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 third and fourth) 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 inquire whether, as a matter of fact, the land in dispute has been ceded by the native owners to the Crown?"

Both these questions were answered by the Court of Appeal in the negative.

151R. 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 unincumbered 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.

151S. The learned Judges in the Court of Appeal thought that the case was within the direct authority of *Wi Parata* v. *Bishop of Wellington*(1), 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.

(1) 3 N.Z.J.R. (N.S.) S.C. 72.