# New Zealand Lost Cases Project

## *R v E Hipu*

## 1 December 1845

## Supreme Court, Wellington, Chapman J

**Keywords:** Maori; stealing; Native Exemption Ordinance; larceny; interpreter; Resident Magistrates Court Ordinance

**Primary Source:** *New Zealand Spectator and Cook's Strait Guardian*, 6 December 1845, p3; 13 December 1845, p3

**Additional Sources:** 'Notebook entitled 'Criminal trials No.1', 1844-5, MS-0411/009, Hocken Library, Dunedin, pp.101-7; *Wellington Independent*, 3 December 1845, p3

**Significance:** *E Hipu* was the first Supreme Court decision to judicially apply those provisions of the *Native Exemption Ordinance* which introduced a practice in cases of theft of allowing for a penalty that more approximated the traditional approach of 'utu' (reciprocity). The Ordinance allowed a fine to be substituted for the usual punishment of imprisonment. This was later extended to also allowing fines instead of imprisonment in cases of assault [*Fines for Assaults Ordinance* 1845]. The Ordinance had earlier been applied in courts below the Supreme Court, the first recorded decision that has been located being that of the Police Magistrate in *R v William Osborne* (6 February 1845, Police Magistrate, Auckland: *Daily Southern Cross* 8 February 1845, p 3).

It had been clear to Governor FitzRoy that the practice of imposing terms of imprisonment for stealing offences was highly unpopular with Maori. A number of incidents, including the Wairau affair, as well as the snatching of Te Mania from the court room when found guilty of stealing [*R v Te Mania*, 20 February 1844, County Court, Auckland], convinced FitzRoy that some amendments were needed to English law. The *Native Exemption Ordinance* was one of a suite of exceptional laws passed in 1844, the others being the *Unsworn Testimony Ordinance*, the *Cattle Trespass Amendment Ordinance*, and the *Jury Amendment Ordinance* (and, although not one of the 'suite', there were also special provisions in the *Dog Nuisance Ordinance*). On introducing the Bill to the Legislative Council Governor FitzRoy noted the unique nature of the Bill, and specifically linked this to the 'advanced' nature of the Maori as against other native peoples. The rationale was said to be that:

"The Natives [do] not regard imprisonment as we [do], deprivation of personal liberty often ended in the death of the savage; and regarding them in a transitional state, he thought imprisonment would tend to retard their improvement;" (Legislative Council Minutes, Tuesday 9 July, printed in the *Daily Southern Cross*, 13 July 1844, p3).

Section 9 provided: "that in case any person of the aboriginal race shall be convicted upon any charge of theft or of receiving stolen goods, either by way of verdict of a jury, or, in the case of theft, in a summary way before any Police Magistrate, every such person may after such conviction, and at any time before sentence passed, pay into the court four times the value of the goods so stolen or received as aforesaid. Such payment being made no sentence shall be passed, but the person so convicted

shall be discharged from custody, and shall be in the same condition in all respects as if he had received sentence and undergone his punishment in the ordinary course of the law."

In this decision, E Hipu was found guilty of stealing a piece of print (in this case meaning cloth). He was ordered to pay £8 or  (*Wellington Independent*), the print having been valued at £2 (Chapman's notebook).

The Ordinance was not popular with many settlers. Newspaper editorials of the time suggested that the "natives have a preference to fine" (*New Zealand Spectator and Cook's Strait Guardian* 15 February 1845 p 2) and excoriated the penalty provisions of the Ordinance as "a positive bonus [is] held out to robbery". (*New Zealand Gazette and Cook's Strait Guardian* 26 July 1845, p2). Other provisions of the Ordinance, including that which allowed Maori to remain at large on payment of a 'deposit' of up to £20 in cases other than murder or rape, were equally unpopular: ss 6-8. The deposit was simply forfeited in cases of non-appearance. Newspaper editors suggested that Maori simply saw this as a £20 fine. Hence, non-appearance was common (*New Zealand Gazette and Cook's Strait Guardian* 26 July 1845, p2). This has not been confirmed by independent data. While Governor FitzRoy received much condemnation for this Ordinance, it appears that the Members of the Legislative Council passed the Bill unanimously (while the Minutes only record that the Bill passed, it was usual to note if the exact votes if a motion was not unanimous).

In 1846 the Ordinance was replaced by Governor Grey with the *Resident Magistrates Court Ordinance*. In the end, however, while the Ordinance did introduce significant procedural improvements over the *Native Exemption Ordinance*, it actually maintained a number of the disliked provisions of the original Ordinance, including the practice of imposing monetary penalties: ss. 10, 11.

**Further Information:** On 'exceptional laws' see Damen Ward, 'A Means and Measure of Civilisation: Colonial Authorities and Indigenous Law in Australasia', 1 History Compass (2003), AU 049, 001 – 024; On the *Native Exemption Ordinance* see Alan Ward *A Show of Justice: Racial 'Amalgamation' in Nineteenth Century New Zealand*, University of Toronto Press, 1973.

**Transcript of the Decision**

*New Zealand Spectator and Cook's Strait Guardian*, 6 December 1845, p 3

Supreme Court, Monday December 1, before Mr Justice Chapman

Hi Honor, in addressing the Grand Jury, observed that the number of cases to be tried at this Session was greater than usual; there were ten offences charged, and six prisoners, some of whom were charged with more than one offence. The first bill which would be sent to them was against E Hipu, an aboriginal native, for escaping from custody. A true bill had been found against him twelve months ago, for stealing a piece of print from Mr. Lyn's store, and for this offence he would be tried; he would also be tried, if a true bill were found by the Grand Jury, for escapement. There was no doubt that the natives come within the perils as well as the protection of the law, and there could not be the slightest doubt hat where a European is concerned, they are

liable to its perils if they offend against the law.**[1]**

The bill against the native for escape was abandoned.

The following presentment was made by the Grand Jury:-

The Grand Jury, of the District of Wellington, assembled on the 1st December 1845, for the dispatch of public business, respectfully present,

That, in the charge addressed to them by your Honor this morning, it was intimated that a native of the name of E Hipu would be indicted for breaking away from custody, but it appears that this indictment has been abandoned.

They therefore view with surprise and regret that an indictment for a similar offence but with mitigating circumstances, has been sent to them against a soldier of the 58th regt., which has been found a true bill, and they unanimously consider that the abandonment of the prosecution against the native is an unequal measure of justice as between the two races. (signed) James Kelham, Foreman.

His Honor, on receiving the presentation, observed that the Court had no power to order a prosecution, and it was usual when a prisoner was convicted of one offence, not to press the other charges against him. The native had been convicted of stealing from Mr. Lon's store, and the other charge had been abandoned.

*New Zealand Spectator and Cook's Strait Guardian* 13 December 1845, p3

(The reports were continued from the last edition)

*E Hipu*, a native, was tried and found guilty of having stolen a piece of print from Mr. Lyon's store about twelve months since, and sentenced (under the Native Exemption Ordinance) to pay eight pounds, or four times the value of the goods stolen. The fine was paid for the prisoner. The prisoner had escaped from custody and was recaptured only a fortnight before trial.

## Transcript of Chapman J's notebook

Monday, December 1 1845

E Hipu – for larceny

David Scott sworn in as interpreter.

Indictment read and explained to prisoner.

Plea – not guilty

The interpreter by direction of the court explained to the prisoner that had any objection to any one of the jurors that juror should retire. He had no objection – he was satisfied with the jurors.

Thomas Tomkins, Shopkeeper, Lambton Quay.

I remember a Maori coming into my shop and offering certain goods for sale similar to the goods produced.

I thought it probable he had stolen them and I detained him. I thought so from the answers [he] has given and from the description of the goods.

I sent for a Constable and gave the prisoner [into his] charge and gave the goods to the Constable. I cannot say other than the prisoner was the maori .

John Barr – shopman to Mr Lyons

I remember missing some goods from our store about August last year. The goods produced are the same. I know these goods. The goods I missed are the same pattern and same quality.

I went to Mr Tomkin's store and there saw the goods. I saw the prisoner at Mr Tomkin's between 8 & 9. I had seen him before in Mr Lyon's store between 6 and 7.

He came into look at a pair of trousers and to light his pipe. The ginghams were not shown to him.

They were on a shelf behind the counter. The native went behind the counter. He asked to go there to see the trousers I had laid aside the day before. The trousers were on the shelf at the level of the ginghams. The trousers were close to the ginghams - they touched. I never sold any gingham to a native.

He had been in our store before. I knew him by sight. I have often spoken to him. I have no doubt the prisoner is the maori.

Cross-examined.

I have been [a] shopman since January 1843. The ginghams had been in the store for more than six months. We had about six pairs different patterns. I saw it about a week or a fortnight before. I cannot swear it was there. I did not miss it at the time. I should have noticed it if it had been taken. I cannot swear it was there three days before. I swear the native was the same.

As to the trousers he came in a day or two before asked me to lay them aside.

Maoris are in the habit of going into Mr Lyon's shop. Scarcely a day passes that there are not some.

The Ex[amination in] ch[ief]

No robbery has taken place since I have been there.

Value of pieces produced in court – 1/6.

I consider the value 1/5 per y[ar]d . But I know not the [number] of yard. One was whole I cannot swear to the others. When cut it was cut off in drapers. New [?] [?] gave 1/- can [?] take 1/2

No [?] makes, the goods were bought here.

Burgess Sayer sworn. The pieces of property have not been out of my possession since. I took the prisoner into custody. I took the goods and marked them. Mr Lyon also marked the goods. The portions delivered to Mr Barr were cut from the piece produced one piece was perfect the other had since [been] cut off. As the one perfect I was not quite certain. There was very little difference between them.

The prisoner said he had got them from another native.

Cross Examined

I was examined before the Police Magistrate. The signature to the deposition is mine.

This closed the case for the prosecution.

Mr Hanson for the prisoner **[2]**

Barrs [sic] deposition reads "sold 1 drop [?] off each piece. 40 shillings/£2. The value is about £2.

Verdict: Guilty

Value of the property found to be forty shillings.

Natives have had the benefit of the law and of the protection of the court in cases where they have been wronged by Europeans and they must submit to the penalty of the law when they do wrong.

[1] From the outset Maori had been considered amenable to English law in matters involving settlers. At the first sitting of the New Zealand Supreme Court (1 – 3 March 1842), a Maori man, Maketu, was convicted of the murder of a settler family. He was sentenced to death: *New Zealand Herald and Auckland Gazette* 5 March 1842, p2. Their amenability for *inter se* matters, however, was not judicially confirmed until 1847 in *R v Rangitapiripiri*: *New Zealand Spectator and Cook's Strait Guardian*, 4 Dec. 1847, p2–3.

[2] Richard Hanson went on to become the Chief Justice of South Australia.

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