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**Native Title or *Terra Nullius*?**  
**The Internal Contradictions of *Wi Parata***

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## Introduction

The judgment of the New Zealand Supreme Court in the case of *Wi Parata v Bishop of Wellington*<sup>2</sup> is infamous within the annals of New Zealand legal history. This is because of the dismissal of the Treaty of Waitangi, by the Chief Justice deciding the case, as a “simple nullity”.<sup>3</sup> However the *Wi Parata* judgment was also a defining moment in the evolution of the legal doctrine of native title in New Zealand. This case not only broke from the major precedent on native title established by two preceding New Zealand cases, *The Queen v Symonds*<sup>4</sup> and *In re 'The Lundon and Whitaker Claims Act 1871'*<sup>5</sup>. It also established the authoritative precedent on native title to which the New Zealand courts would tenaciously cling for the next thirty-four years.<sup>6</sup>

The question of native title, like the question of the Treaty, was a contentious one at the time of the Supreme Court’s judgment in *Wi Parata*.<sup>7</sup> However the two issues were legally distinct. While the status of the Treaty was a question of international law, and so outside the jurisdiction of the Courts, the question of native title had until

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<sup>2</sup> (1878) 2 NZ Jur. (N.S.) S.C. 72

<sup>3</sup> As Chief Justice Prendergast infamously put it: “The existence of the pact known as the ‘Treaty of Waitangi’, entered into by Captain Hobson on the part of Her Majesty with certain natives at the Bay of Islands, and adhered to by some other natives of the Northern Island, is perfectly consistent with what has been stated. So far indeed as that instrument purported to cede the sovereignty – a matter with which we are not here directly concerned – it must be regarded as a simple nullity. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist.” (*Wi Parata v Bishop of Wellington*, at 78).

<sup>4</sup> (1847) N.Z.P.C.C. (SC), 387.

<sup>5</sup> 2 NZ CA (New Zealand Court of Appeal Reports) (1872).

<sup>6</sup> The New Zealand Courts finally broke from the legacy of *Wi Parata* in 1912. In that year, the New Zealand Court of Appeal delivered its judgment in *Tamihana Korokai v The Solicitor-General* (1912) 32 NZLR 321. In this judgment, Chief Justice Stout (with the concurrence of his brother judges) insisted that the *Native Land Act* (1909) provided a statutory basis for the Court’s jurisdiction over native title. As he put it: “I am of opinion that the Native Land Act recognises that Natives have a right to their customary titles.” (*Tamihana Korokai v The Solicitor-General* (1912) 32 NZLR 321, at 345, per Stout C.J.). This effectively broke the legacy of *Wi Parata*, which as we shall see, insisted that native title fell outside the jurisdiction of the Courts because it was exclusively a matter for the Crown’s prerogative powers.

<sup>7</sup> The preceding decade of the 1860s had been dominated by war between the Crown and some Maori tribes, precisely over land and authority issues. C.f. Keith Sinclair, *The Origins of the Maori Wars* (Wellington: New Zealand University Press, 1961); M.P.K. Sorrenson, “Maori and Pakeha”, in W.H. Oliver and B.R. Williams, *The Oxford History of New Zealand* (Auckland: Oxford University Press, 1987), pp. 180-84; Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen and Unwin, 1987), chapter 8.

this time been considered a common law issue.<sup>8</sup> This placed it squarely within the jurisdiction of the Courts and enforceable against the Crown. It was Chief Justice Prendergast's decision in *Wi Parata* to identify native title with the Treaty, by insisting that native title obligations of the Crown were "in the nature of a treaty obligation", which allowed him to insist that native title issues fell just as exclusively outside the jurisdiction of the Courts as treaty matters.<sup>9</sup> Prendergast's judgment in *Wi Parata* therefore placed native title on an entirely new legal basis within New Zealand – transferring it from the realm of common law to the prerogative powers of the Crown.<sup>10</sup> According to Prendergast, only the Crown had authority to settle native title issues, and such settlements were outside the review of the Courts.<sup>11</sup> Needless to say, such an outcome was one that served settler interests at the expense of Maori, who were deprived of any appeal against the Crown within the Courts.

### **The Courts and Land Settlement**

In a settler society, one of the primary concerns is the legal stability of land settlement. The value of *Wi Parata* to the settler community in New Zealand was that it produced a legal settlement which effectively divested Maori tribes of any possible legal challenge against the Crown concerning the latter's appropriation of land. As we shall see, the *Wi Parata* judgment did this in two steps. Firstly, by denying that the Courts had any jurisdiction over native title, and secondly by insisting that the Courts must therefore assume that the Crown's title is authoritative should it wish to assert that title against rival native title claimants. In other words, *Wi Parata* transformed the Crown's exclusive right of pre-emption, upheld in the Treaty of Waitangi, into an exclusive right of appropriation, in so far as it held that the existence of a Crown

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<sup>8</sup> On treaty issues being outside the jurisdiction of the Courts, see *Tamihana Korokai v The Solicitor-General* (1912) 32 NZLR 321 (CA), at 354-55, per Chapman J.; *Te Heuheu Tukino v Aotea District Maori Land Board* [1941], NZLR, 590, at 596-97; *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at 31-32, per Brennan J. On the established New Zealand precedents prior to *Wi Parata* which held that native title were clearly matters of common law, and so inside the jurisdiction of the Courts, see the section "Prendergast's Break With Precedent" below.

<sup>9</sup> On Chief Justice Prendergast's claim that the Crown's native title obligations are "in the nature of a treaty obligation", see *Wi Parata v Bishop of Wellington*, at 79. For a full discussion of this claim, see the section "Prendergast's Recognition of Native Title" below.

<sup>10</sup> C.f. *Wi Parata v Bishop of Wellington* at 79.

<sup>11</sup> *Ibid.*

grant was itself sufficient to extinguish all Maori native title claims over any particular piece of land.<sup>12</sup>

This was in sharp contrast to the existing New Zealand precedents on native title which were in force at the time of *Wi Parata*. The decisions of the New Zealand Supreme Court in *The Queen v Symonds* (1847) and the Court of Appeal in *In re 'The Landon and Whitaker Claims Act 1871'* (1872) had both held that native title was a matter of common law, was therefore within the jurisdiction of the Courts, and could therefore be legally enforced against the Crown.<sup>13</sup>

Consequently, *Wi Parata* fundamentally altered the legal development of native title in New Zealand. It also served Crown and settler interests, because in excluding native title from the jurisdiction of the Courts, it deprived Maori of any judicial enforcement of their native title rights against the Crown. It therefore ensured the Crown's exclusive control over the wider process of land settlement in New Zealand.

The extent to which *Wi Parata* served these wider material interests is evident from the tenacity with which this precedent was subsequently defended by the New Zealand Bench, even to the extent of an open breach with the Privy Council in 1903. This breach had its ostensible cause in what the New Zealand Court of Appeal claimed were the unfair aspersions cast upon it by the Privy Council in *Wallis v Solicitor General for New Zealand*.<sup>14</sup> This produced a formal Protest against the Privy Council by the part of the Court of Appeal in 1903.<sup>15</sup>

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<sup>12</sup> As Prendergast C.J. put it: "In this country the issue of a Crown grant undoubtedly implies a declaration by the Crown that the native title over the land which it comprises has been extinguished. For the reason we have given, this implied fact is one not to be questioned in any Court of Justice, unless indeed the Crown should itself desire to question it, and should call upon the Court to lend its aid in correcting some admitted mistake." (*Wi Parata v Bishop of Wellington*, at 78. C.f. *ibid*, at 81). Of course, to say that *Wi Parata* transformed the Crown's exclusive right of pre-emption, upheld by the Treaty of Waitangi, into an exclusive right of appropriation, is not to suggest that the Crown never negotiated with Maori over the extinguishment of native title after *Wi Parata*. It is simply to insist that, from the Courts' perspective following *Wi Parata*, such questions were entirely matters for the Crown, with the result that there was no legally recognised procedure for extinguishing native title (or even one requiring the Crown to recognise the need for such extinguishment prior to the issue of Crown grants) enforceable against the Crown in the Courts.

<sup>13</sup> See note 88 below.

<sup>14</sup> [1903] AC 173.

<sup>15</sup> Hence the Chief Justice of the Court of Appeal, Sir Robert Stout, begins the Protest by stating: "In the judgment in a recent case before the Lords of the Judicial Committee of the Privy Council – *Wallis v Solicitor-General* – a direct attack has been made upon the probity of the Appeal Court of New Zealand." ("*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", [1840-1932] NZPCC Appendix, 730, at 730, per Stout C.J.). Justice Edwards pointed to what he saw as the unprecedented nature of the aspersions cast on the Court of Appeal by the Privy Council when he

However the deeper motives for the breach seem to have been the extent to which the Privy Council decisions in *Nireaha Tamaki v Baker* (1901) and *Wallis v Solicitor-General* (1903) had moved away from the *Wi Parata* precedent, thereby placing the legal settlement established by that case in jeopardy. This is evident from some of the statements made by the Court of Appeal judges during the 1903 Protest, where they referred to the instability and insecurity of land settlement that would be produced by any departure from *Wi Parata* by the Privy Council. As Justice Edwards states:

"It would be easy by reference to numerous decisions of the Court of Appeal and of the Supreme Court of this Colony, and to statutes which, passed after such decisions, recognising their validity, have virtually confirmed them, to show still further that the interpretation which their Lordships have put upon the laws relating to Native lands in this Colony is subversive of the law which has prevailed from its foundation; and that if that interpretation were acted upon, and carried to its legitimate conclusion in future cases, the titles to real estates in this Colony *would be thrown into irretrievable doubt and confusion.*"<sup>16</sup>

This emphasis on the stability and security of land tenure in New Zealand was also a feature of Chief Justice Stout's Protest. As he put it, if the dicta of the Privy Council in *Nireaha Tamaki v Baker* (1901) were given effect to, "...no land title in the Colony would be safe."<sup>17</sup>

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states: "Never before has it happened that the ultimate appellate tribunal of the Empire has charged the Judges of any colonial Court, as their Lordships have now charged the Judges of this Court, with want of dignity, and with denying or delaying justice at the bidding of the Executive. If there were any foundation in charges so grave, then the learned Judges against whom they are levelled ought to be removed from the high office which they would have shown themselves unworthy to occupy.....Yet such charges have been made by the Judicial Committee against the Judges of the Appellate Court of this Colony; and they have been made without the slightest foundation in fact, and based only upon assumptions of law which to every trained lawyer in the Colony must appear, at the least, astonishing and absurd." (*ibid*, p. 757, per Edwards J.). Justice Edwards ultimately concludes in ringing tones: ".....I feel that the protest against such imputations should be unanimous and unequivocal; and in the interests of justice, liberty, and decency, and of the unity of that great Empire which can only be held together by the mutual respect of its kindred communities, I do protest against them." (*ibid*, p. 759, per Edwards J.). Justice Williams endorsed these sentiments as follows:

"The decision of the Court of Appeal of New Zealand in the case of the *Solicitor-General v Wallis* has recently been reversed by the Judicial Committee of the Privy Council. Their Lordships have thought proper, in the course of their judgment, to use language with reference to the Court of Appeal of a kind which has never been used by a superior Court with reference to an inferior Court in modern times. The judgment of their Lordships has been published and circulated throughout the Colony. The natural tendency of that judgment, emanating as it does from so high a tribunal, is to create a distrust of this Court, and to weaken its authority among those who are subject to its jurisdiction." (*Ibid*, at 747, per Williams J.).

<sup>16</sup> *Ibid*, at 757, per Edwards J. My emphasis..

<sup>17</sup> *Ibid*, at 746, per Stout C.J.

Earlier New Zealand judgments had also insisted that the maintenance of the *Wi Parata* precedent was central to the stability and security of land tenure in New Zealand. In *Nireaha Tamaki v Baker* (1894), Justice Richmond, delivering the judgment of the Court of Appeal, put the matter this way:

“The plaintiff comes here, therefore, on a pure Maori title, and the case is within the direct authority of *Wi Parata v Bishop of Wellington*.... We see no reason to doubt the soundness of that decision..... According to what is laid down in the case cited, 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 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 Crown is under a solemn engagement to observe strict justice in the matter, but of necessity it must be left to the conscience of the Crown to determine what is justice. *The security of all titles in the country depends on the maintenance of this principle.*”<sup>18</sup>

Needless to say, the Crown shared these concerns about the stability and security of New Zealand land titles, not least because the Crown itself was the source of all such title.<sup>19</sup> In his presentation of the Crown's evidence in *Tamihana Korokai v The Solicitor-General* (1912), the New Zealand Solicitor-General asserted the *Wi Parata* principle that "Native title is not available in any manner and for any purpose against the Crown"<sup>20</sup>, and defended this principle in terms of the security of existing land title, stating: "If this is not the principle the Natives could go on a claim based on customary title to the Native Land Court and claim to have the title to *all* Crown lands

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<sup>18</sup> *Nireaha Tamaki v Baker* (1894) 12 NZLR 483, at 488. My emphasis.

<sup>19</sup> The feudal principle that the Crown was the source of all title was transported to the British colonies, along with the legal authority of the Crown (c.f. *The Queen v Symonds* at 388-89, per Chapman J; . *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at 47, per Brennan J.). However such a principle was not inconsistent with the maintenance of native title within these colonies because, although the Crown was perceived as holding the ultimate or radical title to all land, native title was perceived as a “burden” on that radical title. As Lord Davey for the Privy Council pointed out in *Nireaha Tamaki v Baker* (1900-01), "the Native title of possession and occupancy" is not "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." (*Nireaha Tamaki v Baker* (1900-01) [1840-1932] NZPCC 371, at 379). Similarly, Justice Brennan of the Australian High Court stated some ninety years later: “Where a proprietary title capable of recognition by the common law is found to have been possessed by a community in occupation of a territory, there is no reason why that title should not be recognised as a burden on the Crown’s radical title when the Crown acquires sovereignty over that territory.” (*Mabo v Queensland [No. 2]* (1992), at 51, per Brennan J.).

<sup>20</sup> *Tamihana Korokai v The Solicitor-General* (1912), at 331, per Solicitor-General.

investigated.”<sup>21</sup> The Solicitor-General insisted that unless the Courts affirm the *Wi Parata* principle that the Crown’s claim is conclusive on all native title matters, such threats to land tenure may arise:

“If, therefore, any dispute exists as to whether the land is Native customary land or Crown land the *ipse dixit* of the Crown is conclusive, and the question cannot be litigated in this or any other Court.....There is no known method upon which the validity of a cession can be determined, and so if the Crown's claim is not conclusive there is no method of determining its title, *and the security of title to all Crown land will be jeopardised.*”<sup>22</sup>

The tenacity with which the Court of Appeal was willing to cling to the *Wi Parata* precedent was therefore a reflection of these wider material interests which dominated New Zealand settler society - in particular, a desire to ensure that the legal process of land settlement was thoroughly controlled by the Crown and not the indigenous inhabitants. Any claim that native title could be enforced against the Crown threatened to provide Maori tribes with an independent avenue of appeal against the validity of Crown grants which had been issued to settlers. This in turn could place all legal title to land in New Zealand in question. It was the Maori insistence on this possibility, and the Crown and settlers' desire to avoid it, which defined what was at stake in legal disputes over native title at this time. *Wi Parata* was such a cherished precedent because it resolved this struggle thoroughly in the Crown's favour, denying the Courts jurisdiction over native title and so ensuring that Maori had no independent rights to land legally enforceable against the Crown.

However although the real importance of *Wi Parata* lay in its legacy for subsequent native title claims in New Zealand, this paper deals less with that legacy and more with the internal dimensions of the judgment itself. It argues that this judgment, delivered by Chief Justice Prendergast, was riven by internal contradictions, in which native title seemed to be at different times both affirmed and denied. These contradictions had little effect on the subsequent legacy of *Wi Parata* because the conclusions that Prendergast C.J. affirmed fitted too well with existing Crown and settler interests to be disrupted by any lack of consistency in his argument. But as this

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<sup>21</sup> *Ibid*, at 331-32, per Solicitor-General. My emphasis.

<sup>22</sup> *Ibid*, at 331, 332, per Solicitor-General. My emphasis.

paper attempts to show, *Wi Parata* as a legal judgment was inconsistent and, ultimately, irrational.

### **The Facts of the Case**

The case involved the Ngatittoa tribe, resident principally in the Porirua District, whose chiefs desired in 1848 that a school be erected on their land at Witireia.<sup>23</sup> Negotiations were entered into between the Chiefs and the Bishop of New Zealand concerning this school.<sup>24</sup> However while it is clear that in 1850 the Crown granted land to the Bishop for the building of a school in the area, it was open to dispute in the *Wi Parata* case whether the Ngatittoa tribe ever ceded land to the Crown for this purpose.<sup>25</sup> While at various points in the declaration, the Ngatittoa tribe are referred to as the "native donors"<sup>26</sup>, counsel for the plaintiff argued that the Ngatittoa tribe could not legally cede their lands for this purpose, and therefore the Crown grant was illegal because the native title had not been lawfully extinguished.<sup>27</sup> Failing this, the counsel for the plaintiff argued that the purpose for which the Crown grant was issued (the

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<sup>23</sup> *Wi Parata v Bishop of Wellington* at 72.

<sup>24</sup> *Ibid.*

<sup>25</sup> On the Crown grant to the Bishop, see *ibid*, at 73. In the case notes recording the argument of the council for the plaintiff, there was a clear dispute between the council and the bench as to whether the tribal chiefs had ever ceded their land to the Crown for the purpose of building a school (c.f. *ibid*, at 74-75). However in a later Privy Council judgment concerning the same facts as the present case, the Privy Council considered a letter from the tribal chiefs to the Governor, Sir George Grey, clearly indicating that the lands were being donated to the Bishop for the purpose of building a college, as such an act of cession (c.f. *Wallis v Solicitor General for New Zealand* [1903] AC 173, at 177-78). Indeed, the Privy Council went even further, in the circumstances of the case they were considering, and argued that the real act of cession was between the tribal chiefs and the Bishop, the Crown merely playing an intermediary or conveyancing role in the process (c.f. *ibid*, at 179-80). This was disputed by the New Zealand Court of Appeal in its subsequent Protest against the Privy Council judgment (see "*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", [1840-1932] NZPCC Appendix, 730, at 734, per Stout C.J.).

<sup>26</sup> C.f. *Wi Parata v Bishop of Wellington*, at 73.

<sup>27</sup> Hence the declaration states: "The native title to the land granted has never been lawfully extinguished. At the time of the gift, the land formed part of a reserve set apart by the Government for the exclusive use and purposes of the Ngatittoa tribe, who have never been permitted to sell or dispose any portion of the reserve; nor has any grant from the Crown been issued to them for any portion thereof. The grant, in so far as it amounts to a trust for others than the members of the tribe, is void and *ultra vires*, and not sanctioned by any of the statutes in force respecting the gift or alienation of lands, the Native title to which has not been lawfully extinguished." (*ibid*, at 73, per Barton, G.E.). Indeed, at some points, the counsel for the plaintiff suggested that no cession was made by the tribe to the Crown for these purposes, and therefore that the land was granted to the Bishop by the Crown without the tribe's authority - c.f. *ibid*, at 74, 75, per Barton G.E.



building of a school) had never taken place, and therefore the grant should revert to the original owners.<sup>28</sup>

Prendergast found that any failure to fulfill the conditions of a grant meant that the doctrine of *cy-près* would apply, and an approximation to such fulfilment take place.<sup>29</sup> Failing this, he argued, the land would revert back to the Crown, which he saw as the source of the Bishop's grant, not the original native owners.<sup>30</sup> His reason for this second conclusion was his assumption, as we shall see, that the Crown, not the courts, had sole jurisdiction over native title, and so the question of whether the native title had been lawfully extinguished was solely a matter for the Crown.

### **Prendergast's Recognition of Native Title**

But on what basis could Prendergast C.J. presume to deny the Courts jurisdiction over native title, thereby allowing the Crown, rather than the Courts, to determine native title issues? The answer lies in Prendergast's understanding of native title. Prendergast claimed that the question of native title is bound up with the acquisition of sovereignty within New Zealand by the British Crown, and acts of sovereignty are matters of Crown prerogative outside the jurisdiction of the Courts.<sup>31</sup> Indeed,

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<sup>28</sup> Hence the declaration states: "No school of any kind was ever established at Porirua, nor has any school been maintained, or any of the trusts mentioned in the grant been performed. That the said grant, so far as it purports to be a grant for the education of children, is a violation of the agreement between the donors of the lands and the Bishop of New Zealand, and is a fraud upon them. The tribe is now greatly reduced in numbers, not now exceeding between 30 and 40 persons in all, and being scattered over the North Island. Any school at or near Witireia would now be entirely useless, and the trusts upon which the land was given by the native donors are not now capable of being carried out, and the land ought therefore to revert to the surviving donors." (*ibid*, at 73, per Barton G.E.).

<sup>29</sup> *Ibid*, at 82, per Prendergast, C.J. However Prendergast believed that the case had already been disposed of by his prior finding that "...a Crown grant cannot be avoided for a matter not appearing upon the face of the grant, except upon a writ of *scire facias*, or by some analogous proceeding taken in the same or on behalf of her Majesty..." (*ibid*, at 82). In regard to the later point, Prendergast argued that a Crown grant can only be reversed with the agreement of the Crown itself: "It appears sufficiently clear that a Crown grant, which is voidable only for some defect not apparent on the face of the instrument, cannot be annulled except in some proceeding in which the Crown is nominal, if not actual, plaintiff." (*ibid*, at 81).

<sup>30</sup> As Prendergast states: "No case can be cited in which, on the failure of the object of charity founded by deed, a resulting trust of land has been established in favour of the heirs of the donor." (*ibid*, at 83). If the land was to revert to the donors, Prendergast states "...we are of opinion that in law the Crown is to be regarded as the donor, and not the Ngatitōa tribe." (*ibid*). In any case, reversion to the original donors did not arise because Prendergast states that the Court would be "...prepared, if necessary....to decree the execution of the trust *cy pres*, rather than allow a resulting trust in favour of the donors." (*ibid*).

<sup>31</sup> C.f. *ibid*, at 78-79. This principal was upheld most recently in the *Mabo* case, where Justice Brennan cites with approval the statement of Gibbs J. in the *Seas and Submerged Lands Case* that "The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state." (*New South Wales v The Commonwealth* (1975) 135 C.L.R., at p. 388, per Gibbs J., cited in *Mabo v Queensland [No. 2]* (1992)

Prendergast goes so far as to claim that native title matters are “in the nature of” treaty obligations on the part of the Crown, and treaty obligations, also being matters of Crown prerogative, similarly fall outside the jurisdiction of the Courts. As Prendergast puts it:

“Upon such a settlement as has been made by our nation upon these islands, the sovereign of the settling nation acquiring on the one hand the exclusive right of extinguishing the *native title*, assumes on the other the correlative duty, as supreme protector of aborigines, of securing them against any infringement of their right of occupancy.....The obligation thus coupled with the right of pre-emption, although not to be regarded as properly a treaty obligation, is yet in the nature of a treaty obligation. It is one, therefore, with the discharge of which no other power in the State can pretend to interfere. The exercise of the right and the discharge of the correlative duty, constitute an extraordinary branch of the prerogative, wherein the sovereign represents the entire body-politic, and not, as in the case of ordinary prerogative, merely the Supreme Executive power.”<sup>32</sup>

By likening the Crown’s responsibilities concerning native title to a treaty obligation, Prendergast can then represent the Crown’s relationship to Maori tribes as effectively one involving treaty partners, which places the actions of each against the other outside the jurisdiction of the Courts in so far as such actions are effectively acts of state.<sup>33</sup> As Prendergast puts it:

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175 CLR 1, at 31, per Brennan J.). However Brennan points out that although the rights and wrongs of the actual acquisition of sovereignty is outside the jurisdiction of the courts, nevertheless the Courts must still resolve the Blackstonian question (see “The Ghost of Blackstone” below) of what sort of law is in operation once that acquisition of sovereignty takes place. In other words, it is up to the Courts to determine if the colonised land is *terra nullius* (thus allowing all applicable law of the colonising power to apply in the new territory) or whether it is “cultivated land” with pre-existing laws which can only be overturned by the express will of the new sovereign. As Brennan states: “Although the question whether a territory has been acquired by the Crown is not justiciable before municipal courts, those courts have jurisdiction to determine the consequences of an acquisition under municipal law. Accordingly, the municipal courts must determine the body of law which is in force in the new territory. By the common law, the law in force in a newly-acquired territory depends on the manner of its acquisition by the Crown. Although the manner in which a sovereign state might acquire new territory is a matter for international law, the common law has had to march in step with international law in order to provide the body of law to apply in a territory newly acquired by the Crown.” (*Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at 32, per Brennan J.).

<sup>32</sup> *Wi Parata v Bishop of Wellington*, at 78-79.

<sup>33</sup> Issues involving questions of state sovereignty, such as treaty negotiations between the Crown and indigenous inhabitants, or methods by which the Crown acquires sovereignty in new territories, have generally been held by common law Courts to be acts of state falling within the prerogative powers of the Crown and so outside the jurisdiction of the Courts – see note 8 and 31 above.

“.....the Maori tribes are, *ex necessitate rei*, exactly on the footing of foreigners secured by treaty stipulations, to which the entire British nation is pledged in the person of its sovereign representative. Transactions with the natives for the cession of their title to the Crown are thus to be regarded as acts of State, and therefore are not examinable by any Court.....Especially it cannot be questioned, but must be assumed, that the sovereign power has properly discharged its obligations to respect, and cause to be respected, all native proprietary rights.”<sup>34</sup>

In other words, by likening issues involving native title to treaty issues entailing acts of state, Prendergast C.J. is effectively able to withdraw native title from the realm of common law, and therefore from the jurisdiction of the Courts, by placing it entirely within the prerogative powers of the Crown.<sup>35</sup> This therefore renders the Crown, as Prendergast puts it, the “sole arbiter of its own justice” on this issue, since the Courts must accept the declarations of the Crown concerning native title as conclusive.<sup>36</sup> This is particularly the case with Crown grants which, by their very issue, necessarily assume that the native title over the land which the grant covers has been extinguished. As Prendergast puts it:

"If this prerogative be left intact, and we hold it is, the issue of a Crown grant must still be conclusive in all Courts against any native person asserting that the land therein comprised was never duly ceded."<sup>37</sup>

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<sup>34</sup> *Wi Parata v Bishop of Wellington*, at 79. My emphasis. Paul McHugh has criticised Prendergast C.J.'s conclusion that the Crown's dealings with Maori over native title were “acts of state”, on the following grounds: “By 1877 the Maori's status as British subjects had been long fixed – how then could an ‘act of state’ be made by the Crown against its own subjects?” (Paul McHugh, “Aboriginal Title in New Zealand Courts”, *Canterbury Law Review*, Vol. 2, 1984, p. 247). McHugh points out that a long line of judicial authority has established “...that as between the sovereign and a subject there can be no act of state on British territory...” (*ibid*, note 55, p. 247). See also Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991), p. 114.

<sup>35</sup> This exclusion of native title from the jurisdiction of the Courts merely confirms, Prendergast argues, what had always been the case. As he puts it: “On the other hand, it has been equally clear that the Court could not take cognisance of mere native rights to land.” (*Wi Parata v Bishop of Wellington*, at 79).

<sup>36</sup> Prendergast makes the claim that the Crown is the “sole arbiter of its own justice” on native title issues as follows: “But in the case of primitive barbarians, the supreme executive Government must acquit itself as best it may, of its obligations to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice. Its acts in this particular cannot be examined or called in question by any tribunal, because there exist no known principles whereon a regular adjudication can be based.” (*ibid*, at 78).

<sup>37</sup> *Ibid*, at 80. Paul McHugh argues that Prendergast's reasoning at this level ignores fundamental constitutional principles. As we have seen, the basis of Prendergast's claim that the municipal Courts cannot enforce native title claims against the Crown, and therefore must accept all Crown declarations concerning native title as binding, is that such matters are “acts of state” of the Crown, over which the

Consequently, Prendergast's view was that when it comes to questions of native title, the mere issue of a grant by the Crown clearly indicates that the Crown believes such land to be free of native title. Since he believed the Courts lacked the jurisdiction to challenge the Crown's view, from the Court's perspective, the Crown's view is legally conclusive. As Prendergast states:

“Here, then, is one sufficient reason why this Court must disclaim the jurisdiction which the plaintiff is seeking to assume. In this country the issue of a Crown grant undoubtedly implies a declaration by the Crown that the native title over the land which it comprises has been extinguished. For the reason we have given, this implied fact is one not to be questioned in any Court of Justice, unless indeed the Crown should itself desire to question it, and should call upon the Court to lend its aid in correcting some admitted mistake.”<sup>38</sup>

### **Prendergast's Irony**

In order to insist that native title issues fall exclusively within the prerogative powers of the Crown, and so outside the jurisdiction of the Courts, Prendergast likens the Crown's responsibility on native title to a treaty obligation, and the relations between the Crown and Maori to treaty partners. Yet such a strategy is fundamentally ironic, because elsewhere in his judgment, Prendergast fundamentally denies any legal status to Maori tribes as treaty partners, and any legal status to the Treaty of Waitangi, on the grounds that Maori tribes possessed no sovereignty capable of cession. As Prendergast puts it:

“The existence of the pact known as the ‘Treaty of Waitangi’ entered into by Captain Hobson on the part of her Majesty with certain natives at the Bay of Islands, and adhered to by some other natives of the Northern Island, is perfectly consistent with what has been stated. So far indeed as that instrument purported to cede the sovereignty – a matter with which we are not here directly concerned – it must be

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Courts have no authority. However McHugh states: "A major difficulty with this approach was the contradiction of what was then (and remains) a fundamental constitutional principle. According to this, the Crown is unable to make or claim an 'act of state' against its own subjects [c.f. *Entick v Carrington* (1765) 19 St Tr 1030; *Campbell v Hall* (1774) 1 Cowp 204, 208-10; *Walker v Baird* [1892] AC 491 (PC)]. By 1877 the Maori had been British subjects for thirty-seven years." (McHugh, *Maori Magna Carta*, p. 114). See also note 34 above.

<sup>38</sup> *Wi Parata v Bishop of Wellington*, at 78.

regarded as a simple nullity. No body politic existed capable of making cession of sovereignty, nor could the thing itself exist.”<sup>39</sup>

Of course, in denying that the Maori had sovereignty over New Zealand prior to 1840, Prendergast C.J. had to confront Lord Normanby's instructions to Captain Hobson, dated 14<sup>th</sup> August 1839, which clearly indicated the contrary, asserting the need for a treaty to secure a cession of sovereignty to the Crown. These instructions stated: "We acknowledge New Zealand as a sovereign and independent State, so far at least as it is possible to make such acknowledgment in favour of a people composed of numerous, dispersed, and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate in concert.".<sup>40</sup>

Prendergast responds to this clear challenge to his assumptions by insisting that Lord Normanby simply contradicted himself. Prendergast insists that Lord Normanby's "qualification" in his instructions above concerning the level of political development among the Maori tribes effectively "nullifies the proposition to which it is annexed"<sup>41</sup>. That is, it nullifies the proposition that New Zealand was a "sovereign and independent State" prior to the Crown's acquisition of sovereignty, and therefore nullifies any presumption within Normanby's instructions that the Maori tribes exercised a sovereignty capable of being ceded by treaty.

Behind Prendergast's claim that Maori lacked any sovereignty to cede to the British under the Treaty of Waitangi is the belief that they lacked the level of political and social organisation necessary to make sovereign claims over the territory they inhabited. As Prendergast puts it:

“On the foundation of this colony, the aborigines were found without any kind of civil government, or any settled system of law. There is no doubt that during a series of years the British Government desired and endeavoured to recognise the independent nationality of New Zealand. But the thing neither existed nor at that time could be established. The Maori tribes were incapable of performing the duties, and therefore of assuming the rights, of a civilised community.”<sup>42</sup>

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<sup>39</sup> *Ibid.*

<sup>40</sup> Lord Normanby's Instructions to Captain Hobson, 14<sup>th</sup> August, 1839, cited in *Wi Parata v Bishop of Wellington*, at 77.

<sup>41</sup> *Wi Parata v Bishop of Wellington*, at 77.

<sup>42</sup> *Ibid.*, at 77.

He argued that, far from any real negotiation occurring between treaty partners, the Crown, upon its acquisition of sovereignty, simply assumed those obligations it was required to assume under the law of nations existing at the time when dealing with aboriginal peoples:

“In fact, the Crown was compelled to assume in relation to the Maori tribes, and in relation to native land titles, these rights and duties which, *jure gentium*, vest in and devolve upon the first civilised occupier of a territory thinly peopled by barbarians without any form of law or civil government.”<sup>43</sup>

### “Definite Ideas of Property in Land”

Chief Justice Prendergast’s assumptions concerning the treaty arose from the same source as his assumptions concerning native title. In other words, his assumption that the Maori tribes had no sovereignty over the territory of New Zealand which they were capable of ceding was linked to his other assumption that they lacked “definite ideas of property in land”.<sup>44</sup> Presumably, Prendergast believed Maori tribes lacked the capacity to make broader claims to sovereignty because, in his view, they lacked basic rights of property in the land they occupied.

However Prendergast’s claim that Maori lacked property in the land they occupied was clearly contrary to various early colonial statutes which refer to aboriginal occupation of the land, and the Crown’s exclusive right of pre-emption over it. At the very least, the Crown’s claim of a right of pre-emption over Maori land necessarily presumes some prior proprietary relationship between Maori tribes and their land, for otherwise why would the Crown go to the lengths of purchasing that land from them. But in the face of this evidence, Prendergast blankly asserts that these statutes recognise no Maori property in land at all. For instance, he cites section 2 of the Land Claims Ordinance of 1841, which states:

“Declared, enacted, and ordained that all unappropriated lands within the colony of new Zealand – subject, however, to the rightful and necessary occupation and use thereof by the aboriginal inhabitants of the said colony – are and remain Crown or domain lands of her Majesty, her heirs and successors, and that the sole and absolute

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<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

right of pre-emption from the said aboriginal inhabitants vests in and can only be exercised by her said Majesty, her heirs, and successors.”<sup>45</sup>

However on the basis of this passage, which clearly refers to the “rightful and necessary occupation and use” of “unappropriated lands” by Maori tribes, Chief Justice Prendergast reaches the following extraordinary conclusion:

“These measures were avowedly framed upon the assumption that there existed amongst the natives no regular system of territorial rights nor any definite ideas of property in land.....”<sup>46</sup>

Such a conclusion is clearly contrary to the plain meaning of the statutory passage which Prendergast cites. It is as if Prendergast is assuming that the reference in the passage to “Crown or domain lands of her Majesty”, denies the existence of any prior native title in these lands. Yet as we have seen, the maintenance of native title is perfectly consistent with the Crown’s acquisition of radical or ultimate title over new colonial territories.<sup>47</sup> While there may be some confusion in referring to lands subject to native title as “Crown lands”, this is resolved once we understand that native title is a burden on the radical title of the Crown. As Chief Justice Arney explained five years prior to *Wi Parata*, in a New Zealand Court of Appeal judgment:

"No doubt there is a sense in which 'Native lands' are not 'Crown lands'. The 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. But the fullest measure of respect is consistent with the assertion of the technical doctrine, that all title to land by English tenure must be derived from the Crown; this of necessity importing that the fee-simple of the whole territory of New Zealand is vested and resides in the Crown, until it be parted with by grant from the Crown. In this large sense, all lands over which the Native title has not been extinguished are Crown lands."<sup>48</sup>

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<sup>45</sup> *Land Claims Ordinance*, 1841, section 2, cited in *Wi Parata v Bishop of Wellington*, at 77.

<sup>46</sup> *Wi Parata v Bishop of Wellington*, at 77.

<sup>47</sup> See note 19 above.

<sup>48</sup> *In re 'The Lundon and Whitaker Claims Act 1871'*, 2 NZ CA (New Zealand Court of Appeal Reports) (1872), at 49-50, per Arney C.J.

Further, the reference in the statutory passage above to the Crown's "sole and absolute right of pre-emption" over lands occupied by the Maori tribes equally does not deny native title. This is because it is precisely such native title which is extinguished by the Crown's exercise of its exclusive right of pre-emption.<sup>49</sup>

Consequently, it is difficult to understand how Chief Justice Prendergast could have so fundamentally misread the *Land Claims Ordinance*, 1841, interpreting the reference to the Crown's exclusive right of pre-emption, and the statement that all unappropriated lands in the colony remain Crown lands, as implying an absence of native title. Yet he continues such misreading when he turns to the *Native Rights Act*, 1865, criticising its reference to the "Ancient Custom and Usage of the Maori People", ".....as if some such body of customary law did in reality exist."<sup>50</sup> However it is precisely the existence of such "ancient custom and usage" that native title is premised upon – since in common law, native title is a form of customary ownership based on traditional relationships to the land.<sup>51</sup> Yet Prendergast entirely rejects any such pre-existing customary law, stating:

".....a phrase in a statute cannot call what is non-existent into being. As we have shown, the proceedings of the British Government and the legislation of the colony have at all times been practically based on the contrary supposition, that no such body of law existed; and herein have been in entire accordance with good sense and indubitable facts."<sup>52</sup>

Finally, Prendergast insists that the absence of Maori "territorial rights" or "definite ideas of property in land" is due not to any oversight on the part of the Crown. Rather, it is simply due to its non-existence in fact. He states:

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<sup>49</sup> Indeed the whole series of statutes which Prendergast cites alongside the *Land Claims Ordinance*, 1841, refer only to this sole right of pre-emption by the Crown, and the Crown's right to refuse to recognise any title acquired from the Maori tribes except those acquired by the Crown (*Wi Parata v Bishop of Wellington* at 77). Yet Prendergast concludes his analysis of all these statutes with the erroneous claim above, that they were "...avowedly framed upon the assumption that there existed amongst the natives no regular system of territorial rights nor any definite ideas of property in land....." (*ibid*).

<sup>50</sup> *Ibid*, at 79.

<sup>51</sup> Indeed "ancient custom and usage" defines both the identity and content of native title. As *Butterworths Australian Legal Dictionary* puts it, native title is "[a] right or interest over land or waters that may be owned, according to traditional laws and customs.....[t]he content and nature of the rights that may be enjoyed by the owners of native title is determined by the traditional laws and customs observed by those owners." (Peter E. Nygh and Peter Butt (eds) *Butterworths Australian Legal Dictionary*. Sydney: Butterworths, 1997, p. 775).

<sup>52</sup> *Wi Parata v Bishop of Wellington* at 79.



"Had any body of law or custom, capable of being understood and administered by the Courts of a civilised country, been known to exist, the British Government would surely have provided for its recognition, since nothing could exceed the anxiety displayed to infringe no just right of the aborigines."<sup>53</sup>

### ***Terra Nullius***

To insist that the Maori had no settled customary law or property in land capable of being recognised by the Crown is effectively to claim that, upon its occupation by the Crown, New Zealand was *terra nullius*.<sup>54</sup> *Terra nullius* is the inevitable conclusion once the existence of native title is denied within a colonised territory. However *terra nullius* is a concept usually only associated with Crown settlement in Australia. Conventional wisdom would suggest that the Treaty of Waitangi alone indicates that the Crown officially recognised the prior occupation of New Zealand by Maori tribes, thereby precluding any ascription of *terra nullius* to New Zealand. However we have seen that Prendergast rejects the Treaty as a “simple nullity”, and his claim of *terra nullius* follows from exactly the same premises that allows him to disregard the Treaty in this way. In both cases, he assumes that because Maori tribes lacked a basic level of civilisation, they lacked any conception of property in land, and so had no legal claim to sovereignty over the broader land mass that they occupied. As such, Prendergast concludes that neither native title or the Treaty exist in any legal sense, because of an absence of sovereignty and any “definite ideas of property in land” among Maori tribes. The result is that New Zealand, as a territory colonised by the Crown, is conceived by Prendergast as *terra nullius*.

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<sup>53</sup> *Ibid*, at 77-78.

<sup>54</sup> Within English common law, *terra nullius* referred to land which was acquired not by cession or conquest, but by discovery and settlement by the colonising power. Although originally applying to uninhabited land, it came to be applied to land with indigenous inhabitants whom the colonising power did not conquer or engage in treaty negotiations with, simply assuming sovereignty over the land and inhabitants by discovery and settlement alone. As Justice Brennan puts it in the *Mabo* judgment: “International law recognised conquest, cession, and occupation of territory that was *terra nullius* as three of the effective ways of acquiring sovereignty.....The great voyages of European discovery opened to European nations the prospect of occupying new and valuable territories that were already inhabited. As among themselves, the European nations parcelled out the territories newly discovered to the sovereigns of the respective discoverers.....provided the discovery was confirmed by occupation and provided the indigenous inhabitants were not organised in a society that was united permanently for political action.....To these territories the European colonial nations applied the doctrines relating to acquisition of territory that was *terra nullius*. They recognised the sovereignty of the respective European nations over the territory of ‘backward peoples’ and, by State practice, permitted the acquisition of sovereignty of such territory by occupation rather than by conquest....” (*Mabo v*

Both Paul McHugh and Fredericka Hackshaw have pointed to these simultaneous elements of Prendergast's judgment in *Wi Parata* which deny the existence of native title and Maori sovereignty together. They have attempted to explain Prendergast's conclusions along these lines in terms of various legal schools of thought, influential in the latter part of the nineteenth century, to which Prendergast may have been influenced.<sup>55</sup> McHugh argues that one of Prendergast's influences were the legal views of John Austin, who insisted that all law must derive from a sovereign.<sup>56</sup> In the absence of a sovereign, Austin argued, there could be no laws.<sup>57</sup> Therefore Austin refused to recognise that tribal societies, lacking a common sovereign, could be governed by laws.<sup>58</sup> This therefore provides a link between Prendergast's denial of Maori sovereignty and his denial of Maori customary law/native title. From an Austinian perspective, the denial of the Treaty as a "simple nullity" (due to a presumed absence of indigenous sovereignty) leads directly to the denial of native title, because the absence of sovereignty entails an absence of customary law, upon which native title is based.

Therefore both McHugh and Hackshaw's attribution of an Austinian influence to Prendergast provides an explanation for the close proximity in his judgment between his denial of the Treaty and his denial of native title (i.e. his *terra nullius* position). However neither McHugh or Hackshaw point to the obvious contradiction in Prendergast's *Wi Parata* judgment. This is the contradiction between, on the one hand, his *terra nullius* claims which deny the existence of native title, and elsewhere in his judgment, his recognition of native title as falling within the prerogative powers

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*Queensland [No. 2]* (1992) 175 CLR 1, 32, per Brennan J.; see *ibid*, at 77, per Deane and Gaudron JJ.; *ibid*, at 180, per Toohey J.).

<sup>55</sup> Both see various legal positivist schools of thought, influential in the latter part of the nineteenth century, as the strongest influence on Prendergast, in particular the positivist claim arising from the legal theorist John Austin that without a clear source of sovereignty there could be no recognition of law (c.f. Paul McHugh, *The Maori Magna Carta. New Zealand Law and the Treaty of Waitangi*. Auckland: Oxford University Press, 1991, pp. 113-14, 116; Fredericka Hackshaw, "Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi", in I.H. Kawharu (ed) *Waitangi. Maori and Pakeha Perspectives of the Treaty of Waitangi*. Auckland: Oxford University Press, 1989, pp. 99-101, 111). However neither points to the inherent contradiction between this aspect of Prendergast's judgment which denies the existence of native title, and his subsequent recognition of native title in his discussion of the Crown's acts of state on the issue. The failure on the part of Paul McHugh to recognise this contradiction in Prendergast's judgment leads to pitfalls in his analysis of *Wi Parata* and its legacy discussed in note 59 below.

<sup>56</sup> McHugh, *The Maori Magna Carta*, p. 116.

<sup>57</sup> *Ibid*.

<sup>58</sup> *Ibid*.

of the Crown.<sup>59</sup> This contradiction is discussed in the section “Prendergast’s Contradiction” below.

### The Ghost of Blackstone

That Prendergast does arrive at the view that New Zealand is *terra nullius* at various points within his judgment is also evident from his resort to Blackstonian terminology. Blackstone’s famous distinction in his *Commentaries on the Laws of England* (1765) between the discovery and settlement of “desart and uncultivated lands”, and the colonisation of lands “already cultivated”, was central to the development of the doctrines of both native title and *terra nullius* in English common law. As Blackstone stated:

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<sup>59</sup> McHugh’s failure to recognise this contradiction in Prendergast’s *Wi Parata* judgment leads, I believe, to pitfalls in his analysis of that decision and its legacy. For instance, McHugh claims that the legacy of the *Wi Parata* decision for subsequent New Zealand judicial developments was that “...Prendergast handed his judges feudal blinkers which saw the sole title to land in the colony as nothing other than Crown-derived, there never having been any previous sovereign from whom another legally-recognisable system of title could have derived.” (McHugh, *The Maori Magna Carta*, p. 115). This ignores the fact that there were effectively two precedents on native title within Prendergast’s *Wi Parata* judgement – neither of which was consistent with the other. The first was the claim that native title literally did not exist because Maori tribes were “barbarians without any form of law or civil government” and so lacked “any definite ideas of property in land” (*Wi Parata v Bishop of Wellington*, at 77). This is the closest to McHugh’s characterisation of Prendergast’s position above and, as I point out, was effectively an assertion of *terra nullius*. The second precedent was that native title did exist but any dealings concerning it were matters of Crown prerogative over which the Courts had no jurisdiction to interfere (*ibid*, at 79). This second precedent (and not the first) was the position subsequently adopted by New Zealand Courts in the wake of *Wi Parata*. In each case, these Courts did not deny the existence of native title. They simply insisted that they had no jurisdiction over it because it was a prerogative matter for the Crown (c.f. *Nireaha Tamaki v Baker* (1894) 12 NZLR 483, at 488, per Richmond J; *The Solicitor-General v The Bishop of Wellington and Others* (1901) 19 NZLR 665, at 685-86, per Williams J.; *Hohepa Wi Neera v The Bishop of Wellington* (1902) 21 NZLR (CA) 655 at 667, per Stout C.J.; and *ibid*, at 671-72, per Williams J.).

In this respect therefore, I think it is misleading for McHugh to imply in his passage above that the Courts did not recognise native title because they followed Prendergast’s first precedent that native title did not exist, there being no “...previous sovereign from whom another legally-recognisable system of title could have derived.” (McHugh, *The Maori Magna Carta*, p. 115). On the contrary, as we have seen, this *terra nullius* precedent emerging from *Wi Parata* seems to have been effectively ignored by subsequent Courts. Consequently, far from the Courts insisting that the sole title to land derived from the Crown because of the absence of a “previous sovereign”, the Courts upheld this principle because the idea of the Crown as the ultimate source of title was a basic assumption of feudal tenure, upon which all legal property relations within common law relied (c.f. *The Queen v Symonds*, at 388, per Chapman J.). Yet this feudal principle was still consistent with a recognition of the existence of native title (see note 19 above). The Courts simply insisted that any such recognition placed the matter entirely within the jurisdiction of the Crown. Consequently, the “feudal blinkers” adopted by the New Zealand Bench in the wake of *Wi Parata* were premised on a selective reading of that judgment. While it is true that these judges “saw the sole title to land in the colony as nothing other than Crown-derived”, this was not because they assumed that native title did not exist (as McHugh’s reasoning suggests above) but rather because Crown-derived title was the only sort of title that the Courts believed they had jurisdiction to recognise, native title being reserved exclusively for the prerogative powers of the Crown.

"Plantations, or colonies in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desart [*sic*] and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it is held, that if an uninhabited country be discovered and planted by English subjects, all the English laws are immediately there in force. For as the law is the birthright of every subject, so wherever they go they carry their laws with them. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the antient [*sic*] laws of the country remain, unless such as are against the law of God, as in the case of an infidel country."<sup>60</sup>

Consequently, Blackstone's distinction between "desart and uncultivated" and "already cultivated" land entailed two different legal regimes governing the Crown's acquisition of colonies and the status of the Crown's law within these colonies. Which of these legal regimes applied was determined by the existing status of the land itself within the newly occupied territory. If the land was "desart and uncultivated", then both discovery and a simple right of occupancy ("settlement") by the Crown was sufficient for the Crown to acquire valid title to the land under English law, and for all the existing laws of the Crown to immediately apply to the new territory. However if the land was "already cultivated" – that is, clearly subject to prior occupation – then the only means by which the Crown might acquire a valid title to the land under English law was either by conquest of the original inhabitants, or a treaty of cession whereby the original inhabitants transferred sovereignty over the territory to the Crown. Further, in such "already cultivated" territory, existing laws were recognised unless they were expressly annulled by the Crown.

Blackstone's concept of "desart and uncultivated" lands clearly refers to a situation of *terra nullius*. Because of an absence of existing laws in "desart and uncultivated" lands, the Crown, upon settlement, acquired not only sovereignty but full beneficial

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<sup>60</sup> William Blackstone, *Commentaries on the Laws of England* (1765), Vol. I (Chicago: University of Chicago Press, 1979), pp. 104-105.

ownership over all territory, and the laws of the Crown applied in full.<sup>61</sup> Only in “already cultivated” lands did existing laws continue to apply unless expressly overturned by the new sovereign.

But in using the phrase “desert and uncultivated”, was Blackstone applying *terra nullius* only to lands which were literally uninhabited? The fact that he uses the phrase “uninhabited country” later in the passage to refer to these “desert and uncultivated lands” is evidence that this was his intention.<sup>62</sup> However as we shall see below, in line with the evolution of the doctrine of *terra nullius* to include land with indigenous inhabitants (as in Australia), the legal consequences that Blackstone associates with his conception of “desert and uncultivated” lands came in time to be applied by English judicial authorities to inhabited lands as well.<sup>63</sup>

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<sup>61</sup> Certainly prior to the High Court’s *Mabo* judgment in 1992, the orthodox legal view in Australia was that Australia was “desert and uncultivated” land upon its discovery and settlement by the Crown, and so the Crown acquired full beneficial ownership of all land upon the acquisition of sovereignty. Such full beneficial ownership extended beyond ultimate or radical title (which as we have seen, is consistent with the maintenance of native title) to an full beneficial ownership, as in the form of a royal demesne. As Justice Windeyer put it: “On the first settlement of New South Wales (then comprising the whole of eastern Australia), all the land in the colony became in law vested in the Crown. The early Governors had express powers under their commissions to make grants of land. The principles of English real property law, with socage tenure as the basis, were introduced into the colony from the beginning – all lands of the territory lying in the grant of the Crown, and until granted forming a royal demesne.” (*Council of the Municipality of Randwick v Rutledge* (1959) 102 C.L.R. 54, at 71, per Windeyer J.).

<sup>62</sup> For a similar claim that Blackstone’s reference to “desert and uncultivated land” was intended to refer exclusively to “uninhabited” land, see King, “Terra Australis: Terra Nullius aut Terra Aboriginum?”, *Journal of the Royal Australian Historical Society*, Vol. 72, 2, 1986, pp. 79-80; Reynolds, *The Law of the Land*, pp. 33-34.

<sup>63</sup> See the discussion of the Privy Council decision in *Cooper v Stuart* (1889) below. On the extension of the doctrine of *terra nullius* to include inhabited lands as well, see Justice Brennan’s discussion in *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at 32-34, per Brennan J. Frederika Hackshaw explains how Austinian influences of legal positivism in the nineteenth century also enabled the concept of *terra nullius* to be extended to inhabited land. From Austin’s perspective, law could only derive from a sovereign (see note 57 above). However “...[c]ommunities which lacked the necessary criteria to constitute a body politic could not be regarded as sovereign entities, nor did they have legal root of title to the territory they occupied. In other words, such communities were legally non-existent. Because they were legally non-existent, they lacked the contractual capacity to enter into international agreements. Treaties of cession entered into with such communities must, therefore, be regarded as inherently void because a treaty (like any contract) requires two parties. Furthermore, the rules of conduct which customarily governed the relationships between members of the communities *inter se* could not be classified as ‘law’ because they were not enacted by an independent sovereign. Because legal rights, in positivist terminology, were inextricably linked to sovereign-created laws, there were no existing legal rights of property which continued after the acquisition of the territory by another State. The effect of this reasoning was that the meaning of ‘un-occupied’ territory could be extended from territory that was literally unoccupied to include territory occupied by people whose communities failed to meet positivist criteria of sovereignty. These territories were, therefore, open to occupation by Europeans without the need for compliance with the formal requirements of international law in respect of acquisition of territory, that is, cession confirmed by treaty.” (Hackshaw, “Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi”, pp. 100-101).

Regardless of whether Blackstone intended that his conception of "desart and uncultivated" land be extended to inhabited land as well, nevertheless once it was, Blackstone's identification of *terra nullius* with the absence of existing law in the colonised territory gave credence to the idea that the application of the doctrine of *terra nullius* ought to be determined less by whether land is inhabited or uninhabited and more by whether the colonising power was willing to recognise a pre-existing body of law which it would take account of in its colonising process. Indeed, it is the very question of such pre-existing laws which distinguishes Blackstone's model of "already cultivated" land from his "desart and uncultivated" alternative. In the case of "already cultivated" land, pre-existing laws remain and are only overturned by colonial law at the behest of the sovereign.<sup>64</sup> But in the case of "desart and uncultivated" land, where there are no pre-existing laws, all the laws of the colonial power are "immediately there in force".<sup>65</sup> Therefore, it is but a short step from assuming that "desart and uncultivated" land is land without pre-existing law, to assuming that land perceived to be without pre-existing law ought to be conceived as "desart and uncultivated" (i.e. *terra nullius*). It is via this short step that Blackstone's distinction gave credence to the idea that the doctrine of *terra nullius* could be extended beyond uninhabited land to land which the colonising power assumed was peopled by indigenous inhabitants without settled laws or rights in property.

Perhaps the most telling example of the extension of Blackstone's concept of "desart and uncultivated" land (*terra nullius*) to inhabited land is the judgement of the Privy Council in *Cooper v Stuart* (1889) which applied Blackstone's doctrine to Australia. The Privy Council did not suffer from the illusion that Australia was "uninhabited land". Its Aboriginal inhabitants were not "invisible" to them. But in the following passage, one can literally see the Privy Council extending Blackstone's reference to "uninhabited country" in his passage above, to include land "practically unoccupied, without settled inhabitants or settled law" (i.e. the very extension of the concept of *terra nullius* to inhabited land discussed above). They then claimed that New South Wales fell into the latter category:

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<sup>64</sup> See note 60 above. A very early case to apply this doctrine of Blackstone's was *Campbell v Hall* (1774), where Lord Mansfield, C.J., claiming he was articulating a proposition "too clear to be controverted", stated that ".....the laws of a conquered country continue in force until they are altered by the conqueror." [*Campbell v Hall* (1774) [1558-1774] All ER Rep., 252, at 254, per Mansfield, C.J.]

<sup>65</sup> See note 60 above.

"The extent to which English law is introduced into a British Colony, and the manner of its introduction, must necessarily vary according to circumstances. There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class."<sup>66</sup>

It was therefore on the basis of what the British perceived was an absence of "settled inhabitants" and "settled law", rather than a literal absence of people, that the Privy Council felt justified in applying Blackstone's concept of "desart and uncultivated" land (and its full legal consequences) to the colony of New South Wales and its Aboriginal population. The presumed absence of pre-existing law therefore became the basis by which the Privy Council could claim that Australia was *terra nullius*, thus allowing the full legal consequences of English law to take effect from the point of annexation:

"There was no land law or tenure existing in the Colony at the time of its annexation to the Crown; and, in that condition of matters, the conclusion appears to their Lordships to be inevitable that, as soon as colonial land became the subject of settlement and commerce, all transactions in relation to it were governed by English law, in so far as that law could be justly and conveniently applied to them."<sup>67</sup>

### **Prendergast's Use of Blackstone**

At various points within his judgment, Prendergast explicitly evokes Blackstone's distinction between "already cultivated" land, embodying pre-existing law, and "desart and uncultivated" land, within which no pre-existing law exists. For instance, at one point, he distinguishes New Zealand from other British colonies in Lower Canada, Mauritius, Ceylon, Guinea and the Cape, insisting that upon the cession of territory "by one civilised power to another" in one of *these* territories, "...the rights of private property are invariably respected, and the old law of the country is administered, to such extent as may be necessary, by the Courts of the new

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<sup>66</sup> *Cooper v Stuart* Vol. XIV, J.C. (1889), 286 at 291.

<sup>67</sup> *Ibid*, at 292.

sovereign."<sup>68</sup> He contrasts this to the Crown's acquisition of sovereignty in New Zealand, where he claims the Crown, finding itself confronted by "primitive barbarians", was not bound to acknowledge any pre-existing laws, since such laws were absent among the tribes themselves.<sup>69</sup> In other words, New Zealand was deemed by Prendergast to be a territory without pre-existing laws and so, in Blackstone's terms, "desart and uncultivated".

Another Blackstonian concept that Prendergast employs, and which clearly presupposes the idea of *terra nullius*, is the idea of "settlement". As we have seen, Blackstone distinguished between "cultivated" land which was acquired by cession or conquest, and "desart and uncultivated" land which was acquired by discovery and "right of occupancy", or what we now know as "settlement". The Treaty of Waitangi (1840) would appear to clearly indicate that New Zealand was territory of the first type, acquired by a treaty of cession. However as we have seen, Prendergast dismissed the treaty as a "simple nullity" precisely because he believed that the Maori did not have any sovereignty to cede in 1840. Consequently, far from suggesting that the Crown acquired sovereignty over New Zealand by cession (as the Treaty of Waitangi would suggest) various aspects of Prendergast's judgment indicates that he believes such acquisition must have been by "settlement" (i.e. discovery and occupation), despite the pre-existence of Maori tribes.

Hence at one point in his judgment, he refers to various legislative enactments of the Crown in relation to land issues, and argues that these "... express the well-known legal incidents of a *settlement* planted by a civilised Power in the midst of uncivilised tribes."<sup>70</sup> He also refers to absence of pre-existing law which Blackstone identified with "desart and uncultivated" land, and therefore with "settlement", when he refers to the Crown in New Zealand as "...the first civilised occupier of a territory thinly peopled by barbarians without any form of law or civil government."<sup>71</sup> He is even

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<sup>68</sup> *Wi Parata v Bishop of Wellington*, at 78.

<sup>69</sup> C.f. *ibid*, at 78.

<sup>70</sup> *Ibid*, at 77. My emphasis.

<sup>71</sup> *Ibid*, at 77. Ironically, as we have seen above, this statement, which in Blackstonian terms seems to imply a state of *terra nullius* within New Zealand, is preceded by a statement which seems to recognise some idea of native title at international law. Hence the full statement by Prendergast is as follows: "In fact, the Crown was compelled to assume in relation to the Maori tribes, and in relation to native land titles, these rights and duties which, *jure gentium*, vest in and devolve upon the first civilised occupier of a territory thinly peopled by barbarians without any form of law or civil government." (*ibid*). Such a contradictory juxtaposition, at one point seeming to recognise native title, and at another implying *terra nullius*, is evidence of Prendergast's wider contradictions on the issue which I discuss below.



more explicit that New Zealand was acquired by “settlement” when he records his agreement with an earlier case adjudicated by Acting Chief Justice Stephen in Auckland in 1858, whose judgement, he says, “.....imports that the title of the Crown to the country was acquired, *jure gentium*, by discovery and priority of occupation, as a territory inhabited only by savages”.<sup>72</sup>

All of these points indicate that Chief Justice Prendergast was willing to apply Blackstone’s concept of “settlement”, which implied “desert and uncultivated” land (*terra nullius*), to a territory that clearly was not uninhabited but had indigenous occupants who had gone so far as to sign a Treaty with the Crown. In this respect, Prendergast goes even further in his extension of Blackstone than the Privy Council in the case of *Cooper v Stuart* (1889). In that case, as we have seen, Blackstone’s concept of “settlement” was also applied to inhabited lands, and became the legal basis of Crown sovereignty, but in Australia there was no Treaty to indicate an act of cession had taken place inconsistent with such claims to “settlement”.

### **Prendergast’s Contradiction**

From the discussion above it should be evident that one of the most distinguishing features of Chief Justice Prendergast’s *Wi Parata* judgment is its fundamental contradictions. On the one hand, by affirming the Crown’s prerogative powers over native title, he affirms its existence, and even refers to the Crown’s “obligation to respect native proprietary rights”.<sup>73</sup> On the other hand, he categorically denies that Maori tribes possessed any such proprietary rights, thus denying the existence of native title and effectively asserting a doctrine of *terra nullius*.<sup>74</sup> Why does

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<sup>72</sup> *Wi Parata v Bishop of Wellington*, at 78.

<sup>73</sup> *Ibid*, at 78.

<sup>74</sup> Various writers on New Zealand native title do not seem to recognise that the one proposition denies the other. I have pointed to the case of Paul McHugh above (c.f. note 55 and 59 above). But similarly, Frederika Hackshaw, in her discussion of the *Wi Parata* case in the passage that follows, seems to perceive no contradiction between Prendergast’s *terra nullius* argument and his insistence that native title exists, albeit exclusively within the prerogative powers of the Crown. Hackshaw points to Prendergast’s claim that Maori tribes lacked any kind of civil government or settled system of law, and states: “That statement is illuminating of the rest of the argument, because it introduced positivist concepts of sovereignty and legal rights. In positivist terms, a community without a civil Government was not a body politic, and only a body politic could claim a legal root of title to territory. New Zealand, therefore, was technically *territorium nullius*, because the organisation of Maori society did not conform to positivist criteria of a body politic.” (Hackshaw, “Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi”, p. 111). Yet after referring to this assertion of *terra nullius*, she sees no inconsistency between it and her subsequent claim that this same positivist framework allows Prendergast to recognise native title as falling within the prerogative powers of the Crown: “Furthermore, the corollary of the absence of a developed legal

Prendergast's judgment contain such a glaring contradiction? I think the answer lies in the fact that Prendergast was confronted in this case by a clear claim to native title by the Ngatittoa tribe. He clearly did not believe that Maori tribes had proprietary rights to the land, but he had to provide a legal response that would bar the Ngatittoa claim, rather than just nakedly declaring it null and void. Hence he found in favour of the legitimacy of the Crown grant which was disputed by the Ngatittoa tribe on the basis that native title was a prerogative matter for the Crown, and so the mere existence of a Crown grant was conclusive concerning all native title claims. The advantage of such a finding, from Prendergast's perspective, was that it also removed native title matters from the jurisdiction of the Courts, leaving them entirely within the discretion of the Crown. The disadvantage of such a finding, from Prendergast's perspective, was that it was also an effective recognition of the legal existence of native title, which was at odds with his wider *terra nullius* claims within the same judgment. So the need for Prendergast to provide a legal response to a specific native title claim, arising from the Ngatittoa tribe, forced him towards conclusions which were at odds with his wider belief, expressed within the same judgment, that Maori tribes lacked "any definite ideas of property in land."<sup>75</sup>

### **Prendergast and the Native Rights Act, 1865**

Yet Chief Justice Prendergast still faced statutory material which seemed to uphold a position on native title that was contrary to his. For instance, his insistence that all native title questions fall exclusively within the prerogative powers of the Crown, and therefore outside the jurisdiction of the Courts, was apparently at odds with the *Native Rights Act*, 1865. Prendergast recognised that this statute seemed at odds with his judgment. As he put it:

"But it may be thought that the Native Rights Act, 1865, has made a difference on this subject, and by giving cognisance to the Supreme Court, in a very peculiar way, of

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system was an absence of legally cognisable rights of property which continued after annexation. That construction fundamentally alters the nature of the Crown's pre-emptive right: if aboriginal title is cognisable as a legal interest under the common law, it must be extinguished in accordance with common law principles because the inhabitants, having become British subjects, are entitled to the protection of their rights under common law. If aboriginal title is not regarded as a legal right, *the Crown's exclusive right to extinguish the native title could be exercised without the structures imposed by the common law*. In other words, the native title was not enforceable against the Crown." (*ibid.* My emphasis). Hence we see once again that the basic contradiction in Prendergast's argument – his assertion of *terra nullius* and his recognition of native title – is ignored.

<sup>75</sup> *Wi Parata v Bishop of Wellington*, at 77.

Maori rights to land, has enabled persons of the native race to call in question any Crown title in this Court. This would be indeed a most alarming consequence; but if it be the law, we are bound so to hold."<sup>76</sup>

Prendergast points out that the wording of the Act "...can only signify that the Court is enabled and required to entertain and determine questions of native title".<sup>77</sup> Yet he immediately rejects any such suggestion by simply repeating his insistence that native title does not fall within the jurisdiction of the Courts, regardless of what the Act (and therefore the will of Parliament) would suggest:

"We do not understand what could be the doubt vaguely referred to in the preamble [of the Act], 'whether her Majesty's Courts of Law within the colony of New Zealand have jurisdiction in all cases touching the persons and property of the Maori people'. On the one hand, it has always been certain that a Maori could bring trespass or ejection in respect of land held by him under a Crown grant. On the other hand, it has been equally clear that the Court could not take cognisance of mere native rights to land. Whatever doubt may now exist upon the latter point, is solely due to the Act itself."<sup>78</sup>

The result, Prendergast argues, is that the Act imposes on the Court an "impossible task", not least because (according to Prendergast) there are no customary Maori laws which could help the court determine native title in any specific instance.<sup>79</sup> However Prendergast points out that the Act ultimately releases the Court from this "impossible task" by placing all native title issues under the jurisdiction of a new judicial body, the Native Lands Court, to whom the municipal courts are to refer such matters:

"But the framers of the Act, conscious in some degree that the 3<sup>rd</sup> section would lay upon the ordinary Courts of the colony an impossible task, have by the 4<sup>th</sup> section hastened to take off the burden which just before they had seemed to impose. The higher Courts having been mentioned as it were for the sake of form, all questions of native title are by the 5<sup>th</sup> section relegated to a new and peculiar jurisdiction, the Native Lands Court, supposed to be specially qualified for dealing with this subject. To that tribunal the Supreme Court is bound to remit all such questions, and the

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<sup>76</sup> *Ibid*, at 79.

<sup>77</sup> *Ibid*, at 79.

<sup>78</sup> *Ibid*, at 79. My addition.

<sup>79</sup> C.f. *Ibid*, at 79, 80.

verdict or judgment of the Native Lands Court is conclusive. If, therefore, the contention of the plaintiff in the present case be correct, the Native lands Court, guided only by 'the Ancient Customs and Usage of the Maori people, so far as the same can be ascertained', is constituted the sole and unappealable judge of the validity of every title in the country."<sup>80</sup>

Prendergast recognised that such a legislative outcome would extinguish the prerogative powers of the Crown over native title, because, as the “sole and unappealable judge of the validity of every title in the country”, the Native Lands Court would be authorised to enforce native title decisions against the Crown. Faced with this possibility, Prendergast seeks to save the Crown's prerogative from extinguishment under the Native Rights Act by insisting that the Act does not apply to the Crown. He argues that, in so far as the Act does not explicitly mention the Crown, Parliament could not have meant to bind the Crown by it, and therefore could not have meant to override its prerogative on native title.<sup>81</sup> As Prendergast states:

"The Crown, not being named in the statute, is clearly not bound by it; as the Act, if it bound the Crown, would deprive it of a prerogative right, that namely of conclusively determining when the native title has been duly extinguished....."<sup>82</sup>

We see here Prendergast engaging in what is clearly a circular process of reasoning. He effectively admits in the passage above that his underlying reason for concluding that the *Native Rights Act*, 1865 does not affect the Crown's prerogative over native title, is that any other conclusion would jeopardise that prerogative right. In other words, for all intents and purposes, Prendergast admits he is placing a construction on his interpretation of the *Native Rights Act*, 1865 whose sole purpose is to maintain the Crown's prerogative over native title.

Yet Prendergast does not leave his interpretation of the *Native Rights Act*, 1865 there. He goes on to cite further evidence which he believes shows that Parliament did not intend to bind the Crown under this legislation. He cites subsequent native land legislation which allowed a mere declaration by the Crown to be sufficient evidence that native title had been lawfully extinguished, both in the Native Lands Court and in the municipal courts:

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<sup>80</sup> *Ibid*, at 79-80.

<sup>81</sup> *Ibid*, at 80.

"This conclusion is strongly confirmed by remarkable provisions in the Native Lands Acts of 1867 and 1873. By section 10 of the former Act, a copy of the New Zealand Gazette, notifying the extinction of the native title over any land therein comprised, was made conclusive proof of that fact in the Native Lands Court. This provision is re-enacted by the 105<sup>th</sup> section of the Native lands Act, 1873, and is extended in its effect to all Courts."<sup>83</sup>

Prendergast argues that this subsequent legislation indicates that Parliament did not intend, in the earlier *Native Rights Act* 1865, to establish any judicial authority capable of enforcing native title rights against the Crown, either in the Native Lands Court or in the municipal courts. Rather he argues, it indicates that Parliament wished the Crown to retain its prerogative rights, so that a Crown declaration concerning the status of native title on any particular piece of land would be conclusive:

"[W]e cite these provisions as plain intimations on the part of the Colonial Legislature that questions respecting the extinction of the native title are not to be raised either here or in the Native Lands Court in opposition to the Crown, or to the prejudice of its grantees. In our judgment these enactments introduce no new principles, but merely provide a convenient mode of exercising an indubitable prerogative of the Crown."<sup>84</sup>

However during preliminary argument in the *Wi Parata* case, the other presiding judge, Richmond J., went much further than Prendergast in his defence of the Crown's prerogative against any incursion by the *Native Rights Act*, 1865. Richmond J. refused to accept that the municipal courts would be capable of complying with the legislation if it required them to refer all matters of native title to the Native Lands Court. He accepted that native title matters between Maoris themselves might be referred to the Native Lands Court, but for the municipal courts to bind the Crown to the Native Lands Court on issues of native title would be to interfere with the Crown's prerogative. As Richmond J. states:

"The Native Rights Act, 1865, declares this Court shall take cognisance of Maori custom, but the Legislature requires us to send any question of Maori title to the Native Lands Court. It is as much as to say, it is a jurisdiction we are incapable of exercising.....If you can imagine such a thing as the rights of natives *inter se*,

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<sup>82</sup> *Ibid*, at 80.

<sup>83</sup> *Ibid*, at 80.

questions of that kind must go to the native Lands Court.....[However] [i]t is quite plain that we have no power to refer to the Native Lands Court the question whether the native title has been effectually extinguished by her Majesty, and it would be a monstrous thing if we could be required to do it."<sup>85</sup>

With these statements, Richmond J. goes much further than Prendergast in his defence of the Crown prerogative over native title. As we have seen, Prendergast saves the Crown prerogative from the depredation of the *Native Rights Act* by declaring that the Crown itself is not referred to in the Act, and so is not bound by it. He then proceeds to provide what he sees as evidence that indicates that Parliament did not intend to bind the Crown in this way. In doing so, Prendergast preserves the prerogative of the Crown against parliamentary legislation in a manner that does not seem to challenge the sovereignty of Parliament itself. He simply interprets the will of Parliament in such a way that it does not bind the Crown.

Richmond J.'s comments on the other hand indicate that even if, under the *Native Rights Act*, Parliament intended the municipal courts to bind the Crown over to the Native Lands Court, he declares that this is a "jurisdiction" which the courts are "incapable of exercising". In other words, Richmond J. is willing to defend the Crown's prerogative over native title by defying the clear legislative intention of Parliament. As such, his statements appear to be a direct challenge to parliamentary sovereignty

### **Prendergast's Break with Precedent**

We therefore see the extraordinary lengths to which the New Zealand Supreme Court was willing to go in order to preserve the Crown's prerogative powers over native title. Yet these lengths are only intensified when we realise the extent to which both Prendergast C.J. and Richmond J. had to break with New Zealand legal precedent in order to affirm this judgment in *Wi Parata*. Both of Chief Justice Prendergast's contradictory claims – that native title falls entirely within the prerogative powers of the Crown, and that the native title of Maori tribes does not exist – are at odds with the two major New Zealand judicial precedents on native title which preceded *Wi*

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<sup>84</sup> *Ibid*, at 80..

<sup>85</sup> *Ibid*, at 75, per Richmond J. My addition.

*Parata*. These were *The Queen v Symonds* (1847)<sup>86</sup> and *In re 'The Landon and Whitaker Claims Act 1871'* (1872).<sup>87</sup> In both of these cases, the New Zealand Supreme Court and Court of Appeal respectively, upheld both the legal existence of native title and its common law status, thereby ensuring that it fell entirely within the jurisdiction of the municipal courts.<sup>88</sup>

To the extent that it refers to native title, Chief Justice Prendergast effectively ignores the 'Landon and Whitaker Claims Act' precedent. However he adopts a mixed reaction to *The Queen v Symonds* (1847). On the one hand, he tries to enlist the support of *The Queen v Symonds* for his views on the Treaty as follows:

“So far as the proprietary rights of the natives are concerned, the so-called treaty merely affirms the rights and obligations which, *jure gentium*, vested in and devolved upon the Crown under the circumstances of the case. Our view of this subject is in accordance with previous decisions of this Court. In the case of the *Queen v Symonds*, both Judges cite and rely upon the American authorities to which we have referred. Thus it is manifest that in their apprehension the case of the Maoris, like that of the Indian tribes of North America, falls within those rules of the law of nations to which we have adverted.”<sup>89</sup>

However Prendergast finds that he must draw a clear line between his own judgment and that of *The Queen v Symonds*<sup>88</sup> on the issue of the cognisability of native title in municipal Courts, and again it is the U.S. precedents which are at issue. In delivering

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<sup>86</sup> *N.Z.P.C.C* (SC), 387.

<sup>87</sup> 2 NZ CA (1872).

<sup>88</sup> Hence as early as 1847, Justice Chapman of the New Zealand Supreme Court affirmed the legal existence of native title and denied that the Crown had any prerogative power to extinguish it independent of the consent of the native occupiers, as follows:

"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 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 Queen's 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 and unsettled." (*The Queen v Symonds* (1847) *N.Z.P.C.C.* (SC), 387, at 390, per Chapman J.).

Twenty-five years later, Chief Justice Arney of the Court of Appeal affirmed both the legal existence and common law status of native title, and its binding force on the Crown, in equally clear terms: "The 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." (*In re 'The Landon and Whitaker Claims Act 1871'*, 2 NZ CA (New Zealand Court of Appeal Reports) (1872), at 49, per Arney CJ).

<sup>89</sup> *Wi Parata v Bishop of Wellington*, at 78.

his judgment in *The Queen v Symonds*, Justice Chapman had used the precedent of *Cherokee Nation v State of Georgia* (1831) 5 Peters 1, and the *Commentaries* of Chancellor Kent, to insist that “...although the Courts of the United States, in suits between their own subjects, will not allow a grant to be impeached under pretext that the Native title has not been extinguished, yet they would certainly not hesitate to do so in a suit by one of the Native Indians.”<sup>90</sup> In other words, Justice Chapman is clearly insisting that the American courts would recognise native title claims against the State if brought by an indigenous plaintiff.

Prendergast is aware that such a position is entirely at odds with his claim that native title is excluded from the jurisdiction of the Courts, stating that Chapman J.’s view “...seems adverse to our own conclusion.”<sup>91</sup> Prendergast quotes the passage of Chancellor Kent’s *Commentaries*, cited by Justice Chapman<sup>92</sup>, and states that Chapman J.’s conclusions derived from this passage are unwarranted:

“From this passage, Mr. Justice Chapman, in the judgment delivered by him in the case of *Queen v Symonds*.....appears to infer, that although the American Courts would not allow a grant to be impeached on the ground stated in a suit between their own citizens, ‘yet they certainly would not hesitate to do so in a suit by one of the native Indians’. This surely is no legitimate inference from the statement of Mr. Chancellor Kent, and we believe it would be impossible to find authority for it.”<sup>93</sup>

Whether Justice Chapman’s views are a legitimate inference from the commentaries of Chancellor Kent or not, it may seem that the other source Chapman cited in support of his view, the U.S. Supreme Court judgment of *Cherokee Nation v State of Georgia* (1831), provides strong support for his position. In his judgment in that case, Chief Justice Marshall stated that “.....the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy until that right shall be extinguished by a voluntary cession to our government....”<sup>94</sup> Chief

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<sup>90</sup> *The Queen v Symonds*, at 390, per Chapman J.

<sup>91</sup> *Wi Parata v Bishop of Wellington*, at 80.

<sup>92</sup> This passage from Kent’s *Commentaries* is as follows: “Even with respect to the Indian reservation lands, of which they still retain the occupancy, the validity of a patent has not hitherto been permitted to be drawn in question in a suit between citizens of the State, under the pretext that the Indian right and title, as original lords of the soil, had not been extinguished.” – 3 Kent’s Com., p. 378, cited in *Wi Parata v Bishop of Wellington*, at 80.

<sup>93</sup> *Wi Parata v Bishop of Wellington*, at 80.

<sup>94</sup> *The Cherokee Nation v The State of Georgia* (1831), 30 US (5 Pet) 1 at 17, per Marshall C.J.



Justice Marshall's statement would seem to imply that the Courts would uphold the Indians' right to their land prior to any voluntary cession to government, thereby giving credence to Justice Chapman's claim in *The Queen v Symonds* that the Courts of the United States would "...allow a grant to be impeached under pretext that the Native title has not been extinguished", if the suit was bought by Native Indians.

However as Chief Justice Prendergast rightly points out: "The very case which [Justice Chapman] presently cites of the *Cherokee Nation v The State of Georgia* [5 Peters, U.S. Rep. 1.] determines that an Indian tribe has no *persona standi* as a plaintiff in the Courts of the United States. It appears clear that the learned Judge was mistaken in this particular."<sup>95</sup> In other words, while *The Cherokee Nation v State of Georgia* involves a clear recognition of native title by Chief Justice Marshall, he also holds that Indian tribes are unable to assert it within the original jurisdiction of the Supreme Court.<sup>96</sup> This is because although he believes these tribes have the status of "domestic dependent nations", they lack the status of "foreign states" over which, under the Constitution, the Supreme Court would have "original jurisdiction" in any case arising.<sup>97</sup> As Chief Justice Marshall states:

"The Court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the Constitution, and cannot maintain an action in the courts of the United States."<sup>98</sup>

Consequently, the Supreme Court case of *The Cherokee Nation v State of Georgia* (1831) seems to provide little support for Justice Chapman's position in *The Queen v Symonds* (1847). Nevertheless it is evident that Chief Justice Prendergast clearly misreads the import of the American authorities when, earlier in his judgment, he attempts to enlist them in support of his wider *terra nullius* position. He cites the U.S.

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<sup>95</sup> *Wi Parata v Bishop of Wellington*, at 81.

<sup>96</sup> As Chief Justice Marshall puts it: "If it be true that the Cherokee Nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future." (*The Cherokee Nation v The State of Georgia* (1831), 30 US (5 Pet) 1 at 20, per Marshall C.J.).

<sup>97</sup> The U.S. Constitution states that the judicial power of the Supreme Court shall extend, among other things, to controversies "between a State, or the citizens thereof, and foreign States, citizens or subjects." (The Constitution of the United States, Article III, Section 2). On Chief Justice Marshall's claim that Indian tribes within the U.S. have the status of "domestic dependent nations", see *The Cherokee Nation v The State of Georgia* (1831), 30 US (5 Pet) 1 at 17, per Marshall C.J.

<sup>98</sup> *The Cherokee Nation v The State of Georgia* at 20, per Marshall C.J.

Supreme Court case of *Johnson v McIntosh* (1823) as authority for his claim that in the case of “a settlement planted by a civilised Power in the midst of uncivilised tribes”, there is no basis upon which the civilised Power can recognise native proprietary rights in land. As Prendergast states:

“These measures were avowedly framed upon the assumption that there existed amongst the natives no regular system of territorial rights nor any definite ideas of property in land.....They express the well-known legal incidents of a settlement planted by a civilised Power in the midst of uncivilised tribes. It is enough to refer, once for all, to the American jurists, Kent and Story, who, together with Chief Justice Marshall, in the well-known case of *Johnson v McIntosh* [8 Wheaton, 543] have given the most complete exposition of this subject....”<sup>99</sup>

However this is a clear misreading of the Supreme Court’s judgment in *Johnson v McIntosh* (1823). Such a view of native title was asserted by the defence in that case.<sup>100</sup> However the Supreme Court itself clearly recognised native title, and merely asserted the U.S. government’s exclusive right to extinguish it.<sup>101</sup> In this respect, the

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<sup>99</sup> *Wi Parata v Bishop of Wellington*, at 77.

<sup>100</sup> Hence in the notes to the case it states: “On the part of the defendants, it was insisted that the uniform understanding and practice of European nations, and the settled law, as laid down by the tribunals of civilised states, denied the right of the Indians to be considered as independent communities, having a permanent property in the soil, capable of alienation to private individuals. They remain in a state of nature, and have never been admitted into the general society of nations.....All the treaties and negotiations between the civilised powers of Europe and of this continent, from the treaty of Utrecht, in 1713, to that of Ghent, in 1814, have uniformly disregarded their supposed right to the territory included within the jurisdictional limits of those powers....Not only has the practice of all civilised nations been in conformity with this doctrine, but the whole theory of their titles to lands in America rests upon the hypothesis that the Indians had no right of soil as sovereign, independent states. Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives.....The sovereignty and eminent domain thus acquired, necessarily precludes the idea of any other sovereignty existing within the same limits.” (*Johnson v McIntosh* (1823) 21 U.S. (8 Wheaton) 543 at 567). As with Prendergast’s judgment in *Wi Parata*, this argument for the defence assumes that any imputation that the Indians lacked sovereignty over their territory necessarily implied that they also lacked property in their soil.

<sup>101</sup> Hence in discussing the principle, extant among European nations, that discovery of new territories gave European states the title to these lands, Chief Justice Marshall states: “In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it. While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy. The history of America, from its discovery to the present day, proves, we think, the universal recognition of

issue which the Supreme Court had to decide in *Johnson v McIntosh* (1823) was similar to that which later confronted the New Zealand Supreme Court in *The Queen v Symonds* (1847).<sup>102</sup> Both Courts denied the right of individual settlers to purchase land privately from the natives, insisting that the Crown alone had the exclusive right to purchase and extinguish native title, and that in relation to settlers, the Courts could only recognise such titles deriving from the Crown.<sup>103</sup> This judicial recognition of the Crown's exclusive right of pre-emption was necessarily also a recognition of the native title over which this right was exercised.<sup>104</sup> So in no respect can the Supreme Court's judgment in *Johnson v McIntosh* (1823) be legitimately invoked by Chief Justice Prendergast in support of the *terra nullius* position that he articulates above.

However regardless of the import of the American authorities for Chief Justice Prendergast's position, we nevertheless see that he clearly attempts to override two previous New Zealand native title cases whose judgments are contrary to his own, either by effectively ignoring them, as with *In re 'The Lundon and Whitaker Claims Act 1871'* (1872), or by attempting to both enlist the support of the earlier decision, or

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these principles.” (*Johnson v McIntosh*, at 573-74, per Marshall C.J.). Further on in his judgment, in discussing the treaty that concluded the American War of Independence, Chief Justice Marshall articulates even more clearly the Court's recognition of native title, as a necessary consequence of its recognition of the Government's exclusive right of pre-emption. As he put it, “It has never been doubted, that either the United States, or the several states, had a clear title to all the lands within the boundary lines described in the treaty, *subject only to the Indian right of occupancy*, and that the exclusive power to extinguish that right was vested in that government which might constitutionally exercise it.” (*ibid*, at 584-85, per Marshall C.J. My emphasis. See also *ibid*, at 587, 588, per Marshall C.J.). Thus in terms of this exclusive right of pre-emption, the Indians were deemed to have a right to possession of their lands but were also “...deemed incapable of transferring the absolute title to others.” (*ibid*, at 591, per Marshall C.J.). The Court held that the Crown alone retained that right, but short of its exercise, the Government's absolute title to land was held subject to the Indians' right of occupancy: “All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognised the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.” (*ibid*, at 588, per Marshall C.J.). In other words, the Court's recognition of the exclusive right of pre-emption necessarily entailed a recognition of Indian native title.

<sup>102</sup> In *The Queen v Symonds* (1847) the New Zealand Supreme Court had to determine the extent to which the plaintiff's title acquired by direct purchase from Maori tribes (after the Governor had issued the plaintiff with a certificate waiving the Crown's exclusive right of pre-emption to these lands) could be upheld against the defendant's title to the same land acquired by Crown grant (c.f. *The Queen v Symonds*, at 387-88, per Chapman J.). Similarly, in *Johnson v McIntosh* (1823), the Supreme Court was confronted with a claim by the plaintiff to lands purchased directly from the chiefs of certain tribes constituting the Illinois and the Piankeshaw nations (*Johnson v McIntosh*, at 571-72, per Marshall J.). The title to such land was disputed by the defendant who had acquired a title to those same lands via a grant from the United States government (*ibid*, at 543).

<sup>103</sup> C.f. *The Queen v Symonds*, at 392-93, per Chapman J.; *ibid* at 398, per Martin C.J. *Johnson v McIntosh*, at 604-05, per Marshall C.J.

<sup>104</sup> For the US Supreme Court's recognition of native title in the context of its recognition of the Crown's exclusive right of pre-emption, see note 101 above. For the New Zealand Supreme Court's recognition of native title in the same context, in *The Queen v Symonds* (1847), see note 88 above.

dismiss those elements which differ from his own, as in the case of *The Queen v Symonds* (1847).

### **Subsequent New Zealand Authority**

As we have seen, one strategy in Chief Justice Prendergast's attempt to overcome contrary precedent of *The Queen v Symonds* (1847) was to claim that his *Wi Parata* decision was in accord with some aspects of the earlier judgment, but overturned those other aspects which differed from his own. However subsequent New Zealand judicial authorities have had no problem reading the two cases as consistent with each other. Hence in *Hohepa Wi Neera v The Bishop of Wellington* (1902), Chief Justice Stout (in a judgment which was concurred with by Edwards and Conolly J.J.) states:

"The earliest decision of the Supreme Court on the subject is, I believe, that of *McIntosh v Symonds* [sic] [*N.Z. Gazette* (1847), p. 63]. In the very able and learned judgement of the late Mr Justice Chapman, approved of by the Chief Justice Sir William Martin, it was held that the Supreme Court could not recognise any title not founded on the Queen's patent as the source of private title. This decision was followed in several cases, the most important of which was *Wi Parata v Bishop of Wellington*."<sup>105</sup>

In the formal Protest of the New Zealand Court of Appeal against the Privy Council in 1903, Chief Justice Stout continued to identify *The Queen v Symonds* and *Wi Parata* as providing this common precedent as follows:

"The root of title being in the Crown, the Court could not recognise Native title. This has been ever held to be the law in New Zealand: see *Reg v Symonds*, decided by their Honours Sir William Martin, C.J., and Mr Justice Chapman in 1847; *Wi Parata v Bishop of Wellington*, decided by their Honours Sir J. Prendergast and Mr Justice Richmond in 1877, and other cases."<sup>106</sup>

And again in 1912, Chief Justice Stout identifies both cases as providing this common precedent when he states:

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<sup>105</sup> *Hohepa Wi Neera v The Bishop of Wellington* (1902) 21 NZLR 655 (CA), at 665-666, per Stout C.J.

<sup>106</sup> "*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", [1840-1932] NZPCC Appendix, 730, at 732, per Stout C.J.

"The decision of *Wi Parata v The Bishop of Wellington*.....only emphasised the decision in *Reg. v Symonds* that....Native customary title was a kind of tenure that the Court could not deal with."<sup>107</sup>

By reading the precedent of *The Queen v Symonds* as consistent with that of *Wi Parata* (and by effectively ignoring *In re 'The Landon and Whitaker Claims Act 1871'* (1872) ), New Zealand judges in the years after *Wi Parata* were able to look back on what they claimed was a consistent and continuous line of authority, from the inception of common law in New Zealand, excluding native title from the jurisdiction of the Courts.<sup>108</sup> Hence in his contribution to the Protest in 1903, Justice Williams refers to the "unbroken current of authority" in New Zealand that "... the Native occupiers had no right to their land cognisable in a Court of law, and that having no such right themselves they could not transfer any right to others."<sup>109</sup>

Consequently, in the years after *Wi Parata*, the judgment of the Supreme Court in *The Queen v Symonds* (1847) was consistently misread as consistent with this later case. In regard to "Landon and Whitaker Claims", it too was retrospectively assimilated to *Wi Parata*. For instance, in his presentation of the Crown's opinion in *Tamihana Korokai v The Solicitor-General* (1912), the Solicitor-General of the time states:

"The principle of *Wi Parata v Bishop of Wellington*.....has been reaffirmed in the following cases: *Hohepa Wi Neera v Bishop of Wellington*; *Teira te Paea v Roera Tareha*; *Mueller v Taupiri Coal-Mines (Limited)*. The only dictum to the contrary is in *Landon and Whitaker Claims*, but it could not have been meant to conflict with the judgment in *Wi Parata v Bishop of Wellington*."<sup>110</sup>

Here we have the somewhat comic instance of "Landon and Whitaker Claims", which was decided five years prior to *Wi Parata*, being interpreted in such a way that it "could not have been meant to conflict" with *Wi Parata*. Short of clairvoyance on the part of the judges in "Landon and Whitaker Claims", it is not apparent how they could have "meant" any such thing. Yet nothing more clearly indicates the

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<sup>107</sup> *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 at 344, per Stout C.J.

<sup>108</sup> That such unanimity was largely appearance rather than fact, see the section "Minor Exceptions" below.

<sup>109</sup> "*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", [1840-1932] NZPCC Appendix, 730, at 750, per Williams J.

<sup>110</sup> *Tamihana Korokai v The Solicitor-General* (1912) 32 NZLR 321, at 332, per Solicitor-General.

overwhelming desire on the part of the Crown (and the Courts) to assimilate all native title precedents to *Wi Parata*, even the *earlier* ones.<sup>111</sup>

### Minor Exceptions

So the *Wi Parata* principle that native title fell within the prerogative powers of the Crown became the authoritative precedent on native title in New Zealand, until the Courts shifted their recognition of native title to a statutory basis in 1912.<sup>112</sup> Yet there were some minor exceptions to the maintenance of this dominant line of authority, with some judges refusing to maintain the *Wi Parata* orthodoxy on native title. Hence in *Mangakahia v The New Zealand Timber Company* (1882), Justice Gillies of the Supreme Court went so far as to base native title rights on the Treaty of Waitangi. As he states:

“Theoretically the fee of all lands in the colony is in the Crown, subject nevertheless to the ‘full, exclusive and undisturbed possession of their lands’, guaranteed to the natives by the treaty of Waitangi which is no such ‘simple nullity’, as it is termed in *Wi Parata v Bishop of Wellington*.....quoted in argument in this case.”<sup>113</sup>

Gillies’ claim that native title rights are guaranteed by the Treaty is not only at odds with Prendergast in *Wi Parata*, but also with most subsequent New Zealand judicial

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<sup>111</sup> Indeed this conflict with *Wi Parata* is even clearer in *In re 'The Lundon and Whitaker Claims Act 1871' (1872)* than it is in *The Queen v Symonds (1847)*. *In re 'The Lundon and Whitaker Claims Act 1871' (1872)* was a clear affirmation of the central principles of *The Queen v Symonds (1847)*, including its recognition of native title at common law. As Chief Justice Arney stated: "The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right." (*In re 'The Lundon and Whitaker Claims Act 1871'*, 2 NZ CA (1872), pp. 49-50, per Arney CJ.). The Crown was "bound" by common law because the Courts were entitled to enforce common law rights against the Crown. Chief Justice Arney was therefore insisting that native title fell within the jurisdiction of the municipal Courts. No conclusion could be further from the view of Chief Justice Prendergast in *Wi Parata* some five years later. In Prendergast’s view, far from insisting that the Crown was "bound" by common law to a "full recognition" of native title, or that the Courts could enforce this, he stated: "...in the case of primitive barbarians, the supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice. Its acts in this particular cannot be examined or called in question by any tribunal, because there exist no known principles whereon a regular adjudication can be based." (*Wi Parata v Bishop of Wellington* at 78). Whereas Chief Justice Arney believed there were clear principles in common law upon which a "regular adjudication" on native title could be based, Chief Justice Prendergast comes to the directly opposite conclusion only five years later. Consequently, it seems evident that the judgments of *In re 'The Lundon and Whitaker Claims Act 1871' (1872)* and *Wi Parata v Bishop of Wellington (1878)* on native title could not have been more contradictory.

<sup>112</sup> See note 6 above.

<sup>113</sup> *Mangakahia v The New Zealand Timber Company* (1881) 2 NZLR (SC) 345 at 350, per Gillies J.

authority, which held that the Treaty (and the rights it embodied) had no force in law independent of the Treaty's embodiment in statute.<sup>114</sup>

Almost twenty years later, Justice Edwards affirms this conclusion of Gillies J. In the course of a discussion of public navigation rights, Edwards J. makes the following claim:

“The lands in question, as is shown by ‘The new Zealand Settlements Act, 1863’, under which they were granted, were Native lands. When granted these lands were taken from rebellious Natives under the authority of this statute. Up to this point, therefore, the lands were Native lands, the owners of which were entitled to the full, exclusive, and undisturbed possession thereof guaranteed to them by the Treaty of Waitangi. These rights have from the time of the foundation of the colony been recognised by the Crown and by the Legislature. ‘The Native Lands Act, 1862’, recites the treaty, and the rights of the Natives thereunder; and the whole of the legislation relating to Native lands up to the present day recognises the existence of these rights. These are also recognised by ‘The Native Rights Act, 1865’. The position of Native lands was, it seems to me, laid down with perfect accuracy by Mr. Justice Gillies in *Mangakahia v The New Zealand Timber Company* [N.Z.L.R. 2 S.C. 345, at p. 350] in these words: ‘Theoretically, the fee of all lands in the colony is in the Crown, subject, nevertheless, to the ‘full, exclusive, and undisturbed possession of their lands’ guaranteed to the Natives by the Treaty of Waitangi, which is no such ‘simple nullity’ as it is termed in *Wi Parata v The Bishop of Wellington*’.”<sup>115</sup>

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<sup>114</sup> C.f. “*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903”, [1840-1932] NZPCC Appendix, 730, at 732, per Stout C.J.; *Tamihana Korokai v The Solicitor-General* (1912) 32 NZLR 321 (CA), at 354-55, per Chapman J.; *Te Heuheu Tukino v Aotea District Maori Land Board* [1941], NZLR, 590, at 596-97.

<sup>115</sup> *Mueller v The Taupiri Coal-Mines (Limited)* (1900) 20 NZLR 89 (CA), at 122, per Edwards J. However in attempting to reconcile the differences which Justice Gillies asserts between his own judgment and that of Justice Prendergast in *Wi Parata*, Edwards J. goes on to make what I believe is a rather naïve statement concerning the latter, suggesting that in denying that the Treaty was a legitimate instrument of cession in *Wi Parata*, Justice Prendergast never intended to deny native title rights at all: “The case of *Wi Parata v The Bishop of Wellington*...is not, as seems to have been thought by Mr. Justice Gillies, opposed to the view taken by him. The passage to which reference is made appears upon page 78 of the report: ‘The existence of the pact known as ‘The Treaty of Waitangi’, entered into by Captain Hobson on the part of Her Majesty with certain Natives at the Bay of Islands, and adhered to by some other Natives of the Northern Island, is perfectly consistent with what has been stated. So far, indeed, as that instrument purported to cede the sovereignty – a matter with which we are not here directly concerned – it must be regarded as a simple nullity. No body politic existed capable of making cession of the sovereignty, nor could the thing itself exist. So far as the proprietary rights of the Natives are concerned, the so-called treaty merely affirms the rights and obligations which *jure gentium* vested in and devolved upon the Crown under the circumstances of the case’. This passage simply denies any

In the passage above, Edwards J. goes further than Gillies J. and argues that the rights embodied in the Treaty of Waitangi, referring to the “full, exclusive, and undisturbed possession” of land, have actually received legislative recognition - the clear implication of which is that these native title rights are therefore binding on the Crown. Consequently, it is somewhat contradictory for Edwards J., later in the same paragraph, to affirm the other precedent of *Wi Parata* - that native title is subject to the prerogative power of the Crown, and therefore is not binding upon it. Nevertheless he does so as follows:

“.....transactions with the Natives for the cession of their title to the Crown are to be regarded as acts of State, and are therefore not examinable by any Court; and any act of the Crown which declares, or, perhaps, merely assumes, that the Native title has been extinguished is conclusive and binding upon all Courts and for all purposes. This proposition is laid down in *Wi Parata v The Bishop of Wellington*.....”<sup>116</sup>

However these qualified departures from the *Wi Parata* precedent are minor ones, because the main line of New Zealand judicial authority, and certainly the one that confronted the Privy Council in *Nireaha Tamaki v Baker* (1900-01) [1840-1932] NZPCC 371 and *Wallis v Solicitor General for New Zealand* [1903] AC 173, fully affirmed *Wi Parata* as the authoritative precedent on native title in New Zealand.

### **Full Circle**

However perhaps the most ironic element of the Supreme Court's *Wi Parata* judgement is how the long process of judicial development which it initiated eventually came full circle in 1912. As we have seen, Prendergast C.J. went to some lengths in his judgment to explain why the municipal courts were not required by the *Native Rights Act*, 1865, to bind the Crown over to the Native Lands Court on native title issues. He therefore concluded that the Crown's prerogative over native title was not affected by the 1865 Act, and so native title remained entirely outside the jurisdiction of the municipal courts. The courts therefore could not enforce any lawful procedure upon the Crown for extinguishing native title, because the Crown's declaration on native title matters was conclusive and binding on the Courts.

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operation to the treaty as a cession of the sovereignty: it does not deny that it declared the existence of the proprietary rights of the Natives, although it puts those rights upon a higher footing than if they had stood upon the treaty alone.” [*Mueller v The Taupiri Coal-Mines (Limited)*, at 122-23, per Edwards J.].  
<sup>116</sup> *Ibid*, at 123, per Edwards J.



Thirty-four years later, the case of *Tamihana Korokai v The Solicitor-General* (1912) involved largely the same issue, but this time the Court of Appeal decided that the Crown was bound by the *Native Land Act* (1909) which provided a strict procedure for the legal extinguishment of native title.<sup>117</sup> The Court of Appeal held that the municipal courts could refer native title claims involving the Crown to the Native Lands Court, as required under the Act, if it was found that the Crown had not legally extinguished the native title in accordance with the required statutory procedure.<sup>118</sup> In other words, the Court of Appeal held that, on the basis of a 1909 statute, native title was no longer a matter of Crown prerogative, but was defined by statute, which meant it fell within the jurisdiction of the municipal courts, who in the appropriate circumstances could now enforce native title procedures against the Crown. The *Wi Parata* precedent was finally overturned.

Yet this question of the extent to which the Crown was bound by statute on native title matters was precisely the same issue that had arisen in *Wi Parata*. However in that case, the Supreme Court pointedly refused to accept that the *Native Rights Act*, 1865, provided any such authority to bind the Crown, despite the fact that Prendergast himself admitted that the clear expression of the 1865 Act was that the judgment of the Native Lands Court be "conclusive" on native title matters.<sup>119</sup> Instead, the Court held fast to its defence of the Crown prerogative, insisting that the Crown was not bound by the statute because it was not explicitly named in it. Indeed, as we saw above, Prendergast even admitted that his reason for interpreting the Act in this way was precisely to protect the Crown's prerogative over native title, as ".....the Act, if it bound the Crown, would deprive it of a prerogative right, that namely of conclusively determining when the native title has been duly extinguished....."<sup>120</sup> Justice Richmond was even more partisan in his defence of the Crown prerogative, making statements which appeared to suggest he would be willing to defy parliamentary sovereignty in order to do so.

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<sup>117</sup> *Tamihana Korokai v The Solicitor-General* (1912) 32 NZLR 321, at 345, per Stout C.J.

<sup>118</sup> *Ibid* at 345-46, per Stout C.J.

<sup>119</sup> Referring to the *Native Rights Act*, 1865, Prendergast states: ".....all questions of native title are by the 5<sup>th</sup> section relegated to a new and peculiar jurisdiction, the Native Lands Court, supposed to be specially qualified for dealing with this subject. To that tribunal the Supreme Court is bound to remit all such questions, and the verdict or judgment of the Native lands Court is conclusive." (*Wi Parata v Bishop of Wellington*, at 80).

<sup>120</sup> *Ibid*, at 80.

Given this obvious partisanship of the judges in *Wi Parata* in favour of the Crown prerogative, it is fair to say that if they had read the *Native Rights Act, 1865* in a more impartial manner, then they might have held that the 1865 statute overrode the Crown's prerogative on native title as clearly as a subsequent Supreme Court held the 1909 statute did. This result would have avoided the long circular judicial process on native title that occurred in New Zealand, where *Wi Parata* was tenaciously defended by the New Zealand Courts, even to the point of open breach with the Privy Council, only to arrive at a situation in 1912 where the same legal issues which arose in *Wi Parata* produced a directly contrary judicial conclusion.

## Conclusion

The infamy that *Wi Parata* has attracted over the years has almost exclusively been associated with Chief Justice Prendergast's rejection of the Treaty of Waitangi as a "simple nullity". However as the discussion above has indicated, *Wi Parata* had much more to say about native title, and none of it consistent. Treaty issues and native title issues are legally distinct, in that treaties involve acts of state and native title issues are generally matters of common law or statute law. However at several points in *Wi Parata*, Prendergast tried to conflate the two by insisting that the Crown's responsibilities concerning native title issues were "in the nature of a treaty obligation", so that all native title issues were matters of Crown prerogative.<sup>121</sup> At other points in *Wi Parata*, Prendergast denied the existence of native title altogether and asserted what amounted to a claim of *terra nullius*. We have seen that his assertion of *terra nullius* arose from the same set of assumptions that led him to reject the Treaty as a "simple nullity". These assumptions were that Maori tribes lacked the level of civilisation necessary to develop "definite ideas of property in land", and therefore lacked any broader claim to sovereignty over the territory they occupied. So at one level in his judgment, Prendergast affirmed the existence of native title, and at another level, he denied it.

Yet despite these inconsistencies and contradictions in his judgment, subsequent New Zealand judicial authorities (with some minor exceptions discussed above) upheld Prendergast's *Wi Parata* decision as binding precedent on all native title questions in New Zealand. They did so by ignoring those elements of Prendergast's

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<sup>121</sup> *Ibid*, at 79.

judgment which amounted to an assertion of *terra nullius*, and upholding those sections which recognised the practical existence of native title but referred it entirely to the prerogative powers of the Crown. This excluded native title from the jurisdiction of the municipal courts. The Crown could therefore unilaterally determine native title matters by declaration alone, and Maori tribes were denied any redress in the Courts. In other words, as Prendergast put it, the Crown would become the “sole arbiter of its own justice” on native title issues.<sup>122</sup>

Such an outcome was too conducive to settler interests for the authority of Prendergast’s judgment to be diminished by its inherent contradictions. Indeed, the enthusiasm of the New Zealand Bench to uphold *Wi Parata* as binding precedent on native title was most evident in its willingness to read the New Zealand judgments preceding *Wi Parata*, which had arrived at a contrary view on native title, as being consistent with *Wi Parata* itself. In other words, *Wi Parata* represented more to the New Zealand Bench than simply a legal precedent. The extent to which the Bench was willing to defend this precedent, even to the point of open breach with the Privy Council, indicates that the judgment satisfied deeper material interests in nineteenth century New Zealand settler society.

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<sup>122</sup> C.f. *ibid*, at 78.