



Centre of Full Employment and Equity

Working Paper No. 02-14

Pre-Wi Parata

Early Native Title Cases in New Zealand

John W. Tate ¹

Updated April 2003

Centre of Full Employment and Equity
The University of Newcastle, Callaghan NSW 2308, Australia
Home Page: <http://e1.newcastle.edu.au/coffee>
Email: coffee@newcastle.edu.au

Introduction

The question of native title was a contentious issue within the New Zealand judicial system from 1847 to 1912. Following the New Zealand Supreme Court's decision in *Wi Parata v Bishop of Wellington*² in 1877, both the Supreme Court and the New Zealand Court of Appeal held tenaciously to the precedent on native title which they believed this case had established.³ This precedent was that native title was entirely within the jurisdiction of the Crown's prerogative powers, and so was outside the jurisdiction of the Courts.⁴ This meant that native title was not enforceable against the Crown, so that the Crown was the "sole arbiter of its own justice" on native title matters.⁵ The New Zealand judiciary clung to this precedent, even in the face of an open breach with the Privy Council over this issue.⁶ It was not until the decision of the New Zealand Court of Appeal

¹ The author would like to thank Neil Foster from the School of Law, University of Newcastle, Australia, and Elise Histed, Pamela O'Connor and Sharon Rodrick from the Faculty of Law, Monash University, Australia, for their valuable assistance in helping to decipher the more arcane aspects of "seisin in fee" as it relates to the Crown, discussed in the section "Native Title and 'Seisin-in-Fee'" below.

² (1878) 3 NZ Jur (N.S.) S.C. 72.

³ 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. There were some exceptions to this defence of *Wi Parata* - see footnote 22 below. However these were minority views, since the cases defending *Wi Parata* above constituted the dominant New Zealand precedent on native title upon which the Privy Council ruled in its two land mark native title cases, *Nireaha Tamaki v Baker* (1900-01) [1840-1932] NZPCC 371 and *Wallis v Solicitor General for New Zealand* [1903] AC 173.

⁴ C.f. *Wi Parata v Bishop of Wellington* (1878) 3 NZ Jur (N.S.) S.C. 72, at 78-79, per Prendergast C.J.

⁵ *Ibid*, at 78.

⁶ The ostensible reason for the Court of Appeal's official Protest against the Privy Council in 1903 was the injudicious language which the Court of Appeal believed the Privy Council had used in *Wallis v Solicitor General for New Zealand* [1903] AC 173 to describe *obiter dicta* which the Court of Appeal had offered in a previous decision, which the Privy Council had overturned on appeal. As Justice Williams put it: "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 judgement, 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 judgement of their Lordships has been published and circulated throughout the Colony. The natural tendency of that judgement, 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." ("*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", [1840-1932] NZPCC Appendix, 730, at 747, per Williams J.). It was primarily the Court of Appeal's belief that the Privy Council, in its judgement, had implied that the Court of Appeal lacked dignity, and was willing to deny justice, by submitting to undue pressure from the executive, which most aroused the latter's indignation. Chief Justice Stout saw this as a "direct attack" on the "probity" of the Court of Appeal (*ibid*, at 730, per Stout C.J. C.f. *ibid*, at 755-56, per Williams J.; *ibid*, at 757, per Edwards J).

In the context of their Protest, some members of the Court of Appeal made the claim that, as an inferior court, they were not criticising the substantive content of the Privy Council's decision in *Wallis v Solicitor-*

in *Tamihana Korokai v The Solicitor-General* (1912)⁷ that the New Zealand judiciary revealed it was willing to openly break with the *Wi Parata* precedent.⁸ Up until that time it had (with some minor exceptions) clung tenaciously to this precedent.

Yet the irony of this almost unqualified commitment to *Wi Parata* on the part of the New Zealand judiciary is that the case itself was preceded by two judgements which delivered fundamentally different opinions on native title. The judgement of the New Zealand Supreme Court some thirty years earlier in *The Queen v Symonds* (1847), N.Z.P.C.C (SC), 387, and of the Court of Appeal in *In re 'The Lundon and Whitaker Claims Act 1871'*, 2 NZ CA (1872) were the earliest New Zealand decisions delivered on native title. Far from insisting that the native title fell exclusively within the prerogative powers of the Crown, both cases defended the justiciability of native title within municipal courts, by insisting that it fell within the parameters of common law.⁹

Yet what is doubly ironic is that although both cases clearly provided a contrary precedent to the later judgement of *Wi Parata v Bishop of Wellington* (1878),

General (1903), only its manner of expressing it; while others accepted that they were criticising the content of the Privy Council's decision, but only to the extent necessary to defend the dignity of the Court of Appeal (c.f. *ibid*, at 731, per Stout C.J.; *ibid*, at 746, per Williams J.). However it is evident that, despite these protestations, the real issue of contention animating the Protest was the extent to which the Privy Council's judgement in *Wallis v Solicitor-General* (1903) (along with its previous judgement in *Nireaha Tamaki v Baker* (1900-01)) broke from the tradition of *Wi Parata* on issues of native title. All of the judges in the Protest, despite their protestations above, criticised the Privy Council's judgement in *Wallis v Solicitor-General* in these substantive terms (c.f. *ibid*, at 732-34, 742-43, per Stout C.J.; *ibid*, at 747-48, 749-50, 754-55, per Williams J.; *ibid*, at 757, per Edwards J.). Indeed, all went as far as to accuse the Privy Council of ignorance of New Zealand law on these and other matters. (c.f. *ibid*, at 732, 737, 743, 745, 746, per Stout C.J.; *ibid*, at 756, per Williams J.; *ibid*, at 758-59, per Edwards J.).

⁷ 32 NZLR 321.

⁸ The breach with the Privy Council was the high point in the New Zealand Court of Appeal's defence of the *Wi Parata* precedent. By 1912, in its judgement in *Tamihana Korokai v The Solicitor-General* (1912), it is clear that the New Zealand Court of Appeal was looking for ways to heal its breach with the Privy Council of nine years earlier. In this latter case, Chief Justice Stout finally follows the Privy Council in acknowledging the enforceability of native title against the Crown, but on the authority of a 1909 statute *post-dating* any of the Privy Council judgements that had come to a similar view, and therefore relying on legislation subsequent to that cited by the Privy Council (c.f. *Tamihana Korokai v The Solicitor-General* (1912) 32 NZLR 321, at 344-45, per Stout C.J.). In other words, by conforming to the Privy Council position on native title, the New Zealand Court of Appeal finally severed the legacy of *Wi Parata* and healed its rift with the Privy Council, but on the face-saving basis of New Zealand statutory authority both independent of, and subsequent to, the legislation upon which the Privy Council had relied in coming to its conclusions. C.f. Paul McHugh, "Aboriginal Title in New Zealand Courts", *Canterbury Law Review*, Vol. 2, 1984, p. 251; Paul McHugh, *The Maori Magna Carta. New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991), p. 121.

nevertheless in the wake of the *Wi Parata* precedent, these earlier cases were read by both New Zealand's judiciary and Crown law officers as consistent with *Wi Parata*. In other words there was a clear refusal on the part of most of the New Zealand judiciary and the Crown to retrospectively read the legal history of native title in New Zealand as anything other than a clear endorsement of the *Wi Parata* judgement. This paper attempts to provide some explanation of this paradoxical state of affairs. On what basis could otherwise highly qualified legal authorities misread these clearly contrasting precedents in such a manner as to perceive them as consistent with each other? Was this misreading deliberate? Or did it reflect a purely colonial perspective which shaped the way in which issues of land settlement were understood? All these possibilities will be considered in what follows.

Contrasting Precedents

At first glance, it would seem that when it comes to native title, there could hardly be more divergence between the precedent of *The Queen v Symonds* and *In re 'The Landon and Whitaker Claims Act 1871'*, on the one hand, and that of *Wi Parata* on the other. Justice Chapman in *The Queen v Symonds* gave a ringing endorsement of the common law status of native title as follows:

"The intercourse of civilised nations, and especially of Great Britain, with the aboriginal Natives of America and other countries, during the last two centuries, has gradually led to the adoption and affirmation by the Colonial Courts of certain established *principles of law* applicable to such intercourse. Although these principles may at times have been lost sight of, yet animated by the humane spirit of modern times, our colonial Courts, and the Courts of such of the United States of America as have adopted the *common law of England*, have invariably affirmed and supported them; so that at this day, a line of judicial decision, the current of legal opinion, and above all, the settled practice of the colonial Governments, have concurred to clothe with certainty and precision what would otherwise have remained vague and unsettled. These principles are not the new creation or invention of the colonial Courts. They flow not from what an American writer has

⁹ C.f. *The Queen v Symonds* (1847) *N.Z.P.C.C.* (SC), 387, at 388, 390, per Chapman J; and *ibid*, at 393-94, per Martin C.J; *In re 'The Landon and Whitaker Claims Act 1871'*, 2 *NZ CA* (1872), at 49-50, per

called the 'vice of judicial legislation'. They are in fact to be found among the earliest *settled principles of our law*; and they are in part deduced from those higher principles, from charters made in conformity with them, acquiesced in even down to the charter of our own Colony; and from the letter of treaties with Native tribes, wherein those principles have been asserted and acted upon."¹⁰

In this statement, Chapman J. does not refer to statutes or royal proclamations, or the discretion of the Crown as the source of indigenous rights in the colonies. He refers to "principles of law", "settled principles of our law", and the "common law of England" as the basis of indigenous rights against the Crown. To the extent that Chapman J. sees the foundation of indigenous rights as lying in English common law, he sees these rights as justiciable in the municipal courts. This would presumably include the indigenous right most at issue in the present case - native title - since this was the sole basis upon which indigenous inhabitants could claim customary rights to the occupation of traditional land under common law.¹¹

Similarly, in *In re 'The Landon and Whitaker Claims Act 1871'* (1872), during the course of a discussion concerning the distinction between "Crown lands" and "Native lands", Chief Justice Arney of the Court of Appeal also affirmed the common law status of native title, and therefore its justiciability within the Courts, when he stated:

"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,

Arney C.J.

¹⁰ *The Queen v Symonds* (1847) *N.Z.P.C.C.* (SC), 387, at p. 388, per Chapman J. My emphasis.

¹¹ That Chapman J. was referring to native title among the indigenous rights which he refers to as part of the "settled principles of our law" and the "common law of England" is evident elsewhere in his judgement when he states: "The practice of extinguishing Native titles by fair purchases is certainly more than two centuries old. It has long been adopted by the Government in our American colonies, and by that of the United States. It is now part of the law of the land....." (*The Queen v Symonds* (1847) *N.Z.P.C.C.* (SC), 387, at 390, per Chapman J.).

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."¹²

With these words, Chief Justice Arney was simply recognising the common law principle that native title is a "burden" on the ultimate title of the Crown, but that all other titles to land derive exclusively from the Crown.¹³

Chief Justice Prendergast's *Wi Parata* judgement on the other hand, clearly articulated a contrary set of principles concerning native title. At one level he appears to deny the existence of native title altogether, articulating what amounts to an extraordinary claim of *terra nullius* – usually associated with the larger land mass across the Tasman. For instance, in the context of his judgement, Prendergast refers to the *Native Rights Act*, 1865, and criticises its reference to the "Ancient Custom and Usage of the Maori People", ".....as if some such body of customary law did in reality exist."¹⁴ Indeed it is precisely the existence of such "ancient custom and usage" that native title is premised upon – since it is perceived to be a form of customary ownership which pre-dates the Crown's acquisition of sovereignty.¹⁵ Yet Prendergast entirely rejects any such pre-existing customary law, stating that ".....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 suppositions, that no

¹² *In re 'The Lundon and Whitaker Claims Act 1871'*, 2 NZ CA (New Zealand Court of Appeal Reports) (1872), pp. 49-50, per Arney CJ.

¹³ This principle is fundamental to native title at English common law. As Justice Brennan states in the *Mabo* case: "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) 175 CLR 1, at 51, per Brennan J). So native title precedes the Crown's acquisition of radical title and is a "burden" on it. On all other titles deriving exclusively from the Crown's radical title, which therefore precedes these other forms of title, see *ibid*, at 47-48, per Brennan J.

¹⁴ *Wi Parata v Bishop of Wellington* at 79.

¹⁵ 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.....The 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).

such body of law existed; and herein have been in entire accordance with good sense and indubitable facts."¹⁶

Indeed, even when faced with Crown statutes which clearly made reference to "the rightful and necessary occupation and use" of land by the "aboriginal inhabitants", as in the *Land Claims Ordinance of 1841*, Prendergast denies that such statutes reflect Crown recognition of native title, stating: "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."¹⁷

Finally, Prendergast insists that the absence of such "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: "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."¹⁸

It is precisely this purported absence of a body of "law or custom" relating to property within Maori society which, Prendergast C.J. believes, renders English law incapable of cognising any native title rights to which Maori tribes might be able to lay claim. However 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*.¹⁹

¹⁶ *Wi Parata v Bishop of Wellington* at 79.

¹⁷ *Ibid*, at 77.

¹⁸ *Ibid*, at 77-78.

¹⁹ Both Paul McHugh and Fredericka Hackshaw have pointed to these elements of Prendergast C.J.'s judgement in *Wi Parata* which deny the existence of native title altogether. They have attempted to explain them in terms of the influence on Prendergast of various legal schools of thought, influential in the latter part of the nineteenth century (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 judgement 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

Yet Prendergast then contradicts his position above, making reference to native title in the passage below, affirming its existence but yet insisting that it falls entirely within the parameters of the prerogative powers of the Crown, and so is outside the jurisdiction of the Courts. As Prendergast C.J. put 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.....*Quoad* this matter, 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.”²⁰

Prendergast therefore clearly recognises the existence of native title, but places it firmly within the prerogative powers of the Crown, claiming that such matters are akin to a Treaty obligation.²¹ This is so despite his infamous claim elsewhere in his judgement that

recognise this contradiction in Prendergast’s judgement leads to pitfalls in his analysis discussed in note 23 below.

²⁰ *Wi Parata v Bishop of Wellington*, at 78-79. My emphasis.

²¹ 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 the Courts to be within the prerogative powers of the Crown and therefore outside the jurisdiction of the Courts (c.f. *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).

the Treaty of Waitangi itself had no legal status as a cession of sovereignty.²² It is on these grounds – that native title is an affair of state and so falls within the prerogative powers of the Crown – that Prendergast C.J. insists the Crown must be the “sole arbiter of its own justice” on this issue.²³ On this basis, as he states in his concluding sentence

²² As Prendergast C.J. infamously put it, so far as the Treaty purports to be an instrument of cession by which sovereignty was transferred between Maori tribes and the British, “...it must be regarded as a simple nullity.” (*Wi Parata v Bishop of Wellington* at 78). Prendergast C.J.’s reason for arriving at this conclusion was as follows: “No body politic existed capable of making cession of sovereignty, nor could the thing itself exist.” (*ibid*). Consequently, as with his *terra nullius* claims, where Maori tribes were deemed incapable of claiming property in their land due to what Prendergast perceived to be an absence of customary law, Prendergast refused to concede that Maori tribes possessed sovereignty over their land, or possessed the level of political organisation and sophistication necessary to formally treat with the Crown for the cession of that sovereignty. Indeed it is this aspect of Prendergast C.J.’s judgement, not his contradictory views on native title, that the *Wi Parata* case is notorious for.

As we have seen, the precedent of *Wi Parata* was upheld by the main line of New Zealand judicial authority until the early years of the twentieth century. However there were some minor exceptions. Hence in *Mangakahia v The New Zealand Timber Company* (1882), Justice Gillies went so far as to base native title rights on the Treaty of Waitangi. As Gillies J. 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.” (*Mangakahia v The New Zealand Timber Company* (1881) 2 NZLR (SC) 345 at 350, per Gillies J.). Gillies’ suggestion that the Treaty is a legal guarantee of native rights is a position not only at odds with Prendergast in *Wi Parata*, but also with most subsequent New Zealand judicial authority which argued that the Treaty (and the rights it embodied) had no force in law independent of the Treaty’s embodiment in statute (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). Nevertheless, almost twenty years later, Justice Edwards affirms this conclusion of Gillies J. (c.f. *Mueller v The Taupiri Coal-Mines (Limited)* (1900) 20 NZLR 89 (CA), at 122, per Edwards J.). Indeed, Edwards J. goes further and argues that the rights embodied in the Treaty of Waitangi, referring to the “full, exclusive, and undisturbed possession” of land, had actually received legislative recognition in the Native Lands Act, 1862 and the Native Rights Act, 1865 (*ibid*). The clear implication of this claim is therefore that these native title rights, because of their legislative basis, are binding on the Crown. Consequently, it is somewhat contradictory for Edwards J., later in the same paragraph, to also affirm the precedent of *Wi Parata*, that native title is subject to the prerogative power of the Crown and so is not binding upon it. Nevertheless he does so as follows: “No doubt....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.” (*ibid*, at 123, per Edwards J.). However as mentioned in footnote 3 above, these departures from the *Wi Parata* precedent are minor ones, because the main line of New Zealand judicial authority, and certainly the one that reached 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.

²³ *Wi Parata v Bishop of Wellington*, at 78. 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*,

above, the Courts cannot question, but can only assume, that the Crown has acted properly in this regard. The result in terms of native title rights is that, from the perspective of the Courts, such rights are not enforceable against the Crown, because to enforce them would intrude on the Crown's prerogative.

However for our purposes, the central point raised by the passage above is that in so far as Prendergast insists on the Crown's prerogative over native title, he is recognising the existence of that title itself. This recognition is entirely at odds with his claims above that denied the existence of native title altogether, and amounted to assertions of *terra nullius*. We therefore see a fundamental inconsistency in his judgement.²⁴ Nevertheless

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.

²⁴ In this respect, I think Paul McHugh goes too far in his claim 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 (*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 (the one exception being Stout C.J. in his Protest discussed below). 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 13 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 judgement. 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.

Prendergast's conclusions are clear. Native title, to the extent that it exists, falls entirely within the prerogative powers of the Crown, which effectively excludes this issue from the jurisdiction of the Courts. The result is that Maori tribes have no recourse to the Courts in order to enforce native title claims against the Crown. The latter alone is the sole determinant of justice on this issue. Nothing could be more at odds with the earlier judgements of the New Zealand Supreme Court and Court of Appeal in *The Queen v Symonds* (1847) and *In re 'The Landon and Whitaker Claims Act 1871'*, 2 NZ CA (1872).

Subsequent (Mis)Readings

As one can see, it is unlikely that two sets of judgements could yield more contrary precedents on native title. The judges responsible for the earlier decisions in *The Queen v Symonds* (1847) and *In re 'The Landon and Whitaker Claims Act 1871'* (1872) clearly uphold the status of native title in common law, and therefore insist that native title claims are cognisable by the Courts. On the other hand, the *Wi Parata* judgement, when it is not denying the existence of native title altogether, relegates it exclusively to the realm of Crown prerogative, meaning that native title claims are not cognisable by the Courts at all.

Contrary to those judgements that would come after him, Prendergast C.J. recognised in *Wi Parata* that *The Queen v Symonds* embodied a precedent contrary to his own. Hence although he tried (somewhat problematically) to enlist the support of *The Queen v Symonds* for his views on the Treaty of Waitangi and the 'law of nations', he nevertheless recognised that Chapman J.'s citation of U.S. cases in support of the idea that the Courts could take cognisance of native title claims was clearly contrary to his own view.²⁵

²⁵ Prendergast C.J. 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." (*Wi Parata v Bishop of Wellington*, at 78). However Prendergast finds that he must draw a clear line between his own judgement and that of *The Queen v Symonds* on the issue of the cognisability of native title in municipal Courts, and again it is the U.S. precedents which are at issue. 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

Yet subsequent readings by the New Zealand Bench in the wake of *Wi Parata* interpreted these early native title judgements as consistent with *Wi Parata* itself. In *Hohepa Wi Neera v The Bishop of Wellington* (1902), Stout C.J. (in a judgement which was concurred with by Edwards and Conolly J.J.) cited *The Queen v Symonds* in support of the view that the Court's could only recognise titles to land deriving from the Crown, thereby excluding native title from the jurisdiction of the Courts.²⁶ He 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*."²⁷

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." (*The Queen v Symonds*, at 390, per Chapman J.). In other words, Justice Chapman is clearly insisting that the American courts would recognise native title claims if brought by an indigenous plaintiff. Prendergast C.J. admits that this is a dictum "...which seems adverse to our own conclusion." (*Wi Parata v Bishop of Wellington*, at 80). He quotes the passage of Chancellor Kent's *Commentaries*, cited by Chapman J., and argues that Chapman J.'s conclusion that American Courts would recognise a suit for native title brought by an indigenous plaintiff is "surely...no legitimate inference from the statement of Mr. Chancellor Kent, and we believe it would be impossible to find authority for it." (*ibid*).

²⁶ A finding that the Courts can only recognise titles deriving from the Crown necessarily excludes native title from Court jurisdiction because native title is the one form of legal land title that does not derive from the Crown (on the later point concerning native title not deriving from the Crown, c.f. *Mangakahia v The New Zealand Timber Company* (1881) 2 NZLR (SC) 345 at 350-51, per Gillies J.; *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at 64, per Brennan J.). Rather, because it derives from traditional laws and customs which precede the Crown, it pre-exists the Crown as a form of title. It is therefore a "burden" on the Crown's radical title once the Crown acquires sovereignty, rather than deriving from that radical title itself as all other land titles in colonial territory do (c.f. *ibid*, at 51, per Brennan J.). It is because he sees native title as *preceding* the Crown, that Justice Brennan in the *Mabo* judgement can refer to native title as "surviving" the Crown's acquisition of sovereignty (*ibid*, at 69, per Brennan J.).

²⁷ *Hohepa Wi Neera v The Bishop of Wellington* (1902) 21 NZLR 655 (CA), at 665-666, per Stout C.J. However while Stout C.J.'s claim that the Courts could only recognise titles deriving from the Crown certainly excludes native title from the jurisdiction of the Courts, it does not necessarily affirm that native title is purely a prerogative matter for the Crown (even though it was on this basis that Prendergast C.J. had excluded native title from the Courts in *Wi Parata*). Consequently, reading *The Queen v Symonds* judgement as authority for the claim that the Courts can only recognise land titles deriving from the Crown does not justify the conclusion that it therefore also holds that native title is purely a matter of Crown prerogative. This however did not deter the counsel for the Solicitor-General in *Hohepa Wi Neera v the Bishop of Wellington* (1902), who cited *The Queen v Symonds* as the precedent for such prerogative matters, stating: "The prerogative of the Crown to declare the extinguishment of Native title has been recognised by an unbroken line of cases in the colonial Courts, beginning with *Reg v Symonds*....." (*Hohepa Wi Neera v The Bishop of Wellington* (1902), at 659, per Gully for the Solicitor-General).

Of course, it is *Wi Parata* which most clearly upholds this same principle, Prendergast stating that it is “.....clear the Court could not take cognisance of mere native rights to land.”²⁸ Yet in the passage above, Stout C.J. not only attributes such a precedent to *The Queen v Symonds*, but represents *Wi Parata* as merely confirming this prior precedent, thus identifying both cases as embodying a common position on native title.

In the formal Protest of the New Zealand Court of Appeal against the judgement of the Privy Council in *Wallis v Solicitor-General* in 1903, Stout C.J. 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.”²⁹

And again in 1912, Stout C.J. identifies both cases as providing this common precedent when he states:

"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.”³⁰

Consequently, by reading the precedent of *The Queen v Symonds* as identical with that of *Wi Parata* (and by effectively ignoring *In re 'The Lundon and Whitaker Claims Act 1871' (1872)*), New Zealand judges in the wake of *Wi Parata* were able to look back to what they believed was a consistent and continuing line of authority, from the inception of common law in New Zealand, unanimous in its exclusion of native title from the jurisdiction of the Courts.³¹ Hence in his contribution to the Protest in 1903, Justice Williams refers to the "unbroken current of authority" in New Zealand that ".... the

²⁸ *Wi Parata v Bishop of Wellington*, at 79.

²⁹ “*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.

³⁰ *Tamihana Korokai v Solicitor-General* (1912) 32 NZLR 321 at 344, per Stout C.J.

³¹ For evidence that such “unanimity” was largely appearance rather than fact, see the reference to the judgement of Justice Gillies in *Mangakahia v The New Zealand Timber Company* (1882) at note 22 above.

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."³² Referring to the Court's earlier judgement in *The Solicitor-General v The Bishop of Wellington and Others* (1901) 19 NZLR 665 in which this view was affirmed, he says that "[h]ad we not so held we should not only have had to overrule all previous decisions, but should have differed in opinion *from every Judge who has ever sat in this Court.*"³³ Once again, the judgements of both *The Queen v Symonds* (1847) and in *In re 'The Landon and Whitaker Claims Act 1871'* (1872) were assimilated to this "unbroken current of authority".

What we see here in this assertion of an "unbroken current of authority" is the *Wi Parata* precedent being read retroactively to impose its authority over earlier as well as later judicial decisions. Hence Justice Williams implies that *all* New Zealand judicial authority points in the direction of *Wi Parata*, when he insists that: "*It has always been held that any transactions between the Crown and the Natives relating to their title by occupancy were a matter for the Executive Government, and one into which the Court had no jurisdiction to inquire. We considered, as every authority justified us in considering, that the root of all title was in the Crown. What the right of any prior Native occupiers might be, or whether they had any rights, was a matter entirely for the conscience of the Crown. In any case they had no rights cognisable in this Court. Nor could this Court examine in any way what their rights were.*"³⁴ Justice Edwards offered a similar view on the uniformity of New Zealand precedent concerning native title.³⁵

Yet as we shall see below, all of these readings of *The Queen v Symonds* were misreadings, premised on isolating specific passages in Chapman J.'s judgement and interpreting them independent of their broader context in the judgement as a whole. One indication of this is the very different reading *The Queen v Symonds* received in the Privy

³² "*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", [1840-1932] NZPCC Appendix, 730, at 750, per Williams J.

³³ *Ibid.* My emphasis.

³⁴ *Ibid.*, pp. 754-55, per Williams J. My emphasis.

³⁵ C.f. *ibid.*, at 757, per Edwards J. Needless to say, such a conclusion by Edwards J. was somewhat at odds with his position in *Mueller v The Taupiri Coal-Mines (Limited)* (1900), discussed in footnote 22 above. However as we have seen, even in that case, Edwards J. upheld the Crown's prerogative power over native title (one of the primary issues in dispute in the Court of Appeal's Protest against the Privy Council),

Council, which came to very different conclusions concerning the precedent established by this case. Hence in *Nireaha Tamaki v Baker* (1900-01), Lord Davey, delivering the opinion of the Privy Council, stated:

"In an earlier case of *The Queen v Symonds*, it was held that a grantee from the Crown had a superior right to a purchaser from the Natives without authority or confirmation from the Crown which seems to follow from the right of pre-emption vested in the Crown. In the course of his judgement, however, *Chapman, J.*, made some observations very pertinent to the present case. He says: 'Whatever may be the opinion of jurists as to the strength or weakness of the Native title,.....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'. And while affirming 'the Queen's exclusive right to extinguish it' secured by the right of pre-emption reserved to the Crown he holds that it cannot be extinguished otherwise than in strict compliance with the provisions of the statutes."³⁶

Consequently Lord Davey affirmed precisely those elements of Chapman J.'s judgement, endorsing native title rights against the Crown, which subsequent New Zealand judicial authorities had ignored in their haste to assimilate this case to *Wi Parata*. In providing this endorsement however, Lord Davey did not go so far as to affirm Chapman J.'s claim that native title fell within the jurisdiction of common law.³⁷ Rather, he insisted that the Crown was bound by statute on this matter.³⁸ Nevertheless the above statement shows that it was possible for judges to engage in a transparent reading of *The Queen v Symonds*, rather than assimilating it to a subsequent (and contrary) precedent.

The irony in New Zealand judiciary's response, in the wake of *Wi Parata*, to *The Queen v Symonds* (1847) and *In re 'The Lundon and Whitaker Claims Act 1871'* (1872) is not that these judgements were conveniently forgotten (as they might have been given that they upheld contrary precedents to *Wi Parata*) but rather that both cases were misread in

though as we saw, such a position contradicted his other one in that case concerning the legislative recognition of native title rights embodied in the Treaty.

³⁶ *Nireaha Tamaki v Baker* (1900-01) [1840-1932] NZPCC 371, at 384.

³⁷ Although Paul McHugh claims that Lord Davey implied a common law basis for native title via his criticisms of Prendergast C.J.'s *Wi Parata* judgement. C.f. McHugh, *The Maori Magna Carta*, p. 118.

³⁸ *Nireaha Tamaki v Baker* at 382.

a way that assimilated them to this contrary *Wi Parata* precedent, thereby establishing an apparent “unbroken current of authority” on native title.³⁹ A good example of this process in relation to "Lundon and Whitaker Claims" is the following statement from the Solicitor-General during his presentation of the Crown's evidence in *Tamihana Korokai v The Solicitor-General* (1912). He 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 *Lundon and Whitaker Claims*, but it could not have been meant to conflict with the judgement in *Wi Parata v Bishop of Wellington*."⁴⁰

Here we have the somewhat comic instance of a case decided five years prior to *Wi Parata* which, although it gave rise to dictum contrary to *Wi Parata*, is nevertheless interpreted in terms such that it "could not have been meant to conflict" with *Wi Parata*. Short of clairvoyance on the part of the judges in "Lundon and Whitaker Claims", it is not apparent how they could have “meant” any such thing. Yet nothing more clearly indicates the overwhelming desire of the Crown (and the Courts) to assimilate all precedents to *Wi Parata*, even the earlier ones.⁴¹

³⁹ It is in this respect I would disagree with David Williams' claim that *The Queen v Symonds* (1847) "...suffered a long period of total eclipse and only now in these latter days [has] waxed once again." (David V. Williams, "The Queen v Symonds Reconsidered", 19, *Victoria University of Wellington Law Review* (1989), p. 385). Such a statement assumes that the precedent of *The Queen v Symonds* (1847) was effectively ignored or forgotten by subsequent judicial authorities. On the contrary, as we have seen, this judgement was copiously cited, but in a selective manner which allowed the judgement to be interpreted as authority for what it was not. In this respect I would say that the *Queen v Symonds* (1847) suffered not so much a "total eclipse" as a long period of selective (mis)interpretation.

⁴⁰ *Tamihana Korokai v The Solicitor-General* (1912) 32 NZLR 321, at 332, per Solicitor-General.

⁴¹ 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

Yet the fatuous nature of the Solicitor-General's statement is understandable when we realise there were few other ways for the Crown (or the Courts) to overcome the uncomfortable fact that there were two cases prior to *Wi Parata* which clearly conflicted with its judgement on native title. At least the Solicitor-General was honest enough to admit that *In re 'The Landon and Whitaker Claims Act 1871'* (1872) did conflict with *Wi Parata*. As we have seen above, the New Zealand Bench were not so forthcoming in their interpretation of *The Queen v Symonds* (1847), viewing it as entirely consistent with the later *Wi Parata* precedent.

Possible Explanations?

So what possible explanation could there be for such an obvious (and consistent) misreading of the early native title cases of *The Queen v Symonds* and *In re 'The Landon and Whitaker Claims Act 1871'*, relative to the later precedent of *Wi Parata*? I think it is possible to highlight two. Firstly, there are clear elements of Justice Chapman's judgement in *The Queen v Symonds* which, if read selectively and to the exclusion of other elements in his judgement, could give rise to *obita dicta* which would support the subsequent misreading indulged in by the New Zealand Bench. As we shall see, it is only when Chapman J.'s judgement is read in a broader (largely unarticulated) framework, which I argue is presupposed by his judgement, that any resolution is achieved between its apparently conflicting elements.

However unlike *The Queen v Symonds*, *In re 'The Landon and Whitaker Claims Act 1871'* does not have conflicting elements in its judgement that can be read in isolation. So while contrary elements within Chapman J.'s judgement may explain some subsequent misreadings of *The Queen v Symonds*, it does not explain how *In re 'The Landon and Whitaker Claims Act 1871'* (1872) could be effectively overlooked by the New Zealand Bench in their reading of all New Zealand judicial authority as consistent with *Wi Parata*. As such, a second explanation for this is needed, and I think one can be

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 judgements of *In re 'The Landon*

found if we interpret these attempts to assimilate all authorities to *Wi Parata* (and the misreadings of contrary judgements which therefore arise) as exhibiting a distinct “colonial consciousness” on the part of the New Zealand Bench.

A “colonial consciousness” is defined as an outlook informed by the material interests of a settler society. Foremost among these interests is a necessary concern for the process of land settlement, since it is this process which, more than anything else, defines a colonial “settler” society. These material concerns were exacerbated in New Zealand society because of the open military conflict that had erupted between Maori tribes and the Crown over precisely this issue in the middle of the nineteenth century.

Needless to say, it would be highly unusual if the members of the New Zealand Bench were immune from these interests and concerns, so that they never intruded on their legal outlook or judgement in native title cases. I argue below that such concerns did indeed intrude on their judgement in this respect, and it is these concerns which help explain the decisions they arrived at concerning native title during these years. In particular, this “colonial consciousness” explains the New Zealand Bench’s tenacious commitment to the principle of *Wi Parata*, its willingness to misread previous native title cases as consistent with this precedent, and its willingness to defend *Wi Parata* even at the expense of an open breach with the Privy Council. The “colonial consciousness” explains all of this because it reveals the material interests which a judgement such as *Wi Parata* satisfied, and therefore reveals the incentives which existed to maintain this precedent by assimilating all other authorities to it.

To repeat therefore, there are two possible explanations as to why the New Zealand Bench were able to misread *The Queen v Symonds* and overlook *In re 'The Lundon and Whitaker Claims Act 1871'* in such a way that they could assimilate these early New Zealand judicial authorities to *Wi Parata*. There were:

1. The contrary elements in Chapman J.’s judgement in *The Queen v Symonds* (1847).
2. The existence of a “colonial consciousness”.

The following will consider each of these in turn.

and Whitaker Claims Act 1871' (1872) and *Wi Parata v Bishop of Wellington* (1878) on native title could not have been more contrary.

1. Contrary Elements of *The Queen v Symonds* (1847)

The first major judicial decision to deal with native title in New Zealand was *The Queen v Symonds* (1847). This judgement was foundational in the sense that later New Zealand judgements on native title all referred to this case as authoritative precedent. In the wake of *Wi Parata*, the New Zealand Supreme Court and Court of Appeal appealed to this case as the authority for holding that municipal Courts had no jurisdiction over any matter involving native title. They did so on the basis of isolated passages within *The Queen v Symonds* (1847) where Chapman J. had stated that municipal Courts could only recognise land titles deriving from the Crown.⁴²

Yet as we shall see, the use of these passages as the basis for such a conclusion is premised on a selective reading of the judgement. There are some statements by Justice Chapman which, read in isolation, could give reason for claiming that he held that the municipal Courts could not recognise any title to land other than those deriving from the Crown - thereby excluding native title from the jurisdiction of the Courts. However as we shall see below, if such statements are read in the broader context of Chapman's judgement as a whole, and are supplemented by the judgement of Chief Justice Martin in the same case, it is evident that the Supreme Court *did* affirm the jurisdiction of the municipal Courts over native title in *The Queen v Symonds*. By implication therefore, it rejected the presumption that native title was purely a matter of Crown prerogative.

Nevertheless it is impossible to deny that Chapman J.'s judgement does suffer some bifurcation between his insistence at some points that the municipal Courts can only recognise land titles deriving from the Crown, and his apparent affirmation elsewhere in the judgement of the jurisdiction of the Courts over native title. The selective reading of *The Queen v Symonds* by subsequent judicial authorities is made possible by these contrary aspects of the original judgement. The following discussion attempts to outline these contrary aspects of Chapman J. (and Martin C.J.'s) judgements, and provide some explanation for them. It will be argued that these contrary remarks can be reconciled so

⁴² Of course the claim by the municipal Courts in subsequent cases that they had no jurisdiction over native title does not necessarily amount to a claim that native title does not exist. In all but a few isolated instances, the Courts recognised the existence of native title, in so far as they recognised the Crown's

long as the judgement is read in the context of a broader explanatory framework which, it is claimed, was largely unarticulated by either judge in the case, but which must be presumed in order to make sense of the contrary elements of their judgements.

An Initial Denial of Native Title?

The appeal to *The Queen v Symonds* as precedent for claiming that the municipal Courts had no jurisdiction over native title is somewhat ironic given that Justice Chapman begins his judgement with the passage quoted above, in the section entitled “Contrasting Precedents”, which appears to be a clear statement that all matters involving indigenous inhabitants and the Crown are matters of common law, and therefore fall well within the jurisdiction of the municipal Courts. As argued above, this clearly includes native title.

Yet immediately following this claim, Chapman J. goes on to make a series of statements concerning the Crown’s relationship to land in the colony which seem to deny the legal status of native title – and it is these passages that subsequent New Zealand judicial authorities focused on in order to read *The Queen v Symonds* as consistent with *Wi Parata*. These passages seem to deny the legal status of native title because, within them, Chapman J. insists that all title to land in the colony must derive from the Crown alone, in the form of a grant authorised by Letters Patent, and he insists that the Courts cannot recognise any title to land which does not conform to this procedure.

Chapman J. asserts these claims in stages. Firstly, he invokes the conventional doctrine of the Crown as having ultimate (radical) title over all land in the colony:

“It is a fundamental maxim of our laws, springing no doubt from the feudal origin and nature of our tenures, that the King was the original proprietor of all the lands in the kingdom, and consequently the only legal source of private title....In the language of the year-book – M. 24, Edw. III – ‘all was in him, and came from him at the beginning’. This principle has been imported, with the mass of the common law, into all the colonies

exclusive right to extinguish it. However they insisted that such processes fell outside the jurisdiction of the courts, being purely a prerogative matter for the Crown.

settled by Great Britain; it pervades and animates the whole of our jurisprudence in relation to the tenure of land....”⁴³

This claim is not, in itself controversial. It had certainly long been the case in English common law that all land is held in the form of tenure from the Crown.⁴⁴ This notion, deriving from the feudal doctrine that all land was originally distributed by the King to his vassals, entails the assumption that the Crown is the source of all title to land, and therefore holds the ultimate (radical) title to this land.⁴⁵ But this notion becomes somewhat controversial when it is imported to new colonies where there are pre-existing landholders, who have hitherto held land outside the Crown’s preview. In what position do these prior landholders now stand in relation to a Crown insisting on the feudal notion that all title to land in the colony now derives exclusively from it? Sir William Blackstone held that the answer to this question depends on whether the land in question

⁴³ *The Queen v Symonds* (1847) at 388, per Chapman J.

⁴⁴ Under the English system of common law, land is held as an “estate” from the Crown, rather than possessed outright, because the doctrine of “tenure” within common law means that one does not own land but rather possesses an “estate” in it, derived from the Crown: “Ownership of an estate in land is to be distinguished from ownership of the land itself, which in theory resides solely in the Crown.” (Peter E. Nygh and Peter Butt (eds) *Butterworth’s Australian Legal Dictionary*. Sydney: Butterworths, 1997, at “Seisin”, p. 1060). Effectively therefore, all landholders hold “estates” in land derived from the Crown, and so are theoretically “tenants” of the Crown (c.f. Robert Chambers, *An Introduction to Property Law in Australia*. Pymont: LBC Information Services, 2001, p. 89).

⁴⁵ As Blackstone states: “....it became a fundamental maxim, and necessary principle (though in reality a mere fiction) of our English tenures, ‘that the king is the universal lord and original proprietor of all the lands in his kingdom; and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feudal services’. For, this being the real case in pure, original, proper feuds, other nations who adopted this system were obliged to act upon the same supposition, as a substraction and foundation of their new polity, though the fact was indeed far otherwise.” (William Blackstone, *Commentaries on the Laws of England*. Vol. II, Chicago: University of Chicago Press, 1979, ch. 4, p. 51). England was one of those nations who “adopted” this system upon the Norman Conquest, and so were placed under the “fiction” that all land title derived from William the Conqueror, even though much title clearly preceded his conquest. As Blackstone put it, the Normans, “skilled in all the niceties of the feudal [sic] constitutions, and well understanding the import and extent of the feudal terms”, interpreted the new system as meaning that the English “....in fact, as well as theory, owed every thing they had to the bounty of their sovereign lord.” (*ibid.* C.f. *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at 47, per Brennan J.). The contemporary result is that the Crown is considered to have ultimate or radical title over all land, and others merely “hold” their land as a form of tenure from the Crown. As Pollock and Maitland put it: “Every acre of English soil and every proprietary right therein have been brought within the compass of a single formula, which may be expressed thus: - *Z tenet terram illam de...domino Rege*. The king himself holds land which is in every sense his own; no one else has any proprietary right in it; but if we leave out of account this royal demesne, then every acre of land is ‘held of’ the king. The person whom we may call its owner, the person who has the right to use and abuse the land, to cultivate it or leave it uncultivated, to keep all others off it, holds the land of the king either immediately or mediately.” (Pollock and Maitland, *History of English Law*, 2nd ed. 1898, reprinted 1952, Vol. 1, pp. 232-33, cited in *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at 46-47, per Brennan J.).

is perceived by the Crown as “cultivated” or “desart”, and therefore to be acquired by conquest/cession or by discovery and occupation.⁴⁶ Contrary to the view of Chief Justice Prendergast in *Wi Parata*, New Zealand is clearly a colony that was acquired by cession, through the instrument of the Treaty of Waitangi.⁴⁷ In such a context, the pre-existing land titles of the indigenous inhabitants were deemed by Blackstone to be recognised by the new sovereign until expressly extinguished by him.⁴⁸

Yet Chapman J. then goes on to make statements which seem, at face value, to deny that the municipal Courts can recognise native title as a burden on the radical title of the Crown. Such a denial is based on his claim above that, according to the feudal principles imported from Britain, the Crown is the exclusive source of all title. As Chapman J. states:

“As a necessary corollary from the doctrine, ‘that the Queen is the exclusive source of private title’, the colonial Courts have invariably held (subject of course to the rules of

⁴⁶ Concerning newly discovered territory, Blackstone made a fundamental distinction between “desart and uncultivated” lands, where a right of discovery and occupancy (“settlement”) alone is sufficient to validate the Crown’s claim to possession, and lands “already cultivated”, where conquest or cession are the only valid means of the Crown acquiring title. As Blackstone states: “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.” [Blackstone, *Commentaries on the Laws of England*, Vol. 1, Chicago: University of Chicago Press, 1979, pp. 104-105].

Blackstone’s case of “desart and uncultivated” lands clearly refers to a situation of *terra nullius*, where the Crown acquires not only sovereignty but full beneficial title to all territory and where the laws of the Crown apply in full. But in using the phrase “desart 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 “desart and uncultivated lands” is evidence that this was his intention [c.f. King, “Terra Australis: Terra Nullius aut Terra Aboriginum?”, pp. 79-80; Reynolds, *The Law of the Land*, pp. 33-34]. However, in line with the evolution of the doctrine of *terra nullius* to also include land occupied by indigenous inhabitants, the legal consequences that Blackstone associates with his conception of “desart and uncultivated” lands came in time to be applied by English judicial authorities to inhabited lands as well, such as Australia [c.f. *Cooper v Stuart* Vol. XIV, J.C. (1889), 286 at 291].

⁴⁷ However for a contrary view, see Paul McHugh, “Aboriginal Title in New Zealand Courts”, *Canterbury Law Review*, Vol. 2, 1984, p. 239 who claims that New Zealand was perceived by colonial authorities at the time as a “settled” colony – i.e. one in which the Crown’s sovereignty and title derive from discovery and settlement alone. .

⁴⁸ See the passage from Blackstone in footnote 46 above.

prescription in the older colonies) that they cannot give effect to any title not derived from the Crown (or from the representative of the Crown, duly authorised to make grants), verified by letters patent. This mode of verification is nothing more than a full adoption and affirmation by the colonial Courts of the rule of English law; ‘that (as well for the protection of the Crown, as for the security of the subjects, and on account of the high consideration entertained by the law towards Her Majesty) no freehold, interest, franchise, or liberty can be transferred by the Crown, but by matter of record’that is to say, by letters patent under the great seal in England, or (what is equivalent thereto in the Colony) under the public colonial seal. In the instruments delegating a portion of the royal authority to the Governors of colonies, this state of the law is without any exception, that I am aware of, universally and necessarily recognised and acted upon. In some cases the authority and powers of the Governor are set out in his Commissions.....but in this Colony the Governor derives his authority partly from his Commission, and partly from the Royal Charter of the Colony – *Parl. Paper*, May 11, 1841, p. 31 – referred to in and made part of such Commission. In this Charter, we find the invariable and ancient practice followed: the Governor, for the time being, being authorised to make and execute in Her Majesty’s name, and on her behalf, *under the public seal of the Colony*, grants of waste lands, &c. In no other way can any estate or interest in land, whether immediate or prospective, be made to take effect; and this Court is precluded from taking notice of any estate, interest, or claim, of whatsoever nature, which is not conformable with this provision of the Charter; which in itself is only an expression of the well-ascertained and settled law of the land.”⁴⁹

This statement by Chapman J. seems to imply a definite ruling that native title, being a form of title that does not derive from the Crown under the authority of the letters patent, cannot be recognised by the Courts as a source of title to land. It is therefore clearly contrary to Chapman J.’s earlier claim above that the principles governing the intercourse between “civilised nations” and the “aboriginal Natives”, not least the question of land ownership, are settled principles of law cognisable by the courts.⁵⁰

⁴⁹ *The Queen v Symonds* at 388-89, per Chapman J.

⁵⁰ *Ibid*, at 388, per Chapman J.

Chapman J.'s Recognition of Native Title

Yet at a further point in the same judgement, Chapman J. seems to revert to the spirit of his opening remarks, insisting on the full judicial recognition of native title:

"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."⁵¹

Presumably it is because Chapman J. perceives both native title and the Crown's exclusive right of pre-emption as established principles in common law that he can maintain that the Treaty of Waitangi does not assert "any thing new and unsettled" by reaffirming these principles in its clauses.⁵² In any case, their status at common law certainly places them within the jurisdiction of the municipal Courts.

⁵¹ *Ibid* at 390, per Chapman J.

⁵² Similarly, in referring to the Crown's exclusive right of pre-emption over Maori lands, which is mentioned in the Treaty of Waitangi, Martin C.J. states that the principle itself does not derive its authority from the Treaty, but rather was already accepted legal practice, and so already bound the Crown and its subjects, independent of the Maori: "This right of the Crown, as between the Crown and its British subjects, is not derived from the Treaty of Waitangi; nor could that Treaty alter it. Whether the assent of the natives went to the full length of the principle, or (as is contended [by the claimant in the present case]) to a part only, yet the principle itself was already established and in force between the Queen and Her British subjects." (*The Queen v Symonds* (1847) *N.Z.P.C.C.* (SC), 387, at 395, per Martin C.J. My addition).

David Williams has strongly argued against the idea that *The Queen v Symonds* (1847) is "an affirmation of Maori rights and the Treaty of Waitangi" (Williams, "The Queen v Symonds Reconsidered", p. 395). Williams does so on the basis of Chapman J.'s claim at the end of his judgement that McIntosh's acquisition of land from the Maori would have been contrary to the *Australian Waste Lands Act*, 1842 (c.f. *The Queen v Symonds*, at 392-93, per Chapman J.). However Williams' reasoning is not self-evident here, because Chapman J. makes it clear that the McIntosh land becomes waste land of the Crown only *because* MacIntosh's purchase would have extinguished the native title (*ibid*, at 393, per Chapman J.). Hence Chapman J.'s application of the *Australian Waste Lands Act* to the facts of the case is in no way a denial of native title, and any Maori lands coming under this legislation would (in principle) have already been

Consequently, we see a clear contradiction in Chapman J.'s judgement between an endorsement of the common law status of native title in the early and later stages of his argument, and yet in the middle an apparent denial of native title in his insistence that the Crown alone is the source of all land title in the colony, with the result that the Courts only have jurisdiction to recognise titles deriving from the Crown.

An Explanation of Chapman J.'s Contradiction

So was Chapman J's assertion of these contrary principles a clear case of contradiction in his judgement?

The answer I think lies in what I call the "dual relationship" between the Crown and its subjects which I believe Chapman J. implicitly assumes in his judgement. The Maori tribes clearly stood in a different relationship to the Crown relative to the Crown's non-indigenous subjects, with the result that Crown laws affected them differently. For instance, the Crown's exclusive right of pre-emption was intended to limit only the non-indigenous subjects of the Crown in their dealings with Maori over land. In regard to

purchased by the Crown, in line with the sole right of pre-emption guaranteed by the Treaty. However Williams' claim that *The Queen v Symonds* (1847) is not an affirmation of Treaty rights becomes clearer when we understand the maximal interpretation which Williams gives to such rights. He points out that the reference to *rangatiratanga* in the Treaty translates as a guaranteeing to Maori "the entire chieftainship of their lands, their villages, and all their property" (Williams, "The Queen v Symonds Reconsidered", pp. 393-94). On this basis he criticises Lord Davey's interpretation of section 2 of the *Land Claims Ordinance Act*, 1841 (in the Privy Council case of *Nireaha Tamaki v Baker* [1840-1932] NZPCC 371, at 373), insisting that Davey was wrong to interpret this section as a guarantee of Treaty rights because the rights of occupation which the *Land Claims Ordinance Act* accords to Maori are coexistent with Crown title over the same land (c.f. Williams, "The Queen v Symonds Reconsidered", at 394-95). In other words, Williams interprets the *rangatiratanga* guaranteed by the Treaty in maximal terms, as inconsistent with any Crown title to the same lands.

While it may be the case that *The Queen v Symonds* (1847) does not uphold the full range of rights that Williams associates with the Treaty, nevertheless the case is clearly a guarantee of native title under common law, and so even if this is a significantly lesser title than the *rangatiratanga* that Williams refers to, nevertheless the judgement is a considerable advance in New Zealand jurisprudence (particularly when compared to later cases). Further, it is not clear that Chapman J. intended the case to be a guarantee of Treaty rights, as opposed to common law rights of Maori. His reference to the Treaty as not asserting "either in doctrine or in practice anything new and unsettled" is *only* in regard to native title and the Crown's right of pre-emption, since he clearly saw these as already established under common law (c.f. *The Queen v Symonds*, at 390, per Chapman J.). He makes no reference to any other aspect of the Treaty and so was arguably not concerned to affirm all the rights (including the full scope of *rangatiratanga*) upheld in that document, as Williams' criticism of the case might otherwise imply.

Maori, it left them free to deal with each other under traditional Maori custom, just as before.⁵³

Consequently, we can only understand the apparent contradiction which emerges in Chapman J.'s judgement, between his obvious recognition of native title on the one hand, and on the other, his insistence that the Crown is the source of all title and the Courts only recognise title deriving from the Crown, by interpreting them in the context of this "dual" relationship – where indigenous and non-indigenous subjects stand in a different relationship to the Crown under the law. For instance, as the following will illustrate, when Chapman J. refers to the Crown as the sole source of title and limits the Courts' jurisdiction to the recognition of such, he is referring to the law as it applies to the Crown's non-indigenous subjects. When he refers to native title, and the capacity for the Courts to recognise its status in law, he is referring to the law as it applies to the Crown's Maori subjects. The result is that this “dual” relationship means each group has both a different legal relationship to the Crown, and different rights under the law.

Chapman J. never makes this dual relationship explicit in his judgement. We are left to infer it from his apparently contradictory remarks concerning the Crown and native title, as the only way of making sense of them and resolving their differences.

Chapman J.'s "Dual Relationship"

Why did Chapman J. implicitly resort to a "dual relationship" as the broader, unarticulated context within which he presented his views in this case? The answer lies in the facts of the case itself.⁵⁴ This case considered the claim of a Mr. C. Hunter McIntosh,

⁵³ As Chapman J. states: "The legal doctrine as to the exclusive right of the Queen to extinguish the Native title.....operates only as a restraint upon the purchasing capacity of the Queen's European subjects, leaving the Natives to deal among themselves, as freely as before the commencement of our intercourse with them....." (*ibid*, at 391, per Chapman J.).

⁵⁴ David Williams has pointed out that the facts of the case were politically contrived by the colonial authorities of the time in order to settle the disputed legal status of the Crown Pre-emption Certificates that had been issued under the previous governorship of Captain Robert Fitzroy (Williams, "The Queen v Symonds Reconsidered", p. 388. See also Hackshaw, "Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi", pp. 102-105). Both the claimant and the defendant agreed to undergo legal proceedings in order to resolve this issue. The Governor, Captain George Grey, issued a Crown grant to John Jermyn Symonds, the Native Secretary and Protector of Aborigines, precisely for this purpose (Williams, "The Queen v Symonds Reconsidered", pp. 389-90). The grant deliberately ceded land which already fell within the Crown Pre-emption Certificate previously acquired by C. Hunter McIntosh, who had been Secretary to the Land Commission during the previous governorship of

who insisted he had a valid title to land he had purchased directly from the Maori, on the strength of a certificate from Governor Fitzroy purporting to waive the Crown's exclusive right of pre-emption over such land. This certificate was not issued under the seal of the Colony, and had none of the features of a patent, but was issued by Proclamation by the Governor, whose terms the claimant faithfully complied with.⁵⁵ Yet Mr. McIntosh's claim was disputed on the grounds that the Crown had since issued the defendant with a grant to the same land, the grant being issued under the public seal of the Colony.⁵⁶ As Chapman J. stated: "The question which this Court has to determine is, Did the claimant.....acquire by the certificate and his subsequent purchase (admitted to have been in all respects fair and *bona fide*) such an interest in the land, as against the Crown, as invalidates a grant made to another, subsequently to the certificate and purchase?"⁵⁷

The Supreme Court's judgement came down in favour of the defendant, and therefore against Mr. McIntosh, on the grounds that the Crown always retained the exclusive right of pre-emption over native lands, which it could not waive in another's favour.⁵⁸ But in order to justify this claim, both judges went into some detail concerning the legal foundation of the Crown's exclusive right of pre-emption. It is in this context that Chapman J.'s statements above concerning the Crown as the sole source of land title become meaningful, because as the following passage shows, he insisted that the

Captain Fitzroy (*ibid*, p. 388). The legal conflict requiring resolution had thereby been created. Williams also points out that the legal issue in question was a "re-run" of the conflict which had emerged between the New South Wales Governor, Sir George Gipps, and the settler William Charles Wentworth, in the New South Wales Legislative Council in 1840. Wentworth had been at the head of a group who had attempted to purchase large tracts of land, directly from Maori tribes, for the purpose of on-selling this land to incoming New Zealand settlers (*ibid*, 391-92). However Gipps introduced a bill into the Legislative Council (*Claims to Grants of Land in New Zealand Bill*) which attempted to make such purchases null and void by insisting on the exclusive pre-emption principle that the sole source of valid title to colonial land derived from the Crown (meaning it alone was entitled to purchase it from Maori), and so land could only be acquired by settlers via grant from the Crown (*ibid*, p. 392). Gipps was victorious and the bill became law (*ibid*). Similarly, both Chapman J. and Martin C.J. upheld the Crown's exclusive right of pre-emption in *The Queen v Symonds* (1847), precisely on the same grounds - that in relation to non-indigenous settlers, the Crown is the sole source of title (c.f. *The Queen v Symonds*, at 390-92, per Chapman J.; *ibid*, at 393, per Martin C.J.). The necessary result of such a view is that in regard to non-indigenous settlers, only land titles deriving from the Crown would be recognised in the Courts. Anything else would be a violation of the Crown's exclusive right of pre-emption, and its status (in relation to non-indigenous settlers) as the sole source of title.

⁵⁵ C.f. *Queen v Symonds*, at 388-89, per Chapman J.

⁵⁶ C.f. *ibid*, at 387, per Chapman J.

⁵⁷ *Ibid*, at 388, per Chapman J.

⁵⁸ C.f. *ibid*, at 392, per Chapman J.; *ibid*, at 398, per Martin C.J.

Crown's exclusive right of pre-emption, and its inability to waive this in another's favour, derived solely from the Crown's status as the *sole* source of all land title in the colony:

“It seems to flow from the very terms in which the principle, ‘*that the Queen is the only source of title*’, is expressed, that no subject can for himself acquire new lands by any means whatsoever. Any acquisition of territory by a subject, by conquest, discovery, occupation, or purchase from Native tribes (however it may entitle the subject, conqueror, discoverer, or purchaser, to gracious consideration from the Crown) can confer no right on the subject. Territories therefore, acquired by the subject in any way vest at once in the Crown. To state the Crown's right in the broadest way: it enjoys the exclusive right of acquiring newly found or conquered territory, and of extinguishing the title of any aboriginal inhabitants to be found thereon.....The rule, therefore, adopted in our colonies, ‘that the Queen has the exclusive right of extinguishing the Native title to land’ is only one member of a wider rule, that the Queen has the exclusive right of acquiring new territory, and that whatsoever the subject may acquire, vests at once, as already stated, in the Queen. And this, because in relation to the subjects, *the Queen is the only source of title*.”⁵⁹

The italicised sections of the passage above make clear that the Crown's exclusive right of pre-emption (i.e. its sole right to purchase land from Maori) is premised on its legal identity as the *exclusive* source of title – an "exclusivity" which seems to preclude native title, because the source of native title does not derive from the Crown. Yet such a conclusion is undermined when we remember that the Crown's exclusive right of pre-emption necessarily entails a recognition of native title, because it is this title that is

⁵⁹ *Ibid*, at 389-90, per Chapman J. Chapman J. qualifies this claim by pointing out that any private action on the part of the subject to purchase land from indigenous inhabitants, thereby violating the Crown's exclusive right of pre-emption, is not an entirely futile action. Such a purchase would conceivably be upheld in law against any party *other* than the Crown. As Chapman J. states: “To say that such purchases are absolutely null and void, however, is obviously going too far. If care be taken to purchase off the true owners, and to get in all outstanding claims, the purchases are good as against the Native seller, but not against the Crown. In like manner, though discovery, followed by occupation vests nothing in the subject, yet it is good against all the world except the Queen who takes. All that the law predicates of such acquisitions is that they are null and void as against the Crown: and why? because ‘*the Queen is the exclusive source of title*’.” (*ibid*, p. 390. My emphasis).

extinguished by the Crown's exercise of this right. How can this contradiction be resolved?

The answer lies in the "dual relationship" that Chapman J. implicitly presupposes in the above passage. When he refers to "subjects" in the above passage, Chapman J. is clearly referring to non-indigenous subjects. This is evident from the whole import of the passage, which is a discussion of the relationship between those "subjects" on the one hand, and what he refers to as "Native tribes" or "aboriginal inhabitants" on the other, concerning the acquisition of the latter's land. The passage insists that the Crown has an exclusive right of pre-emption in relation to such lands, and this right of pre-emption limits the capacity of non-indigenous subjects to privately acquire land from Native tribes.

But it is the *justification* of this exclusive right of pre-emption which most clearly demonstrates this "dual relationship". As we have seen, the Crown's right of pre-emption is "exclusive" only against its non-indigenous subjects, because in relation to indigenous subjects, it leaves them free to acquire land from each other just as before. Yet because the Crown's right of pre-emption only applies to non-indigenous subjects, the justification of this right only applies to them also. Chapman J. justifies the Crown's exclusive right of pre-emption on the grounds that the Crown is the exclusive source of title. But if the Crown has no exclusive right of pre-emption against Maori, then it also has no claim to be the exclusive source of title in relation to them, since they can continue to purchase native land from other Maori independent of the Crown. One other reason why the Crown cannot claim to be the exclusive source of title in relation to Maori is that its very right of pre-emption is a right over a form of title (native title) whose source is independent of the Crown. Consequently we can see the "dual" relationship between indigenous and non-indigenous subjects of the Crown clearly emerging in Chapman J.'s judgement. The Crown stands in a very different legal relationship to each of them. Therefore, when Chapman J. states in the passage above that the Crown has an exclusive right of pre-emption because "in relation to the subjects, the Queen is the only source of title.", this is a reference to non-indigenous subjects only. In relation to Maori, the situation is different.

Therefore the apparent contradiction cited above - where on the one hand the Crown's exclusive right of pre-emption presupposes native title, and yet on the other the justification of that right (in terms of the Crown as the *exclusive* source of all title) seems to preclude it - is overcome once we recognise that in each instance, the Crown is assuming a different ("dual") relationship between indigenous and non-indigenous subjects in relation to the law. Under this "dual relationship", the Crown is the exclusive source of all title in relation to its non-indigenous subjects, because in their case, it exercises an exclusive right of pre-emption over native lands. Alternatively, when the Crown confronts those indigenous inhabitants whose lands are subject to this exclusive right of pre-emption, the Crown is no longer the exclusive source of land title because it necessarily recognises the native title over which the exclusive right of pre-emption is exercised.⁶⁰ Therefore once we adopt this dual perspective, the apparent contradiction referred to above is resolved. The Crown both is and isn't the exclusive source of all land title, because the Crown both does and doesn't exercise an exclusive right of pre-emption over native lands, depending on whether the Crown is confronting its indigenous or non-indigenous subjects.

Native Title and "Seisin in Fee"

One of the most obvious manifestations of this "dual relationship" in Chapman J.'s judgement is in his discussion of native title and "seisin in fee". In the following passages, Chapman J. argues that the same land can be subject to native title, and yet at the same time be subject to Crown title under "seisin in fee", even though "seisin in fee" is thought to extinguish any prior claim to native title.⁶¹ But this apparent contradiction is

⁶⁰ Indeed this "dual relationship" is also evident in Governor Fitzroy's Proclamation, upon which the claimant, Mr McIntosh, relied for his claims, and whose concluding passage is quoted by Martin C.J. in his judgement as follows: "The public are reminded that no title to land in this Colony, held or claimed by any person not an aboriginal Native of the same, is valid in the eye of the law, or otherwise than null and void, unless confirmed by a grant from the Crown." (cited in *ibid*, at 398, per Martin C.J.). In this statement, Governor Fitzroy clearly assumes that it is only in relation to non-indigenous subjects that all land titles must *derive* from the Crown. "Aboriginal Natives" are excepted.

⁶¹ Why is "seisin in fee" often thought to extinguish any prior claim to native title? "Seisin in fee" refers to a freehold estate derived from the Crown (see note 63 below). Given that freehold is the most complete form of tenure one can hold from the Crown, it would in ordinary circumstances be presumed to have extinguished any prior native title attached to the same land. Hence in the *Mabo* judgement, it was widely held that the Crown's alienation of any land, upon issuing a land grant, automatically extinguished the native title, since the granting of such tenure clearly indicated an intention on the part of the Crown to

once again resolved when we interpret Chapman J.'s statements in terms of the wider "dual relationship" which he presupposes between the Crown and its indigenous and non-indigenous subjects.

The first passage in which Chapman J. clearly recognises native title as co-existing with the Crown's "seisin in fee" is as follows:

"In order to enable the Court to arrive at a correct conclusion upon this record, I think it is not at all necessary to decide what estate the Queen has in the land previous to the extinguishment of the Native title. Anciently, it seems to have been assumed, that notwithstanding the rights of the Native race, and of course subject to such rights, the Crown, as against its own subjects, had the full and absolute dominion over the soil, as a necessary consequence of territorial jurisdiction. Strictly speaking, this is perhaps deducible from the principle of our law. The assertion of the Queen's pre-emptive right supposes only a modified dominion as residing in the Natives. But it is also a principle of our law that the freehold never can be in abeyance; hence the full recognition of the modified title of the Natives, and its most careful protection, is not theoretically inconsistent with the Queen's seisin in fee as against her European subjects. This technical seisin against all the world except the Natives is the strongest ground whereon the due protection of their qualified dominion can be based. This extreme view has not been judicially taken by any colonial Court that I am aware of, nor by any of the United States' Courts, recognising the principles of the common law. But in one case before the Supreme Court in the United States there was a mere naked declaration to that effect by a majority of the Judges."⁶²

It would seem that the term "seisin in fee", when applied to the Crown in the passage above, is somewhat misleading. "Seisin in fee" refers exclusively to freehold estates.⁶³ Because the Crown does not have a tenure relationship with itself, it cannot have a "seisin in fee" over the land it holds. Rather, when the Crown holds land it either has absolute

extinguish any previously existing incompatible titles (c.f. *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at 64-65, 69-70, per Brennan J.; *ibid* at 89-90, per Deane and Gaudron JJ.).

⁶² *The Queen v Symonds* at 391-92, per Chapman J.

⁶³ C.f. Peter E. Nygh and Peter Butt (ed) *Butterworths Australian Legal Dictionary*. Sydney: Butterworths, 1997, p. 1060. See also Robert Chambers, *An Introduction to Property Law in Australia*. Pyrmont: LBC Information Services, 2001, p. 90..

ownership, “.....called “allodial title” or “allodium” (meaning the entire property).”⁶⁴ Or else it has “radical title” to the land.⁶⁵ In cases of *terra nullius*, there being no prior owners of the land, the Crown comes to assume full beneficial (allodial) title over the land rather than merely radical title.⁶⁶ At all other times, radical title is adopted by the Crown, as not inconsistent with the continued existence of a prior native title.⁶⁷ At times, as in the passage of Chapman J. above, judges seem to have mistakenly conflated “seisin in fee” with “radical title”.⁶⁸

⁶⁴ Chambers, *An Introduction to Property Law in Australia*, p. 86.

⁶⁵ Radical title does not refer to such an absolute or full (allodial) possession of the land. Rather, as Justice Brennan states, “...the radical title, without more, is merely a logical postulate required to support the doctrine of tenure (when the Crown has exercised its sovereign power to grant an interest in land) and to support the plenary title of the Crown (where the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown's territory).” (*ibid*, at 50, per Brennan J. See also *ibid*, at 47-48, per Brennan J.). Because radical title does not, in itself, give rise to the full or absolute possession of the land on behalf of the Crown (only providing the means for the Crown to so acquire land if it wishes) it is consistent with the maintenance of native title (c.f. *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at 50-51, per Brennan J.).

⁶⁶ Justice Brennan distinguished the allodial title of the Crown from radical title in cases of colonisation as follows: “If the land were deserted and uninhabited, truly a *terra nullius*, the Crown would take an absolute beneficial title (an allodial title) to the land.....there would be no *other* proprietor. But if the land were occupied by the indigenous inhabitants and their rights and interests in the land are recognised by the common law, the radical title which is acquired with the acquisition of sovereignty cannot itself be taken to confer an absolute beneficial title to the occupied land.” (*Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at 48, per Brennan J.).

⁶⁷ In his *Mabo* judgement, Justice Brennan pointed to the co-existence of radical title which the various other forms of title emanating from it, as follows: “By attributing to the Crown a radical title to all land within a territory over which the Crown has assumed sovereignty, the common law enabled the Crown, in exercise of its sovereign power, to grant an interest in land to be held of the Crown or to acquire land for the Crown's demesne. The notion of radical title enabled the Crown to become Paramount Lord of all who hold a tenure granted by the Crown and to become absolute beneficial owner of unalienated land required for the Crown's purposes.” (*Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at 48, per Brennan J.). However Brennan J. goes on to point out that radical title, despite being the legal expression of the Crown's acquisition of sovereignty over a new territory, is capable of co-existence with native title: “But it is not a corollary of the Crown's acquisition of a radical title to land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants.” (*ibid*).

⁶⁸ Another example of this conflation between “seisin in fee” and radical title, as if the two are synonymous, is evidenced by Lord Davey of the Privy Council in *Nireaha Tamaki v Baker* (1900-01) [1840-1932] NZPCC 371. In the context of his judgement in that case, Lord Davey states: “.....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).

Indeed, the mistaken tendency for judges to define the Crown or state's ultimate title as “seisin-in-fee” goes back a long way. For instance, Chief Justice Marshall made the following claim in one of the earliest American Indian title cases: “It was doubted whether a state can be seized in fee of lands, subject to the Indian title....The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state.” (*Fletcher v Peck* 10 US (6 Cranch) 87 (1810), at 142-43, per Marshall

Nevertheless, despite this mistaken terminology, we see in the passage above another example of the “dual relationship” which forms the unarticulated background framework within which Chapman J.’s judgement acquires meaning. Once again, the indigenous and non-indigenous subjects of the Crown stand in a different relationship to the Crown under the law. In relation to the non-indigenous subjects, the Queen does have “full and absolute dominion over the soil” (what Chapman J. has mistakenly referred to as a “seisin in fee as against her European subjects” but what is perhaps better described as an allodial title) because it is the sole source of title in relation to these subjects. Yet Chapman points out that this “technical seisin” is good against all the world “except the Natives”.⁶⁹ In relation to these indigenous subjects, the Crown no longer has “full and absolute dominion over the soil” because, in their case, it recognises a prior native title, which “...is not theoretically inconsistent with the Queen's seisin in fee as against her European subjects.”⁷⁰ Consequently we see this “dual relationship” emerge once again, where the Crown both is and isn’t the sole source of land title depending on whether it is confronting its indigenous or non-indigenous subjects.

Admittedly, Chapman J. is rather unusual in claiming that native title co-exists with the Crown's claim to land as a "seisin in fee" (or what is better referred to as an allodial title). Usually, these titles are perceived as incompatible, and it is the Crown's "radical title" that native title is deemed to co-exist with. But it is because he perceives the relationship between the Crown and its subjects in a "dual" manner that Chapman J. is able to make this unusual claim, and avoid the contradiction that would otherwise arise. For Chapman J., the Crown's recognition of native title and its claim to "seisin in fee" (allodial title) are compatible because, on the one hand, the Crown's recognition of native title clearly does not apply to those subjects (non-indigenous) to whom it asserts its possession of land as a "seisin in fee", and on the other hand, its assertion of "seisin in fee" does not apply to those subjects (indigenous) to whom it recognises native title. As such, no contradiction arises.

C.J.). Again, for the reasons above, I think it is misleading for the Crown/state’s ultimate title to be defined as “seisin-in-fee”. Perhaps what is meant by these statements is that the Crown has sufficient title over the land to issue grants in fee to others, allowing these others to then be “seised” of them.

⁶⁹ *The Queen v Symonds* at 391, per Chapman J.

⁷⁰ *Ibid.*

The Question of Court Jurisdiction

But what of Chapman J.'s claim that the Courts are only entitled to recognise land titles deriving from the Crown? Surely this is a clear indication that native title is excluded from the Courts, and therefore for all intents and purposes, the Crown is the exclusive source of all title at common law? Once again, the answer to this question rests on the "dual relationship" that I have argued Chapman J. presupposes as the implicit framework of his judgement. As the following passage makes clear, although the Courts will not recognise native title in suits brought by non-indigenous subjects, Chapman J. claims that they will do so in suits brought by indigenous subjects:

"The practice of extinguishing Native titles by fair purchases is certainly more than two centuries old. It has long been adopted by the Government in our American colonies, and by that of the United States. It is now part of the law of the land, and 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*. In the case of the *Cherokee Nation v State of Georgia* [(1831) 5 Peters 1] the Supreme Court threw its protective decision over the plaintiff nation, against a gross attempt at spoliation; calling to its aid, throughout every portion of its judgement, the principles of the common law as applied and adopted from the earliest times by the colonial laws....."⁷¹

⁷¹ *Ibid*, at 390, per Chapman J. My emphasis. However as Chief Justice Prendergast pointed out in his *Wi Parata* judgement some thirty years later, Justice Chapman erroneously cites the U.S. Supreme Court in support of his position here. As Chief Justice Prendergast states: "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." (*Wi Parata v Bishop of Wellington*, at 81). Hence although within this U.S. case Chief Justice Marshall recognised the native title of Indian tribes (c.f. *The Cherokee Nation v The State of Georgia* (1831), 30 US (5 Pet) 1 at 17, per Marshall C.J.), nevertheless he did not believe that they had the capacity to enforce such rights within the Supreme Court. This is because although he held that these tribes have the status of "domestic dependent nations" (c.f. *ibid*), they lack the status of "foreign states" over which, under the Constitution, the Supreme Court would have "original jurisdiction" in any case arising (c.f. The Constitution of the United States, Article III, Section 2). As Chief Justice Marshall put it: "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." (*The Cherokee Nation v The State of Georgia* at 20, per Marshall C.J.). Hence he concludes: "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." (*ibid*).

However regardless of the extent to which Chapman J. mistakes this U.S. precedent as authority for his own position, nevertheless it is evident that in the context of his evocation of this precedent, Chapman J. is once again assuming a “dual relationship” concerning the Court’s jurisdiction over native title, arising from the fact that the Crown stands in a different legal relation to its indigenous and non-indigenous subjects. Chapman J. claims that while the U.S. Courts will not consider a claim to native title arising in a suit between any of their own subjects, they “would certainly not hesitate to do so in a suit by one of the Native Indians”.⁷² It must be noted that American Indians occupy a different legal status in the U.S. from Maori in New Zealand.⁷³ However the same distinction still holds. Chapman J. assumes (erroneously in the case of *Cherokee Nation v State of Georgia* – see note 71 above) that the U.S. Courts would adopt a different position on native title depending on whether the suit was brought by a native or non-native plaintiff. In affirming this U.S. precedent and its application to New Zealand,

⁷² *The Queen v Symonds*, at 390, per Chapman J.

⁷³ The primary differences in the legal status of American Indians relative to New Zealand Maori are twofold. Firstly, treaties between the United States government and Indian tribes have the status of constitutional law, because Article VI of the U.S. Constitution states in part that “...all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.” (The United States Constitution, Article VI, Section 2, in Richard Hofstadter (ed) *Great Issues in American History. From the Revolution to the Civil War, 1765 to 1865*. New York: Vintage Books, 1958, p. 101). This constitutional provision upholds the authority of treaties even over domestic statutory legislation. In contrast, the Treaty of Waitangi does not have the status of law, cognisable in the Courts, unless specifically embodied in domestic statutes (c.f. *Te Heuheu Tukino v Aotea District Maori Land Board* [1941], NZLR, 590, at 596-97; *Tamihana Korokai v The Solicitor-General* (1912) 32 NZLR 321 (CA), at 354-55, per Chapman J.). Secondly, the U.S. Supreme Court very early indicated that it considered the Indian tribes of the United States to have the status of “domestic dependent nations” – or “nations” within a nation. As Chief Justice Marshall put it in 1831: “Though 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, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations.” (*The Cherokee Nation v The State of Georgia* (1831), 30 US (5 Pet) 1 at 17). However this status as “domestic dependent nations” did not imply that the Indian tribes had sovereignty relative to the United States as a whole. On the contrary, as Marshall C.J. stated: “They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.” (*ibid*, at 17-18). In contrast, even though the main text above has argued that Maori, because of their indigenous status, often stand in a different legal relationship to the Crown relative to all other subjects, nevertheless this difference has never been elevated by New Zealand legislation or Courts to the overriding collective distinction implied by the U.S. concept of “domestic dependent nations”.

Chapman J. is implying that the New Zealand municipal Courts do have jurisdiction over native title, so long as the suit in question is brought by Maori subjects of the Crown.

Once again therefore, we see the "dual relationship" arising. Just as Chapman J.'s statement that the Crown is the exclusive source of all title only applies to non-indigenous subjects, so does his claim that Court jurisdiction is limited to recognising *only* those titles deriving from the Crown. In relation to indigenous subjects on the other hand, the situation is very different. The fact that, in their case, the Crown is willing to recognise native title means that, from their legal perspective, the Crown is not the exclusive source of all title, nor are the Courts limited to recognising only those titles deriving from the Crown.

The Reason for Chapman J.'s "Dual Relationship"

But why didn't Chapman J. explicitly articulate his "dual relationship" as the framework within which his otherwise contrary statements could be resolved? Why are we left to assume the implicit existence of this framework as the only means by which we can make sense of his judgement? One can only presume that the facts of the case led to a judicial concentration on the legal relationship of the Crown with its non-indigenous subjects, rather than encouraging a contrast between this relationship and the Crown's other legal relationship with its indigenous subjects. The result was that the binary and distinct relationship of the Crown with its indigenous subjects on the one hand, and its non-indigenous subjects on the other, was assumed rather than explicitly articulated throughout the judgement.

But why did the facts of the case lead to an overriding focus on the relationship of the Crown with its non-indigenous subjects? The answer is as follows. The case involved the status of the Crown's right of pre-emption and whether it could be waived in favour of non-indigenous settlers. Chapman J. was concerned to insist that the Crown could not waive this right, and was therefore anxious to justify this in terms which would discourage other settlers from attempting to acquire native land by private purchase.⁷⁴ He

⁷⁴ Indeed, Chapman J. justified this concern to discourage such acts of private purchase by pointing to the deleterious affects that he believed such a practice could have on the welfare of the Maori tribes, through the rapid dispossession of their land (c.f. *The Queen v Symonds*, per Chapman J., at 391). He therefore

therefore insisted strongly on the Crown as the exclusive source of title in relation to non-indigenous settlers, in order to preclude any claim that such title could be acquired by settlers independently of the Crown, through private purchase from Maori tribes. His insistence that the Courts would only recognise titles deriving from the Crown also needs to be understood in this context – as once again an attempt to discourage settlers from violating the Crown’s exclusive right of pre-emption. Any such violation, Chapman J. was suggesting, would be overturned by the Courts because in relation to such settlers, the Courts would only recognise titles deriving from the Crown.

Consequently, because the case was concerned with the status of the Crown’s exclusive right of pre-emption, the judicial focus was on the legal relationship between the Crown and the settler (non-indigenous) population against whom that right was exercised. In this context, there was a strong emphasis on the Crown as the exclusive source of title and the Courts as recognising only titles deriving from this source. Chapman J.'s other statements concerning native title, which contradicted this view, were therefore directed to a different group of subjects over whom the Crown did not exercise an exclusive right of pre-emption, and therefore to whom a contrary set of legal assumptions applied. Because the facts of the case emphasised the former set of legal circumstances rather than the latter, they mitigated against both sides of this dual relationship being explicitly articulated as the background framework of the judgement as a whole.

presented the maintenance of the Crown's exclusive right of pre-emption as a humanitarian principle protective of Maori welfare (*ibid*). David Williams has challenged the idea that the Crown's exclusive right of pre-emption worked in this manner, insisting that it often had the opposite effect, placing the Crown in a monopoly position in relation to the sale of Maori lands, to the disadvantage of the Maori themselves (c.f. Williams, "The Queen v Symonds Reconsidered", p. 395-98). Williams insisted that the real purpose behind the Crown's insistence on its exclusive right of pre-emption was "as a device to maintain Crown control over colonisation [rather] than to protect Maori interests" (*ibid*, p. 397. My addition). Indeed the reasoning of Martin C.J. in the *Symonds* case comes far closer to this view of the matter, when the Chief Justice justifies the "rule" concerning the Crown's exclusive right of pre-emption precisely in terms of the need to control the colonisation process: "It may well be presumed that a rule so strict and apparently severe, and yet so generally received, must be founded on some principle of great and general concernment.....The principle is apparently this: that colonisation is a work of national concernment, a work to be carried on with reference to the interests of the nation collectively; and therefore to be controlled and guided by the Supreme Power of the nation." (*ibid*, at 395, per Martin C.J.).

Martin C.J.

Chief Justice Martin indicated he was in full accordance with the opinion of Justice Chapman, but provided further affirmation of the legal status of native title by citing American authorities to this effect as follows:

“I shall content myself with citing two passages from the well-known *Commentaries on American Law*, by Mr Chancellor Kent, of the State of New York. I quote this book, not as an authority in an English Court, but only as a sufficient testimony that the principle contained in the rule of law above laid down – and which same principle, with no other change than the necessary one of form, is still recognised and enforced in the Courts of the American Union, is understood there to be derived by them from the period when the present States were Colonies and Dependencies of Great Britain. ‘The European nations’, says Mr. Chancellor Kent, Vol. 3, p. 379, ‘which respectively established Colonies in America, assumed the ultimate dominion to be in themselves, and claimed the exclusive right to grant a title to the soil, subject only to the Indian right of occupancy. The Natives 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, though not to dispose of the soil at their own will, except to the Government claiming the right of pre-emption.’”⁷⁵

Therefore we see that Martin C.J. insists (on the authority of Chancellor Kent) that the Crown’s “exclusive right to grant title in the soil” was always subject to the recognition of native title. Martin C.J. clearly indicates that in expressing such a view he is in accord with the judgement of Justice Chapman in the present case.⁷⁶

However in the passage immediately following the one above, Martin C.J. once again cites Chancellor Kent, but this time to apparently opposite effect. Whereas the above passage indicates that native title survives the Crown's acquisition of sovereignty in the new colonies and is a burden on the Crown's claim to "ultimate dominion", and also insists on the legal right of the "Natives" to retain possession of that land, the following

⁷⁵ *Ibid*, at 393-94, per Martin C.J.

⁷⁶ As Martin C.J. states: “The very full discussion of this subject in the judgement of my learned brother, Mr. Justice *Chapman*, renders it superfluous for me to enter further upon the question” (*ibid*, at 393, per Martin C.J.).

passage implies that the Courts do not have jurisdiction to enforce native title claims at law:

“Those governments asserted and enforced the exclusive right to extinguish Indian titles to land inclosed [*sic*] within the exterior lines of their jurisdictions, by fair purchase, under the sanction of treaties; and they held all individual purchases from the Indian, whether made with them individually or collectively as tribes, to be absolutely null and void. The only power that could lawfully acquire the Indian title was the State, *and a Government grant was the only lawful source of title admitted in the Courts of justice.* The Colonial and State Governments, and the Government of the United States, uniformly dealt upon these principles with the Indian nations dwelling within their territorial limits.”⁷⁷

Once again we see an apparent contradiction similar to that in Chapman J.'s judgement above, where on the one hand there is an apparent affirmation of native title, and its legal status in common law, and yet on the other, an insistence that the Courts can only recognise title deriving from the Crown, to the apparent exclusion of native title. However the fact that Martin C.J. directly juxtaposed these two apparently contrary statements above indicates that he did not conceive them as contradictory. Indeed, like the apparent contradiction in the judgement of Chapman J., I believe this one is also resolvable by placing it in the broader context of the facts of the case.

Like Chapman J., Martin C.J. emphasises the Crown's exclusive right of pre-emption. Such an emphasis was necessary in order to reject the argument of the claimant that the Crown had waived this right in his favour. In this context, a close reading of the two passages from Chancellor Kent above indicate that while the first refers to the legal situation *prior* to the Crown's exercise of its exclusive right of pre-emption, the second is referring to the legal situation which arises *after* that right has been exercised, and the native title had been extinguished. It is in this context that we must understand Chancellor Kent's claim that “.....a Government grant was the only lawful source of title admitted in the Courts of justice.”⁷⁸ Such was certainly the case *after* the native title to

⁷⁷ Chancellor Kent, *Commentaries on American Law*, Vol. 3, at p. 385, cited in *The Queen v Symonds*, at 394, per Martin C.J. My emphasis.

⁷⁸ See note 77 above.

the land in question had been extinguished. But prior to this, as Chancellor Kent points out in the first passage, "[t]he Natives 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....."⁷⁹

Conclusion

The final piece of evidence which indicates that New Zealand judicial opinion after *Wi Parata* was mistaken in reading *The Queen v Symonds* (1847) as precedent for excluding native title from Court jurisdiction, is that the entire case itself was an example of the exercise of such jurisdiction. The issue in *The Queen v Symonds* was whether the Crown could waive its exclusive right of pre-emption over native title. Far from accepting the Crown's declaration on the matter at face value, as the Court would be obliged to do if they considered all matters of native title a question of Crown prerogative, both judges in this case adjudicated on the issue at hand. By this example alone they clearly affirmed their belief that matters of native title fell within the jurisdiction of the municipal Courts, even when directly involving the Crown.

To conclude therefore, the subsequent reading of *The Queen v Symonds* (1847) by New Zealand judicial authorities as the authoritative precedent for the exclusion of native title from the jurisdiction of the municipal Courts, is based on a selective interpretation of some of Chapman J.'s comments, and a failure to read them in the broader context of his judgement as a whole. However this selectivity is encouraged by Chapman J.'s failure to articulate the implicit background framework within which his isolated comments acquire their broader meaning. The result is that his judgement does read as if he is upholding contrary and apparently contradictory claims concerning native title and its recognition in the Courts. Subsequent New Zealand judicial authorities have therefore focused on some of these statements, without attempting to resolve their meaning in terms of the others.

2. Colonial Consciousness

However even if the "dual" relationship that Chapman J. assumes was not spelt out in his reasoning, nevertheless it is clear upon even a cursory reading of his judgement that it

⁷⁹ See note 75 above.

contains contrary (and apparently contradictory) statements on native title. Therefore what requires explanation is why subsequent New Zealand judicial authorities, in their reading of *The Queen v Symonds* (1847) in the wake of *Wi Parata*, would selectively adopt some of Chapman J.'s statements as authoritative precedent, and yet pointedly ignore those others that yield a contrary point of view? The answer is in terms of the "colonial consciousness" which I believe shaped New Zealand judicial opinion on native title from *Wi Parata* onwards.⁸⁰

Native title raised significant material interests in New Zealand settler society for the following reasons. Firstly, native title could act as a legal barrier to settler ambitions to expand their land holdings. Secondly, land settlement in general in New Zealand was a highly volatile process in the nineteenth century, with large-scale wars erupting around the issue in the middle of the century.⁸¹ Indeed, in his judgement in *Hohepa Wi Neera v Bishop of Wellington* (1902), Chief Justice Stout referred to the possibility of judicial decisions in New Zealand on native land questions actually fanning the flames of war.⁸² Finally, native title issues threatened to throw all existing settler titles to land into legal doubt. If it was found by the Courts that (contrary to *Wi Parata*) the Crown did not have a prerogative power over native title, and therefore that its unilateral declaration, in any particular instance, that native title over land was extinguished was not binding on the Courts, this meant that all land held by Crown grant could conceivably be subject to native title claims. If the Crown could not simply declare such native title claims void, and if the Courts were not bound to accept the Crown's declaration as binding, then the holders of existing Crown grants might have their title to land declared invalid if the Courts found that native title had not been validly extinguished prior to the issue of the grant. In other words, any judicial suggestion that the Crown did not have full prerogative

⁸⁰ Again, the minor exceptions are detailed in footnote 22 above.

⁸¹ C.f. Claudia Orange, *The Treaty of Waitangi* (Wellington: Allen and Unwin, 1989), ch. 8.

⁸² Hence Stout C.J. referred to the Native Rights Act, 1865, and said: "It ought to be remembered that, if this Act had been read as an Act authorising an individual Maori to sue for possession of tribal land, the result of an interference by the Supreme Court with such land would have in some instances created a civil war." (*Hohepa Wi Neera v The Bishop of Wellington* (1902) 21 NZLR 655 (CA), at 666, per Stout C.J.). Indeed he points out: "It is well known that in many parts of the colony the sittings of the Native Land Court had to be suspended after 1865 in order that the peace might be preserved." (*ibid*). This was the wider political context in which New Zealand judicial decisions on native title were arrived at, and it would not be surprising if it exerted some influence on New Zealand judges in their deliberations on the legal issues before them.

power over native title inevitably threw all existing titles to land in New Zealand into doubt.

Consequently, it would not be surprising if such wider issues weighed heavily on the minds of New Zealand judges when they adjudicated on native title issues. It is this that I see as characteristic of a “colonial consciousness” – a sense of the material interests at stake in any land settlement issue given the wider commitments and concerns of the settler society.

The attribution of an overriding “colonial consciousness” to judicial perceptions on native title provides a possible answer to the question of why New Zealand judicial authorities in the wake of *Wi Parata* failed to interpret the isolated statements they derived from Chapman J., indicating that the Courts could not recognise native title, in terms of the wider context of his judgement as a whole. Such a failure is understandable when we perceive the material interests which were served for a settler society in legally concluding that the Courts could not enforce native title against the Crown. Such a conclusion would deny Maori tribes any native title rights enforceable in common law against the Crown. It would therefore provide the means for resolving the land settlement issue entirely in the Crown’s favour, by leaving all native title issues to the “conscience” of the Crown alone.⁸³ Indeed this is precisely what the *Wi Parata* precedent did do. The selective focus on isolated statements within *Queen v Symonds* (1847) was therefore a convenient means for subsequent Courts to preserve the *Wi Parata* precedent by reading the earlier *Queen v Symonds* judgement as consistent with it.

Such a “colonial consciousness” not only explains how *The Queen v Symonds* (1847) could be systematically misread by New Zealand judicial authorities in the wake of *Wi Parata*. It also explains how the other early New Zealand native title case, *In re 'The Landon and Whitaker Claims Act 1871'* (1872), could be effectively ignored by these same authorities in so far as it too upheld judicial conclusions contrary to *Wi Parata*. Indeed in relation to this case, we have seen that this colonial consciousness gave rise to a

⁸³ That there was a real desire on the part of the Crown for exclusive control over the land settlement process is indicated by Chief Justice Martin, in *The Queen v Symonds* (1847), who explains the Crown's insistence on its exclusive right of pre-emption in these terms (c.f. *The Queen v Symonds* (1847) *N.Z.P.C.C.* (SC), 387, at 394-95, per Martin C.J.).

commitment to *Wi Parata* that was so strong that, at one point, the New Zealand Solicitor-General argued that *In re 'The Landon and Whitaker Claims Act 1871'* (1872) “.....could not have been meant to conflict with the judgement in *Wi Parata v Bishop of Wellington*”, despite the fact that “Landon and Whitaker Claims” was decided five years earlier.⁸⁴

However to impute this "colonial consciousness" to New Zealand judges during this period is effectively to accuse them of extreme partiality, since a "colonial consciousness" suggests that these judges will consistently favour settler over indigenous interests in any legal case involving land issues. Such an accusation therefore places the judicial integrity of these judges in question, in so far as such integrity presupposes impartiality and judicial independence, and is therefore inconsistent with any prior commitment to the interests of particular groups in colonial society. Indeed it was precisely this integrity and independence which the New Zealand Court of Appeal felt bound to defend against the Privy Council in 1903. The very tenor of this Protest indicates that New Zealand judges themselves did not perceive their outlook to be distorted by colonial interests. Rather, they suggested the opposite, claiming that their close proximity to New Zealand affairs provided them with a wisdom and insight into New Zealand law which was denied a more distant and remote Privy Council.⁸⁵

Nevertheless it seems that such a presumption of partiality is the only way to explain some of the peculiarities of the New Zealand judiciary's position on native title during this period, in particular their systematic misreading of *The Queen v Symonds* in the wake

⁸⁴ C.f. *Tamihana Korokai v The Solicitor-General* (1912) 32 NZLR 321, at 332, per Solicitor-General.

⁸⁵ Hence Justice Edwards strongly implied that the closer proximity of the New Zealand Bench to New Zealand laws gave it greater clarity and expertise on New Zealand legal issues than could be hoped to be acquired by the Privy Council in London: "...their Lordships might well reflect that trained lawyers who have spent their lives in the Colony, who know and understand its genius, its laws and its customs, as they cannot hope to know and understand them; who have spent anxious days and much thought and reflection in the elucidation of the laws of their country, to which their Lordships themselves can give but a brief and hurried consideration; who have the assistance of an able and zealous Bar (many of those members are members of the English Bar), well-versed in the laws of the Colony, while their Lordships themselves must depend as a rule upon such assistance as they can get from members of the English Bar, who know nothing of such laws - their Lordships might well reflect, I say, that the Judges of this Court are under these circumstances at least as likely to arrive at a correct conclusion as to the meaning of the statute law of the Colony as they are themselves." (*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", [1840-1932] NZPCC Appendix, 730, at 758-59, per Edwards J.). See also footnote 4 above,

of *Wi Parata*, and their agonistic desire to defend the *Wi Parata* precedent at all costs, even at the expense of an open breach with the Privy Council.⁸⁶

Further evidence that such a “colonial consciousness” animated the views these judges arise from two other sources:

A. The expressions of concern, articulated by some judges, about the “stability” and “security” of land settlement in New Zealand;

and;

B. The isolated instances where two New Zealand judges actually articulated a doctrine of *terra nullius* in response to Maori native title claims.

A. “Security” and “Stability” of Land Settlement

Within a “settler society”, the acquisition and settlement of territory defines the colonial process. Therefore a central political and legal issue in any settler society is the security of land tenure - and it is concern over this issue which will be a defining feature of the “colonial consciousness”. One of the clearest pieces of evidence that the judgements of significant elements of the New Zealand judiciary, from the time of *Wi Parata*, were informed by a “colonial consciousness”, involves statements by some of these judges which clearly reflect these concerns. At various points these judges defended their commitment to *Wi Parata*, and therefore rejected any attempt to render native title rights enforceable in the Courts, on the grounds that any movement away from the *Wi Parata* precedent would undermine the “stability” and “security” of land settlement in New Zealand.⁸⁷

So for instance, in the Court of Appeal's judgement in *Nireaha Tamaki v Baker* (1894), Justice Richmond delivered the judgement of the Court, and argued that the “security of

which details those points in the Protest where the Court of Appeal judges accused the Privy Council judges of ignorance regarding New Zealand law.

⁸⁶ See note 6 above which explains that even though the ostensible reason for the Court of Appeal’s “Protest” against the Privy Council in 1903 was the latter’s injudicious use of language and imputation of improper motives to the Court of Appeal, nevertheless the underlying reason was the Privy Council’s departure from the *Wi Parata* precedent in *Nireaha Tamaki v Baker* (1900-01) [1840-1932] NZPCC 371 and *Wallis v Solicitor General for New Zealand* [1903] AC 173.

⁸⁷ The reason why they believed such a recognition of native title in the Courts would undermine stability and security of land tenure is discussed below – i.e. such a move was liable to throw all existing land titles deriving from Crown grant into doubt.

all titles in the country” depends on the “maintenance” of the principle cited in *Wi Parata* that native title is purely a matter of Crown prerogative, and that the Crown alone must be the sole determinant of justice in this matter.⁸⁸ Similarly, in their Protest against the Privy Council in 1903, the Court of Appeal judges again insisted that any departure from the *Wi Parata* precedent would threaten the "stability" and "security" of land settlement in New Zealand. Hence in the context of his Protest, Chief Justice Stout says that 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."⁸⁹ Justice Edwards articulates a similar sentiment, insisting that the Privy Council's position on native title (involving the rejection of the *Wi Parata* precedent) places New Zealand land settlement in jeopardy:

"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

⁸⁸ Justice Richmond affirmed the *Wi Parata* precedent as follows: “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.” (*Nireaha Tamaki v Baker* (1894) 12 NZLR 483, at 488). Richmond J. then went on to affirm all the relevant aspects of that precedent (the prerogative power of the Crown over native title, and therefore its exclusion from the jurisdiction of the Courts) as follows: “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.” (*ibid*). This is a direct restatement of Prendergast C.J.’s claim in *Wi Parata* that “....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.” (*Wi Parata v Bishop of Wellington*, at 78). Yet in the line following his statement above, Justice Richmond goes on to affirm this principle of *Wi Parata* entirely in terms of its security for land settlement in New Zealand, stating: “The security of all titles in the country depends on the maintenance of this principle.” (*Nireaha Tamaki v Baker* (1894) at 488).

⁸⁹ “*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903”, [1840-1932] NZPCC Appendix, 730, at 746, per Stout C.J.

cases, the titles to real estates in this Colony *would be thrown into irretrievable doubt and confusion.*"⁹⁰

In all of these statements, there is a clear concern about the stability of land settlement in New Zealand - a settlement which by the late nineteenth century had not only been secured through landmark decisions such as *Wi Parata v Bishop of Wellington* (1878) but also through the Crown's military victory over various Maori tribes. Not surprisingly therefore, the maintenance of this settlement was an interest which dominated colonial society, and the statements above show that it also animated the views of some of the Court of Appeal judges in their deliberations on native title. Such concerns are a clear example of the "colonial consciousness" at work, since that consciousness is defined above all by a focus on the material interests of colonial society.

B. Isolated Assertions of Terra Nullius.

The doctrine of *terra nullius* is usually associated with New Zealand's neighbour across the Tasman. It is rarely associated with New Zealand because the existence of the Treaty, the clear references to native land ownership in successive Crown statutes and ordinances from the time of settlement, and also the existence of the Native Land Court from the 1860s onwards indicate that Maori occupation of large segments of New Zealand was a legally recognised fact.⁹¹ Nevertheless at two points in the history of New Zealand judicial deliberations on native title, New Zealand judges have articulated views which amount to an assertion of *terra nullius*. The instances I refer to are aspects of Chief

⁹⁰ *Ibid*, at 757, per Edwards J. My emphasis. Needless to say, the Crown shared these concerns about the stability and security of land settlement. In his presentation of the Crown's evidence in *Tamihana Korokai v The Solicitor-General* (1912), the Solicitor-General asserted the view that "Native title is not available in any manner and for any purpose against the Crown", 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 investigated." (*Tamihana Korokai v The Solicitor-General* (1912), at 331-32, per Solicitor-General. My emphasis). The Solicitor-General then concluded that only the maintenance of the *Wi Parata* precedent that a mere declaration of the Crown is sufficient to oust any native title claims could avoid this outcome: "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.*" (*ibid*, at 331, 332. My emphasis).

Justice Prendergast's judgement in *Wi Parata v Bishop of Wellington* (1878), and a view expressed by Chief Justice Stout in his Protest against the Privy Council in 1903. I have already discussed Chief Justice Prendergast's assertion of *terra nullius* above. The following is therefore devoted to Chief Justice Stout's assertion of the same

In its judgement in *Wallis v Solicitor General for New Zealand* [1903], the Privy Council clearly ruled that the Treaty of Waitangi was the legal basis for Maori land rights in New Zealand.⁹² It was this claim which drew some of the most vigorous responses from the Court of Appeal in its "Protest" in 1903. For instance, in the following statement, Chief Justice Stout denied that the Treaty had any status in New Zealand law. But what is even more significant is that in the context of this claim, he goes even further and insists that native title lacks any existence, which is nothing short of an assertion of *terra nullius*:

"It is an incorrect phrase to use to speak of the Treaty as a law. The terms of the Treaty were no doubt binding on the conscience of the Crown. The Courts of the Colony, however, had no jurisdiction or power to give effect to any Treaty obligations. These must be fulfilled by the Crown. All lands of the Colony belonged to the Crown, and it was for the Crown under Letters Patent to grant to the parties to the Treaty such lands as the Crown had agreed to grant. 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. Nor did the Privy Council in *Nireaha Tamaki v Baker* entirely overrule this view, though it did not approve of all the dicta of the Judges in *Wi Parata's* case."⁹³

⁹¹ Indeed, as Justice Chapman stated in his *Tamihana Korokai* judgement: "The creation of [the Native land Court] shows that Native titles have always been regarded as having an actual existence." (*Tamihana Korokai v Solicitor-General* (1912), at 356 per Chapman J. My addition).

⁹² As Lord Macnaghten put it: "As the law then stood under the treaty of Waitangi, the chiefs and tribes of New Zealand, and the respective families and individuals thereof, were guaranteed in the exclusive and undisturbed possession of their lands so long as they desired to possess them, and they were also entitled to dispose of their lands as they pleased, subject only to a right of pre-emption in the Crown." [*Wallis v Solicitor-General* [1903] AC 173, at 179].

⁹³ "*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. See *ibid*, pp. 747-48, per Williams J. Stout C.J.'s claim at the end of this passage that the judgement of the Privy Council in *Nireaha Tamaki v Baker*, "does not entirely overrule

The legal position articulated by Stout C.J. in this statement is nothing short of extraordinary. While the first part of the statement reflects the conventional and uncontroversial view that the Courts have no jurisdiction to take account of the Treaty of Waitangi in and of itself, independent of its embodiment in statute, the rest of the statement amounts to a complete denial of the very existence of native title, thereby according with that element of the *Wi Parata* judgement which asserted the doctrine of *terra nullius*.

How does Stout C.J. deny the existence of native title in the statement above? His claim that "[t]he root of title being in the Crown, the Court could not recognise Native title" could simply be one more selective (mis)reading of *The Queen v Symonds* (1847) judgement, and Stout C.J. does cite this case in the passage above as support for this view.

Yet it is not this aspect of the passage above which amounts to a complete denial of native title. Rather it is Stout C.J.'s claim that "[a]ll lands of the Colony belonged to the Crown, and it was for the Crown under Letters Patent to grant to the parties to the Treaty such lands as the Crown had agreed to grant." Such a statement entirely excludes the possibility of native title because it effectively claims that after the Crown's acquisition of sovereignty, all title to land legally held by either party to the Treaty was acquired by Crown grant issued under the Letters Patent. Native title is fundamentally inconsistent with Crown grants as a source of title to land, because unlike Crown grants, which "derive" from the Crown, native title is a form of title which "precedes" the Crown and at best is seen as a burden on the Crown's ultimate title to land.⁹⁴ Consequently, for Stout C.J. to claim in the passage above that upon the Crown's acquisition of sovereignty over New Zealand, all title to land derived from Crown grant, means that he is denying the very existence of native title. Therefore the passage is effectively a claim that upon the Crown's acquisition of sovereignty, the territory of New Zealand was *terra nullius*.

this view" [i.e. that "[t]he root of title being in the Crown, the Court could not recognise Native title"] is clearly disingenuous since Lord Davey insisted that the Courts did have jurisdiction over native title so long as it fell within the boundaries of statute (*Nireaha Tamaki v Baker* (1900-01) [1840-1932] NZPCC 371, at 382-83).

⁹⁴ See note 13 and 26 above.

In his statement above, Stout C.J. is going much further than Chapman J. in *The Queen v Symonds* (1847). Chapman J. had argued that upon the Crown's acquisition of sovereignty, the Crown had “full and absolute dominion over the soil” in the form of a “seisin in fee” – a full beneficial title which excludes native title.⁹⁵ But as we saw, Chapman’s judgement implied that this absolute title of the Crown only applied to the Crown's relationship with its non-indigenous subjects. In relation to its indigenous subjects, the Crown recognised the existence of native title.

Similarly, in those parts of *Wi Parata* where Prendergast C.J. accepted the existence of native title but asserted that the Courts could not recognise it, he still allowed that native title could be recognised by the Crown, through its prerogative powers.⁹⁶ Again, Stout C.J. seems to be going much further. In the context of his wider claim of *terra nullius*, Stout C.J.'s contention in the passage above that “[t]he root of title being in the Crown, the Court could not recognise native title”, takes on a new meaning. Rather than following the *Wi Parata* precedent that the Courts could not recognise native title because it was outside their jurisdiction, Stout C.J. seems to be saying that the Courts cannot recognise native title because native title does not exist at all.

How can Stout C.J. claim that all title to land derived from Crown grant when it would have been clear that prior to and even after the establishment of such institutions as the Native Land Court, there were vast tracts of land occupied by Maori to which no Crown grant had been issued, not to mention the various statutes and ordinances which made specific reference to native lands? The answer I think is that Stout C.J. was thoroughly confused in his statement above that all title to land derived from Crown grant. I think he was confused because the three Ordinances which he goes on to cite in support of this view bare absolutely no relation to it.

After Stout C.J. cites both *The Queen v Symonds* (1847) and *Wi Parata v Bishop of Wellington* (1878) above in support of his view that all land title in New Zealand derives from Crown grant, he then goes on to claim: “There are three Ordinances of the new Zealand Parliament dealing with the subject. These enactments are in accordance with the

⁹⁵ *The Queen v Symonds* at 391, per Chapman J. On the problems associated with describing the Crown’s title in land as a ‘seisin in fee’, see the section “Native Title and ‘Seisin in Fee’” above.

judgements in the New Zealand cases referred to."⁹⁷ However the passages which Stout C.J. quotes from these Ordinances refer not to his claim that all title to land derives from Crown grant; nor to his claim that only such titles could be recognised in the Courts. Rather, each passage refers to the Crown's exclusive right of pre-emption over native lands, and the inability of settlers to privately purchase land from Maori individuals or tribes, when the land of these individuals or tribes are not held under Crown grant.⁹⁸

In other words, Stout C.J.'s purported Ordinance evidence, intended to substantiate his claim that all title to land derives from Crown grant, in fact proves the contrary. Firstly, these Ordinances detail the restrictions placed on settlers when dealing with Maori lands that do not derive from Crown grant; and secondly they deal with the Crown's exclusive right of pre-emption – a right which presupposes the existence of native title (i.e. a form of title not deriving from Crown grant). In both cases, they clearly refer to forms of legal title to land that do not derive from Crown grant.

Stout C.J. concludes that had the Privy Council known of these Ordinances, they would not have made the claim above in *Wallis v Solicitor-General* (1903) concerning native rights under the Treaty of Waitangi, but would "...have said that the natives were not entitled to dispose of lands that had not been granted to them by Crown grant or Letters Patent."⁹⁹ While this is a fair summing up of the legal import of the Ordinances cited by Stout C.J., it certainly does not substantiate his earlier claim that "[a]ll lands of the Colony belonged to the Crown, and it was for the Crown under Letters Patent to grant to the parties to the Treaty such lands as the Crown agreed to grant."¹⁰⁰ Indeed in regard to native title, the two statements are inconsistent. While the former, being premised on a recognition of the Crown's exclusive right of pre-emption, implicitly acknowledges the existence of native title but insists the Crown's right of pre-emption limits Maori rights concerning the disposal of such land, the latter is not consistent with the existence of native title at all.

⁹⁶ C.f. *Wi Parata v Bishop of Wellington*, at 78-79.

⁹⁷ "*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", at 732, per Stout C.J.

⁹⁸ On this latter point see the Native Land Purchase Ordinance, 1846, s. 1, cited by Stout C.J. at *ibid*, at 733.

⁹⁹ *Ibid*, at 733, per Stout C.J.

¹⁰⁰ *Ibid*, at 732, per Stout C.J.

Consequently, Stout C.J.'s citation of these Ordinances, and his explanation of them, as substantiation for a statement which denies the existence of native title, is clear evidence of his confusion on the matter, since such evidence clearly affirmed the contrary. Either he did not understand what was required to support his denial of native title or he never intended to deny native title in the first place. Perhaps he only meant to affirm the conventional precedent which subsequent Courts derived from *Wi Parata* - that native title exists, but is subject to the exclusive prerogative of the Crown? But his statements above make no mention of that view. Rather, his claim that, after the Crown's acquisition of sovereignty, *all* land title derived from Crown grant, is a clear reference to the sort of *terra nullius* doctrine which applied in Australia, where the Crown had full and beneficial (allodial) title to land, unencumbered by any prior native title, and all private property tenures were therefore held of the Crown, in the form of some sort of Crown grant.¹⁰¹

In each of these instances, the assertion of *terra nullius* by Prendergast C.J. and Stout C.J. was juxtaposed with other elements of their judgements which clearly indicated the contrary. This would indicate that these assertions were perhaps the outcome of unclear thinking rather than specific intent. But why were such assertions of *terra nullius* even suggested, when the doctrine was so clearly contrary to all other features of the Maori-Pakeha settlement in New Zealand and should have appeared anomalous from the start?

Again, I think the only explanation is in terms of the workings of the "colonial consciousness". The material interests at stake in New Zealand land settlement clearly animated the "colonial consciousness" in ways which were highly defensive of settler interests in land against any assertions of native title by the indigenous inhabitants. *Terra nullius* was of course a legal doctrine which had the effect of organising land settlement in colonial societies in the interests of settlers, since it denied the very existence of native title, and therefore removed any problem of its legal recognition or accommodation. One can only assume that both Chief Justice Prendergast, and Chief Justice Stout, in articulating a *terra nullius* position which departed from the otherwise clearly recognised legal situation in New Zealand (and from other elements of their judgements) were simply over-zealous in their defence of settler interests, and therefore allowed their

¹⁰¹ C.f. *Cooper v Stuart* Vol. XIV, J.C. (1889), 286 at 291, 292; *Mabo v Queensland [No. 2]* (1992) 175

"colonial consciousness" to momentarily get in the way of their better legal judgement. In Stout C.J.'s case, this occurred in the heat of his Protest against the Privy Council, a Protest which was animated precisely by the defence of such settler interests, in the form of the *Wi Parata* precedent.¹⁰²

Conclusion

Thus we see that there is clear evidence that significant senior elements of the New Zealand judiciary were fundamentally influenced by an overriding "colonial consciousness" in their rulings on native title in the late nineteenth and early twentieth century. This is most clearly evident in their desire to uphold the *Wi Parata* precedent during this period, and the lengths to which they were willing to go in order to do so. This included a systematic misreading of the early native title cases in New Zealand to ensure that they accorded with the later *Wi Parata* judgement; and also a willingness to engage in open breach with the Privy Council. It wasn't until the Court of Appeal's judgement in *Tamihana Korokai v Solicitor-General* (1912), that the New Zealand judiciary ultimately broke from the *Wi Parata* precedent, in so far as they acknowledged a limited jurisdiction of the municipal Courts over native title issues. But *Tamihana Korokai v Solicitor-General* (1912) did not return to the recognition of native title in common law which had characterised *The Queen v Symonds* (1847) and *In re 'The Lundon and Whitaker Claims Act 1871'* (1872). Rather, it only recognised native title on the basis of statute – a position which had characterised the Privy Council's decision in *Nireaha Tamaki v Baker* (1900-01).¹⁰³ According to some authorities, it was not until the High Court's decision in *Te*

CLR 1, at 26-28, per Brennan J.

¹⁰² See note 6 above which indicates that the underlying motive for this Protest was the defence of the *Wi Parata* precedent.

¹⁰³ C.f. *Nireaha Tamaki v Baker* (1900-01) [1840-1932] NZPCC 371, at 382. Indeed it was precisely because the judges in *Tamihana Korokai v Solicitor-General* (1912) did not recognise the status of native title in common law that they refused to accept that the municipal Courts had jurisdiction to inquire into native title as an end in itself. Rather, they insisted that the jurisdiction of the municipal Courts extended to binding the Crown over to the Native Land Court under the terms of the *Native Land Act*, 1909. As Edwards J. stated in that case: "The Supreme Court has no jurisdiction to inquire into purely Native titles, nor can it investigate questions arising out of the procedure and practice of the Native Land Court so long as that Court confines itself within the limits of its peculiar jurisdiction. The Supreme Court has, however, jurisdiction to interpret the statutes to which the Native Land Court owes its existence and its jurisdiction; to confine that Court within the limits of that jurisdiction if it is being exceeded; and to compel that Court to exercise its jurisdiction if, for some fancied reason not arising out of Native customs and usages, it

Weehi v Regional Fisheries Officer (1986)¹⁰⁴ that the New Zealand Bench finally recognised the status of native title in common law and so finally returned to the opinion of *The Queen v Symonds* (1847).¹⁰⁵

Nevertheless these early native title cases which preceded *Wi Parata* were pioneering in that they upheld a position on native title, and its status in common law, which would place the New Zealand judiciary in a state of denial from the time of *Wi Parata* onward. Far from suffering an eclipse, the case of *The Queen v Symonds* (1847) was copiously cited by subsequent New Zealand authorities, but always in a context which systematically misread its isolated statements which gave credence to the view that the Courts could only recognise land titles deriving from the Crown. This misreading was

refuses or fails to do so." (*Tamihana Korokai v The Solicitor-General* (1912) 32 NZLR 321, at 349, per Edwards J.).

¹⁰⁴ 1 NZLR 680 (HC)

¹⁰⁵ C.f. Paul McHugh, *The Maori Magna Carta. New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press), pp. 130-31. However Frederika Hackshaw has argued that although *Te Weehi v Regional Fisheries Officer* (1986) recognised traditional Maori fishing rights at common law, "[t]he finding does not....affect the statutory bar which operates against the enforcement of customary rights based on aboriginal title to land...." (Hackshaw, "Nineteenth Century Notions of Aboriginal Title", p. 116). This "statutory bar" refers to the various attempts by the New Zealand legislature to enshrine the *Wi Parata* precedent in legislation by protecting the Crown from native title claims. Such an attempt was evident in sections 84 to 86 of the *Native Land Act* (1909) which stated:

"Save so far as otherwise expressly provided in any other Act the Native customary title to land shall not be available or enforceable as against His Majesty the King by any proceedings in any Court or in any other manner." (*Native Land Act* [1909] 9 Edw. VII. No. 15, s 84, in *The Statutes of the Dominion of New Zealand* (1909) (Wellington, 1909), p. 181).

Section 86 of the Act clearly attempted to ensure the stability of all existing land titles deriving from the Crown by insulating them from any prospective native title claims as follows:

"No Crown grant, Crown lease, or other alienation or disposition of land by the Crown, whether before or after the commencement of this Act, shall in any Court or in any proceedings be questioned or invalidated or in any manner affected by reason of the fact that the Native customary title to that land has not been duly extinguished." (*ibid*, s. 86).

As we have seen, such Crown immunity from native title claims depends on the capacity of the Crown to unilaterally declare native title extinguished, and for such declaration to be binding on the Courts. Section 85 provides for this as follows:

"A Proclamation by the Governor that any land vested in His Majesty the King is free from the Native customary title shall in all Courts and in all proceedings be accepted as conclusive proof of the fact so proclaimed." (*ibid*, s. 85).

However it is important to note that the *Native Land Act* (1909) and the statutes which came after it did not deny the existence of native title, and therefore are not an attempt to reassert the *terra nullius* aspects of *Wi Parata*. Rather, as Stout C.J. argued in *Tamihana Korokai v Solicitor General* (1912), the 1909 Act constitutes a statutory recognition of native title, and (under s. 85 above) requires the Crown to abide by specific procedures for its extinguishment (*Tamihana Korokai v The Solicitor-General* (1912) 32 NZLR 321, at 344, 345, per Stout C.J.). Indeed far from denying native title, section 90 of the Act reserved to the Native Land Court the "....exclusive jurisdiction to investigate the title to customary land, and to determine the relative interests of the owners thereof." (*ibid*, section 90).

encouraged by Justice Chapman's failure to articulate the background context from which his statements derived their broader meaning.

But ultimately this misreading of *The Queen v Symonds*, along with the effective overlooking of *In re 'The Landon and Whitaker Claims Act 1871'* (1872), in the years after *Wi Parata*, can only be explained in terms of a wider "colonial consciousness" which animated the outlook of significant elements of the New Zealand judiciary at this time, and fundamentally influenced its perceptions on native title. This wider "colonial consciousness" is also demonstrated in the clear concern that some of the judicial judgements of this period demonstrate for the "stability" and "security" of land settlement in New Zealand. It is also revealed in the two isolated instances where a New Zealand judge actually went so far as to assert a doctrine of *terra nullius* within New Zealand law – despite the very different settlement that had been reached in New Zealand between the Crown and the country's indigenous inhabitants, compared to the Crown's less honourable actions across the Tasman.

In all these respects therefore, the early native title cases of New Zealand stand as a beacon of judicial independence fair-mindedness compared to the fate which awaited native title in the years after them. They demonstrate such qualities because they reveal no trace of that "colonial consciousness" which had such a distorting influence on judicial perceptions of native title in later years. Whether the judges who delivered these judgements were personally immune from the material interests of the settler society of which they were a part, or whether these interests had yet to coalesce into a series of firm legal predispositions, these cases affirming the common law status of native title were prescient not only for their own time but for over a century afterward, as is evident in the fact that it was not until the 1980s that the New Zealand judiciary finally returned to a common law recognition of native title.