meaning "expressly granted". However in *Attorney-General ex rel. Hutt River Board* v. *Leighton,* Fair J. expreessed the view that the word "granted" should be construed as meaning "expressly or by necessary implication granted" whilst F. B. Adams J. was of like opinion.[14] In *Re Bed of the Wanganui River*[15] the Court of Appeal proceeded on the basis that the Maori claim over the navigable portion of the river could not be based upon a Crown grant express or implied and so was not saved by the opening words of section 261. Significantly, however, F. B. Adams J. was later to resile from the position that the Crown's title to the navigable (and tidal) riverbed originated from section 261 which was the underlying assumption in *Re Bed of the Wanganui River*:[16]

10 Territorial Sea and Fishing Zone Act 1965, s.7; Territorial Sea and Exclusive Economic Zone Act 1977, s.7.
11 (1877) 3 N.Z. Jur. (N.S.) S.C. 72.
12 This provision first appeared as s.14 of the Coal-Mines Act Amendment Act 1903, and later became s.206 of the Coal-Mines Act 1925.
13 [1950] N.Z.L.R. 247, 267; [1949] G.L.R. 567, 576.
14 [1955] N.Z.L.R. 750, 772-73 (C.A.) per Fair J.; ibid. at 789-90 per F. B. Adams J.; Stanton J. expressed no opinion on the point.
15 [1955] N.Z.L.R. 419.
16 *A.-G. ex rel. Hutt River Board* v. *Leighton,* supra n. 14 at 789.

> The operative words are "shall remain and shall be deemed to have always been vested in the Crown". These are not words purporting to vest or divest anything. The words "shall remain" look to the future, and the other words look back to the past, and there are no words operative *in praesenti* such as one would expect to find if the purpose were to divest interests already alienated from the Crown and to revest them in the Crown. This is the sort of thing one expects in a declaratory enactment; and in my opinion, the wording tells strongly against the theory that any divesting of private rights already acquired was intended.

This was an analysis of the words and construction of section 261 which previously had not been made. It is clear, logical interpretation of the words of the provision and hence is the one adopted here: section 261 was enacted as more than declaratory of Crown title and so does not exclude application of the doctrine of aboriginal title. It has no constitutory effect.

Section 7 of the Territorial Sea and Exclusive Economic Zone Act is declaratory in tone and duplicates section 7 of the Territorial Sea and Fishing Zone Act 1965. These provisions state that title to the territorial seabed is in the Crown and contain a saving clause much like section 261 of the Coal Mines Act 1979 though these clauses appear to be wider than that of the latter Act. These sections state:

> Subject to the grant of any estate or interest therein (whether by or pursuant to the provisions of any enactment or otherwise, and whether made before or after the commencement of this Act), the seabed and subsoil of submarine areas bounded on the landward side by the low-water mark along the coast of New Zealand (including the coast of all islands) and on the seaward side by the outer limits of the territorial sea of New Zealand shall be deemed to be and always to have been vested in the Crown.

Does this section prevent the recognition of Maori fishing rights over the seabed? A negative answer can be given on two counts. First, the section is declaratory in character so it is possible for the Crown's title to be bound by estates or interests other than those referred to in section 7. The section does not give a comprehensive definition of the types of interests that might subsist over the territorial seabed because only Crown-derived rights are acknowledged. Secondly, the section can be seen as simply stating that the Crown's title is qualified by those rights or interests recognised at common law or by statute. The choice of the word "grant" in preference, say, to "existence" or "presence" merely indicates the legislators' choice of a standard formula they believed to encompass all private rights over the seabed. Here one might also recall and apply the analysis of F. B. Adams J. quoted earlier concerning the similar (and narrower) saving clause in the coal mining legislation affecting the nevigable riverbed. Whatever view one takes, this section declaring the Crown's title to the territorial seabed does not exclude the doctrine of aboriginal title by virtue of a definitive description of the Crown's title. It has no such purport.

As section 7 is declaratory it is necessary to isolate the source of the recognising Crown ownership of the territorial seabed and to see the bearing which this source has upon claims to an aboriginal title thereover. If Crown ownership derives from some ancient Common Law title then the position is quite simple. The territorial seabed would be ordinary Crown lands and hence on general principle burdened by any aboriginal title arising in the same way at it would on land above the low-water mark. It may well be, though, that the Crown's title to the territorial seabed derives from some norm of international law which

become incorporated into municipal law. It may be that aboriginal title cannot burden a Crown title when the source of title is a rule of international law as opposed to prerogative title recognised at Common Law.

The importance of this question must be explained a little more fully. In *R.* v. *Keyn* it was held by a narrow majority that the realm of England ended at the low-water mark.[17] This rule has been interpreted in the dominions to the effect that colonial boundaries extended only to the low-water mark.[18] The cases holding this indicate, however, that by a process independent of the acquisition of the colony in question the Crown obtained territorial sovereignty to the territorial seabed.[19] It is still a matter of some controversy but it appears that this created what Salmond called a band of maritime territory "in gross"[20] around the colony vested in the Crown in right of the United Kingdom rather than comprising part of the adjacent colony. Title to this territory passed to the successor in title to the Crown in right of the United Kingdom by some process of constitutional devolution which in New Zealand's case would probably have been in 1947 when the Statute of Westminster was adopted.[21] Until then colonial legislation affecting the territorial sea, and there appears to have been some such statutes,[22] would have been justified on the "peace, order, and good government" powers of legislation granted the

17 Also known as *The Franconia* (1876) L.R. 2 Ex. D. 63; 13 Cox Crim. Cas. 404. The case and its effect in England are discussed by G. Marston *The Marginal Seabed: United Kingdom Legal Practice* (O.U.P., 1981).

18 *Bonser* v. *La Macchia* (1969) 122 C.L.R. 177 per Barwick C.J. and Windeyer J.; contra, Kitto J. (H.C.A.); *Re Offshore Mineral Rights* [1967] S.C.R. 792 (S.C.C.); *New South Wales* v. *The Commonwealth* (1975), 135 C.L.R. 337 per Barwick C.J., McTiernan, Mason and Jacobs JJ.; contra, Gibbs and Stephen JJ. This ruling arises from disputes within a federal system of government.

19 *Bonser* v. *La Macchia,* supra n. 18, at 190 per Barwick C.J. and at 222 per Windeyer J.; *Re Offshore Mineral Rights,* supra n. 18 at 807-808 (the Supreme Court indicated the source of Crown title to be a rule of international law which has become incorporated into municipal law); *New South Wales* v. *The Commonwealth,* supra. n. 18 at 368-369 per Barwick C.J. (title derives from a rule of international law); at 378-382 per McTiernan J. (title derives from a rule of international law); at 461-466 per Mason J. (title derives from a rule of international law); contra, at 441 per Stephen J. ("sovereignty over the colonial land mass carried with it ownership and dominion of its league seas" as a matter of Common Law) and at 392 per Gibbs J. (title derives from the Common Law). This approach, rightly, has been criticised for its "curious legal alchemy" whereby the territorial sea slid from the Imperial to the colonial Crown: D. P. O'Connell *The International Law of Sea* (2nd ed., Clarendon Press 1982) at 116 (n. 279) and 118-121.

20 Supra n. 9, at 240.

21 The Statute of Westminster Adoption Act 1947.

22 Some examples are the Oyster Fisheries Act 1866; Inquiry into Wrecks Act 1863; New Zealand and Australian Submarine Telegraph Act 1870; Fish Protection Act 1877. There has been a judicial intimation that the boundaries of the colony of New Zealand at the time of British annexation extended to include a three mile belt of territorial sea: *Waipapakura* v. *Hempton* (1914) 33 N.Z.L.R. 1065 (S.C.), 1071 per Stout C.J. This stance accords with the colonial legal practice evidenced by the above statutes, a practice too overwhelming to be based upon a "peace, order, and good government" legislative competence. It is also a rejection of the applicability of *Keyn* (supra n. 17) to New Zealand, a case which Marston (supra n. 17) has authoritatively shown to be wrongly interpreted.

colonial legislature by the Imperial authorities.[23] The precise moment need n isolated since it is clear that title to New Zealand's territorial seabed has long vested in the Crown in right of New Zealand and that this is the appro sovereign to consider bound by any subsisting aboriginal title thereover.

It appears that even if the Crown's "sovereignty" over the territorial sea d from some title in international law, that "sovereignty" for municipal law poses is the same as that for land above low-water mark. That is, th ere i qualitative difference between the local formulation of "sovereignty" in e region. For all its ebb and flow the international law of the sea app ears sistently to have held no more than that a state's national boundaries ca n in a belt of territorial sea. International law has left it to each country to defi its own terms the nature of its "sovereignty" over the territorial sea a rou shores. International law provides the rules for the delimitation of this regi well as regulating some aspects of the coastal state's activities in the reg ion. regulation does not, however, challenge the coastal state's sovereignty exc ept t extent that it imposes duties on the coastal state in respect of its exerci *imperium* (that is, its right of government) in the territorial sea.[24] The terri sea legislation of New Zealand makes it plain that the traditional formula ble *imperium* and *dominium* applies to the country's sovereignty in the regio n.[25] even if the Crown's title to the territorial sea and subjacent soil derives fr rule of international law there would appear to be no basis for find ing tha source disqualifies application of a doctrine of aboriginal title unless invocati the doctrine challenges the Crown's sovereignty in this region.

It could be said that an aboriginal claim in respect of the territori al se amounts to a claim which is sovereign in character in as much as it is ba sed some residual, aboriginal sovereign status. That is, the Maori could be alleg

23 This power was conferred by the New Zealand Constitution Act 1852 (U.K.), 15 Vict., c.72, s.53.

24 The Convention on the Territorial Sea and the Contiguous Zone (done a t Ge neva April 1958, 516 U.N.T.S. 206) and the United Nations Convention on the Law Sea recognise in article 1 and article 2 respectively that a coastal state's 'sovere extends over its territorial sea. O'Connell, supra n.19 at 80 observes: "There i s no that the intention behind the use of the word 'sovereignty' in Article I of the vention on the Territorial Sea and Contiguous Zone is to concede to the coasta plenary power to regulate events in the territorial sea. If such power carries with that State's constitutional law the attribution to the sovereign of the characteri stics public domain, there is no reason to suppose that the Convention forbids this : it the maximum implications that may be drawn from the concept of sovereig nty, does not impose these implications on the coastal State; it leaves them to be dra municipal law." The regulation of a coastal state's territorial sea prescribed by national law relates to the right of innocent passage (U.N. Convention on t he L the Sea, Part II, s.3) and the coastal state's duty to protect and preserve the environment (ibid. Part XII).

25 Supra n.10. This is true also of most other Commonwealth nations. In *N.S.W.* v. *Commonwealth* (supra n.18) all the judges talked of 'sovereignty' over the terri sea in terms blending *imperium* and *dominium.* See the review of coloni al legislat i G. Marston "Colonial Enactments Relating to the Legal Status of Offshore Subm Lands" (1976) 50 A.L.J. 402. See also the review of national legisla tion conce sovereignty over the territorial sea in O'Connell, supra n.19, at 82-83.

be setting up a rival sovereign claim in respect of the territorial sea which is incompatible with the exclusive sovereignty given a nation by international law. There is a certain irony in this contention as it attributes the source of Maori claims over the territorial seabed to a long judicially denied Maori sovereign status. More fundamentally, it views aboriginal title as flowing from some former sovereign status surviving in a residual form with respect to the territorial sea. This variation on the feudal obsession with the sovereign-derived character of property rights is countenanced neither by the cases concerning aboriginal title nor the colonial practice of the Crown. Aboriginal title derives from tribal use and occupation of its traditional territory since time immemorial and whether claimed in respect of land above or below the shoreline poses no challenge to the Crown's sovereignty. Indeed its existence at law is reliant upon that sovereignty since aboriginal title is based upon an attribute of the Crown's sovereignty, its *dominium*.

It is submitted, therefore, that whatever the source of Crown title to the territorial sea and adjacent soil, the Maori are able to make an aboriginal claim in respect thereof.

III. APPLICABILITY OF MAORI LAND LEGISLATION?

The purpose of this paper is to inquire into the existence of Maori fishing rights over tidal land. It has been alleged that this task is best undertaken through use of the doctrine of aboriginal title. The Crown's ownership of tidal land has been shown though the situation regarding Maori fishing rights when the Crown has made a grant of this land has yet to be considered.[26] The next step to be taken in identifying the legal character of Maori fishing rights is to consider the nature of the rights which on the pure application of the doctrine of aboriginal title would burden the Crown's title. In short, what is the nature of this burden on the Crown's ownership of tidal land?

The general principle of the Common Law is that fishing rights are mere profits of the soil over which the water flows and that title to a private or several fishery arises from the right to the soil.[27] In other words, the right of fishery is but one right accruing from ownership of the soil albeit a right of a severable character. So far as fisheries in tidal waters are concerned the law presumes that the soil subject to the ordinary flow and reflow of the tide up to the line of medium high tide belongs to the Crown and the rights of fishery over it are common to all subjects except where some subject(s) acquires a proprietary exclusive of the Common Law rights of the public.[28] It is possible however for a several fishery to co-exist with some public rights — the two are not mutually exclusive. In English law the possession of a several fishery to the exclusion of others was presumed to carry with

26 Discussed below, text accompanying notes 79-85.

27 *A.-G. (British Columbia)* v. *A.-G. (Canada)* [1914] A.C. 153 (P.C.), 167; *Marshall* v. *Ulleswater Steam Navigation Co.* (1863) 3 B. & S. 732; 122 E.R. 274, aff'd (1865) 6 B. & S. 570; 122 E.R. 1306 (Ex.Ch.); *Lord Chesterfield* v. *Harris* [1908] 2 Ch. 397 (C.A.), 413 per Buckley L.J., aff'd sub nom. *Harris* v. *Earl of Chesterfield* [1911] A.C. 623 (H.L.); *Neill* v. *Duke of Devonshire* (1882) 8 App.Cas. 135 (H.L.), 169 per Lord O'Hagan. And see generally *Halsbury's Laws of England* (4th ed.), vol. 18, para. 601.

28 *Lord Fitzwalter's Case* (1674) 1 Mod. Rep. 106, 86 E.R. 766; *Carter* v. *Murcot* (1768) 4 Burr. 2163; *Neill* v. *Duke of Devonshire*, supra n.27, at 158 per Lord O'Hagan.

it the soil, the origin of the right going back to some grant or act of the Crown prior to Magna Carta or alternatively to some legislative grant.[29]

So far as the Maori claim to fishing rights over tidal land is concerned it quite plain that the presumption of legal ownership of the soil accorded the ownership of a several fishery is immediately inapplicable since the very basis of the doctrine of aboriginal title is that legal title to the land subject to such a claim is vested the Crown with the Maori claimants enjoying what amounts to some form charge or burden upon the Crown's ultimate title. In short, the presumption Maori ownership of the maritime *solum* is instantaneously rebutted. Reference this presumption may be inappropriate not only for reasons of logical consistence however, but also because there is no compelling reason for the Maori claim to fishing right over a given area of tidal land to be a claim to some form of exclusive ownership of the soil. It may be and hereinafter it is taken as given that the solitary claim to a fishing right is something less than a claim to full aboriginal ownership the subjacent soil. This is perfectly consistent with the Common Law's position several fishery rights since it acknowledges the severable character of those rights.

However, is the existence of an aboriginal 'charge' upon (as opposed to aboriginal claim to) tidal land consistent with the Common Law's stance that private fishery rights must derive from statutory grant or Crown grant prior to Magna Carta? Here one must not fall foul of the trap which has ensnared New Zealand judges, in particular the courts of Prendergast and Stout C.JJ. and exclude colonial law from the reckoning. This part of the Common Law governed the Crown acquisition of overseas territories and as the previous paper showed was the source of the doctrine of aboriginal title. Nor should it be forgotten that the law as stood in England was only imported into the colony to the extent that it applicable to local circumstances.[30] This settled rule clearly presupposed the vigour of colonial law, a vigour fully evident in the consistent recognition of aboriginal title during the first decades of British rule in New Zealand.[31] Given this, the requi

29 *Malcomson* v. *O'Dea* (1863) 10 H.L. Cas. 593, 11 E.R. 1155; *Carlisle Corporation* *Graham* (1869) L.R. 4 Exch. 361; *Parker* v. *Lord Advocate* [1904] A.C. 364 (H.L. *Lord Fitzhardinge* v. *Purcell* [1908] 2 Ch. 139, 167.

30 *Delohery* v. *Permanent Trustee Co. of New South Wales* (1904) 1 C.L.R. 283 (H.C.A. *Winterbottom* v. *Vardon & Sons* [1921] S.A.S.R. 364 (S.Aust.S.C.); *Belilios* v. *Ng Shi* (1893) (Hong Kong S.C.) appended to the report of *Re Tse Lai-chiu* [1969] Ho Kong L.R. 159 (Hong Kong S.C.); *Garrett* v. *Overy* (1968) 69 S.R. (N.S.W.) 2 (N.S.W.C.A.). It is laid down in *R.* v. *Cyr* (1917) 13 Alta. L.R. 320, 38 D.L.R. 6 (Alta. C.A.) that regard should be had to the general condition of public affairs a the attitude of the community on the issue. See also *Halsbury's Laws of England* (ed.), vol. 6, para. 1196 and K. Roberts Wray *Commonwealth and Colonial* (Stevens, London 1966) 544. The rule was used in New Zealand in *Veale* v. *Bro* (1868) N.Z.L.R. 1 C.A. 152 (the law of escheat held applicable to the circumsta of the colony). See also these local statutes: the English Laws Act 1854 ; the Engl Laws Act 1858; and the English Laws Act 1908.

31 The reader is referred to P. Adams *Fatal Necessity: British Intervention in New Zeala 1830-1847* (1979) at 86-87; A. Ward *A Show of Justice* (1974); I. Wards *The Shad of the Land* (1968); A. H. McLintock *Crown Colony Government in New Zeala* (1958). These leading historical accounts of the colonial practices vis-a-vis Maori la reveal a consistent, almost unwavering recognition by colonial authorities of the Ma right to their land. R. Simpson *Te Rire Pakeha: The White Man's Anger* (1979) tains numerous inaccuracies.