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In the Wake of *Wi Parata*: New Zealand Native Title 1878 - 1903

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Introduction

The New Zealand Supreme Court's decision in *Wi Parata v Bishop of Wellington*² was nothing less than a watershed in New Zealand legal history. And this for reasons other than those usually thought. Chief Justice Prendergast's judgment in *Wi Parata* is infamous for his dismissal of the Treaty as a "simple nullity".³ Paul McHugh has referred to this judgment as "notorious", and the case is widely remembered for this reason.⁴ However far from its statements on the Treaty being of overriding importance, it is the precedent which *Wi Parata* established for native title in New Zealand which was to have the most widespread legal ramifications over the next three decades. Subsequent New Zealand Courts clung to this precedent with great tenacity, even to the point of open breach with the Privy Council.

This paper traces the legacy of *Wi Parata* in subsequent New Zealand native title cases. In particular, it focuses on the fundamental conflicts on native title which arose between the New Zealand Court of Appeal and the Privy Council, culminating in an unprecedented breach and formal protest by the Court of Appeal against this august British body. Finally, it attempts to provide some explanation for this extraordinary series of events, suggesting that the breach with the Privy Council can ultimately be explained by the "colonial consciousness" which dominated the New Zealand Courts at this time. This consciousness saw any break from the *Wi Parata* precedent on native title as a fundamental threat to the security of land tenure in New Zealand.

Consequently, native title did not represent some arcane legal doctrine of little material interest to New Zealand society in the nineteenth century. Rather, it struck to the very heart of those material interests, which explain the extraordinary lengths to which the New Zealand Court of Appeal was willing to go on native title.

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² (1878) 2 NZ Jur. (N.S.) S.C. 72

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

Background

Native title is distinct from treaty issues. Native title has traditionally been understood as a common law doctrine and therefore as a native right which is enforceable within the municipal courts. Treaty issues on the other hand are governed by acts of state, and so fall outside common law and the jurisdiction of the Courts.⁵

The question of native title arose within English common law due to the new phenomenon of Britain as a colonising power in the eighteenth century. The problem arose of the extent to which the Crown ought to recognise existing indigenous property rights once it acquired sovereignty over new territories. William Blackstone responded to this question in his *Commentaries on the Laws of England* (1765). Although not making actual reference to native title, Blackstone's distinction concerning the legal consequences that arose between land which had either been conquered by or ceded to the British, and land which had been discovered and was "desart and uncultivated", became central to the development of native title in English common law.⁶ In the case of "desart and uncultivated" land, there was no need to recognise native title as the land was deemed to be uninhabited.⁷ But in the case of lands either conquered or ceded by treaty, Blackstone argued that the Crown ought to recognise existing laws unless it expressly overturned them, with the result that indigenous property rights were capable of recognition.⁸ Blackstone's distinction was

⁴ C.f. Paul McHugh, *The Maori Magna Carta. New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991), p. 113.

⁵ 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.

⁶ As Blackstone said: "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." [William Blackstone, *Commentaries on the Laws of England* (1765), Vol. I (Chicago: University of Chicago Press, 1979), pp. 104-105].

⁷ Indeed in the passage in note 6 above, Blackstone goes on to define "desart and uncultivated" land as "uninhabited country".

⁸ A very early English case to partly apply this principle of Blackstone's arose less than a decade after the publication of Blackstone's *Commentaries*. In *Campbell v Hall* (1774), Lord Mansfield, C.J., claiming he was articulating a proposition "too clear to be controverted", stated that ".....the laws of a

to become highly influential within English common law. Indeed, his concept of “desart and uncultivated” lands was extended by the Courts to include some inhabited lands as well, having the effect of denying some indigenous groups, such as Australian Aborigines, native title rights on the basis that the territory they occupied was deemed *terra nullius*.⁹

Within New Zealand, early native title cases fundamentally affirmed the legal status of native title within common law, and the Crown’s obligation to respect it. Justice Chapman in *The Queen v Symonds*¹⁰ provided the first endorsement of this position, in the New Zealand Supreme Court in 1847:

"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

conquered country continue in force until they are altered by the conqueror." [*Campbell v Hall* (1774) [1558-1774] All ER Rep., 252, at 254, per Mansfield, C.J].

⁹ We can literally see this process at work in the Privy Council case of *Cooper v Stuart* (1889). The Privy Council were fully aware that the colony of New South Wales was inhabited by Aboriginal tribes. And yet on the basis that these tribes had not established the sort of “settlement” which defined other indigenous tribes elsewhere, the Privy Council concluded that the territory was “practically unoccupied”. As Lord Watson, who delivered the judgment of the Court, put it:

"The extent to which English law is introduced into a British Colony, and the manner of its introduction, must necessarily vary according to circumstances. There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class." (*Cooper v Stuart* Vol. XIV, J.C. (1889), 286 at 291).

Consequently, on this basis, the Privy Council concludes that the Aborigines of New South Wales had no property laws which the Crown was obligated to recognise upon its acquisition of sovereignty:

"There was no land law or tenure existing in the Colony at the time of its annexation to the Crown; and, in that condition of matters, the conclusion appears to their Lordships to be inevitable that, as soon as colonial land became the subject of settlement and commerce, all transactions in relation to it were governed by English law, in so far as that law could be justly and conveniently applied to them." *Cooper v Stuart* Vol. XIV, J.C. (1889), 286 at 292.

Consequently, we clearly see Blackstone’s concept of “desart and uncultivated” land, to which Crown laws immediately applied due to the absence of any pre-existing law, being extended to what the Privy Council believed was “practically unoccupied” land – i.e. land which the Privy Council deemed to be “without settled inhabitants or settled law”.

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."¹¹

Fifteen years later, Chief Justice Arney of the New Zealand Court of Appeal similarly affirmed the common law status of native title, and the Crown's obligations to respect it, as follows:

"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."¹²

However in 1877, the New Zealand Supreme Court thoroughly broke with these established precedents. Chief Justice Prendergast, delivering the judgment for the New Zealand Supreme Court in the case of *Wi Parata v Bishop of Wellington* (1878), established a new precedent on native title which was thoroughly at odds with all that had gone before. As we shall see, this precedent would remain the legal orthodoxy in New Zealand for the next two decades.¹³ After that, it would come under severe

¹⁰ (1847) *N.Z.P.C.C.* (SC), 387.

¹¹ *The Queen v Symonds* (1847) *N.Z.P.C.C.* (SC), 387, at 390, per Chapman J.

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

¹³ There were, however, some minor exceptions which departed from the *Wi Parata* precedent. Hence in *Mangakahia v The New Zealand Timber Company* (1882), far from following Chief Justice Prendergast and declaring the Treaty a "simple nullity", Justice Gillies went so far as to base native title rights on the Treaty. 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 (see note 5 above). 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 these qualified departures from the *Wi Parata* precedent are minor ones, because the main line of New Zealand judicial authority, and certainly the one that reached the Privy Council in *Nireaha Tamaki v Baker* (1900-01) [1840-1932] NZPCC 371 and

challenge from the Privy Council and be a matter for serious dispute between this body and the New Zealand Court of Appeal for some years. The legacy of *Wi Parata* therefore dominated New Zealand judicial deliberations on native title for the next thirty years.

Chief Justice Prendergast's judgment on native title in *Wi Parata* was somewhat contradictory. On the one hand, he seemed to deny the legal existence of native title altogether, insisting that Maori lacked any settled system of property or customary law upon which such native title could be based:

“On the foundation of this colony, the aborigines were found without any kind of civil government, or any settled system of law.”¹⁴

He argued that Crown legislation regarding the Maori had been “...framed upon the assumption that there existed amongst the natives no regular system of territorial rights nor any definite ideas of property in land....”¹⁵ Referring to the *Native Rights Act*, 1865, and its reference to the “Ancient Custom and Usage of the Maori people”, he rejects the very possibility of such customary law, upon which a concept of native title could be based:

“[A] phrase in a statute cannot call what is non-existent into being. As we have shown, the proceedings of the British Government and the legislation of the colony have at all times been practically based on the contrary supposition, that no such body of law existed; and herein have been in entire accordance with good sense and indubitable facts.”¹⁶

In so far as such statements deny the legal existence of native title altogether, they are an assertion of the doctrine of *terra nullius*.¹⁷

Wallis v Solicitor General for New Zealand [1903] AC 173, fully affirmed *Wi Parata* as the authoritative precedent on native title in New Zealand.

¹⁴ *Wi Parata v Bishop of Wellington*, at 77.

¹⁵ *Ibid*, at 77.

¹⁶ *Ibid*, at 79.

¹⁷ Within English common law, *terra nullius* referred to land which was acquired not by cession or conquest, but by discovery and settlement by the colonising power. Although originally applying to uninhabited land, it came to be applied to land with indigenous inhabitants (see note 9 above), but indigenous inhabitants whom the colonising power did not conquer or engage in treaty negotiations with. Rather, in the context of *terra nullius*, the colonising power simply assumed sovereignty on the basis of discovery and settlement alone. As Justice Brennan puts it in the *Mabo* judgment: “International law recognised conquest, cession, and occupation of territory that was *terra nullius* as three of the effective ways of acquiring sovereignty.....The great voyages of European discovery opened to European nations the prospect of occupying new and valuable territories that were already

On the other hand, at other points within his judgment, Prendergast C.J. seemed to recognise the legal existence of native title, but insisted that it fell outside the realm of common law:

“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.”¹⁸

Prendergast therefore insisted that because native title matters were “in the nature of a treaty obligation”, they effectively entailed acts of state, and so fell within the Crown’s prerogative powers. These prerogative powers were outside the jurisdiction of the Courts:

“.....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

inhabited. As among themselves, the European nations parceled out the territories newly discovered to the sovereigns of the respective discoverers.....provided the discovery was confirmed by occupation and provided the indigenous inhabitants were not organised in a society that was united permanently for political action.....To these territories the European colonial nations applied the doctrines relating to acquisition of territory that was *terra nullius*. They recognised the sovereignty of the respective European nations over the territory of ‘backward peoples’ and, by State practice, permitted the acquisition of sovereignty of such territory by occupation rather than by conquest....” (*Mabo v Queensland [No. 2]* (1992) 175 CLR 1, 32, per Brennan J.; see *ibid*, at 77, per Deane and Gaudron JJ.; *ibid*, at 180, per Toohey J.).

¹⁸ *Wi Parata v Bishop of Wellington*, at 78-79.

assumed, that the sovereign power has properly discharged its obligations to respect, and cause to be respected, all native proprietary rights.”¹⁹

It was the second of these precedents which was thoroughly affirmed by subsequent New Zealand authorities. They effectively ignored the first, which denied the existence of native title altogether.²⁰ The second of these precedents, although recognising the existence of native title, thoroughly transformed the relative power of the Crown and Maori tribes concerning native title claims. This was because, in placing native title within the prerogative powers of the Crown, a mere declaration by the Crown alone was sufficient to determine all native title matters, and was conclusive on the Courts.²¹ This meant that no Crown grant to settlers could be impeached by a native title claim because the Crown grant alone was deemed by the Courts to be sufficient indication of the Crown’s declaration that the native title had been extinguished, and this declaration was conclusive. As Prendergast put it:

"If this prerogative be left intact, and we hold it is, the issue of a Crown grant must still be conclusive in all Courts against any native person asserting that the land therein comprised was never duly ceded."²²

Such a legal settlement was clearly in the interests of settlers, who no longer had to fear that the land they held under Crown grant could be impeached by native title claims enforceable in the Courts. It was thoroughly against the interests of Maori

¹⁹ *Ibid*, at 79. My emphasis. Paul McHugh has criticised Prendergast C.J.’s conclusion that the Crown’s dealings with Maori over native title were “acts of state” on the following grounds: “By 1877 the Maori’s status as British subjects had been long fixed – how then could an ‘act of state’ be made by the Crown against its own subjects?” (Paul McHugh, “Aboriginal Title in New Zealand Courts”, *Canterbury Law Review*, Vol. 2, 1984, p. 247). McHugh points out that a long line of judicial authority had established “...that as between the sovereign and a subject there can be no act of state on British territory...” (*ibid*, note 55, p. 247). See also Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991), p. 114.

²⁰ The sole exception to this claim was a single statement by Chief Justice Stout, in his Protest against the Privy Council in 1903, which seemed to resurrect the specter of *terra nullius*. This is discussed below.

²¹ Such a declaration could take the form of a Crown grant, where the Courts would assume that the mere existence of this grant implied a declaration by the Crown that all native title attaching to the land within the grant had been extinguished. Therefore the existence of the grant alone would constitute a declaration by the Crown and would be binding on the Courts. As Prendergast C.J. put it: “Here, then, is one sufficient reason why this Court must disclaim the jurisdiction which the plaintiff is seeking to assume. In this country the issue of a Crown grant undoubtedly implies a declaration by the Crown that the native title over the land which it comprises has been extinguished. For the reason we have given, this implied fact is one not to be questioned in any Court of Justice, unless indeed the Crown should itself desire to question it, and should call upon the Court to lend its aid in correcting some admitted mistake.” (*Wi Parata v Bishop of Wellington*, at 78).

²² *Ibid*, at 80.

tribes, since their native title rights no longer had the judicial enforcement of common law, but were subject entirely to the discretion of the Crown.

Consequently, Chief Justice Prendergast's judgment in *Wi Parata* transformed the legal landscape on native title, and provided the Crown with full discretionary power to extinguish the native title of Maori tribes. The extent to which such a precedent was conducive to settler interests may explain the lengths to which the New Zealand Court of Appeal was willing to go to defend this decision, even at the risk of its relations with the Privy Council. It is to this subsequent legacy of *Wi Parata* that we now turn.²³

Nireaha Tamaki v Baker (1894) 12 NZLR 483

The Facts of the Case

The plaintiff in this case claimed title to a particular piece of land in the Mangatainoko Block. He did so on two grounds. Firstly, he claimed that the land had been the subject of an order by the Native Land Court in 1871, whereby the certificate for the land was to be issued to the plaintiff. Secondly, he claimed that the native title on the land had never been extinguished and so the land still belonged to its original owners.

Native Title Issues

Justice Richmond, delivering the judgment for the Court of Appeal, found that no certificate of title for the land had been issued by the Native Land Court, because a required survey of the land, being a condition of the certificate being issued, had not been carried out.²⁴ Therefore, he concluded, "[t]he plaintiff comes here....on a pure Maori title....."²⁵ The question raised, Richmond J. said, ".....is, therefore, whether the Native title to the piece of land claimed by the plaintiff on behalf of himself and other aboriginal natives has or has not been extinguished."²⁶

²³ As we have seen above at note 13, there were some exceptions to the *Wi Parata* legacy, where the New Zealand Courts questioned this precedent to a greater or lesser extent. However these were only minor ripples in the broad wake of *Wi Parata*. The dominant New Zealand legal orthodoxy – the orthodoxy that was eventually challenged by the Privy Council – fully affirmed *Wi Parata*. Consequently, the following discussion will concentrate on the cases which defined this orthodoxy alone.

²⁴ *Nireaha Tamaki v Baker* (1894) 12 NZLR 483, at 487-88, per Richmond J.

²⁵ *Ibid*, at 488, per Richmond J.

²⁶ *Ibid*, at 487, per Richmond J.

So the question of native title arose squarely within the case. Yet in the wake of the precedent established by *Wi Parata*, this in turn raised the issue of whether the Court had jurisdiction to determine native title issues. Hence Justice Richmond concluded that the Court's capacity to determine the native title questions above depended on its answer to two other questions raised before the Court:

"Can the interest of the Crown in the subject-matter of this suit be attacked by this proceeding?"²⁷

"Has the Court jurisdiction to inquire whether, as a matter of fact, the land in dispute herein has been ceded by the native owners to the Crown?"²⁸

In answering these questions, Justice Richmond found that the case fell clearly within the precedent of *Wi Parata*. This meant he answered the above two questions in the negative. As Richmond J. stated:

".....the case is within the direct authority of *Wi Parata v The Bishop of Wellington*. We see no reason to doubt the soundness of that decision.....According to what is laid down in the case cited, the mere assertion of the claim of the Crown is in itself sufficient to oust the jurisdiction of this or any other Court in the colony. There can be no known rule of law by which the validity of dealings in the name and under the authority of the Sovereign with the Native tribes of this country for the extinction of their territorial rights can be tested."²⁹

The Court therefore followed *Wi Parata* in insisting that the declaration of the Crown is conclusive on any native title issue. This meant that the Court had no jurisdiction to determine if Maori land had been validly ceded to the Crown and the native title effectively extinguished, because according to the *Wi Parata* precedent, the mere declaration of the Crown is conclusive on any native title issue. In other words, as Prendergast put it in *Wi Parata*, the Crown must be "the sole arbiter of its own justice" on these issues.³⁰ Richmond J. makes this point as follows:

²⁷ *Ibid*, at 485, per Richmond J.

²⁸ *Ibid*.

²⁹ *Ibid*, at 488, per Richmond J.

³⁰ The full statement by Prendergast is as follows: "...in the case of primitive barbarians, the supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice. Its acts in this particular cannot be examined or called in question by any tribunal, because there exist no known principles whereon a regular adjudication can be based." (*Wi Parata v Bishop of Wellington*, at 78).

"The Crown is under a solemn engagement to observe strict justice in the matter, but of necessity it must be left to the conscience of the Crown to determine what is justice. The security of all titles in the country depends on the maintenance of this principle."³¹

The last sentence in the passage above indicates the wider material context within which the Court's determination of native title issues was situated. With this statement, Richmond J. clearly shows that the Court recognised that what was at stake in these native title claims was nothing less than the security of land tenure in New Zealand settler society. Indeed, his statement above makes it clear that, from the perspective of the Court, the maintenance of the *Wi Parata* precedent, establishing Crown's prerogative over native title, free from all interference from the municipal courts, is necessary to the preservation of that security.

***Nireaha Tamaki v Baker* (1900-01) [1840-1932] NZPCC 371**

The plaintiffs in the Court of Appeal case then appealed to the Privy Council. The judgment of the Privy Council considered the two issues that were central to the *Wi Parata* precedent:

Whether native title as a title to land exists in New Zealand.

Whether the courts had jurisdiction to consider native title cases, in particular, whether the native title had been lawfully extinguished.

The Privy Council answered these questions in the affirmative.³² The extent to which this broke from the *Wi Parata* precedent will be considered below. However it clearly overturned the decision of the Court of Appeal in *Nireaha Tamaki v Baker* (1894), which had held that native title was an issue that lay outside the jurisdiction of the Courts.

However in the process of delivering its opinion, the Privy Council also considered the *Wi Parata* judgment itself, upon which the Court of Appeal's decision in *Nireaha*

³¹ *Nireaha Tamaki v Baker* (1894), at 488, per Richmond J.

³² As Lord Davey concluded in the case: "Their Lordships are therefore of opinion that the order of the Court of Appeal should be reversed, and a declaration should be made in answer to the third and fourth issues of law as follows: That it not appearing that the estate and interest of the Crown in the subject-matter of this suit subject to such Native titles (if any) as have not been extinguished in accordance with law is being attacked by this proceeding, the Court has jurisdiction to inquire whether as a matter of fact the land in dispute has been ceded by the Native owners to the Crown in accordance with law....." (*Nireaha Tamaki v Baker* (1900-01) [1840-1932] NZPCC 371, at 385).

Tamaki v Baker (1894) was based. As we shall see, on the question concerning the existence of native title, the Privy Council fundamentally departed from the judgment of *Wi Parata*. However the Privy Council stopped short of challenging *Wi Parata*'s central assertions concerning the status of the Crown's prerogative over native title. The following will consider each of the major issues raised by the Privy Council's judgment.

1. The Existence of Native Title

Lord Davey, who delivered the judgment of the Privy Council, began his judgment by reciting the Treaty of Waitangi. He then cited s. 2 of the *Land Claims Ordinance*, 1841, which held that it was:

"Declared enacted and ordained, that all unappropriated lands within the said Colony of New Zealand, subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants of the said Colony, are and remain Crown or Domain Lands of Her Majesty, her heirs and successors, and that the sole and absolute right of pre-emption from the said aboriginal inhabitants vests in and can only be exercised by Her said Majesty, her heirs and successors....."³³

As we have seen, Prendergast C.J., in *Wi Parata v Bishop of Wellington* (1878) denied that this provision of the *Land Claims Ordinance*, 1841 entailed any recognition of native title, stating that "[t]hese 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....."³⁴

Lord Davey fundamentally rejected Prendergast's reading of this provision. He argued that although this ordinance did not confer title on the Crown, nevertheless ".....it declares the title of the Crown to be subject to the 'rightful and necessary occupation' of the aboriginal inhabitants, and was to that extent a legislative recognition of the rights confirmed and guaranteed by the Crown by the second article of the Treaty of Waitangi."³⁵

³³ *Land Claims Ordinance*, 1841, s. 2, cited in *Nireaha Tamaki v Baker* (1900-01) [1840-1932] NZPCC 371, at 373.

³⁴ *Wi Parata v Bishop of Wellington*, at 77.

³⁵ *Nireaha Tamaki v Baker* (1900-01), at 373.

However because its status as an ordinance meant that it did not have the full authority of statute law, Lord Davey claimed that this provision ".....would not of itself, however, be sufficient to create a right in the Native occupiers cognisable in a Court of law."³⁶

Lord Davey then goes on to recite all the major pieces of legislation affecting native land rights in New Zealand extant at the time of his judgment, and as we shall see, it is these later legislative acts which, he believes, gives native title in New Zealand a sound foundation in statutory if not common law.³⁷ His references to these legislative enactments included a recitation of s. 4 and s. 5 of the *Native Rights Act*, 1865, which affirmed that native title ".....shall be determined according to the ancient custom or usage of the Maori people so far as the same can be ascertained....."³⁸; and "....that in any action involving the title to or interest in any such land the judge before whom the same shall be tried shall direct issues for trial before the Native Land Court....."³⁹ Lord Davey refers to these legislative provisions without further comment which, when read in the context of the rest of his judgment, indicates that he accepts the meaning and legality of these provisions at face value.

Lord Davey's affirmation of s. 4 and s. 5 of the *Native Rights Act*, 1865 is significant because it was precisely these elements of the Act that both Prendergast C.J and Richmond J. took issue with in *Wi Parata v Bishop of Wellington* (1878). Concerning section 4 of this Act, which referred to the "ancient custom or usage of the Maori people", Prendergast C.J. denied that "some such body of customary law did in reality exist", arguing that ".....a phrase in a statute cannot call what is non-existent into being."⁴⁰ He therefore effectively rejected the legality of this provision, arguing that ".....the proceedings of the British Government and the legislation of the colony have at all times been practically based on the contrary supposition, that no such body of law existed; and herein have been in entire accordance with good sense and indubitable facts."⁴¹

³⁶ *Ibid.*

³⁷ C.f. *ibid.*, at 373-75.

³⁸ Cited at *ibid.*, at 374.

³⁹ Cited at *ibid.*, at 374.

⁴⁰ *Wi Parata v Bishop of Wellington*, at 79, per Prendergast C.J.

⁴¹ *Ibid.*

Concerning section 5 of the *Native Rights Act*, 1865, both Prendergast C.J. and Richmond J. denied that the Supreme Court could refer questions of native title involving the Crown to the Native Lands Court as required under the Act. Richmond J.'s response to this provision was that "[i]t is as much as to say, it is a jurisdiction we are incapable of exercising."⁴² The reason why Prendergast C.J. and Richmond J. refused to countenance s. 5 of the *Native Rights Act*, 1865 was that they saw its elevation of the Native Lands Court as the ultimate authority on native title as inconsistent with what they believed was a Crown prerogative on this matter. Therefore, Prendergast goes to some lengths in *Wi Parata* to prove that the Parliament had no intention of binding the Crown by this legislation, thereby preserving its prerogative over native title intact.⁴³

Such an assertion was somewhat disingenuous on Prendergast's part given that he elsewhere admits that the clear purpose of s 5 of the *Native Rights Act*, 1865 is to ensure that on all questions of native title ".....the verdict or judgment of the Native Lands Court is conclusive"⁴⁴ - a statement clearly at odds with any reservation to the Crown of prerogative rights over native title, even if the Crown (as Prendergast claims) was not named in the statute.

Lord Davey thoroughly rejects Prendergast's interpretation of s. 4 and s. 5 of the *Native Rights Act*, 1865, dismissing the arguments that Prendergast puts forward in its defence. Regarding Prendergast's opinion on s. 4, concerning Maori customary law, Lord Davey states:

“[I]t was said in the case of *Wi Parata v Bishop of Wellington*, which was followed by the Court of Appeal in this case, that there is no customary law of the Maoris of which the Courts of law can take cognisance. Their Lordships think that this argument goes too far, and that it is rather late in the day for such an argument to be addressed to a

⁴² *Ibid*, at 75, per Richmond J.

⁴³ He argues that, in so far as the Act does not explicitly mention the Crown, Parliament could not have meant to bind the Crown by it, and therefore could not have meant to override its prerogative on native title. As Prendergast states: "The Crown, not being named in the statute, is clearly not bound by it; as the Act, if it bound the Crown, would deprive it of a prerogative right, that namely of conclusively determining when the native title has been duly extinguished....." (*Wi Parata v Bishop of Wellington*, at 80). Yet Prendergast's reasoning here is somewhat circular. It is apparent in his statement above that his prime reason for interpreting the statute as non-binding on the Crown is to preserve the Crown's prerogative powers over native title. Hence he begins from the premise that the Crown cannot be limited in its prerogative unless by statute, and then interprets the statute as non-binding on the Crown, precisely in order to keep this prerogative intact.

⁴⁴ *Ibid*, at 80, per Prendergast C.J.

New Zealand Court. It does not seem possible to get rid of the express words of ss. 3 and 4 of the Native Rights Act, 1865, by saying (as the Chief Justice said in the case referred to) that 'a phrase in a statute cannot call what is non-existent into being'. It is the duty of the Courts to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them by evidence.....The legislation both of the Imperial Parliament and of the Colonial Legislature is consistent with this view of the construction and effect of the Native Rights Act, and one is rather at a loss to know what is meant by such expressions 'Native title', 'Native lands', 'owners', and 'proprietors', or the careful provision against sale of Crown lands until the Native title has been extinguished if there be no such title cognisable by the law and no title therefore to be extinguished."⁴⁵

Lord Davey therefore affirms the existence of native title in New Zealand, not on the basis of common law, but on the basis of the strict reference to it within the *Native Rights Act*, 1865. He therefore gives the death-knell to that aspect of the *Wi Parata* judgment which had denied the existence of native title altogether on the basis of an absence of Maori customary law. As Lord Davey states:

“Their Lordships think that the Supreme Court are bound to recognise the fact of the 'rightful possession and occupation of the Natives' until extinguished in accordance with law in any action in which such title is involved, and (as has been seen) means are provided for the ascertainment of such a title."⁴⁶

Contrary to Prendergast, Lord Davey also insists on the validity of s. 5 of the *Native Rights Act*, 1865, which purported to reserve to the Native Lands Court ultimate authority in the determination of native title issues:

"By s. 5 it is plainly contemplated that cases might arise in the Supreme Court in which the title or some interest in Native land is involved, and in that case provision is made for the investigation of such titles and the ascertainment of such interests being remitted to a Court specially constituted for the purpose."⁴⁷

⁴⁵ *Nireaha Tamaki v Baker* (1900-01), at 382-83.

⁴⁶ *Ibid*, at 383.

⁴⁷ *Ibid*, at 382.

2. The Crown Prerogative

However although rejecting Prendergast's interpretation of the *Native Rights Act*, 1865, and affirming both the statutory existence of native title and its place within the jurisdiction of New Zealand municipal courts, the Privy Council stopped short of fully rejecting Prendergast's judgment in *Wi Parata*. This is because it did not challenge his central claim that native title is purely a matter of Crown prerogative.

As we have seen, this was the element of the *Wi Parata* judgment which was most fully embraced by subsequent New Zealand judicial opinion. It was this precedent which allowed the New Zealand Court of Appeal in the present case to deny it had jurisdiction to consider the plaintiff's claim, on the grounds that it had no authority to enforce any native title claims against the Crown.⁴⁸ Indeed, Richmond J. even went so far as to argue that the "security of all titles in the country" depends on the maintenance of this principle.⁴⁹ Consequently, the priority of *Wi Parata* in New Zealand jurisprudence depended on the maintenance of its central claim that native title fell within the Crown prerogative, and therefore outside the jurisdiction of the municipal courts.

The Privy Council avoided challenging this issue of Crown prerogative by arguing that it did not arise in the present case. It did not arise, they argued, because the respondent's actions affecting the plaintiff were not exercised on behalf of the Crown, or in terms of its prerogative, but rather in terms of an authority derived wholly from statutes.⁵⁰ Therefore, as the following shows, the Privy Council argued that in so far as none of the respondents were exercising authority under the prerogative powers of the Crown, the New Zealand Court of Appeal, in their assumption that their jurisdiction was barred because an issue of Crown prerogative was at stake, had misunderstood the questions arising in the case:

⁴⁸ C.f. *Nireaha Tamaki v Baker* (1894), at 488, per Richmond J.

⁴⁹ *Ibid.*

⁵⁰ As Lord Davey put it: "The respondent's authority to sell on behalf of the Crown is derived solely from the statutes and is confined within the four corners of the statutes." (*Nireaha Tamaki v Baker* (1900-01), at 380). The Privy Council argued that while it did not deny "...that the Crown has an exclusive right of pre-emption over Native lands and of extinguishing the Native title", nevertheless "....that right is now exercised by the constitutional Ministers of the Crown on behalf of the public in accordance with the provisions of the statutes in that behalf, and there is no suggestion of the extinction of the appellant's title by the exercise of the prerogative outside the statutes if such a right still exists." (*Ibid.*, at 381-82).

"Their Lordships think that the learned Judges have misapprehended the true object and scope of the action, and that the fallacy of their judgment is to treat the respondent as if he were the Crown or acting under the authority of the Crown for the purposes of this action. The object of the action is to restrain the respondent from infringing the appellant's rights by selling property on which he alleges an interest in assumed pursuance of a statutory authority the conditions of which (it is alleged) have not been complied with. The respondent's authority to sell on behalf of the Crown is derived solely from the statutes and is confined within the four corners of the statutes. The Governor in notifying that the lands were rural land open for sale was acting and stated himself to be acting in pursuance of s. 136 of the Land Act, 1892, and the respondent in his notice of sale purports to sell in terms of s. 137 of the same Act. If the land were not within the powers of those sections (as is alleged by the appellant), the respondent had no power to sell the lands, and his threat to do so was an unauthorised invasion of the appellant's alleged rights."⁵¹

Consequently, the Privy Council concluded that the question at issue was whether the respondent had the statutory authority to sell the lands claimed by the appellant. As the concluding point of the passage above suggests, if the statutes did not provide that authority, their Lordships did not believe that anything else (including any Crown prerogative power) would provide that authority. Therefore, in coming to this conclusion, the Privy Council was declaring that the issue before the Court in the present case was purely one of statutory interpretation (rather than Crown prerogative) and so clearly fell within the jurisdiction of the municipal Courts. As Lord Davey states:

"But it is argued that the Court has no jurisdiction to decide whether the native title has or has not been extinguished by cession to the Crown. It is said and not denied that the Crown has an exclusive right of pre-emption over native lands and of extinguishing the Native title. But that right is now exercised by the constitutional Ministers of the Crown on behalf of the public in accordance with the provisions of the statutes in that behalf, and there is no suggestion of the extinction of the appellant's title by the exercise of the prerogative outside the statutes if such a right still exists. There does not seem to be any greater difficulty in deciding whether the

⁵¹ *Ibid*, at 380-81.

provisions of an Act of parliament have been complied with in this case than in any other, or any reason why the Court should not do so."⁵²

Consequently, the Privy Council's insistence that all the relevant legal issues in the present case fall within statutory law allow it to claim that the issue of Crown prerogative over native title does not arise, and therefore can be avoided. It therefore reserved judgment on whether the Crown retained its prerogative over native title:

"Their Lordships.....express no opinion on the question which was mooted in the course of the argument whether the Native title could be extinguished by the exercise of the prerogative, which does not arise in the present case."⁵³

They also therefore reserved judgment on the other major issue arising from the Crown prerogative - whether native title claimants have rights enforceable against the Crown within the municipal courts. As Lord Davey stated:

"If all that is meant by the respondent's argument is that in a question between the appellant and the Crown itself the appellant cannot sue upon his Native title, there may be difficulties in his way (whether insurmountable or not it is unnecessary to say), but for the reasons already given that question, in the opinion of their Lordships, does not arise in the present case."⁵⁴

Hence Lord Davey concludes that precisely *because* the issue of Crown prerogative does not arise, it is clear that the municipal courts in New Zealand have jurisdiction over the matters arising in the present case:

"Their Lordships are therefore of opinion that the order of the Court of Appeal should be reversed, and a declaration should be made in answer to the third and fourth issues of law as follows: That it not appearing that the estate and interest of the Crown in the subject-matter of this suit subject to such Native titles (if any) as have not been extinguished in accordance with law is being attacked by this proceeding, the Court has jurisdiction to inquire whether as a matter of fact the land in dispute has been ceded by the Native owners to the Crown in accordance with law...."⁵⁵

⁵² *Ibid*, at 381-82.

⁵³ *Ibid*, at 385.

⁵⁴ *Ibid*, at 383.

⁵⁵ *Ibid*, at 385.

Fudging the Issue?

Yet in failing to challenge the *Wi Parata* judgment in this respect, I believe that the Privy Council effectively "fudged" the issue, because as the following shows, the circumstances of the rest of its judgment in the present case required it to place the issue of the prerogative in question. On the one hand, as we have seen, the Privy Council affirms the legality of s. 5 of the *Native Rights Act*, 1865, and therefore the authority of the New Zealand municipal Courts to refer all questions of native title to the Native Lands Court.⁵⁶ Yet it was precisely this authority which Prendergast C.J. and Richmond J. denied in *Wi Parata* on the grounds that it was inconsistent with the Crown's prerogative.⁵⁷ So it would seem that even from the perspective of *Wi Parata*, the Privy Council's affirmation of s. 5 of the *Native Rights Act*, 1865, would oblige it to deny that the Crown retained prerogative rights over native title, because s. 5 is inconsistent with that prerogative.

So if the Privy Council was willing to override Prendergast's interpretation of the *Native Rights Act*, 1865 - and as we have seen, Lord Davey later refers to Prendergast's "limited construction" of sections of that Act - then they ought to have been willing to take the further step of fundamentally challenging the Crown's prerogative over native title, which was the basis upon which Prendergast came to his conclusions concerning the Act, and was the mainstay of the *Wi Parata* judgment itself.⁵⁸ Instead, the Privy Council simply argued that the Court of Appeal was mistaken in their belief that the Crown prerogative arose in the present case, thereby placing the issue safely to one side. Concerning the prerogative itself, the Privy Council expressed uncertainty as to whether it still existed, but again, did not pass judgment on the issue.⁵⁹

⁵⁶ C.f. *ibid*, at 382-83.

⁵⁷ C.f. *Wi Parata v Bishop of Wellington*, at 80, per Prendergast C.J.; *ibid*, per Richmond J., at 75. In a later judgment the year after the Privy Council's decision in *Nireaha Tamaki v Baker* (1900-01), the Chief Justice of the New Zealand Court of Appeal affirmed Prendergast C.J.'s claim that the Crown was not bound by the *Native Rights Act*, 1865, and pointedly criticised the present judgment of the Privy Council for failing to affirm the same - c.f. *Hohepa Wi Neera v The Bishop of Wellington* (1902) 21 NZLR (CA) 655, at 667, per Stout C.J.

⁵⁸ Concerning the basis upon which Prendergast interpreted the *Native Rights Act*, 1865, see note 43 above.

⁵⁹ Hence at one point they express uncertainty about the continued existence of the prerogative, stating: "...there is no suggestion of the extinction of the appellant's title by the exercise of the prerogative outside the statutes *if such a right still exists*." (*Nireaha Tamaki v Baker* (1900-01), at 381-82. My emphasis). Such uncertainty also pervades the following comment concerning any challenge to such a prerogative: "If all that is meant by the respondent's argument is that in a question between the

3. The Legacy of *Wi Parata*

So in the context of their criticism of Prendergast's judgment in *Wi Parata*, what aspects of that judgment does the Privy Council overturn in the present case, and what aspects does it leave intact? We have already seen that the Privy Council avoids confronting the central claim of the *Wi Parata* judgment - that the Crown retains full prerogative authority over native title. However we have also seen that it thoroughly rejects those elements of Prendergast's judgement which deny the existence of Maori customary law, and therefore native title altogether. Indeed, as is evident in the passage below, the Privy Council provides a mixed opinion on *Wi Parata*, arguing that Prendergast's *dicta* on native title went far beyond what was required for his decision, but affirming the actual conclusion of the case - that a Crown grant indicates the extinguishment of native title to the detriment of the native title applicants. As Lord Davey states:

"In the case of *Wi Parata v The Bishop of Wellington*, already referred to, the decision was that the Court has no jurisdiction by *scire facias* or other proceeding to annul a Crown grant for matter not appearing on the face of it, and it was held that the issue of a Crown grant implies a declaration by the Crown that the Native title has been extinguished.....But the dicta in the case go beyond what was necessary for the decision.....As applied to the case then before the Court however, their Lordships see no reason to doubt the correctness of the conclusion arrived at by the learned Judges."⁶⁰

So the real legacy of the Privy Council's decision in *Nireaha Tamaki v Baker* (1900-1901) is there thorough rejection of any suggestion by Prendergast that native title does not exist. As Lord Davey memorably put it:

"Indeed it was said in the case of *Wi Parata v Bishop of Wellington*, which was followed by the Court of Appeal in this case, that there is no customary law of the Maoris of which the Courts of law can take cognisance. Their Lordships think that

appellant and the Crown itself the appellant cannot sue upon his Native title, *there may be difficulties in his way* (whether insurmountable or not it is unnecessary to say), but for the reasons already given that question, in the opinion of their Lordships, does not arise in the present case." (*ibid*, at 383. My emphasis).

⁶⁰ *Ibid*, at 383-84.

this argument goes too far, and that it is rather late in the day for such an argument to be addressed to a New Zealand Court.”⁶¹

As we shall see, the next Privy Council case to deal with native title went much further, directly attacking the Crown prerogative itself.

The Solicitor-General v The Bishop of Wellington and Others (1901) 19 NZLR 665

This case involved the same land and Crown grant that were in dispute in *Wi Parata v Bishop of Wellington* (1878). However the New Zealand Court of Appeal adjudicated on this case before they had an opportunity to read the Privy Council’s decision in *Nireaha Tamaki v Baker* (1900-01), which had significantly departed from the *Wi Parata* precedent. Consequently, the New Zealand Court of Appeal assessed the present case in the wake of its full affirmation of the *Wi Parata* precedent seven years before in *Nireaha Tamaki v Baker* (1894), and not in terms of the very different Privy Council judgment which had emerged on appeal from this earlier decision.

In *Solicitor-General v Bishop of Wellington* (1901) there was no dispute over whether the land in question had actually been ceded by the Maori to the Crown for the

⁶¹ *Ibid.*, at 382. The New Zealand Parliament was certainly highly attuned to the Privy Council’s departure from the *Wi Parata* precedent, even if the Crown prerogative powers over native title were ostensibly left intact by the Privy Council. According to McHugh, in response to this departure, Parliament passed the *Land Titles Protection Act*, 1902 (c.f. Paul McHugh, *The Maori Magna Carta. New Zealand Law and the Treaty of Waitangi*. Auckland: Oxford University Press, 1991, p. 118). The Preamble to this Act clearly indicates that its purpose is to placate the “considerable alarm” that had been caused among holders of Crown grants by these challenges to New Zealand precedent concerning native land. The Preamble indicates the Act’s intention that “...reasonable protection...be afforded to the holders of such titles.” (*Land Titles Protection Act*, 2 Edw. VII (1902), No. 37, preamble, in *The Statutes of the Dominion of New Zealand* (1902), Wellington, 1902, p. 169). Consequently, the Act itself makes little claim to impartiality regarding the competing interests of Maori native title claimants and Crown grant holders. Indeed, the long title to the Act is “An Act to protect the Land Titles of the Colony from Frivolous Attacks in certain Cases.” (*ibid.*). It was clearly apparent to Parliament that the most effective way of doing this was to legislatively entrench the *Wi Parata* precedent concerning Crown prerogative powers. As such, section 2 (1) of the Act holds that no Crown grant can be impeached on the grounds of native title without the permission of the Crown itself:

“In the case of Native land or land acquired from natives, the validity of any order of the Native Land Court, Crown grant, or other instrument of title purporting to have been issued under the authority of law which has subsisted for not less than ten years prior to the passing of this Act shall not be called in question in any Court, or be the subject of any order of the Chief Judge of the Native Land Court.....unless with the consent of the Governor in Council first had and obtained; and in the absence of such consent this Act shall be an absolute bar to the initiation of any proceedings in any Court calling in question the validity of any such order, Crown grant or instrument of title, or the jurisdiction of the Native Land Court to make any such order, or the power of the Governor to make and issue any such Crown grant.” (*ibid.*, section 2 (1)).

purposes of building a school.⁶² Rather, the question was whether the trustees of the grant had a right to use the money for an alternative purpose, given that no school had been built, or whether the grant reverted back to the Crown because of the non-fulfillment of its conditions?

As we saw in *Wi Parata*, the facts of the case concerned negotiations between the Ngatitōa tribe and the Bishop of New Zealand in 1848, for the purposes of building a college on native land.⁶³ This land was transferred to the Bishop by a Crown grant in 1850 - the terms of the grant indicating that the land had been ceded by the natives to the Crown for this purpose.⁶⁴ Under the terms of the *Bishop of New Zealand Trusts Act*, 1858, the Bishop transferred this land into the hands of a trust in 1859.⁶⁵ The land was then rented and money accrued to the trust. By 1901, no college had been built, and as many of the local Maori had moved from the area, it seemed that the building of a college would be a waste of the trust's money.⁶⁶ Consequently, the trustees appealed to the government for permission to use the money for alternative, but related purposes.⁶⁷ The government refused, indicating it wished to review the matter further.⁶⁸ When no review had taken place, the trustees then appealed to the Supreme Court for permission to use the money for an alternative but related purpose.⁶⁹ The Solicitor-General (representing the Crown) opposed the motion, claiming that the lands had reverted back to the Crown because the original terms of the grant (involving the use of the land to support a college) had not been fulfilled.⁷⁰ Chief

⁶² As Williams J. stated in the present case: "There is practically no dispute as to the circumstances which led up to the issue of the Crown grant, nor as to what had been done under the Crown grant." (*The Solicitor-General v Bishop of Wellington* (1901), 19 NZLR 665, at 677). However we can see the legacy of *Wi Parata* in the following statement, where Williams J. effectively insists that any issues connected with the Maori cession of land to the Crown cannot invalidate the Crown grant once made: "Any circumstances which led up to the issue of the Crown grant are manifestly inadmissible as evidence to contradict or vary the terms of the Crown grant, although they may be relevant on the inquiry as to what scheme should be adopted." (*ibid*, at 677).

⁶³ Subsequent evidence tabled on behalf of the Solicitor-General indicated that other tribes besides the Ngatitōa were involved in the donation of the land (c.f. *ibid*, at 667).

⁶⁴ *Ibid*, at 675.

⁶⁵ *Wallis v Solicitor-General* [1903] AC 173, at 180.

⁶⁶ C.f. *ibid*, at 181.

⁶⁷ *Ibid*.

⁶⁸ *Ibid*.

⁶⁹ *Ibid*.

⁷⁰ C.f. *ibid*, at 676-77. Needless to say, the Solicitor-General had a series of reasons which informed his opposition to the plan put forward by the trustees. As Williams J. put it, the Solicitor-General, in his statement of defense to the Supreme Court, argued that the Executive Government had been "...advised that by reason of the failure of the trusts the land and moneys have reverted to the Crown

Justice Prendergast, for the Supreme Court, rejected the Solicitor-General's claim, but not being convinced that the original purpose of building a college on the land was defunct, reserved these matters for further determination.⁷¹ The subsequent Supreme Court case which considered these matters found for the trustees, and approved their alternative plan for the use of the trust money.⁷²

The Solicitor-General then appealed this decision in the Court of Appeal, giving rise to the present case. Williams J, who delivered the judgment of the Court in the present case, found for the Solicitor-General on two grounds. Firstly, he found that the Crown had been "deceived" in its grant to the Bishop, since the purpose of the grant had never been fulfilled.⁷³ Secondly, he found that the land reverted to the Crown because the "true construction" of the Crown grant to the Bishop "was in the nature of a conditional limitation" which was determinable when the purpose of the grant - religious education, industrial training, and instruction in the English language - ceased to be given in the college.⁷⁴ Finding on these two grounds that the land had become the property of the Crown, Williams J. concluded that the Court had no jurisdiction to adopt the scheme proposed by the trustees.⁷⁵

The Late Amendment

However, what is much more significant for our purposes was the Court of Appeal's response to a late amendment to the statement of defence offered by Council for the Solicitor-General. This late amendment included the following statement:

"The defendant by Hugh Gully, Crown Solicitor for the Wellington District, further amends his statement of defence filed herein by adding thereto the following paragraph: 'That the terms of cession to the Crown by the aboriginal Natives of the

without any trust being attached to them, and submits, accordingly, that the question should be dealt with by Parliament, and that the Court has no jurisdiction." (*ibid*, at 677). Hence in the first instance, the Solicitor-General's claim that the Court had no jurisdiction had nothing to do with native title matters, but was premised on his claim that the grant had reverted back to the Crown, and so was a Crown matter. Indeed, the Court of Appeal ultimately accepted this argument, with Williams J. concluding "...the Court has no jurisdiction because the property is now vested in the Crown" (*ibid*, at 685). However if it had have been found that the Court did have jurisdiction over the matters relating to the trust, the Solicitor-General, in his statement of defence to the Supreme Court, adopted a second position, proposing an alternative scheme to the one proposed by the trustees (c.f. *ibid*, at 677).

⁷¹ *Ibid*, at 677.

⁷² *Ibid*.

⁷³ *Ibid*, at 678-80.

⁷⁴ *Ibid*, at 681.

⁷⁵ *Ibid*, at 687.

lands comprised in the grants were such as to preclude the Crown from consenting to the application of the said lands and rents and profits thereof to any other purposes or objects than those expressly mentioned in the grant. And that the Crown has a duty to observe the terms of the cession to itself and the trust thereby confided by the aboriginal Natives in the Crown. And that the Executive Government has determined, so far as the matter is one for the determination of the Crown, that any departure from the precise terms of the grant by the application *cy-près* of the said lands and funds without the consent of the Parliament of the Colony would contravene the terms of the said cession and be a breach of the trust thereby confided in the Crown."⁷⁶

With this statement, the Crown was claiming that if the trust was allowed to be administered on a *cy-près* basis (thereby allowing the trustees to fulfill the terms of the trust by an alternative, but related, purpose) this would violate a purported duty of the Crown to the natives to ensure that the land ceded by the natives was used expressly for the purposes originally stated in the Crown grant.⁷⁷

In its judgment, the Court stated that it did not have to consider the matters raised in the late amendment to the statement of defence, as it had already determined the case in favour of the Crown on the two grounds cited earlier. But the Court said it would consider the issue raised in the amended statement of defence concerning the Court's jurisdiction, as these matters were argued at length in the case.⁷⁸ The Court's views on this matter were therefore outside its reasons for judgment in this case, and were therefore clearly *obiter dicta*.

The Court of Appeal's response to the amended statement of defence was, in effect, to indicate agreement with the Crown that issues of trust and duty arising between the Crown and Maori were outside the jurisdiction of the Courts, particularly as regards the cession of native land to the Crown. As the Court put it:

"In the present case there are, however, circumstances which make the question of exercising the jurisdiction more difficult. The land, as appears from the grant, was

⁷⁶ Cited in "*Wallis and Others v Solicitor-General*. Protest of Bench and Bar, April 25, 1903", [1840-1932] NZPCC, App., 730, at p. 741.

⁷⁷ The *cy-près* doctrine is a doctrine within the law of charitable trusts. It operates in a case where a donor has expressed a general charitable intention that it is impossible or impractical to effect, and so the courts will allow the intention to be fulfilled as closely as possible to the original intention (c.f. *Butterworths Australian Legal Dictionary*, edited by Peter E. Nygh and Peter Butt. Sydney: Butterworths, 1997, p. 316).

⁷⁸ *The Solicitor-General v Bishop of Wellington* (1901), at 685.

ceded by Natives to the Crown. Mr. Bell, who appeared for the Solicitor-General, the representative of the Crown, made a statement at the bar as from the Crown that the terms of the cession by the Natives were such as to preclude the administration of the gift otherwise than in the direct terms of the grant.....[T]he Crown therefore asserts that it has duties towards the Natives who ceded the land which could not be performed if the Court administered the trust *cy-près*. This would place the Court in a considerable difficulty. What the original rights of the Native owners were, what the bargain was between the Natives and the Crown when the Natives ceded the land, it would be difficult, if not impossible, for this Court to inquire into, even if it were clear that it had jurisdiction to do so."⁷⁹

Was the Court once again affirming the precedent of *Wi Parata* that issues concerning the Crown and native title, including the cession of such title to the Crown, were matters of Crown prerogative, over which the Court had no jurisdiction? At one level it does not appear so. This is because the Court goes on to point out below that the reason it does not have clear jurisdiction in this matter is that the Crown's special duty to protect the Natives and their title to land is a duty *parens patriae*. This duty seems to be distinct from any consideration of affairs of state which had given rise to the Crown prerogative in *Wi Parata*, since it refers to a specific obligation of the Crown to assume responsibilities for those unable to fend for themselves, and these responsibilities are administered through the Courts.⁸⁰ As Williams J. puts it:

"The position appears to be somewhat as follows. The Crown.....as *parens patriae*, is under a solemn obligation to protect the rights of Native owners of the soil. When, therefore, the Crown as *parens patriae*, asserts that in that capacity it is under an obligation to Natives in respect of a property, can this Court, representing the Crown as *parens patriae*, say to the Crown, You shall not carry out this obligation, but the property you have granted shall be devoted to charitable purposes, to be determined

⁷⁹ *Ibid*, at 685-86.

⁸⁰ According to *Butterworths Australian Legal Dictionary*, the doctrine of "parens patriae" is "A common law doctrine by which the Sovereign has an obligation for the welfare of children and 'lunatics'. That obligation was in return for the allegiance of the sovereign's subjects." (*Butterworths Australian Legal Dictionary*, p. 841). Williams J. argues in the present case that the doctrine of *parens patriae* extends even further than this. He argues that the Crown is in a position of *parens patriae* when it comes to the administration of funds devoted to charity, to ensure that the funds are spent for the right purposes (a role administered through the courts) and that it is also *parens patriae* when it comes to protecting the rights of Native owners of the soil (c.f. *The Solicitor-General v Bishop of Wellington* (1901), at 686). So clearly the doctrine of *parens patriae* has been extended beyond the realm of children and lunatics over time.

by the Court irrespective of your obligations? We see great difficulty in holding that, in such circumstances, the Court could or ought to interfere.....In the above circumstances it seems more appropriate that the matter should be dealt with by the Legislature than by this Court."⁸¹

So the doctrine of *parens patriae* seems to be distinct from the Crown prerogative as a reason for excluding the jurisdiction of the Court over native title matters involving the Crown. The Court's reasoning above therefore seems to be distinct from its reasoning in *Wi Parata* as grounds for limiting its jurisdiction.

But as the Court of Appeal's Protest in 1903 will make clear, the real animating principle underlying the Court of Appeal's doubt above that it had any jurisdiction over the matters raised in the Solicitor-General's amended statement of defence is not the doctrine of *parens patriae*, but the doctrine of Crown prerogative as outlined in *Wi Parata*. As we saw, the position of Chief Justice Prendergast in *Wi Parata* was that matters concerning native title between Maori tribes and the Crown entailed acts of state, and therefore issues of Crown prerogative, which were outside the jurisdiction of the Courts.⁸² As we shall see, it was precisely these issues, rather than the doctrine of *parens patriae*, that the Court of Appeal raised in the Protest, in order to defend its *obiter dicta* above concerning the matters raised in the Solicitor-General's amended statement of defence.⁸³

In the Protest, the Court of Appeal took exception to significant elements of the Privy Council's judgment in *Wallis v Solicitor-General* (1903) (raised on appeal from the present case) in particular the Privy Council's criticism of the Court of Appeal's *obiter dicta* concerning the Solicitor-General's amended statement of defence above. Yet the Court of Appeal's response to this criticism was not to refer to the doctrine of *parens patriae*, which was central to the *obiter dicta* itself. Rather, as the following shows, their Protest refers directly to the *Wi Parata* precedent that all matters involving the Crown and native title involve acts of state and so are outside the

⁸¹ *The Solicitor-General v Bishop of Wellington* (1901), at 686.

⁸² See note 18 and 19 above.

⁸³ The Court of Appeal needed to defend its decision in this regard because its denial of jurisdiction over the matters raised in the Solicitor-General's amended statement of defence was the object of extreme criticism by the Privy Council in *Wallis v Solicitor-General* (1903) See note 121 below where the Court of Appeal criticises the injudicious use of language and the aspersions cast upon it by the Privy Council in this context. Such language and such aspersions arose in those aspects of the Privy

jurisdiction of the Courts. So for instance, Chief Justice Stout stated in his Protest that in responding to the Solicitor-General's amended statement of defence, in particular his claim that the terms of cession gave rise to special obligations on the part of the Crown, "[t]he Court held that the cession was an act of State, and that it was difficult, if not impossible, in 1900 to inquire – if it had jurisdiction to do so – into the act of State in 1850."⁸⁴

Justice Williams, in his Protest, was far more elaborate in his defense of the Court of Appeal's *obiter dicta*. Yet once again, the defense is couched entirely in terms of the *Wi Parata* precedent, and not the doctrine of *parens patriae* which was central to the *obiter dicta* itself:

“After we had given our decision on the grounds above mentioned, we made some remarks which were altogether independent of what we had decided. We indicated that there appeared to us in any case, and apart from our decision, to be some difficulty in administering the trust *cy-près*, as the Crown by its counsel had asserted that it had duties towards the Natives who ceded the land which could not be performed if the Court so administered it. We gave at length our reasons for the apparent difficulty, but expressly refrained from giving any decision on the question. 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. As was laid down in *Wi Parata v Bishop of Wellington*: ‘Transactions with the Natives for the cession of their title to the Crown are to be regarded as acts of State, and therefore are not examinable in any Court’.....We were considering with hesitancy how far the above principle would have been applicable to the case before us. 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. If the Crown by its representatives asserted the existence of any duty to the Natives, it

Council's judgment which criticised the Court of Appeal's denial of jurisdiction over the Solicitor-General's amended statement of defence.

⁸⁴ “*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903”, [1840-1932] NZPCC Appendix, 730, at 742, per Stout C.J.

seemed to us that the above principles might require the acceptance by the Court of the assertion, and so have placed us in the difficulty suggested.”⁸⁵

Thus we see that, two years after their decision in *The Solicitor-General v The Bishop of Wellington* (1901), the judges of the Court of Appeal retrospectively defended their *obiter dicta* in that case entirely in terms of the *Wi Parata* precedent concerning Crown prerogative, rather than in terms of the doctrine of *parens patriae* which had formed the basis of the *obiter dicta* itself. We can see therefore that it was the *Wi Parata* precedent which was the underlying factor informing the Court of Appeal’s *obiter dicta* in *Solicitor-General v Bishop of Wellington* (1902), despite their reference to the very different doctrine of *parens patriae*.

***Wallis v Solicitor General for New Zealand* [1903] AC 173**

The trustees appealed to the Privy Council against the New Zealand Court of Appeal’s ruling in *Solicitor-General v Bishop of Wellington and Others* (1901). In the resulting case, *Wallis v Solicitor-General for New Zealand*⁸⁶, the Privy Council overturned the Court of Appeal’s ruling and found in favour of the trustees. While the Privy Council rejected the basis upon which the Court of Appeal had found for the Crown, it reserved its strongest criticism for the *obiter dicta* at the end of the Court of Appeal’s judgment, where in responding to the Solicitor-General’s late amendment, the Court of Appeal had discussed its views concerning the Court’s jurisdiction over Crown-Maori affairs.

The Privy Council and Maori Land Rights

A fundamental difference between the New Zealand Court of Appeal and the Privy Council’s reasoning which led to their divergent judgments in this case can be traced to their very different understanding of the status of the Crown in the circumstances that led to the cession of native title by the Ngatittoa tribe. As we have seen, the Court of Appeal took the view that the Ngatittoa tribe had ceded the land directly to the Crown, and the Crown had thereupon provided a grant to the Bishop.⁸⁷ The Privy

⁸⁵ *Ibid*, pp. 754-55, per Williams J.

⁸⁶ [1903] AC 173.

⁸⁷ Indeed, the whole thrust of the Solicitor-General’s late amendment, and the Court of Appeal’s conclusion, on the basis of this amendment, that a *parens patriae* relationship existed between the Crown and Ngatittoa tribe, is premised on the assumption that a direct cession of land had occurred between the Ngatittoa tribe and the Crown.

Council on the other hand, took the view that the cession was effectively between the native tribe and the Bishop, the Crown merely playing an intermediary or “conveyancing” role in waiving its right to pre-emption and issuing a Crown grant to the Bishop.⁸⁸ As Lord Macnaghten, who delivered the judgment for the Privy Council, put it:

“When the Government had once sanctioned their gift, nothing remained to be done but to demarcate the land and place on record the fact that the Crown had waived its right of pre-emption. That might have been effected in various ways. The course adopted was to issue a Crown grant. That, perhaps, was the simplest way, though the Crown had no beneficial interest to pass. After all it was only a question of conveyancing, as to which the native owners were very possibly not consulted.”⁸⁹

One reason why the Privy Council could claim that the Ngatitōa tribe had effectively ceded their land directly to the Bishop was its assumption that “...[i]t was not until 1852 that it was made unlawful for any person other than Her Majesty to acquire or accept land from the natives....”⁹⁰ Hence according to Lord Macnaghten, the Crown

⁸⁸ C.f. *Wallis v Solicitor-General* [1903] AC 173, at 179-80. In his Protest against the Privy Council's judgment in this case, Justice Williams clearly recognised that the most significant difference of opinion between the Court of Appeal and the Privy Council, giving rise to their divergent judgments in this case, was their disagreement over precisely this question of who ceded the land to the Bishop of New Zealand. Williams J. points out that the Privy Council's judgment in *Wallis* “seems to have been based in the main” on the opinion that the Ngatitōa tribe ceded the land directly to the Bishop, the Crown merely fulfilling a “conveyancing” role in the process. In response, Williams J. argued that at the time, the Maori had no legal right to their land cognisable in a Court of law, as there were no statutes at the time “regulating the extinction of native title” [*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903”, at 749, per Williams J]. As he puts it: “If the Native occupiers had no right cognisable in a Court of law, it is difficult to see how they could transfer such a right to the Bishop.” [*ibid*]. He then points to the long line of legislative authority which he believes supported the Court of Appeal's view that the Crown, and not the Ngatitōa tribe, were the donors of the land to the Bishop [*ibid*, at 748-49, per Williams J]. He then sums up this legislative authority as follows: “Whether, however, we were right or wrong, there was certainly an unbroken current of authority. First, that the Native occupiers had no right to their land cognisable in a Court of law, and that having no such right themselves they could not transfer any right to others. Secondly, that the Crown grant was not a mere piece of conveyancing, but was essential to create any right at all of which this Court could take notice, and that any such right was derived from the Crown grant, and by virtue of the grant, and from the grant alone. Thirdly, that as the Natives never had any rights cognisable in a Court of law they had no *locus standi* to impeach the grant, and were neither necessary nor proper parties in any proceedings between the Crown and its grantee in relation to the subject-matter of the grant....Had 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.” [*ibid*, at 750].

⁸⁹ *Wallis v Solicitor-General* [1903] AC 173, at 179-80.

⁹⁰ *Ibid*, at 179. In the Court of Appeal “Protest” against this judgment, Williams J. questions this opinion, arguing that at least from 1846, Maori were not entitled to sell land to whoever they pleased (“*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903”, at 748, per Williams J.). Indeed the Crown's exclusive right of pre-emption was upheld in the Treaty of Waitangi itself.

was able to legally waive its exclusive right of pre-emption, allowing for what in effect was a direct cession of land from the Ngatittoa tribe to the Bishop.⁹¹ This allowed the Privy Council to conclude that:

“The founders of the charity, therefore, were the native donors. All that was of value came from them. The transfer to the bishop was their doing.”⁹²

This assumption that the Crown only played an intermediary role in the transfer of land from the Ngatittoa tribe to the Bishop, never having full possession of the land itself, was central to the Privy Council’s conclusions in this case. It was the basis upon which the Privy Council departed from the judgment of the Court of Appeal that the land in question should revert to the Crown due to the non-fulfillment of the purposes of the grant. The Privy Council argued that, because the Crown in its intermediary role never had full possession of the land, any argument that the land should "revert" to the Crown due to a non-fulfilment of the terms of the grant was spurious, because it was, in effect, an argument that land should revert to the Crown which the Crown had never possessed in the first place.⁹³

However the main grounds for the Privy Council’s belief that the Ngatittoa tribe had directly ceded their land to the Bishop was its assumption that the Maori still had full possession of their lands as guaranteed by the Treaty of Waitangi, and therefore were fully capable of ceding land to the Bishop on their own volition (subject to the Crown's waiver of its right of pre-emption). As Lord Macnaghten states:

“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.”⁹⁴

⁹¹ *Wallis v Solicitor-General*, at 179-80.

⁹² *Ibid*, at 179.

⁹³ Hence Lord Macnaghten described the Solicitor-General’s evidence before the Court of Appeal as entailing the contradictory assertion that “.....property of which the Crown was never possessed had ‘reverted’ to the Crown.” (*ibid*, at 186).

⁹⁴ *Ibid*, at 179.

Privy Council Rejection of the *Wi Parata* Precedent.

What we see in the statement above is the Privy Council clearly claiming that the Treaty of Waitangi, in and of itself, was the ultimate source of Maori land rights in New Zealand law. The claim is extraordinary because it moves against the well-known legal principle that treaties, in and of themselves, do not give rise to rights within municipal law until embodied in statute.⁹⁵ Nevertheless, with this claim, the Privy Council is definitely rejecting the precedent of *Wi Parata v Bishop of Wellington* (1878), which had held that the Treaty gave rise to no such rights.⁹⁶

This constituted the second refutation of *Wi Parata* by the Privy Council in the space of two years. The Privy Council's judgment in *Nireaha Tamaki v Baker* in 1901 had rejected those elements of *Wi Parata* which had denied the existence of native title, by clearly recognising the legal status of Maori customary law. Now its decision in *Wallis v Solicitor-General* (1903) was clearly breaking from another aspect of *Wi Parata* in asserting that the Treaty itself was a source of Maori legal rights – a Treaty which Chief Justice Prendergast in *Wi Parata* had dismissed as a “simple nullity”.⁹⁷

Privy Council Rejection of the Court of Appeal Judgment

As we saw above, in *The Solicitor-General v The Bishop of Wellington* (1901) the New Zealand Court of Appeal found for the Crown on two grounds. Firstly, the Court of Appeal found that the Crown had been “deceived” in the grant because its purposes had not been fulfilled, and secondly that the grant itself contained a conditional limitation which ensured that the land reverted back to the Crown when these purposes were no longer fulfilled. The Privy Council rejected both of these findings.

Concerning the Court of Appeal’s second finding that the grant contained a conditional limitation, ensuring that the land reverted to the Crown when it ceased to be used for the purposes described in the grant, the Privy Council stated that such a

⁹⁵ This principle was most famously affirmed by the Privy Council in regard to the Treaty of Waitangi some thirty-eight years later in *Te Heuheu Tukino v Aotea District Maori Land Board*, NZLR [1941] 590 at 596-97.

⁹⁶ Indeed the judgment of Prendergast C.J. in *Wi Parata* was notorious for declaring that the treaty, in so far as it purported to be an instrument ceding sovereignty to the Crown, was a “simple nullity” - c.f. *Wi Parata v Bishop of Wellington* (1878) at 78.

⁹⁷ See note 96 above.

conditional limitation never came into effect, because the purposes of the grant were never fulfilled in the first place.⁹⁸ As the Privy Council put it:

“Now as it is common ground that no school was ever established at or in the neighbourhood of Porirua, it would seem to follow that the occasion on which the trust, according to the construction placed on the grant by the Court of Appeal, was to cease and determine never arose and never could have arisen. It appears, therefore, hardly necessary to consider the second ground on which the Court of Appeal determined the case in favour of the Crown. It was not pressed at their Lordships’ bar.”⁹⁹

Concerning the first ground for the Court of Appeal’s decision, that the Crown had been “deceived” in the grant, the Privy Council stated:

“The learned counsel for the respondent were in much the same difficulty in attempting to support the first ground upon which the Court of Appeal relied. There too the Court had recourse to an assumption which has no basis in fact. What evidence is there that the Crown was deceived? Absolutely none. The evidence is entirely the other way.”¹⁰⁰

As such, Lord Macnaghten stated that the council for the Solicitor-General, in the course of their argument before the Privy Council, did not feel that they could support either of the findings of the Court of Appeal in the Solicitor-General’s favour.¹⁰¹ They therefore adopted an argument suggested by the Solicitor-General that “there was no

⁹⁸ *Wallis v Solicitor-General* [1903] at 183.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, pp. 183-84. Indeed much of the disagreement between the Privy Council and the Court of Appeal concerning whether the Crown was “deceived” in the grant, turned on differing accounts of what it meant to be deceived. The position of the Privy Council was that, given that the Crown itself had drawn up the grant and included in the recitals the commitment to building a school, if the Crown had been deceived then it had effectively deceived itself (*ibid.*, pp. 184-85). However in his contribution to the “Protest of Bench and Bar” against the Privy Council decision in *Wallis v Solicitor-General*, one of the judges in the original Court of Appeal case, Mr Justice Williams, rejects this idea that the Crown had deceived itself: “In interpreting the grant we did not consider it material to inquire into what was passing in the mind of the person who happened to be the Governor of the Colony at the time it was issued. We looked at the grant and found a statement in it that a school was about to be established under the superintendance of the grantee. The statement, no doubt, was the statement of the Crown, but the Crown must have made the statement on the information of somebody....[W]e considered that the establishment of the school was in effect the consideration for the grant, and that the consideration had not been duly performed.” (“*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903”, [1840-1932] NZPCC Appendix, 730, at 751-52).

¹⁰¹ *Wallis v Solicitor-General*, at 185.

general purpose of charity [in the grant] but only an intention to erect 'a specific school on a specified site'".¹⁰²

This meant that the absence of such a general purpose meant that the trust could not be administered *cy-près*, but had to fulfil its original purposes or revert back to the Crown. However the Privy Council dismisses such a position, stating that it is ".....a very narrow view of the transaction, at variance, in their Lordships' opinion, with the express terms of the gift, and opposed to principles laid down in recognised authorities...."¹⁰³

Privy Council Rejection of the Court of Appeal's *Obiter Dicta*

However although overturning the substantive judgment of the Court of Appeal, the Privy Council reserved its most scathing criticism for the *obiter dicta* offered by the Court of Appeal on the amended statement of defence submitted to the Court by counsel for the Solicitor-General. Lord Macnaghten claimed that the amended statement added to the "confusion" of the case.¹⁰⁴ He states:

"[O]n the hearing of the appeal the Solicitor-General applied for and obtained leave to amend his defence. A formal order for the amendment was afterwards obtained on the ground that such amendment was necessary 'to more clearly define the grounds of defence of the Crown'. But the amendment only made the confusion worse. It was a medley of allegations incapable of proof and statements derogatory to the Court. But the Court accepted it, and treated it with extreme deference. The learned judges intimate pretty plainly that if they had not been able to find satisfactory reasons for deciding in favour of the Crown, the amendment would of itself have prevented their making an order in favour of the trustees."¹⁰⁵

Indeed, as we have seen, the Court of Appeal judges agreed with the thrust of the amended statement of defence that they might not have jurisdiction to adjudicate on the claims raised in the case, given that they involved issues of trust and duty between the Crown and the Ngatitōa tribe concerning the purposes for which the land was

¹⁰² C.f. *ibid*, at 185. My addition.

¹⁰³ *Ibid*, at 185.

¹⁰⁴ *Ibid*, at 187.

¹⁰⁵ *Ibid*, at 187.

ceded.¹⁰⁶ At one point, the Court of Appeal stated: "What the original rights of the native owners were, what the bargain was between the natives and the Crown when the natives ceded the land, it would be difficult if not impossible for this Court to inquire into, even if it were clear that it had jurisdiction to do so."¹⁰⁷ As we have seen, in making this claim, the Court of Appeal was ostensibly drawing on the principle of *parens patriae*, to define the exclusive relationship between the Crown and the native tribe. But as we also saw above, it was implicitly drawing on the precedent of *Wi Parata*, which had insisted that all such matters concerning the cession of native land was a matter of Crown prerogative, and was therefore outside the jurisdiction of the courts.¹⁰⁸

However the Privy Council ignored any such reasoning by the Court of Appeal, simply insisting that it was "unable to follow" the Court of Appeal's claim that it lacked jurisdiction over the matters relating to the Crown in the Solicitor-General's amended statement of defence.¹⁰⁹ The Privy Council was unable to follow this claim because, from the Privy Council's perspective, the cession of native land referred to in the amended statement of defence did not involve the Crown, but rather was a direct cession of land from the Ngatitōa tribe to the Bishop. From the Privy Council's perspective therefore, the issues of trust or duty between the Crown and the tribe, referred to in the amended statement of defence, did not arise. As Lord Macnaghten states:

"The land was part of the native reserves, as appears from the Government minute of October 7, 1848. At the date of the cession to Bishop Selwyn the rights of the natives in their reserves depended solely on the treaty of Waitangi. There is not in the evidence the slightest trace of any cession to the Crown, or of any bargain between the Crown and the native donors."¹¹⁰

¹⁰⁶ C.f. *The Solicitor-General v Bishop of Wellington* (1901), at 686.

¹⁰⁷ *Ibid.*

¹⁰⁸ C.f. *Wi Parata v Bishop of Wellington*, at 79.

¹⁰⁹ C.f. *Wallis v Solicitor-General*, at 187.

¹¹⁰ *Ibid.*, at 188. In the passage below, Lord Macnaghten states that this assumption that the land was not ceded to the Crown might alter were the Crown itself to step forward as plaintiff. But again, this would not justify any claim by the Court of Appeal that it lacked jurisdiction over the case. Rather, the claims of the Crown would also be subject to investigation within the Court. As Lord Macnaghten puts it: "Of course, if the Crown comes forward as plaintiff, the transaction may assume a very different complexion. There may be in existence evidence which has not yet been disclosed. But if the Crown seeks to recover property and to oust the present possessors, it must make out its case just like any

However it was the apparent willingness of the Court of Appeal, when confronted with the amended statement of defence, to surrender its jurisdiction to the executive, which aroused the most stinging criticism from the Privy Council. So for instance, part of the amended statement of defence stated that "...the executive Government has determined.....that any departure from the precise terms of the grant by the application of cy-près of the....land and funds without the assent of the Parliament of the Colony would contravene the terms of the....cession, and be a breach of the trust thereby confided in the Crown".¹¹¹ In response, the Court of Appeal agreed, stating: "We see great difficulty.....in holding that, in such circumstances, the Court could or ought to interfere."¹¹² The Privy Council fundamentally rejected the propriety of any such response on the part of the Court of Appeal as follows:

"The proposition advanced on behalf of the Crown is certainly not flattering to the dignity or the independence of the highest Court in New Zealand, or even to the intelligence of the Parliament. What has the Court to do with the executive? Where there is a suit properly constituted and ripe for decision, why should justice be denied or delayed at the bidding of the executive? Why should the executive Government take upon itself to instruct the Court in the discharge of its proper functions? Surely it is for the Court, not for the executive, to determine what is a breach of trust. Then again, what has the Court to do with the prospective action of Parliament as shadowed forth by the executive? No one disputes the paramount authority of the Legislature. Within certain limits it is omnipotent. But why should it be suggested that Parliament will act better if it acts in the dark, and without allowing the Court to declare and define the rights with which it may be asked to deal?"¹¹³

We see here a fundamental rejection of the remaining elements of the *Wi Parata* precedent. In *Nireaha Tamaki v Baker* (1900-1901), the Privy Council had rejected those elements of the *Wi Parata* which had denied the existence of Maori native title or its status in law. Yet it had left the other *Wi Parata* principle – that native title fell

other litigant. All material allegations must be proved or admitted. Allegations unsupported go for nothing." (*Ibid*, at 188). This reference to unsupported allegations by the Crown is presumably a reference to the view, emerging from *Wi Parata*, that a mere declaration by the Crown is sufficient to oust the jurisdiction of the Courts in native title matters involving Crown prerogative (c.f. *Nireaha Tamaki v Baker* (1894), at 488. See also note 115 below).

¹¹¹ Cited in *Wallis v Solicitor-General* [1903] AC 173, at 188.

¹¹² *The Solicitor-General v Bishop of Wellington* (1901), at 686, cited in *Wallis v Solicitor-General* [1903], at 188.

¹¹³ *Wallis v Solicitor-General* [1903], at 188-89.

within the prerogative powers of the Crown – intact, by claiming the issue did not arise in that case.¹¹⁴ In the passage above however, the Privy Council directly confronts and rejects that principle, by rejecting the propriety of the Court of Appeal’s response to the Solicitor-General’s amended statement of defence. It is evident that what was really agitating the Court of Appeal in its consideration of the amended statement of defence was the *Wi Parata* precedent. Despite its reference to the *parens patriae* principle, we have seen above that the real animating factor of its concern was the principle established in *Wi Parata* that all native title matters involving the Crown fell within the Crown’s prerogative powers, thereby excluding the jurisdiction of the Courts. This principle effectively meant that a mere declaration by the Crown that its interests were involved was sufficient to oust the jurisdiction of the Courts in native title matters.¹¹⁵ It is evident from the Court’s deferential response to the Solicitor-General’s amended statement of defence that it believed this statement constituted precisely such a declaration.

Yet the Privy Council, in its statement above, insists that the Courts ought not to defer to the Crown in this way. Further, it insists that, far from a declaration by the Crown ousting the jurisdiction of the Courts, any such declarations must be subject to the test of evidence within the Courts. As Lord Macnaghten states:

"[I]f the Crown seeks to recover property and to oust the present possessors, it must make out its case just like any other litigant. All material allegations must be proved or admitted. Allegations unsupported go for nothing."¹¹⁶

Consequently, from the perspective of the Privy Council, such declarations are not matters of Crown prerogative conclusive and binding on the Courts, but rather are subject to investigation by the Courts. Hence in regard to that part of the amended statement of defence which "...asserts that the Crown has come under some undefined and undisclosed obligations to the natives", with the result that the Court of Appeal concludes that "...this assertion must place the Court 'in a considerable difficulty'", the Privy Council responds:

¹¹⁴ C.f. *Nireaha Tamaki v Baker* (1900-01), at p. 380, 382.

¹¹⁵ This was the view expressed by Richmond J. in *Nireaha Tamaki v Baker* (1894) – a view he saw as arising wholly from the principle laid down in *Wi Parata*. As he put it: "According to what is laid down in the case cited [i.e. *Wi Parata*], 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." [*Nireaha Tamaki v Baker* (1894), at 488. My addition]

"Why? Why should a Court which acts on evidence and not on surmise or loose suggestions pay any attention to an assertion which, if true, could not have been proved at that stage of the proceedings, and which the evidence in the cause shews [*sic*] to have been purely imaginary?"¹¹⁷

Once again therefore, the Privy Council rejects any suggestion that a mere declaration by the Crown on matters regarding native title could be considered an exercise of the Crown's prerogative and therefore sufficient in law to oust the jurisdiction of the Courts. The Privy Council then puts the *Wi Parata* precedent entirely to rest by concluding that the Courts have full jurisdiction in native title matters involving the Crown:

"Notwithstanding the doubts expressed by the Court of Appeal, it is perfectly clear that the Court has jurisdiction to deal with a claim to property made on behalf of the Crown when properly brought forward. It has no right to decline jurisdiction. Still less has it a right to stay its hand at the instance of a claimant who may present a case into which it may be difficult, if not impossible, for the Court to inquire, even though that claimant be the Crown."¹¹⁸

¹¹⁶ *Wallis v Solicitor-General* [1903], at 188.

¹¹⁷ *Ibid*, at 187. Lord Macnaghten's claim that the Crown's assertions were "purely imaginary" is presumably based on his belief that the effective terms of cession were not between the tribal chiefs and the Crown but between the tribal chiefs and the Bishop - with the result that the Crown's intermediary role gave rise to no "undefined and undisclosed obligations to the natives". Far from accepting that the Crown had taken on such obligations, as asserted in the Solicitor-General's amended statement of defence, Lord Macnaghten states: "According to the evidence, the only obligation which the Crown undertook was to waive its right of pre-emption." (*ibid*, at 187). In the Court of Appeal's Protest against the Privy Council's decision, Stout C.J. singled out this assumption for attack. Stout C.J. argues that the Privy Council's assertion "that the only obligation the Crown undertook was to waive its right of pre-emption" is "based on a fallacy" ("*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", [1840-1932] NZPCC Appendix, 730, at 742, per Stout C.J.). Stout says: "[T]he Crown stood in quite a different position. It had the occupancy or possessory rights of the Maoris ceded to it that it might endow a school, and it was in a sense a trustee to give effect to that cession. Further, it gave up its title - the title in fee-simple - to the Bishop." (*ibid*, at 742). Needless to say, the source of the disagreement between the Privy Council and the Court of Appeal as to the facts in this instance is due to their contrary views as to whom the land was ceded to. From the Privy Council's perspective, the land was effectively ceded by the Ngatittoa tribe directly to the Bishop. From the Court of Appeal's perspective, it was ceded to the Crown, who then granted it to the Bishop. In the latter version of events, the Crown would be likely to undertake a series of obligations to the Ngatittoa tribe which would not have arisen in the former set of circumstances.

¹¹⁸ *Wallis v Solicitor-General* [1903] AC 173, at 188.

The Court of Appeal's Protest

The Privy Council's criticisms of the Court of Appeal in *Wallis v Solicitor-General* (1903) drew an unprecedented Protest from the New Zealand Court.¹¹⁹ The ostensible reason for this Protest was what the Court of Appeal perceived as the Privy Council's injudicious use of language and imputation of improper motives to the Court of Appeal.¹²⁰ As Justice Williams put it:

¹¹⁹ Hence at an adjourned sitting of the Court of Appeal in Wellington on April 25, 1903, "...the Chief Justice indicated that he had something to say regarding the recent judgment of the Privy Council" ("*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", [1840-1932] NZPCC Appendix, 730). The Chief Justice also read a protest by his colleague, Mr Justice Williams, and Mr Justice Edwards also read a protest. At the end of these readings, a member of the bar, Mr W.L. Travers, rose and, on behalf of the Bar, joined the justices in their protest (*ibid*, pp. 759-60). This latter statement from the Bar was described as "...a unique, impressive incident, made more impressive by reason of the fact that it was quite unrehearsed and unexpected." (*ibid*, p. 759).

¹²⁰ Hence the Chief Justice of the Court of Appeal, Sir Robert Stout, begins his address by stating: "In the judgment in a recent case before the Lords of the Judicial Committee of the Privy Council – *Wallis v Solicitor-General* – a direct attack has been made upon the probity of the Appeal Court of New Zealand." (*ibid*, p. 730). Although he was not party to the actual judgment of the Appeal Court, he argued that "...when the Court of which I have the honour to be President is attacked by such a body as the Privy Council, it is my duty to explain the position to my fellow-colonists." (*ibid*, p. 745). It was primarily the imputation that the Court of Appeal lacked dignity, and was willing to deny justice, by submitting to undue pressure from the executive, which most aroused its indignation. As Justice Williams states: "I have had the honour of being a Judge of this Court for more than twenty-eight years. I have seen Governments come and go, but never have I known any Government attempt in the slightest degree to interfere with the independence of the Court. Nor have I ever heard it suggested that this Court, in the exercise of its judicial functions, has shown a want of independence or a subservience to the Executive Government....No suggestion of the kind has ever been made here. It has been reserved for four strangers sitting 14,000 miles away to make it." (*ibid*, at 755-56, per Williams J.). Williams J. concludes: "Had we ever spoken of a Judge of an inferior Court in the terms their Lordships have spoken of the Judges of this Court, it would be ourselves and not the Judge who would have stood condemned." (*ibid*, at 756, per Williams J.). Justice Edwards points to the unprecedented nature of the aspersions cast by the Privy Council when he states: "Never before has it happened that the ultimate appellate tribunal of the Empire has charged the Judges of any colonial Court, as their Lordships have now charged the Judges of this Court, with want of dignity, and with denying or delaying justice at the bidding of the Executive. If there were any foundation in charges so grave, then the learned Judges against whom they are leveled ought to be removed from the high office which they would have shown themselves unworthy to occupy.....Yet such charges have been made by the Judicial Committee against the Judges of the Appellate Court of this Colony; and they have been made without the slightest foundation in fact, and based only upon assumptions of law which to every trained lawyer in the Colony must appear, at the least, astonishing and absurd." (*ibid*, p. 757). Justice Edwards ultimately concludes in ringing tones: ".....I feel that the protest against such imputations should be unanimous and unequivocal; and in the interests of justice, liberty, and decency, and of the unity of that great Empire which can only be held together by the mutual respect of its kindred communities, I do protest against them." (*ibid*, p. 759). Chief Justice Stout also appealed to the "unity of Empire", suggesting that this had been placed in danger by what he saw as the Privy Council's intemperate criticisms. He states: "The matter is really a serious one. A great Imperial judicial tribunal sitting in the capital of the Empire, dispensing justice even to the meanest of British subjects in the uttermost parts of the earth, is a great and noble ideal. But if that tribunal is not acquainted with the laws it is called upon to interpret or administer, it may unconsciously become the worker of injustice. And if such should unfortunately happen, that Imperial spirit that is the true bond of union amongst His Majesty's subjects must be weakened." (*ibid*, p. 746).

"The decision of the Court of Appeal of New Zealand in the case of the *Solicitor-General v Wallis* has recently been reversed by the Judicial Committee of the Privy Council. Their Lordships have thought proper, in the course of their judgment, to use language with reference to the Court of Appeal of a kind which has never been used by a superior Court with reference to an inferior Court in modern times. The judgment of their Lordships has been published and circulated throughout the Colony. The natural tendency of that judgment, emanating as it does from so high a tribunal, is to create a distrust of this Court, and to weaken its authority among those who are subject to its jurisdiction."¹²¹

In the context of their Protest, some members of the Court of Appeal made claim that, as an inferior court, they were not criticising the substantive content of the Privy Council's decision in *Wallis v Solicitor-General*, 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.¹²² However it is evident that, despite these protestations, the real issue of contention giving rise to the Protest seems to be the clear difference of opinion which had emerged between the Court of Appeal and the Privy Council over the legal status of native title and the Treaty of Waitangi. These differences emerged in the Privy Council decisions of *Nireaha Tamaki v Baker* (1900-01) and *Wallis v Solicitor-General* (1903), which, as we saw, broke significantly from the *Wi Parata* precedent. It was this precedent which had informed New Zealand jurisprudence on native title for the previous twenty years. Indeed, in the context of their response to the Privy Council decisions which broke from this precedent, all the judges in the Protest went

¹²¹ *Ibid*, at 747, per Williams J.

¹²² Hence Chief Justice Stout states: "It is not my purpose to canvass the decision of the Privy Council. My object is to show that the comments of the Council on, and its criticism of, the Appeal Court were alike unwarranted." (*ibid*, p. 731). However his statement then goes on to challenge and question many legal aspects of the Privy Council decision. Justice Williams admits it is necessary to criticise the decision of the Privy Council, but not as an end in itself. Rather, only in so far as this is necessary to defend the dignity of the Court of Appeal: "For an inferior Court to criticise the judgment of a superior Court which reversed its decision would be in general alike, unprofitable and unseemly. But where the decision of the inferior Court has been not only reversed but has been reversed with contumely – where the inferior Court has been taunted with want of independence and subservience to the Executive Government – it is right that the members of the Court who pronounced the decision in question should come forward and defend the honour of the Court they represent. In order that they may do so, it would become necessary for them to refer to their own decision, and also to criticise to some extent the decision of the superior Court. They would do this not so much with a view of justifying their decision as to show that the aspersions cast upon them by the superior Court were unjustifiable." (*ibid*, p. 746. See also *ibid*, p. 756).

so far as to accuse the Privy Council of ignorance of New Zealand law on native title and other matters.¹²³

Consequently, the factors animating this Protest by the Court of Appeal do not seem to be confined to wounded pride over injudicious remarks made by the Privy Council. Rather, as much of the following will indicate, a major concern of the Court of Appeal was the extent to which the Privy Council had departed from the *Wi Parata* precedent in *Nireaha Tamaki v Baker* (1900-01) and *Wallis v Solicitor-General* (1903).

Stout C.J. and the Resurrection of *Terra Nullius*

In its judgment in *Wallis v Solicitor General for New Zealand* (1903), the Privy Council clearly asserted that the Treaty of Waitangi was the legal basis for Maori land rights in New Zealand.¹²⁴ As we saw, this was a significant departure from the *Wi Parata* precedent. It was this claim which drew some of the most vigorous responses from the Court of Appeal in its Protest. 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 statement, he goes even further and insists that native title also lacks any legal existence. Such a claim is nothing less than an assertion of *terra nullius*. As Stout C.J. states:

“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

¹²³ Hence Chief Justice Stout accused the Privy Council, in its judgment in *Wallis v Solicitor-General* (1903), of making statements of fact and law “...without a knowledge of our legislation” (*ibid*, p. 732). He then says of a particular statement by the Privy Council in that case that it “...could not have been made by any counsel at the Bar in New Zealand, nor by any one conversant with our history.” (*ibid*, p. 737). He refers to a particular statement of the Privy Council as having been written “through want of knowledge of our statutes” (*ibid*, at 743). He then points to other cases in which he believes the Privy Council has pronounced judgment “...under a misapprehension or an ignorance of our local laws.” (*ibid*, p. 745). He then concludes: “At present we in New Zealand are, so far as the Privy Council is concerned, in an unfortunate position. It has shown that it knows not our statutes, or our conveyancing terms, or our history. What the remedy may be, or can be, for such a state of things, it is not at present within my province to suggest.” (*ibid*, p. 746). Justice Williams goes even further, writing that the Privy Council, “...by its imputations in the present case, *by the ignorance it has shown in this and other cases of our history, of our legislation, and of our practice*, and by its long-delayed judgments, has displayed every characteristic of an alien tribunal.” (*ibid*, p. 756. My emphasis). Finally, Justice Edwards indirectly accuses the Privy Council of ignorance of New Zealand law when he suggests that the Privy Council should take more note of judicial reasoning within New Zealand on New Zealand matters, given that New Zealand lawyers have greater experience and understanding of these matters than the Privy Council itself (c.f. *ibid*, pp. 758-59).

¹²⁴ As we saw above, Lord Macnaghten stated: “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

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.”¹²⁵

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 uncontentious view that the Courts have no jurisdiction to take account of treaties, in and of themselves, independent of their 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* judgment which also denied the legal existence of native title.¹²⁶

How does Stout C.J. deny the existence of native title in the statement above? He does so with his claim that "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". Such a statement does not simply assert that the Crown is the ultimate source of all title to land – i.e. the conventional common law view, deriving from feudal times, that the Crown holds the ultimate or radical title to all

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], at 179].

¹²⁵ *Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903”, 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 judgment of the Privy Council in *Nireaha Tamaki v Baker*, "does not entirely overrule 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 statutory recognition (c.f. *Nireaha Tamaki v Baker* (1900-01), at 382-83).

¹²⁶ On the *Wi Parata* judgment, see the section entitled “Background” above. However as we saw, Prendergast C.J.’s judgment is contradictory in this respect, as other aspects of that judgment affirm the legal existence of native title, though situate it entirely within the jurisdiction of the Crown’s prerogative powers.

land, and all land titles are held in tenure from the Crown.¹²⁷ Rather, Stout's statement goes further than this and insists that after the Crown's acquisition of sovereignty in New Zealand, the *only* title to land acquired by either party to the Treaty was acquired by Crown grant issued under the Letters Patent.

It is this point of view that is thoroughly inconsistent with the legal existence of native title. This is because native title is fundamentally inconsistent with Crown grants as a form of land title. The two forms of title are generally thought to exclude each other. For instance, Crown grants are generally seen as evidence, under common law, that the native title over the land covered by the grant has been extinguished.¹²⁸

Consequently, for Stout C.J. to claim above that upon the Crown's acquisition of sovereignty in New Zealand, all title to land derived from Crown grant, is to assert not only that the Crown is the *ultimate* source of all title to land, but also that it is the *only* source. This is because the focus on Crown grant as the exclusive source of land title denies the existence of forms of title whose sources are independent of the Crown – in particular, native title which has its sources in Maori customary law.¹²⁹ To deny

¹²⁷ 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, 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*). 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. It was very early held by colonial courts that this doctrine was equally in force in the colonies. For Australia, see *Attorney-General (N.S.W.) v Brown* (1847) 1 Legge 312 at 317-18, per Stephen C.J.; *Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at 47-48, per Brennan J. For New Zealand, see *In re 'The Landon and Whitaker Claims Act 1871'*, 2 NZ CA (New Zealand Court of Appeal Reports) (1872), at 49, per Arney C.J.

¹²⁸ As Chief Justice Prendergast put it in *Wi Parata*: “In this country the issue of a Crown grant undoubtedly implies a declaration by the Crown that the native title over the land which it comprises has been extinguished.” (*Wi Parata v Bishop of Wellington*, at 78).

¹²⁹ Justice Brennan of the Australian High Court described native title as deriving from traditional or customary sources as follows: “The term ‘native title’ conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.” (*Mabo v Queensland [No. 2]* (1992) , at 57, per Brennan J.). Consequently even though native title is ultimately dependent on the Crown's radical title for its existence (being recognised by the Courts as a “burden” on that radical title – c.f. *ibid*), nevertheless it is distinct from forms of title deriving from the Crown

the legal existence of native title in this way is effectively to claim that upon the Crown's acquisition of sovereignty, New Zealand was *terra nullius*.¹³⁰ Indeed, in a context of *terra nullius*, all land title *would* be acquired by Crown grant, because the Crown would recognise no other sources of title other than those deriving from itself. All of this is implied by Stout C.J.'s statement above.

In this context, Stout C.J.'s claim 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. In those elements of *Wi Parata* where Prendergast C.J. asserted this view, he was insisting that native title could not be recognised in the Courts because it was entirely subject to Crown prerogative.¹³¹ Such a statement was consistent with the recognition of native title, albeit one which confined it to the prerogative powers of the Crown. The same statement by Stout C.J., following directly from his *terra nullius* assertion above, takes on a different meaning. It effectively comes to mean that, because Crown grants are the exclusive source of all land title, the Courts cannot recognise native title because, not being a title deriving from Crown grant, it does not exist at all.¹³²

Reasons for Stout's *Terra Nullius* Claim

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 the Native Land Court, there were vast tracts of land occupied by Maori to which no Crown grant had been issued. Further, legislation such as the *Land Claims Ordinance*, 1841 included a clear recognition of native occupation of land, independent of Crown grant, when it stated:

since it has its roots in indigenous customs of property which precede the Crown's acquisition of sovereignty. As Justice Brennan put it, in his defence of the legal existence of native title: "...there is no reason why the common law should not recognise novel interests in land which, not depending on Crown grant, are different from common law tenures." (*Mabo v Queensland [No. 2]* (1992), at 49, per Brennan J.).

¹³⁰ On the doctrine of *terra nullius*, see note 17 above.

¹³¹ C.f. *Wi Parata v Bishop of Wellington* at 78-79.

¹³² Williams J.'s Protest reflects a somewhat different position on native title to Stout C.J. above. As Williams J. states in his explanation of the Court of Appeal's *obiter dicta* in *Solicitor-General v Bishop of Wellington* (1901): "What the rights of any prior Native occupiers might be, or whether they had any rights, was a matter entirely for the conscience of the Crown." ("*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", at 755, per Williams J.). Consequently, he does not deny that native title exists. Rather, he affirms those elements of the *Wi Parata* judgment which hold that such matters are not "cognisable" by the Court (being outside its jurisdiction) and are therefore "a matter entirely for the conscience of the Crown" (*ibid*, at 755, per Williams J. See also *ibid*, at 750, per Williams J.). He certainly does not go as far as Stout C.J. in asserting that the only basis for land title in New Zealand derives from Crown grants.

"That all unappropriated lands within the Colony of New Zealand, subject, however, to the rightful and necessary occupation and use thereof by the aboriginal inhabitants of the said Colony, are, and remain Crown and domain lands of her Majesty, her heirs and successors....."¹³³

Indeed, the previous year, in *Hohepa Wi Neera v Bishop of Wellington* (1902)¹³⁴ Stout C.J. had recognised the existence of native title precisely in terms of these statutes.¹³⁵ Why had he apparently shifted his position the following year in his Protest?

The answer I think is that Stout C.J. was thoroughly confused in his claim above that all land title derived from Crown grant, and therefore in his assertion of *terra nullius*. 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 he cites both *The Queen v Symonds* (1847) and *Wi Parata v Bishop of Wellington* (1878) in support of his view in the passage above, 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 judgments in the New Zealand cases referred to."¹³⁶

However the passages which Stout C.J. quotes from these Ordinances refer not to his claim that all title to land derived 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

¹³³ *Land Claims Ordinance*, 1841, cited in "*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", at 732, per Stout C.J.

¹³⁴ 21 NZLR 655 (CA).

¹³⁵ Chief Justice Stout begins his judgment in *Hohepa Wi Neera v Bishop of Wellington* (1902) by referring to chapter xii, section 9 of the Imperial Instructions of 1846, which he says allows land claims of aboriginal inhabitants to be admitted to land courts if "...the claimants or their progenitors or those from whom they derived title had actually had the occupation of the lands so claimed, and had been accustomed to use and enjoy the same either as places of abode, or for tillage, or for the growth of crops, or for the depasturing of cattle, or otherwise for the convenience and sustentation of life by means of labour expended thereon." (*Hohepa Wi Neera v Bishop of Wellington* (1902) 21 NZLR 655 (CA) at 664-65, per Stout C.J.). He also points to the Native Rights Act of 1865 with its reference to "...titles to land held under Maori custom and usage..." (*ibid*, at 666). Both of these statements seem to be a clear recognition, on the part of Stout C.J., of customary occupation and use of land as a legitimate basis for land title among the indigenous population. In other words, they are an effective statutory recognition of native title.

¹³⁶ "*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", at 732, per Stout C.J.

privately purchase land from Maori individuals or tribes which the latter do not hold under Crown grant.¹³⁷

The irony of Stout C.J. citing these passages concerning the Crown's exclusive right of pre-emption in support of his claim that all land title derives from Crown grant, is that whereas the claim concerning Crown grant excludes native title, the Crown's exclusive right of pre-emption necessarily acknowledges it, because it is precisely this native title which is extinguished by the Crown's exercise of this right. Stout C.J. concludes that had the Privy Council known of these Ordinances, they would not have made the claim above 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."¹³⁸ While this is a fair summing up of the legal import of the Ordinances, it certainly does not substantiate Stout C.J.'s earlier claim that "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 agreed to grant."¹³⁹ 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 that the native title is not sufficient to allow its holders to dispose of lands as they please, the latter is not consistent with the existence of native title at all.

Consequently, Stout C.J.'s citation of a series of Ordinances which presuppose the existence of native title as evidence in support of a statement which denies that existence is clear evidence of his confusion on the matter. It seems that he had confused the narrower (correct) claim arising from the Crown's exclusive right of pre-emption – that only Maori land held by Crown grant could be sold by Maori directly to settlers - with the broader (incorrect) claim that Crown grant was the only form of title by which Maori could hold land. The latter was clearly untrue, as the *Land Claims Ordinance*, 1841 above, makes clear.¹⁴⁰

¹³⁷ C.f. *ibid*, at 732-33. On this latter point see the *Native Land Purchase Ordinance*, 1846, s. 1, cited by Stout C.J. at *ibid*, at 733.

¹³⁸ *Ibid*, at 733, per Stout C.J.

¹³⁹ See note 125 above.

¹⁴⁰ *** There is one section of Justice Chapman's judgment in *The Queen v Symonds* (1847) which seems to support Chief Justice Stout's claim that "The root of title being in the Crown, the Court could not recognise Native title." (see note 125 above). This is where Justice Chapman states: "As a necessary corollary from the doctrine, 'that the Queen is the exclusive source of private title', the

Contradictions in Stout C.J.'s Protest

Within the facts of the case under dispute (i.e. *Wallis v Solicitor-General*), Stout C.J.'s denial of the existence of native title meant that he had to explain exactly what was the status of the land ceded by Maori to the Crown for the purposes of building a college. If native title was not ceded in this action, something else must have been. Stout C.J. argues that what was ceded was a "reserve" which the Crown had previously granted to the Ngatitōa tribe.¹⁴¹ Contemporary judicial opinion believes that native title is not extinguished by the Crown's granting of reserves to natives for their own use.¹⁴² But consistent with his *terra nullius* position above, Stout C.J.

colonial Courts have invariably held (subject of course to the rules of 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." (*The Queen v Symonds* (1847) *N.Z.P.C.C.* (SC), 387, at 388, per Chapman J.). Such a statement seems to imply, in line with Stout C.J.'s statement above, that the Courts cannot recognise native title, because it is not a form of title deriving from the Crown or verified by Letters Patent. Yet contrary to this, Chapman J. elsewhere in his judgment clearly states that the Courts *can* recognise native title (c.f. *ibid*, at 390, per Chapman J.). So what explains this apparent contradiction? The answer lies in the broader context of Justice Chapman's statement above. Justice Chapman's statement refers to the situation in law as it applies to settler society. The Courts (and the Crown) continually insisted that, from the settler perspective, the root of all title lay in the Crown, and the Courts would recognise no other settler title to land. (c.f. *ibid*, at 389, per Chapman J.; *ibid*, at 393, per Martin C.J.). It was this doctrine which enforced the Crown's exclusive right of pre-emption over native lands, since the Courts continually refused to recognise any settler's title, acquired from the Natives, unless that title was subsequently confirmed by the Crown (c.f. *ibid*, at 389, per Chapman J.; *ibid*, at 393, per Martin C.J.). Yet Chapman J. holds a very different perspective regarding Maori title to land. He argues that although the Crown held ultimate or radical title to all land, native title could co-exist with that radical title (c.f. *ibid*, at 391-92, per Chapman J.). Hence when confronted with Maori native title claimants, Chapman J. deviates from his position above, because in recognising native title, the Courts were recognising a form of title *not* deriving from the Crown (c.f. *The Queen v Symonds*, at 390, per Chapman J.). Consequently, in *The Queen v Symonds*, the Court adopted two positions on land title depending on whether the claim derived from Maori or settlers. In relation to Maori, the Court recognised that the Crown's status as the "exclusive" source of title was qualified by the prior existence of native title; in relation to settlers, the Crown as the exclusive source of title was unconditional and no other title could be recognised by the Courts. Chapman J. articulated this dual outlook of the Court, involving a different legal perspective in relation to Maori and settler claimants, as follows: "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." (*ibid*, at 391). Consequently, we see that Justice Chapman's viewpoint, cited by Stout C.J. in support of his *terra nullius* position above, needs to be understood in its wider context. Far from asserting that because the root of all title lies in the Crown, the Courts cannot recognise native title, Chapman J. was merely asserting that this was the case in relation to settlers alone. In relation to Maori, the perspective of the Court was entirely different.

¹⁴¹ "*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", 734, per Stout C.J.

¹⁴² Justice Brennan, representing a majority of the Australian High Court, argued in his *Mabo* judgment that the granting of reserves by the Crown to the natives does not extinguish native title. As Brennan put it: "...the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or by the Executive.....A clear and plain

insists below that no cession of native title was involved in the transfer of the “reserve” from the Ngatitōa tribe to the Crown, because the title to the land was already held by the Crown:

“No doubt the Crown had agreed to reserve Witireia for the Ngatitōa tribe, and the letter quoted was a consent of the tribe to give up the occupancy of this reserve. In that sense, and in that sense only, was it the tribe’s gift. The fee-simple was in the Crown, and the Crown gave that to the Bishop. The legal title came from the Crown, and in that sense the Crown was the donor.”¹⁴³

Further on he again denies any possibility that native title had been ceded by the Ngatitōa tribe when he states:

"The title, being in the Crown, could not have been conveyed to the Bishop save by the Crown."¹⁴⁴

Therefore from Stout C.J.'s perspective, the Ngatitōa tribe, in transferring this land to the Crown, were only returning to the Crown what the Crown owned in the first place, and so no cession of native title was involved.

Yet this denial of the existence of native title is somewhat at odds with other statements which Stout C.J. makes in his Protest. For instance, he strongly defends the Court of Appeal's *obiter dicta* in *Solicitor-General v Bishop of Wellington* (1901), where the Court had expressed reservations about its jurisdiction over native title matters raised in the Solicitor-General's amended statement of defence. As we have seen, this *obiter dicta* was subject to strong criticism from the Privy Council in *Wallis v Solicitor-General* (1903), but Stout affirms the Court of Appeal's opinion on the grounds that any negotiations between Crown and Maori over such matters were acts of state, and therefore outside the jurisdiction of the Courts. As Stout C.J. put it:

“The Crown stated that the terms of cession prevented the *cy-près* doctrine being applied, and that it had duties toward the Natives. The Court held that the cession was

intention to extinguish native title is not revealed by a law which merely regulates the enjoyment of native title....or which creates a regime of control that is consistent with the continued enjoyment of native title....A fortiori, a law which reserves or authorises the reservation of land from sale for the purpose of permitting indigenous inhabitants and their descendants to enjoy their native title works no extinguishment.” (*Mabo v Queensland [No. 2]* (1992) 175 CLR 1, at 64-65, per Brennan J.; c.f. *ibid*, at 111, per Deane and Gaudron JJ.; *ibid*, at 196, per Toohey J.).

¹⁴³ “*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903”, at 734, per Stout C.J.

¹⁴⁴ *Ibid*.

an act of State, and that it was difficult, if not impossible, in 1900 to inquire – if it had jurisdiction to do so – into the act of State in 1850.”¹⁴⁵

Yet as we have seen above, Stout C.J. clearly sees the land ceded by the Ngatitōa tribe as a reserve whose fee-simple lay with the Crown. From Stout’s perspective therefore, it was a cession of land which was devoid of native title. Therefore, on what grounds could this cession be now deemed by Stout to be an "act of state"? The precedent of *Wi Parata v Bishop of Wellington* (1878) is that only issues between the Maori and Crown involving the Treaty or native title are acts of state.¹⁴⁶ Yet Stout C.J. has already denied that either the Treaty or native title are involved in the transfer of land in this case.

Thus Stout C.J. effectively contradicts himself. On the one hand he asserts that native title does not legally exist, and certainly does not exist in regard to this particular cession of land by the Ngatitōa tribe, thereby effectively resurrecting the doctrine of *terra nullius*, which had made a brief appearance in *Wi Parata*. And on the other, he affirms the *obiter dicta* of the Court of Appeal which had clearly presupposed the existence of native title in this same case.

However Stout C.J. is not alone in asserting the doctrine of *terra nullius* and then contradicting himself in the space of a single judgment. As we have seen, a similar contradiction exists in the only other judicial assertion of *terra nullius* in New Zealand judicial history, when Prendergast C.J., in his *Wi Parata* judgment, denied the existence of native title, only to then reaffirm its existence as a matter of Crown prerogative.¹⁴⁷

The Defence of *Wi Parata*

As we have seen, in his Protest above, Stout C.J. clearly appeals to *Wi Parata* as one of the primary authorities in support of his position. However it is Williams J. who, in the face of Privy Council criticisms, most clearly defends the *Wi Parata* precedent.¹⁴⁸

¹⁴⁵ *Ibid*, at 742, per Stout C.J.

¹⁴⁶ C.f. *Wi Parata v Bishop of Wellington*, at 78-79.

¹⁴⁷ See the section entitled “Background” above.

¹⁴⁸ Justice Williams' protest was read to the Court by Chief Justice Stout. His protest was made on behalf of the judges who decided *Solicitor-General v Bishop of Wellington* (1901). As Williams J. states: "The Judges of the Court of Appeal of New Zealand who decided the case in question have therefore thought it right that I, who was the Judge who presided on that occasion, should on their behalf protest publicly against the attack made on the honour of the Court they represent, and should

He does this in the context of his explanation of the *obiter dicta* which he himself delivered on behalf of the Court of Appeal in *Solicitor-General v The Bishop of Wellington* (1901). As we have seen, this *obiter dicta* which was the subject of the Privy Council's most scathing comment. From the Privy Council's perspective, the Court of Appeal's view, expressed in its *obiter dicta*, that native title matters involving the Crown were outside its jurisdiction, showed undue deference to the executive power.¹⁴⁹

In his response, Williams J. makes a point of noting that at the time of the Court of Appeal's judgment in *Solicitor-General v Bishop of Wellington* (1901), the Court had not yet read the Privy Council's decision in *Nireaha Tamaki v Baker* (1900-01), where the Privy Council had asserted that native title in New Zealand had a statutory foundation and so was within the jurisdiction of the Courts.¹⁵⁰ Nor did the Court believe that at the time of the land transactions in dispute there were any statutes "regulating the extinction of native title."¹⁵¹ Williams J. therefore concludes that at the time of its *obiter dicta*, the Court of Appeal was justified in concluding that native title issues were outside the jurisdiction of the Court because an "unbroken current of authority" sustained it in this conclusion:

"Whether, however, we were right or wrong, there was certainly an unbroken current of authority. First, that the Native occupiers had no right to their land cognisable in a Court of law, and that having no such right themselves they could not transfer any right to others. Secondly, that the Crown grant was not a mere piece of conveyancing, but was essential to create any right at all of which this Court could take notice, and that any such right was derived from the Crown grant, and by virtue of the grant, and from the grant alone. Thirdly, that as the Natives never had any rights cognisable in a Court of law they had no *locus standi* to impeach the grant, and were neither necessary nor proper parties in any proceedings between the Crown and its grantee in

endeavour to show that whether their judgment was right or wrong there is no ground whatever for the attack their Lordships have thought fit to make." (*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", at 747, per Williams J.).

¹⁴⁹ See the section "The Privy Council's Rejection of the Court of Appeal's *Obiter Dicta*" above.

¹⁵⁰ As Williams J. states: "The case of *Nireaha Tamaki v Baker* was decided by their Lordships shortly before our decision in the present case, but the judgment had not then reached the Colony." (*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", at 749, per Williams J.). Concerning Privy Council's opinion, expressed in *Nireaha Tamaki v Baker* (1900-01), that native title has a statutory basis in New Zealand, see note 45 above.

¹⁵¹ "*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", at 749, per Williams J.

relation to the subject-matter of the grant. We therefore held that the charity owed its existence to, and that the Bishop derived his title to the land from, the Crown grant alone, and that the intention of the Crown in making the grant, and the conditions on which the land was held by the grantee, were to be determined by the language of the grant without any reference to anything that had taken place between the grantee and the former Native occupiers. Had 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." ¹⁵²

Consequently, Williams J. insists that at the time of the Court of Appeal's judgment in *Solicitor-General v Bishop of Wellington* (1901), there was no authority that justified them departing from the precedent established by *Wi Parata* that native title could not be recognised by the municipal Courts. He does so on the following grounds. Firstly, even such clear legislative recognition of native occupation of land, such as the *Lands Claims Ordinance*, 1841, was insufficient because, as the Privy Council held in *Nireaha Tamaki v Baker* (1900-01), although the *Ordinance* was "...a legislative recognition of the rights confirmed and guaranteed by the Crown by the second article of the Treaty of Waitangi"¹⁵³, nevertheless "...[i]t would not of itself,,,be sufficient to create a right in the native occupiers cognisable in a Court of law."¹⁵⁴ Secondly, Williams J. insists that at the time of the cession of land by the Ngatitōa tribe to the Crown, there was no other legislation that could have created such a native title right cognisable in a Court of Law.¹⁵⁵ He points out that the Native Rights Act referred to in the case of *Nireaha Tamaki v Baker* as a statutory basis of native title was not passed till 1865 – i.e. after the cession of the land occupied by the

¹⁵² *Ibid*, at 750, per Williams J. Hence Williams J. points to a fundamental difference between the judgment of the Court of Appeal in *Solicitor-General v Bishop of Wellington* (1901) which held that the grant in question should revert to the Crown, and the judgment of the Privy Council on appeal in *Wallis v Solicitor-General* (1903), which held that the grant should remain with the grantees. This concerned the very different viewpoint each had concerning the terms of cession, which in turn affected their views of the relative rights of the respective parties. As Williams J. put it: "The judgments start with a fundamental disagreement. Their Lordships' judgment asserts that the Maoris were the donors of the land and the founders of the charity. Our judgment asserts that the Crown was the donor and founder." (*ibid*, at 747, per Williams J.).

¹⁵³ *Nireaha Tamaki v Baker* (1900-01), at 373.

¹⁵⁴ *Ibid*, cited in "*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", at 749, per Williams J.

¹⁵⁵ As Williams J. states: "At the time of the transactions in question there was nothing else to create such a right. There were no statutes regulating the extinction of native title.....If the Native occupiers had no right cognisable in a Court of law, it is difficult to see how they could transfer such a right to the Bishop. A man cannot give what he has not got." (*ibid*, at 749, per Williams J.).

Ngatitōa tribe – and so was not applicable to the case.¹⁵⁶ Finally, Williams J. points out that the Privy Council, in *Nireaha Tamaki v Baker* (1900-01), although disagreeing with certain dicta expressed by Prendergast C.J. in *Wi Parata v Bishop of Wellington* (1878), nevertheless affirmed the correctness of his conclusion concerning the land relating to the Ngatitōa tribe – a conclusion which the Court of Appeal in *Solicitor-General v Bishop of Wellington* (1901) fully concurred with.¹⁵⁷ So in relating the above, Justice Williams makes the point that even though the Court of Appeal had not read the judgment of the Privy Council in *Nireaha Tamaki v Baker* (1900-01), when they came to their conclusion in *Solicitor-General v Bishop of Wellington* (1901), nevertheless there was nothing in that judgment which justified them departing from the *Wi Parata* precedent.

Finally, as we have seen in an earlier section, Williams J. ends his defence of the *Wi Parata* precedent by claiming it was this precedent which informed the Court of Appeal's *obiter dicta* at the end of its judgment in *Solicitor-General v Bishop of Wellington* (1901).¹⁵⁸ It was Williams J. who actually delivered the judgment of the Court of Appeal in *The Solicitor-General v The Bishop of Wellington* (1901), so presumably he had inside knowledge of the reasoning which informed the *obiter dicta* at the end of that case.

Yet Justice Williams' assertion that it was the *Wi Parata* precedent which informed the Court of Appeal's reasoning in its *obiter dicta* seems somewhat disingenuous. If the Court of Appeal was really referring to the *Wi Parata* precedent in their *obiter dicta*, why refer to the doctrine of *parens patriae*? Why not just refer to the doctrine of *Wi Parata* that native title matters involving the Crown fall exclusively within the Crown's prerogative powers and so outside the jurisdiction of the Courts, just as the Court of Appeal had done in *Nireaha Tamaki v Baker* (1894)?¹⁵⁹

I think the answer is that, despite Justice Williams' assertion above, the Court of Appeal's *obiter dicta* in *Solicitor-General v Bishop of Wellington* (1901) was *not* informed by the *Wi Parata* precedent. I think the Court of Appeal, in their Protest,

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.* In *Nireaha Tamaki v Baker* (1900-01), Lord Davey affirmed the specific decision of the New Zealand Supreme Court in *Wi Parata v Bishop of Wellington* (1878), while disagreeing with the wider *dicta* expressed in that judgment. See note 60 above.

¹⁵⁸ See note 85 above.

¹⁵⁹ C.f. *Nireaha Tamaki v Baker* (1894), at 488, per Richmond J.

claims it was because it is the *Wi Parata* precedent which is most under threat by the recent Privy Council decisions, and in the context of their Protest they wish to align all of their previous judgments in defence of this precedent in order to buttress its authority. Consequently, both Williams J. and Stout C.J., in their respective Protests, try to retrospectively assimilate their *obiter dicta* in *Solicitor-General v Bishop of Wellington* (1901) to the *Wi Parata* precedent, when that precedent played little part in the *obiter dicta* in the first place.

My evidence for this relates to the *obiter dicta* itself. Within that *obiter dicta*, Williams J. suggests that the doctrine of *parens patriae* makes the terms of cession of native title raised in the Solicitor-General's amended statement of defence a matter that ought more appropriately be dealt with by Parliament than the Courts.¹⁶⁰ Yet if the doctrine of *Wi Parata* was being upheld in the *obiter dicta*, any matter concerning a cession of native title to the Crown would presumably be seen to lie exclusively within the jurisdiction of the Crown, rather than Parliament, since it would entail an act of state, and so be subject to the Crown's prerogative powers.¹⁶¹

However, contrary to such references to Parliament in the *obiter dicta* itself, Williams J. states in his Protest that the view of the Court of Appeal in its *obiter dicta* was that "What the rights of any prior Native occupiers might be, or whether they had any rights, was a matter entirely for the conscience of the Crown."¹⁶²

So we have a clear contradiction between the reference to Parliament as the appropriate jurisdiction for the consideration of the matters raised by the Solicitor-General's amended statement of defence – a reference that occurs within the *obiter dicta* itself - and a reference to the Crown as the appropriate jurisdiction in the

¹⁶⁰ "In the above circumstances it seems more appropriate that the matter should be dealt with by the Legislature than by this Court." (*Solicitor-General v Bishop of Wellington*, at 686, per Williams J.).

¹⁶¹ Why is the Crown, rather than Parliament, the usual jurisdiction for matters involving acts of state? Acts of state are exercised by the Crown under its prerogative powers, derived from the Queen, and are outside the jurisdiction of the Courts (c.f. Peter E. Nygh and Peter Butt (eds) *Butterworths Australian Legal Dictionary*. Sydney: Butterworths, 1997, "Act of State", p. 20). In so far as these prerogative powers also include the capacity to summon, prorogue or dissolve parliament, they are also in such instances exercised outside the jurisdiction of parliament itself (*ibid*, "Prerogative Powers", p. 906). However Parliament may circumscribe and extinguish such prerogative powers (*ibid*), but this in itself would be an extraordinary measure, and "acts of state" are therefore generally seen to lie within the jurisdiction of the Crown alone. As such, contra Stout C.J. and Williams J. in their explanation of the *obiter dicta* in their Protest above, it is reasonable to assume that the reference in the *obiter dicta* to the legislature as the most likely venue for consideration of a *parens patriae* relationship arising between Crown and Maori, means that the *parens patriae* doctrine does not entail acts of state, and so is not an oblique reference to the *Wi Parata* precedent.

explanation of that *obiter dicta* two years later. The contradiction is explained by the fact that two different principles are being referred to in each case, neither of which is assimilable to the other. If *parens patriae* is the appropriate doctrine governing the Crown's dealing with the Ngatittoa tribe on the cession of native title, then according to the Court of Appeal in 1901, Parliament is the appropriate authority. If the precedent of *Wi Parata* is the appropriate doctrine, then the Crown is the appropriate authority. Therefore the Court of Appeal's reference to Parliament as the appropriate jurisdiction for matters involving *parens patriae* indicates that it was not the *Wi Parata* precedent which animated its *obiter dicta*. It is only their wish to defend that *Wi Parata* precedent in 1903, in their Protest against the Privy Council, which makes them claim otherwise.

This is one more piece of evidence that what really animated the Court of Appeal's Protest in 1903 was less the ostensible reasons the Court of Appeal pointed to (the Privy Council's injudicious use of language and imputation of improper motives to the Court of Appeal in *Wallis v Solicitor-General*) and more the extent to which the Privy Council's decisions in that case and the preceding one of *Nireaha Tamaki v Baker* (1900-01) departed from the *Wi Parata* precedent and so threatened the principles which had guided New Zealand jurisprudence on native title for the previous twenty years.

Colonial Consciousness

So the defence of *Wi Parata* was the animating motive which underlay the Court of Appeal's Protest against the Privy Council. But why were the Court of Appeal willing to go to such lengths to defend this precedent? Why was it so anxious in the face of any apparent departure from it? I think the answer lies in the material basis of New Zealand society at the time. Like any settler society, particularly a settler society whose settlement necessarily entailed the peaceful or hostile displacement of indigenous inhabitants, one of the primary material concerns is the stability of land settlement. It was precisely issues concerning this and the wider ramifications of the Treaty and sovereignty which led to full scale war between the Crown and some

¹⁶² "*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", at 755, per Williams J.

Maori tribes in the 1860s.¹⁶³ Consequently, the stability of land settlement was an overriding concern within the settler society as a whole, and it would not be surprising if the same concern animated the views of the municipal Courts which arose within that same society.

The *Wi Parata* decision, delivered by Chief Justice Prendergast, met these settler concerns. By insisting that native title matters fell within the prerogative powers of the Crown, and so outside the jurisdiction of the Courts, Prendergast ensured that no Crown grant could be impeached on the grounds of native title, unless the Crown itself was party to this action. This was because a mere declaration by the Crown was deemed sufficient to determine all native title issues attaching to any piece of land.¹⁶⁴ Further, by denying Courts jurisdiction over this process, Chief Justice Prendergast ensured that Maori tribes had no recourse to appeal in the Courts against any such actions by the Crown. In other words, *Wi Parata* ensured that the process of land settlement fell entirely within the authority of the Crown, ensuring that all land acquired by Crown grant was safe from legal challenge on native title issues by Maori tribes.

That *Wi Parata* was indeed seen by the New Zealand Bench as central to the stability of land settlement in New Zealand is evident from the concern expressed by some judges at those points where the *Wi Parata* precedent was under challenge. In each case, these judges insisted that any departure from *Wi Parata* would affect the “stability” and “security” of land tenure in New Zealand. Such claims are in themselves evidence of the fact that the commitment of New Zealand judges to the *Wi Parata* precedent reflected wider material concerns about land settlement in New Zealand.

So for instance, in the Court of Appeal's judgment in *Nireaha Tamaki v Baker* (1894), Justice Richmond delivered the judgment of the Court, and argued that the “security of title to all Crown land ” in the country depends on the “maintenance” of the principle cited in *Wi Parata* that native title is purely a matter of Crown prerogative,

¹⁶³ C.f. Keith Sinclair, *The Origins of the Maori Wars* (Wellington: New Zealand University Press, 1957); M.P.K. Sorrenson, “Maori and Pakeha”, in W.H. Oliver and B.R. Williams (ed) *The Oxford History of New Zealand* (Auckland: Oxford University Press, , 1987), pp. 175-76; Claudia Orange, *The Treaty of Waitangi* (North Sydney: Allen and Unwin, 1988), pp. 159-60.

¹⁶⁴ See Justice Richmond in *Nireaha Tamaki v Baker* (1894), who interprets the *Wi Parata* precedent along these lines at note 29 above.

and that the Crown alone must be the sole determinant of justice in this matter.¹⁶⁵ Similarly, in his Protest against the Privy Council, 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."¹⁶⁶ 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 cases, the titles to real estates in this Colony *would be thrown into irretrievable doubt and confusion.*"¹⁶⁷

¹⁶⁵ Justice Richmond affirmed *Wi Parata* as the authoritative precedent in the case before him 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 last sentence 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).

¹⁶⁶ "*Wallis and Others v Solicitor General*, Protest of Bench and Bar, April 25, 1903", at 746, per Stout C.J.

¹⁶⁷ *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). As we see in the following passage, the Solicitor-General then concluded by defending the

Consequently, while the judges in the New Zealand municipal Courts arrived at their judgments within the wider framework of English common law, and were profoundly influenced by its authorities and precedents, I think the statements above also indicate that they were also influenced by what I would call a “colonial consciousness”. This “colonial consciousness” is defined by a commitment to the material values and interests of the wider settler society of which these judges were a part. These values and interests were most manifest on land issues. Crown grants formed the basis of colonial land tenure, and was the material foundation on which New Zealand settler society was based. A central concern of the “colonial consciousness” was therefore to ensure that this system of land tenure was “stable” and “secure”. It is this consciousness which is evident in the statements above and which, I believe, therefore explains the New Zealand Court’s tenacious defence of the *Wi Parata* precedent, even in the face of an unprecedented breach with the Privy Council. The *Wi Parata* precedent provided New Zealand settler society with the stability and security it needed on land questions, and it did so primarily at the expense of the indigenous inhabitants.

Wi Parata precedent that there are no principles of law outside the Crown’s prerogative powers by which the justice of native title issues can be determined, and so the Crown must be the “sole arbiter of its own justice” in such matters. However he defended these views on the grounds that anything else would be a fundamental threat to the security of land settlement in New Zealand. As he put it: “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. This is the principle that has dominated all Native land law since the foundation of the colony: See *Wi Parata v Bishop of Wellington*. . . . *Nireaha Tamaki v Baker* [1894]. . . . 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 addition. My emphasis).