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Maori Preserved Heads: A Legal History

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ROBERT K. PATERSON*

Content

1. Introduction

Maori preserved heads were first seen by Europeans during Captain James Cook's visit to New Zealand in January, 1770, at Queen Charlotte Sound on the South Island. On that occasion, Joseph Banks purchased one head:

"One I bought tho much against the inclinations of its owner, for tho he likd the price I offerd he hesitated much to send it up, yet having taken the price I insisted either to have that returnd or the head given, but could not prevail untill I enforc'd my threats by shewing Him a musquet on which he chose to part with the head rather than the price he had got, which was a pair of old Drawers of very white linnen"[1]

Banks recorded the head as appearing to be that of a fourteen to fifteen year old individual whose skull exhibited signs of having received blows

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1 JOHN C. BEAGLEHOLE (ed.) *The Endeavour Journal of Joseph Banks, 1768–1771*, Vol. 2, 2d.ed. (Public Library of New South Wales, Sydney, 1963) at 31.

and being broken. There is no mention of the head being tattooed and its present whereabouts is unknown.[2]

For the first three decades of the nineteenth century New Zealand remained untouched by outside law. Foreign contacts mostly involved visits by traders, whalers, and missionaries. The latter sought to discourage the Maori practice of tattooing (*ta moko*), while the former quite soon began to see opportunities for trade in preserved tattooed heads.[3] Early accounts of New Zealand described these heads and their mode of preservation.[4] Observers noted that both the heads of enemy warriors slain in battle, along with those of deceased chiefs and others of high rank, were preserved. The process involved the removal of interior soft tissue and the repeated steaming of the head in an oven. Heads, which were filled with flax, were then exposed in the sun so that they completely dried out. Sometimes the preserved heads of enemies were used in the context of peace negotiations between tribes and might, as a result, be returned to their originating people. Heads of important chiefs were sometimes preserved, kept in sacred places and brought out for ceremonial purposes, while those of enemies were often reviled.[5]

These traditional Maori practices underwent profound and rapid change as a result of the activities of early traders and other visitors. Sydney, in New South Wales, soon became a sort of transit point for trade in heads between New Zealand and the rest of the world. The so-called "musket wars" of the late 1810s to early 1830s exacerbated Maori demand for guns and gunpowder and led to the debasement of many ancient practices, including the sale of heads of enemies and slaves, the latter sometimes apparently being tattooed expressly for the purpose of trade.[6]

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2 See D. WAYNE ORCHISTON, "Preserved Maori Heads and Captain Cook's Three Voyages to the South Seas: A Study in Ethnohistory", 73 *Anthropos* (1978), 798 and 807 to 808.

3 Tattooing was practiced in several parts of the South Pacific but the styles and practices of the Maori were unique insofar as they involved the use of chisels to carve the skin, resembling the techniques of wood carving with the use of adzes. The faces of men of rank were sometimes covered by spiral designs that were unknown elsewhere in Polynesia. These designs exhibit considerable variation and can reveal the tribal origin of an individual. Tattoos were also applied to thighs and buttocks. Tattooing of women was usually confined to the lips and chin. The tattooing process was a complex and lengthy exercise that was considered sacred as it involved the head. See NGAHUIA TE AWEKOTUKU, *Mau Moko*: *The World of Maori Tattoo* (Penguin Viking, Auckland, 2007).

4 See for example, JOHN RAWSON ELDER (ed.) *The Letters and Journals of Samuel Marsden, 1765–1838* (Dunedin, 1932), at 167–168 and Richard A. Cruise, *Journal of a Ten Month's Residence in New Zealand* (London, 1823), at 50 to 51 and 200.

5 See Rev. PHILIP WALSH, "Maori Preserved Heads", *Transactions and Proceedings of the Royal Society of New Zealand, 1868–1961*, 27 (1894) 610.

6 See HAZEL PETRIE, *Outcasts of the Gods? The Struggle over Slavery in Maori New Zealand* (Auckland University Press, 2015), 147 to 154.

Portrait of Joseph Banks by Benjamin West (1773)

2. The New South Wales Proclamation of 1831

At the beginning of the nineteenth century the nearby British colonial government of New South Wales (NSW) had an ongoing interest in events in New Zealand. However, it was not until 1839 that New South Wales had any legislative authority over New Zealand.[7] In 1830, after a massacre of its tribal members, the Ngapuhi Maori sought the return of a number of preserved heads that had been taken to Sydney.[8] Samuel Marsden, chaplain of the Church Missionary Society in NSW, advocated the end of traffic in heads and the result was that on April 16, 1831, NSW Governor Ralph Darling issued the following proclamation:[9]

[7] In 1839 the territory comprised in the commission of the Governor of NSW was extended to cover New Zealand as a dependency of NSW.

[8] See Elder, *supra*, n. 4 at 498–499.

[9] See *Sydney Monitor,* April 20, 1831, p. 4 and Elder, *supra,* n. 4, at 500.

GOVERNMENT ORDER

COLONIAL SECRETARY'S OFFICE
SYDNEY, 16th *April*, 1831

Whereas it has been represented to His Excellency the Governor that the masters and crews of vessels trading between this colony and New Zealand are in the practice (sic) of purchasing and bringing from thence human heads which are preserved in a manner peculiar to that country; and whereas there is strong reason to believe that such disgusting traffic tends greatly to increase the sacrifice of human life amongst savages whose disregard of it is notorious, His Excellency is desirous of evincing his entire disapprobation of the practice above mentioned as well as his determination to check it by all means in his power. And with this view His Excellency has been pleased to order that the Officers of the Customs do strictly watch and report every instance which they may discover of an attempt to import into this Colony any dried or preserved human heads in future, with the names of all parties concerned in any such attempt. His Excellency trusts that to put a total stop to this traffic it is necessary for him only thus to point out the almost certain and dreadful consequences which may be expected to ensue from a continuance of it, and the scandal and prejudice which it cannot fail to raise against the name and character of British traders in a country with which it has now become highly important for the merchants and traders of this colony, at least, to cultivate feelings of natural good-will. But if His Excellency should be disappointed of this reasonable expectation, he will feel it an imperative duty to take strong measures for totally suppressing the inhuman and very murderous traffic in question. His Excellency further trusts that all persons who have in their possession human heads recently brought from New Zealand, and particularly by the schooner *Prince of Denmark*, will immediately deliver them up for the purpose of being restored to the relations of the deceased parties to whom these heads belonged, this being the only possible reparation that can now be rendered, and application having been specially made to His Excellency for this purpose.

By His Excellency's command,
ALEXANDER MCLEAY.

Darling also announced that a £40 fine would be imposed on anyone violating the order, but it does not appear that any such penalty was ever enacted and no record exists of a prosecution in NSW for trading in heads. Nevertheless, the 1831 order appears to have had a salutary impact on the trade though it does not appear to have ended it. That was more likely to have occurred as a result of New Zealand becoming a British colony in 1841, together with the relative saturation of the market outside New Zealand. By the end of the nineteenth century most known Maori head specimens were in European and North American museums, with perhaps as few as a dozen remaining in New Zealand institutions.[10]

In 1901 New Zealand became one of the earliest countries to enact legislation concerning controls on the export of cultural material. The *Maori Antiquities Act, 1901*, prohibited the removal of "Maori antiquities" from the colony without the permission of the government.[11] The *Act* defined the term as including:

"...Maori relics, articles manufactured with ancient Maori tools and according to Maori methods, and all other articles or things of historical or scientific value or interest and relating to New Zealand, but does not include any private collection not intended for sale, nor botanical or mineral collections or specimens."[12]

The year the law was enacted, the English artifacts collector James Edge-Partington wrote to the bibliophile Alexander Turnbull in Wellington; "It is about time or the Germans will sweep [New Zealand] clean."[13] Though Maori heads were very likely within the scope of the law it was likely ineffective as far as limiting their removal was concerned since by 1901 only a few remained in New Zealand. The 1901 Act was amended in 1904 to remove the exclusion of private collections and to impose a £100 fine for exports made without the permission of the Colonial secretary.[14]

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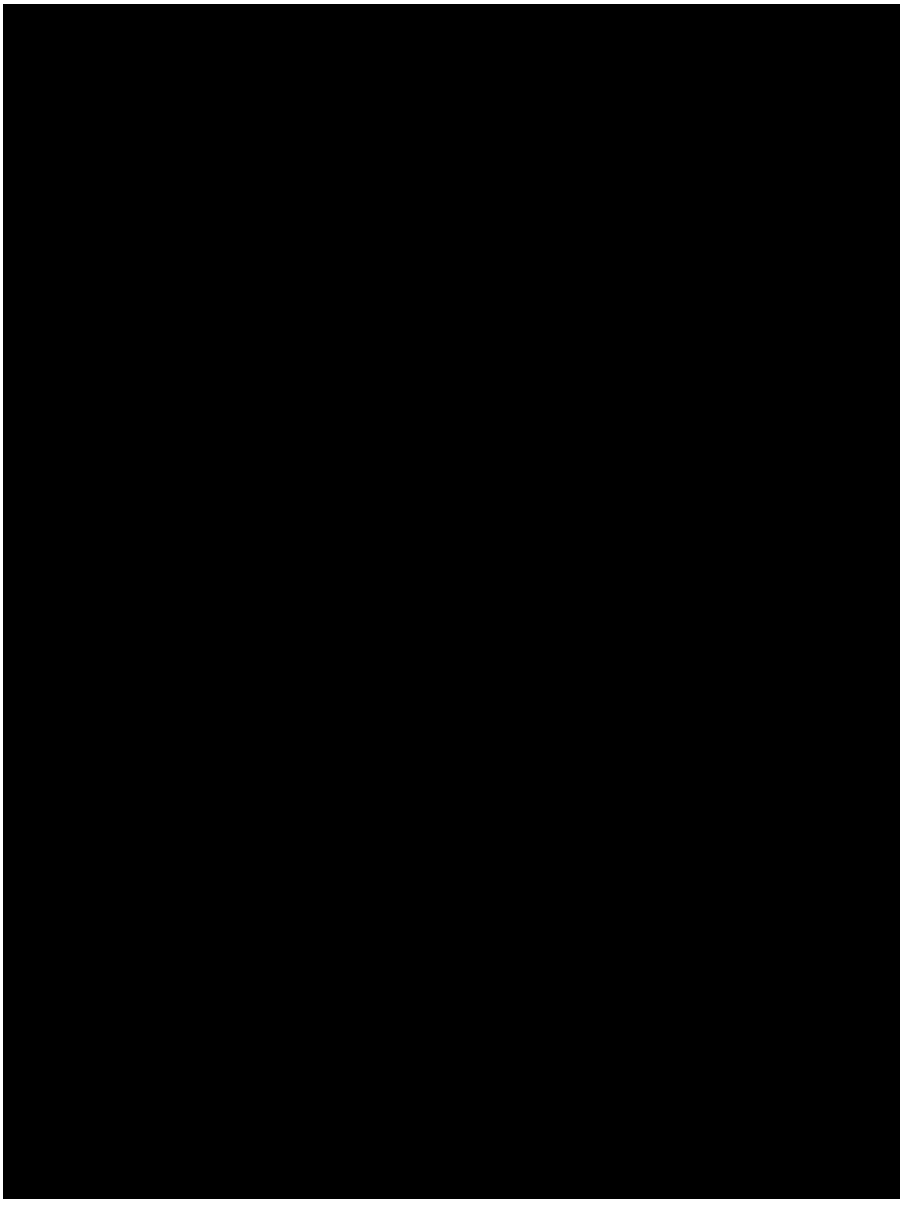
10 ROBLEY (1896) *infra,* n. 17, describes it as "curious that the museums in New Zealand and Sidney (sic) have the fewest and worst (heads)", at 194.

11 No. 21, 1 Edw. VII.

12 *Id*, s. 2

13 See ROGER NEICH, "James Edge-Partington (1854–1930): An Ethnologist of Independent Means," 46 *Records of the Auckland Museum* (2009) 57 at 93.

14 *The Maori Antiquities Act Amendment Act, 1904*, No. 14, 4 Edw. VII. The two Acts were later consolidated as *The Maori Antiquities Act, 1908*, No. 110.



Photograph of a watercolor of a mokomokai by Horatio Gordon Robley (circa 1900); photographer: Goran Basaric (private collection)

3. Horatio Gordon Robley

No discussion of *mokomokai* is complete without mention of an iconoclastic figure who was a major influence on their collection and study.[15] Major General Horatio Gordon Robley was born on Madeira Island in 1840 and 24 years later arrived in New Zealand as an officer in the British Army to engage in British military campaigns against Maori.[16] Despite being in the country for less than two years, Robley became deeply interested in Maori culture and *moko* in particular. He was an avid amateur artist who sketched what he saw, his drawings becoming important evidence of Maori life at that time. Though he never returned to New Zealand Robley maintained a lifelong interest in the country, publishing a significant reference work – *Moko or Maori Tattooing* in 1896.[17] This work is even today an important source of information about Maori tattooing and *mokomokai*.

Robley purchased his first *mokomokai* in 1893 from a London phrenologist – Stockpool O'Dell. He went on to acquire approximately 40 *mokomokai* – the largest private collection ever assembled. Most of these came from museums attached to hospitals (such as King's College Hospital and St.Thomas's Hospital) and had probably been originally acquired by physicians like O'Dell. Robley also acquired heads from private individuals and at auction. In 1899 he offered his entire collection to the New Zealand government, an offer that was repeated many times but never accepted. By 1907, Robley seems to have abandoned hope that his collection would ever go back to New Zealand and that year he sold 35 heads to Morris Jesup, then president of the American Museum of Natural History in New York. Jesup immediately donated the heads to his museum. The result was that from 1907 to 2014 it had the largest collection of *mokomokai* in the world. In 2014, the heads were returned to New Zealand as part of a comprehensive repatriation program administered by the Museum of New Zealand:Te Papa Tongarewa (Te Papa). In comparison, during Robley's lifetime, only one *mokomokai* that passed through his hands returned to New Zealand – a head

[15] In THOMAS KENDALL and SAMUEL LEE, *A Grammar and Vocabulary of the Language of New Zealand* (R. Watts, London, 1820) at 182, the words *moko mokai* are defined as meaning "the tatooed decapitated head of a man". In EDWARD TREGEAR, *The Maori-Polynesian Comparative Dictionary* (Wellington 1891) the word is spelled "mokamokai" though it remains unclear why a change of spelling occurred around that time. More recently, Maui Pomare, formerly chair of the National Museum Council, advocated the use of the term "toi moko" based on the word "mokai" meaning a captive or slave. This term has since been adopted for use by the National Museum of New Zealand: Te Papa Tongarewa.

[16] SEE L.W. MELVIN, *Robley-Soldier with a Pencil* (Tauranga Historical Society, 1957).

[17] See MAJOR-GENERAL ROBLEY, *Moko; or Maori Tattooing*, (London, Chapman and Hall Ltd., 1896)

purchased by Robley on behalf of Dr. Thomas Hocken, a passionate collector whose library eventually formed the nucleus of the well-known Hocken Library in Dunedin. Hocken bequeathed the head he had acquired from Robley to the Otago Museum.[18]

Robley was, of course, not the only serious collector of *mokomokai* in his day. There were a number of famous English collectors of Maori and Pacific artifacts active during the nineteenth and early twentieth centuries. One of these – Augustus W. Franks (1826–1897) – presented a head to the British Museum in 1882. Probably the greatest of these collectors was William O. Oldman (1879–1949) who purchased his first *mokomokai* in 1905 and went on to acquire several more, at least four of which he acquired from Robley. Oldman's vast collection was sold to the New Zealand government in 1948 and included nine heads.[19] Another accomplished collector in this group was James T. Hooper (1897–1971) whose collection contained at least two mokomokai that were sold at auction in 1977.[20]

Even after Robley's death in 1930, *mokomokai* continued to be offered for sale, principally at auction in the United Kingdom, but also in France and elsewhere. Between 1967 and 1988 at least eight heads were offered for sale in England, but there is no record of a head having been so offered since then.

4. Re Tupuna Maori

On April 3, 1979, a Maori head was offered at Christies in London and stated to be "the property of the Marquess of Tavistock".[21] It was apparently not sold, as it was again offered at Sotheby's in London on June 16, 1980. It was finally offered for sale at Sotheby's on June 24, 1983 carrying an estimate of £4000 to £5000. On that occasion the New Zealand government intervened with the result that this head was withdrawn from sale and voluntarily returned to New Zealand by its owner. These events were to mark the start of the end of the offering of *mokomokai* at auction in the United Kingdom.

What was to be the last public auction of a *mokomokai* in England was scheduled at Bonhams, London on May 20, 1988. The sale included a head

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[18] See DONALD JACKSON KERR, *Hocken Prince of Collectors* (Otago University Press, Dunedin, 2015), 280.

[19] See ROBERT HALES and KEVIN CONRU, *W.O. Oldman The Remarkable Collector* (Gent, 2016).

[20] See HERMIONE WATERFIELD and J.C.H. KING, *Provenance Twelve Collectors of Ethnographic Art in England 1760–1990* (Paris, 2006) at 111.

[21] Christies, *Tribal Art*, London, April 3, 1979; Lot 131, "A fine Maori Preserved Head."

stated to be the property of Mrs. Weller-Poley.[22] This time protestations by Maori and others led to unique judicial proceedings in New Zealand. The president of the New Zealand Maori Council, Sir Graham Latimer, and a leader of the deceased's likely *iwi* (tribe), sought letters of administration for the deceased's estate from the High Court of New Zealand in Wellington. The application was supported by the New Zealand government, represented by the minister of Maori Affairs. In an oral judgment the application was granted on the basis that the deceased was a Maori who was presumed to have died in New Zealand around 1820. Probate was granted to allow legal proceedings to be commenced (in the United Kingdom) for the purpose of according the deceased a proper burial according to Maori law and custom. The judge stating:

"There can be little, if any, dissent from the proposition that the sale and purchase of human remains for gain and for the purposes of curiosity is abhorrent to New Zealanders and, I hope, to any civilized person. There is a macabre circumstance to the proposed transaction that has some of the attributes of necrophilia. That is no reason to say, of course, that for archaeological and other scientific reasons human remains should not be kept for study and for consideration."[23]

The New Zealand Maori Council subsequently sought an injunction in England to prevent the sale and the outcome was that the consignor agreed to withdraw the head and deliver it to New Zealand representatives in exchange for a carved Maori club.

The court's brief ruling in *Re Tupuna Maori* did not address many of the most significant issues surrounding human remains. These include the question of title or ownership and how that relates to the obligations of those with custody of remains, such as auction houses and museums. These problems form the second part of this paper which addresses the law of human remains and the law and practice surrounding the return of remains from museums and other institutions to indigenous peoples – such as Maori.

5. The Law and Human Remains

Despite challenges to its legitimacy, the long-standing common law principle is that there exist no property rights in human remains.[24] The basis for this rule has never been clearly explained, but, historically, it appears to

[22] See BONHAMS, *Antiquities and Tribal Art*, 20th May, 1988, Lot 181, "A rare and important early 19th Century Maori Mokomokai Preserved Human Head".

[23] *Re Tupuna Maori*, Unreported Oral Judgment of Greig J., High Court of New Zealand, Wellington Registry, P 580/88 (19 May, 1988).

[24] See *R. v. Sharpe* [1857] 169 ER 959.

have been aimed at preventing the looting of graves to steal valuables interred with the deceased. It may also have been explicable in relation to judicial aversion towards slavery. Whatever its foundation, the rule has survived down to the present despite suggestions that it be changed to deal with scientific progress in relation to such things as stem cell research and cloning.[25]

The civil law also fails to recognize property in human remains. American law is, in effect, the same, though it is sometimes described as conferring "quasi-property rights" on family members, so as to allow for the proper burial of the deceased.[26]

At common law the "no property" rule has been modified in three respects, all of which could pertain to *mokomokai*.

5.1 Mistreatment of Human Remains

Most legal systems criminalize certain conduct involving the mistreatment of or interference with human remains. In 1822, a George Cundick was found guilty of an offence for destroying the remains of a deceased whose body he had been employed to bury.[27] While the "no-property" rule would perhaps seem to preclude allegations of simple larceny or theft, this sort of disrespectful conduct is usually the subject of a specific misdemeanor or felony offence.

5.2 The Rights of Executors and Next-of-kin

Another universal exception to the "no property" role is recognition that the executors of a deceased have a limited possessory right to arrange for his or her burial or some alternative.[28] *Re Tupuna Maori* illustrates how this right can be protected through legal proceedings. American law, as noted, has gone so far as to accord quasi-property rights to the next-of-kin, in order of inheritance, of the deceased.[29] It seems that in the case of *Re Tupuna Maori* Mrs. Weller-Poley made no arguments in opposition to the application for letters of administration, so the court was under no pressure to consider whether she had any claims to the head of a proprietary nature.

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[25] See PETER SKEGG, "Human Corpses, Medical Specimens and the Law of Property", (1975) 4 *Anglo-Am. L. Rev.*, 412.

[26] See *Pierce v. Proprietors of Swan Point Cemetery*. 10 RI 227 (1872) (Supreme Court of Rhode Island).

[27] *R. v. Cundick* (1822) Dowl. & Ry N.P. 13.

[28] *Williams v. Williams* (1992) 20 Ch.D. 659.

[29] *Renihan et al. v. Wright et al.* 125 Ind. 536 (1890) (Supreme Court of Indiana).

5.3 The "Work and Skill" Exception

The most controversial exception to the "no property" rule regarding human remains is also arguably the only true exception, since it unequivocally recognizes property rights in a way the first two exceptions do not. In 1908, in *Doodeward v. Spence,* the High Court of Australia laid down the so-called "work and skill" exception.[30] The case involved a two-headed foetus that had been preserved 40 years earlier, and which the appellant claimed he owned in order to recover it from the police who had seized it. Griffiths C.J. stated that human remains were capable of legally becoming the subject of property rights:

"When a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attribute differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial, but subject, of course, to any positive law which forbids its retention under the particular circumstances".[31]

The "work and skill" exception was subsequently affirmed in the United Kingdom in a case involving human specimens housed by the Royal College of Surgeons.[32] It seems to have been significant that the case involved preserved specimen body parts and not an entire corpse. In Swiss law the recognition of the transferability of human remains is based on the expiration of a certain period of time as the duty of reverence decreases.[33]

The question that next arises is whether or not *Re Tupuna Maori* was correctly decided? According to the rule in *Doodeward* the *mokomokai* involved was certainly sufficiently modified to qualify for being capable of becoming the subject of ownership, but could Griffiths C.J.'s *dictum* that such ownership does not withstand the rights of a "person entitled to have it delivered to him for the purpose of burial" mean that the rights of a person granted probate could override those of a subsequent possessor?[34]

This question was addressed by a subsequent ruling of the Supreme Court of Tasmania. In 2007 the Tasmanian Aboriginal Centre Inc. became aware that the Natural History Museum in London was planning to conduct intrusive tests on the remains of seventeen Tasmanian Aboriginals before

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30 (1908) 6 CLR 406 (High Court of Australia).

31 *Id,* at 414.

32 *R. v. Kelly* [1999] Q.B. 621; [1998] 3 All ER 741 (English Court of Appeal)

33 See BEAT SCHÖNENBERGER, *The Restitution of Cultural Assets Causes of Action-Obstacles to Restitution – Developments* (Stampfli Publishers, Bern, 2009), 97.

34 *Supra*, n. 31 and see Steven Gallagher, "Museums and the Return of Human Remains: An Equitable Solution", 17 *Int'l. J. of Cultural Property*, 65 (2010).

returning them to Tasmania for burial. The facts closely resembled those in *Re Tupuna Maori* in that it appeared the deceased had died over 150 years ago and there was no evidence that they owned any property when they died. Chief Justice Underwood granted limited letters of administration to the Centre (to seek return of the remains or an injunction to prevent interference with them) based on it having a real interest in seeing that the remains received a proper burial in accordance with Aboriginal customary law.[35] The court referred to both the *Doodeward* and *Re Tupuna Maori* cases, so it appears to have implicitly endorsed the principle that any person or group holding letters of administration in respect of the deceased's remains could defeat a claim to property in those remains based on the *Doodeward* exception to the "no property" rule. Thus, the equitable right of executors to claim possession of remains appears to override the limited common law right of ownership.[36]

Both *Re Tupuna Maori* and the *Tasmanian Aboriginal Centre* case involved applications to courts outside the country where the remains, that were the subject of the proceedings, were located. These applications were both equitable in nature and given the increasing recognition of indigenous customary law in New Zealand and Australia it was not entirely surprising that both applications were successful. It is less clear that applications for letters of administration would have been granted by English courts. That said, the changes in international law surrounding indigenous cultural rights, most significantly the provisions of the 2007 UN *Declaration on the Rights of Indigenous Peoples*, could perhaps convince such courts otherwise, especially if the facts surrounding the original acquisition of the heads in contention were known.[37] However, it still remains difficult to assess how courts, in countries where *mokomokai* are held in institutional collections or privately, would respond to applications to appoint administrators of deceaseds' estates (or equivalent orders).

6. Inalienability in French Law

The Museum of Natural History in the French city of Rouen had had a *mokomokai* in its collection since 1875. In 2007 the city's mayor agreed to

[35] In *Re An Application by The Tasmanian Aboriginal Centre Inc.* [2007] TASSC 5 (9 February 2007), at para. 11. See CHRIS DAVIES and KATE GALLOWAY, "The Story of Seventeen Tasmanians: The Tasmanian Aboriginal Centre and Repatriation from the Natural History Museum", (2008-9) 11 *Newcastle Law. Rev*. 143.

[36] See GALLAGHER, *supra* n. 34 at 76.

[37] See GA Res. 295, UN GAOR, 61st Sess., UN Doc. A/RES/61/295 (2007) and Robert K. Paterson, "Collecting "Tribal Art" – Sacred or Secular?", 21 *Int'l. J. of Cultural Property*, 305, 312–313 (2014).

return the head to New Zealand. However, before this happened, the French Ministry of Culture intervened to stop the return on the grounds that it was impermissible under French law.[38]

French museums, like those elsewhere in Europe, are governed by the concept of inalienability which dates from the Enlightenment and had, before the French revolution, applied to royal collections. From this perspective museums are seen as places that allow for collection and study of objects from different cultures and the inviolability of their collections facilitates the indefinite pursuit of these objectives. Thus, Article L.451-5 of the French Heritage Code (*Code du Patrimoine*) provides as follows:

"The property constituting the collections of the Museums of France belonging to state bodies is part of the public domain of those bodies and is, as such, inalienable."[39]

In 2002 the Code was amended to allow for the removal of an object if it had first been declassified by the French National Scientific Commission.[40]

In the Rouen case, the prefect of Seine-Maritime petitioned the Administrative Tribunal at Rouen for summary judgment halting the return of the head. It was argued that the head was inalienable under Article L. 451-5 of the Code. The city's response was that the head was not part of the museum's collection because under Article 16-1 of the French Civil Code, human remains cannot be subject to proprietary rights and, therefore, the principle of inalienability did not apply to them. The Tribunal found that it had not been established that the head was within Article 16.1 and, therefore, that the provisions of the Heritage Code applied. Since these required the head to be declassified before it could be returned, and that had not happened, the city's decision was invalid.[41] This result was later affirmed in 2008 by the Administrative Court of Appeal.

Subsequently, French President Nicolas Sarkozy voiced support for the return to New Zealand of the Maori heads held in French museums. In 2002 France had enacted a separate law that allowed for the return to South Africa of the remains of Saartjie Baartman (known pejoratively as the "Hottentot Venus")[42] In 2007, it appeared that there were approximately 16 *mokomokai*

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38 See ROBERT K. PATERSON, "Heading Home:French Law Enables Return of Maori Heads to New Zealand", 17 *Int'l J. of Cultural Property*, 643 (2010).

39 *Code du patrimoine,* 20 February 2004, Article L451-5(1).

40 *Id,* Article L115-1.

41 See Administrative Tribunal of Rouen, Decision No. 702737, December 27, 2007 (Maori Head case) 15 *Int'l. J. of Cultural Property*, 223 (2008).

42 Loi No. 2002-323 du 6 mars 2002 relative á la restitution par la France de la dépouille mortelle de Saartjie Baartman á l'Afrique du Sud.

in French public institutions, such as the Musée du quai Branly – Jacques Chirac, and museums in Lyon, Marseilles, La Rochelle and elsewhere.

In 2010 amendments to the French Heritage Code were enacted by the National Assembly. Article 1 of the new law provides:

"As of the date of entry into force of the present legislation, the Maori heads kept by French National Museums (Musées de France) shall cease to be part of their collections in order to be returned to New Zealand."[43]

The law also redefined the role and make-up of the National Scientific Commission on Collections (La commission scientifique nationale des collections) to allow it to have sole responsibility over the declassification of museum objects and to expand its membership to include politicians, as well as art professionals and philosophers. This may mean that the force of the Enlightenment principles upon which inalienability was originally based is not spent. In the meantime, the Rouen head was returned to New Zealand in 2011. Further Maori heads were returned from France after that date.

7. Conclusion

Concerted action to secure the return of *mokomokai* has been taking place in New Zealand itself since the 1970s. Initially, this was due to the efforts of Maui Pomare, chair of the National Museum Council and after that by the musician, Dalvanius Prime.[44] In 2003 the New Zealand government mandated Te Papa to be the agent of the Crown in the repatriation of all Maori ancestral remains (*koiwi tangata Maori*), including *mokomokai* and approved a repatriation policy (the Karanga Aotearoa Repatriation Programme). The programme receives significant government financial assistance and has been very successful in identifying *mokomokai* in public collections outside New Zealand and securing their return. As a result there are now well over 100 *mokomokai* at Te Papa. So far these do not include any from the British Museum in London which has resisted requests to return the seven *mokomokai* in its collection, possibly because it does not think they were even intended to be buried or subject to some other funerary practices. The issue of how to deal with the heads that have been returned is

[43] See Adopted Text No. 455: To Authorize the Restitution of Maori Heads to New Zealand and Concerning Management of Collections, 17 *Int'l. J. of Cultural Property*, 639 (2016). For an enumeration of restitutions prior to then see PHILIPPE PELTIER and MAGALI MELANDRI, "Cronologie concernant les têtes tatouées et momifiées Maori ou *toi moko* (aussi connues sous le terme de *moko mokai",* 134 *Le Journal de la Société des Océanistes*, 28–30 (2012).

[44] See CONAL MCCARTHY, *Museums and Maori Heritage Professionals, Indigenous Collections, Current Practice* (Wellington, 2011) 216 to 221, and BRIAN HOLE, "Playthings for the Foe:The Repatriation of Human Remains in New Zealand", 6 *Public Archaelogy* (2007), 5.

largely unresolved and most remain out of view in a consecrated place (*wahi tapu*) at Te Papa.[45]

Even though it is almost 250 years since Europeans first encountered *mokomokai*, these unique objects continue to be the focus of conflicting opinions. While no laws mandate the return of *mokomokai* to New Zealand, many institutions and individuals outside New Zealand have agreed to return the *mokomokai* in their collections. Some, like the British Museum, contend that *mokomokai* which, unlike unmodified skeletal remains, feature facial tattoos whose tribal origins are often unknown, involve complex issues that justify delay in agreeing to returns. While scientific study also has a history as a justification for the retention of remains, the issues surrounding *mokomokai* are perhaps even more specialized and complicated. Whichever perspective one most sympathizes with the story surrounding these remarkable objects seems far from having reached its end. In the meantime, with Te Papa having said that it prefers not to pursue legal means to secure the return of *mokomokai*, the resolution of the legal issues surrounding their future remains uncertain.

[45] See ZOE ALDERTON, "The Secular Sacred Gallery: Religion at Te Papa Tongarewa", in Christopher Hartney (ed.) *Secularisation*: *New Historical Perspectives* (Newcastle upon Tyne, 2014), 251, at 264 to 266.