



**JIM EVANS**

Tena koutou katoa. I have sometimes stood on a busy street corner, watching the pedestrians crossing with the lights and thought in awe of the vast number of human generations that stand behind each of them. Behind that again is three billion years of evolution from the first replicating cells on earth. Each of us is a result of that extraordinary process.

To get down to the particular – all sides of my family have been in New Zealand for at least four generations; in some cases for five or six. Among the older generations many were involved in firing clay. One great, great, grandfather on my mother's side, Rice Owen Clark, began to make pipes to drain land in Hobsonville in the 1860's. Then he branched out into bricks. His daughter, my great grandmother, who had learnt the business from him, later persuaded her husband and their sons to set up a competing works in New Lynn, which started in 1902. In 1929, the two businesses amalgamated. As an offshoot of her family's brickworks, my great aunt, Briar Gardner, made pottery at New Lynn from the 1920's to the 1950's. On my father's side, my grandfather set up a brickworks in Masterton, and then moved to Christchurch where he set up another brickworks. In later generations, engineers have featured prominently in my family. My father and three of my uncles (two by marriage) were engineers, one of my brothers is an engineer and three of my nephews are. My elder brother and I are lawyers, but we are mavericks!

My father worked as an engineer in England, in Sri Lanka (where I was born in 1941), and in the Manawatu. In Sri Lanka he helped reconstruct two ancient irrigation schemes, one of them 75 km of a canal originally constructed by King Daaskelliya in AD 459. In the Manawatu, my father designed a flood control scheme for the Manawatu River. Throughout my childhood in Palmerston North, my mother ran a tennis club from our house for any young people who wanted to come. My parents both managed to live lives devoted in various ways to public service, in a time before simple-minded economists deemed such lives impossible.

I have spent the past 38 years teaching in the Faculty of Law at Auckland University, pondering issues of jurisprudence, both generally and as they affect New Zealand society. During this time, my wife Jill, who is an artist, and my children, Mark and Sarah, have provided balance against this rather single-minded pre-occupation. Jill and I have one grandchild, and two more due.

## REFLECTIONS ON *NIREAHA TAMAKI v BAKER*

JIM EVANS\*

Anyone who wants to understand New Zealand history since 1840 needs to understand the decision in *Wi Parata v The Bishop of Wellington*<sup>1</sup> in 1877 and its subsequent influence on the country's legal history. In that case Prendergast CJ, in delivering the judgment of a Supreme Court (the equivalent of the current High Court) at Wellington, consisting of himself and Richmond J, held that Maori had no title in their land that could be recognised under the common law, a view contrary to that taken in earlier New Zealand cases. (I shall call this finding the basic finding in *Wi Parata*, since there were several others.) This article is about the history of that ruling, but it approaches that topic indirectly, through a close study of the judgment of the Privy Council in *Nireaha Tamaki v Baker*<sup>2</sup> in 1901, the first Privy Council case to consider *Wi Parata*.

In recent times *Nireaha Tamaki* has been treated as holding that the basic finding in *Wi Parata* was wrong. For example, in *Attorney-General v Ngati Apa*<sup>3</sup> (the foreshore case) Elias CJ, speaking of *In re the Ninety-Mile Beach*,<sup>4</sup> a decision over-ruled by the Court in *Ngati Apa*, said:<sup>5</sup>

*Re the Ninety-Mile Beach* followed the discredited authority of *Wi Parata v Bishop of Wellington* which was rejected by the Privy Council in *Nireaha Tamaki v Baker*.

Tipping J also commented on *Nireaha Tamaki v Baker* in *Ngati Apa*. His remarks occur in the course of discussing the significance of the Land Claims Ordinance of 1841 (an enactment of the New Zealand Legislative Council). So to give the context, and because it will be important later, let me first set out the relevant text of this ordinance:

And whereas it is expedient to remove certain doubts which have arisen in respect of titles of land in New Zealand, be it

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<sup>1</sup> (1877) 3 NZ Jur (NS) SC 72.

<sup>2</sup> [1901] AC 561.

<sup>3</sup> [2003] 3 NZLR 645.

<sup>4</sup> [1963] NZLR 461.

<sup>5</sup> *Supra* n3 at 13.

therefore 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 ...

Commenting on this Ordinance, Tipping J said:<sup>6</sup>

I note that in its judgment in [*Nireaha Tamaki v Baker*] the Privy Council said that the 1841 Ordinance did not “create a right in the Native occupiers cognizable in a Court of Law”. This observation is, however, apt to be misunderstood. What Their Lordships were saying was not that the “Native occupiers” had no rights, but simply that the ordinance itself gave them no rights. It did, however, clearly recognise pre-existing rights. Again, with great respect, I do not consider this important distinction was sufficiently recognised in the *Ninety-Mile Beach* case.

By “pre-existing rights” he meant rights under the common law.

However, *Nireaha Tamaki* was not always so understood in New Zealand legal history. The first case to consider it in New Zealand was *Hohepa Wi Neera v Bishop of Wellington*,<sup>7</sup> a decision of the Court of Appeal in 1902. That case was an attempt by a person not bound by the judgment in *Wi Parata* to re-litigate the facts involved in that earlier case. Let me describe those facts briefly. In 1848 a number of Maori chiefs had ceded land at Porirua to the Governor to be transferred to Bishop Selwyn, then Bishop of New Zealand, to assist the founding of a church school at Porirua. It was duly transferred in trust in 1850. In 1877 the current trustee was the Bishop of Wellington. By 1877 no such school had ever been built and as only a few Maori remained in the area it was then pointless to build a school. *Wi Parata v the Bishop of Wellington* was an action by Wi Parata, a chief of Ngatitōa, one of the tribes involved, to recover the land from the Bishop. In the current case Wi Neera claimed as successor of a person involved in the original cession whom Wi Parata had not represented.

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<sup>6</sup> Supra n3 at 214.

<sup>7</sup> (1902) 21 NZLR 655 (CA).

In the course of the argument of counsel in the Court of Appeal in *Hohepa Wi Neera*, Williams J remarked that native rights in land “are not rights known to the law of England”. Stout CJ then added, “*Tamaki v Baker* says that”.<sup>8</sup> In his judgment Stout CJ then stated:<sup>9</sup>

The important point in [*Nireaha Tamaki v Baker*] bearing on this case seems to me to be that it declares that *Wi Parata v The Bishop of Wellington* was rightly decided, though it disapproves of certain dicta in the judgment.

Summarising the effect of *Nireaha Tamaki*,<sup>10</sup> Williams J stated:

[This] action has evidently been brought upon a misconception of the real effect of the decision of the Privy Council in the case of *Nireaha Tamaki v Baker*. .. [That case] decided that by virtue of “The Native Rights Act 1865,” a suit could be brought upon a Native title, and therefore that a Native holding under such a title, if his title was put in jeopardy by an officer of the Crown acting outside his statutory authority, could bring a suit to restrain the officer from so acting.

Justice Williams view was that *Nireaha Tamaki* held only that a right of native title was created by the Native Rights Act 1865. All five judges in *Hohepa Wi Neera* agreed that the law on native title stated in *Wi Parata* was still valid and, because the events in the case in front of them had occurred before 1865, it governed that case. They dismissed the action on this ground.

So here, then, are two puzzles. The first is, “What exactly was decided in *Nireaha Tamaki v Baker*?”, and the second, “How is it that different judges could understand the case so differently?” A third puzzle arises from considering the overall historical picture: “Independently of *Nireaha Tamaki v Baker*, if (as I shall argue) the basic finding in *Wi Parata* was always wrong, how is it that it was regarded as good law in New Zealand for nearly 110 years?”<sup>11</sup> This article is concerned with these puzzles.

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<sup>8</sup> Ibid 660.

<sup>9</sup> Ibid 667.

<sup>10</sup> Ibid 670. The whole summary is worth reading, as it is the root of much later understanding of *Nireaha Tamaki v Baker*.

<sup>11</sup> The basic finding in *Wi Parata* was first challenged in *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680.

When I set out to write this paper I believed that the Privy Council in *Nireaha Tamaki* had held that native title was a right under the common law existing from the foundation of the colony. However, as I worked backwards and forwards through the judgment of Lord Davey, who delivered the judgment of the Privy Council, I was forced to recognise that the issue was not so straightforward. In the end I have concluded that the Privy Council did not decide that native rights existed from the start of the colony, although Lord Davey favoured that view; but neither did it hold that the rights were created by the Native Rights Act 1865. It simply left the source of native rights undecided. The problem with the case is that Lord Davey failed to make this clear.

For the decision in *Ngati Apa*, the fact that there is not a finding in *Nireaha Tamaki* that a right of native title existed under the common law from the foundation of New Zealand as a colony is of small moment. At least two Privy Council decisions did hold this as a *ratio decidendi*<sup>12</sup> within twenty years after 1901,<sup>13</sup> and one of these was on appeal from New Zealand.<sup>14</sup> However, Lord Davey's failure to make himself clear in *Nireaha Tamaki* turns out to be a very important part of the historical story. For, the partially correct, and partially distorted, understanding of *Nireaha Tamaki* that began in the New Zealand courts in *Hohepa Wi Neera* in 1902 played a major role in consolidating the understanding of native title that prevailed in New Zealand for the following 85 years.

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<sup>12</sup> Throughout this paper, I mean by *ratione decidendi* a legal proposition that is used as a premise in an argument employed in a judgment to decide some aspect of the case. This notion of *ratio* yields, first and foremost, *rationes* (for there may be several) of a judgment, and only secondarily *rationes* of a case; but all the Privy Council cases mentioned in this article contained only one judgment, so no distinction between a *ratio* of a judgment and a *ratio* of a case is needed for these cases. I have defended this understanding of *ratione decidendi* in "On Case Law Reasoning" (1985) *Juridical Review* 85. A similar view is taken by Neil MacCormick, in *Legal Reasoning and Legal Theory* (Clarendon Press, Oxford, 1978) 82-86.

<sup>13</sup> See *Manu Kapua v Para Haimona* [1913] AC 761 at 765; and *Amodu Tijani v Secretary of Southern Nigeria* [1921] 2 AC 399 at 404. I have not included *Wallis v Solicitor General for New Zealand* [1903] AC 173, because in that case the Court spoke of the rights as being secured by the Treaty of Waitangi (179 and 187-188), a clear mistake. I do not rely on *St Catherine's Milling & Lumber Company v The Queen* (1888) 14 App Cas 46 or *Attorney-General (Quebec) v Attorney-General (Canada)* [1921] 1 AC 401 as Privy Council support for the proposition of law stated in the text, as in both cases the native rights in question depended on a royal proclamation of George III in 1763 (see pages 54 and 409, respectively).

<sup>14</sup> *Manu Kapua*, supra n13.

The argument in the article is divided into two parts, followed by a brief conclusion. In the first part I will clarify what was and was not decided in *Nireaha Tamaki*; in the second I will show how Lord Davey's failure to make himself clear turned out to be so significant.

#### WHAT WAS DECIDED IN *NIREAHA TAMAKI V BAKER*?

Let us start with the facts of the case. In 1871, the Native Land Court made orders that titles should issue to two different groups of Maori for, in the one case, a block of land known as Kaihinu No. 2, and in the other case a block known as Mangatainoka. In both cases title was to issue only when a proper survey of the land had been furnished to the Chief Judge. No survey of either was ever produced, but Kaihinu No. 2 was later surrendered to the Crown. A dispute arose between the Crown and the Maori owners of Mangatainoka as to whether a piece of land containing 5184 acres was in Kaihinu No. 2 or in Mangatainoka.<sup>15</sup> In 1893, the respondent, who was the Commissioner of Crown lands for the Wellington province, acting under the authority of the Land Act 1892, advertised for sale a block of 20,000 acres, called Kaiparoro, that contained most of the disputed 5184 acres.<sup>16</sup> The appellant, who represented members of Rangitane, the owners of Mangatainoka, issued proceedings seeking a declaration against the Commissioner that the disputed land was not Crown land and an injunction to restrain the Commissioner from selling it. As the right of the appellant and others to receive a certificate of title under the order of 1871 had lapsed, because of the absence of a survey, the appellant had to rely on the tribe's customary title. In response to this claim based on native title, the Commissioner, relying on *Wi Parata v the Bishop of Wellington*,<sup>17</sup> which had held, as we have seen, that native title could not be recognised by the courts and had also held that the courts had no jurisdiction to investigate whether or not a native title had been properly extinguished by the Crown, pleaded that the Court had no jurisdiction to enquire whether the land in dispute in this case had or had not been properly vested in the Crown.

Among several legal issues identified for argument prior to trial, two, originally numbered (3) and (4), had been argued before the Court of Appeal. They were: "(3) Can the interest of the Crown in the subject-matter of this suit be attacked by this proceeding? (4) Has the Court

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<sup>15</sup> See the New Zealand Court of Appeal decision in *Nireaha Tamaki v Baker* (1894) 12 NZLR 483, 484.

<sup>16</sup> Ibid at 485.

<sup>17</sup> *Supra* n1.

jurisdiction to inquire whether, as a matter of fact, the land in dispute has been ceded by the native owners to the Crown?" In 1894, the New Zealand Court of Appeal had answered "No" to both questions,<sup>18</sup> applying the law laid down in *Wi Parata*.

I shall now state in a series of propositions some things it is plain the Privy Council did and did not decide.

The Privy Council decided:

1. The respondent's authority to sell on behalf of the Crown derived solely from statute.<sup>19</sup>
2. An aggrieved person may sue an officer of the Crown to restrain a threatened act purporting to be done in pursuance of an Act of Parliament, but really outside the statutory authority.<sup>20</sup>
3. If the appellant could succeed in proving that he and the members of his tribe were in possession and occupation of the lands under a native title that had not been lawfully extinguished, he could maintain such an action to restrain an unauthorised invasion of his title.<sup>21</sup>

The Privy Council did not decide:

1. Whether or not the appellant could rely on his native title in an action directly against the Crown.<sup>22</sup>
2. Whether any prerogative power to extinguish native title survived the introduction of a statutory scheme for exercising the Crown's exclusive right of acquiring such title.<sup>23</sup>

All these propositions are clearly supported by the text. Although some of them were occasionally ignored in discussions of the case within New

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<sup>18</sup> Supra n15 at 488.

<sup>19</sup> Supra n2 at 575.

<sup>20</sup> Ibid 576.

<sup>21</sup> Ibid 578.

<sup>22</sup> Idem.

<sup>23</sup> Supra n2 at 576. I take it the statutes Lord Davey there refers to are the Native Lands Act 1865 and its successors, the effect of which he has described on 569ff, together, perhaps, with the Land Acts prior to 1892, which he refers to on 570.

Zealand, for the most part they were accepted. The older view of the case and the modern view of it differ primarily on the nature of the title referred to in proposition 3 above. The two options are: (1) It was a “title” only under international law, binding only on the conscience of the Crown, but later given recognition in domestic law by statute (the older view); (2) it was a title under the common law that existed from the foundation of the colony (the modern view)? However, at least so far as the older cases are concerned this point was closely related to another: namely, the correct interpretation of a *dictum* in the judgment of the Privy Council in which it appears to give limited support to the judgment in *Wi Parata*. I will now discuss each of these issues in turn.

We can take up first a point that arises from the interpretation of *Nireaha Tamaki* by Williams J in *Hohepa Wi Neera* in 1902. One thing Williams J stated in that case was that *Nireaha Tamaki* held that: “by virtue of ‘The Native Rights Act 1865,’ a suit could be brought upon a Native title”.<sup>24</sup> That, I think, is right. More dubious, however, is his attempt to derive support from *Nireaha Tamaki* for his view that such rights *had* no status in domestic law apart from that statute or later statutes. This view appears in the following passage:<sup>25</sup>

In the present case, however, we have to deal with transactions which took place before New Zealand became a self-governing colony [they occurred between 1848 and 1850], and long before the statutes now regulating the rights of Natives and the ascertainment of title to and the disposition of Native lands were in existence. [He then stated the effect of that part of the Land Claims Ordinance 1841 that I have set out above, and continued:] This Act [ie the Ordinance], as stated by the Privy Council in *Tamaki v Baker*, was a legislative recognition of the rights guaranteed by the Crown by the Treaty of Waitangi, but would not of itself be sufficient to create a right in the Native occupiers cognizable in a Court of law. There were [at the time of the events at issue in the present case] no statutes regulating the acquisition of Native rights of occupancy by the Crown, whether by purchase, gift from the Natives, or otherwise. If the question arose in any particular case whether native rights had been ceded to the Crown, it must have been for the Governor of the colony to say whether they had been ceded or not, and whether the Crown had accepted such cession. No Court would have had jurisdiction to consider the question.

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<sup>24</sup> Supra n7 at 670.

<sup>25</sup> Idem.



Plainly, Williams J viewed the rights guaranteed by the Treaty as rights under international law, and not as rights under domestic law. That is why he says no court could consider a claim based on such rights until they were backed by statute. However, that is not the view expressed by Lord Davey. It is worth contrasting the passage above with Lord Davey's actual comment on the Land Claims Ordinance of 1841:<sup>26</sup>

No doubt this Act of the Legislature did not confer title on the Crown, but 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. It would not of itself, however, be sufficient to create a right in the native occupiers cognizable in a Court of Law.

Some comment is needed on the difference between these two views. Since the Crown's title is plainly a title at common law, Lord Davey must also have been thinking of the right of occupation, to which he says the 1841 Ordinance declares the Crown's title to be subject, as potentially a right at common law. Additionally, he must have seen at least this one right among the rights "confirmed and guaranteed" by the second article of the Treaty of Waitangi as potentially a right at common law. (I say "potentially" in both cases, for a reason that will appear below.) So, Lord Davey is here stating that those who framed the Ordinance assumed this right of occupation to be part of the common law. Since he does not dissent from this view, we can conclude he was inclined to think it correct. But does he endorse it? If he does, why does he choose the particular word "declares", instead of "enacts" in speaking of the Ordinance? After all, the enacting part of the Ordinance began, "be it therefore declared, *enacted* and ordained.. [my emphasis]". If the assumption about the common law made by those who framed this Ordinance was false, would the Ordinance not at least *make* the law that which it declares, *enacts* and ordains? And why does he say, in the last sentence of the paragraph, that the Ordinance would not *of itself* be sufficient to create a right recognisable in the courts?

Lord Davey does not make these points clear. However, we need to keep in mind that the Ordinance was enacted by the New Zealand Legislative Council, which had only a limited, delegated law-making power that

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<sup>26</sup> Supra n2 at 567.

was, by virtue of a specific statute,<sup>27</sup> subject to the terms of the Royal Charter that the Crown had issued on 16 November 1840 and to any Royal instructions. By the statute, any laws made had to be consistent with the laws of England and could be disallowed by the Crown. To create a new structure of native rights that did not already exist at common law would almost certainly have been beyond the law-making power of the Legislative Council. In any event, for whatever reason, Lord Davey clearly read that part of the Ordinance that states the Crown's title to be subject to the occupational right of the "aboriginal inhabitants" as purely declaratory. But that being so, he must have recognised that the declaration in the Ordinance could be inaccurate: that those who framed it might have been wrong about the common law. The sense of the final sentence in the passage above is, then, that the ordinance would not be sufficient to create such a right *if it were to turn out that none existed*. On this view, in this passage Lord Davey does not commit the Judicial Committee<sup>28</sup> to the position that such a right exists at common law.

Does he commit it to that position elsewhere in the judgment? The most important passage comes later. Since it discusses the Native Rights Act 1865, I will set out first his Lordship's useful summary of that Act.<sup>29</sup>

By the Native Rights Act, 1865, of the Colonial Legislature.. it was enacted (s. 2) that every person of the Maori race within the Colony of New Zealand, whether born before or since New Zealand became a dependency of Great Britain, should be taken and deemed to be a natural-born subject of Her Majesty to all intents and purposes whatsoever; (s. 3) that the Supreme Court and all other Courts of Law within the Colony ought to have and have the same jurisdiction in all cases touching the persons and the property whether real or personal of the Maori people, and touching the titles to land held under Maori custom or usage, as they have or may have under any law for the time being in force in all cases touching the persons and property of natural-born subjects of Her Majesty; (s. 4) that every title to and interest in land over which the native title shall not have been extinguished shall be determined according to the ancient custom or usage of the Maori people so far as the same can be

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<sup>27</sup> 3 & 4 Vict C 42.

<sup>28</sup> For those new to these matters, the "court" we call the Privy Council is strictly the Judicial Committee of the Privy Council: technically, it "advises" the sovereign on the order to be made in a particular case.

<sup>29</sup> Supra n2 at 568.

ascertained. And (s. 5) 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.

It is worth comment that, like the Land Claims Ordinance of 1841, the Native Rights Act 1865 states that it is passed to remove doubts. Its substantive portion begins: “Be it therefore declared and enacted”. So, like the Ordinance, it also leaves open whether it is declaring law or making new law. However, its authority to make new law was undeniable.

Here now is the central passage in Lord Davey’s judgment on the status of native title.<sup>30</sup> The numbers in square brackets are mine:

[1] The right [ie of native title], it was said, depends on the grace and favour of the Crown declared in the Treaty of Waitangi, and the Court has no jurisdiction to enforce it or entertain any question about it. [2] 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 cognizance. 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 New Zealand Court. It does not seem possible to get rid of the express words of the 3rd and 4th sections 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. By the 5<sup>th</sup> section it is plainly contemplated that cases might sometimes 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. 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 [as]

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<sup>30</sup> Ibid at 577.

“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 cognizable by the law, and no title therefore to be extinguished. 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. The Court [ie the Supreme Court when it eventually hears the case] is not called upon in the present case to ascertain or define as against the Crown the exact nature or incidents of such title, but merely to say whether it exists or existed as a matter of fact, and whether it has been extinguished according to law. If necessary for the ascertainment of the appellant’s alleged rights, the Supreme Court must seek the assistance of the Native Land Court; but that circumstance does not seem to their Lordships an objection to the Supreme Court entertaining the appellant’s action. Their Lordships, therefore, think that, if the appellant can succeed in proving that he and the members of his tribe are in possession and occupation of the lands in dispute under a native title which has not been lawfully extinguished, he can maintain this action to restrain an unauthorized invasion of his title.

If one reads [1] above as a separate argument from [2], the text reads as if Lord Davey proceeds immediately to discuss [2] and - since he never signals that he is returning to [1] - simply leaves that point hanging. On this reading it will seem that in this passage the Judicial Committee concedes the first point, or, at least, does not question it. At a later point in its judgment the Privy Council gives some limited approval to the decision in *Wi Parata*. This reading of the present passage is compatible with believing that this limited approval was of the finding in that case that native title depended “on the grace and favour of the Crown”, the limited approval being that this was correct prior to the Native Rights Act 1865.<sup>31</sup>

I think, however, that this reading is wrong. When Lord Davey speaks of “this argument” (singular) he means, I think, the argument in [1], of which he treats [2] as a subordinate part: the overall argument he turns to address is that native title depends entirely on the grace and favour of the Crown, for which one reason advanced in *Wi Parata* was that no body of

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<sup>31</sup> See the discussion below of the Privy Council’s *dictum* on *Wi Parata*.

customary law exists that could determine title. When he states that this overall argument goes too far, he means that the claims it makes on behalf of the Crown are extravagant. It might be that native title can not be relied on in an action directly against the Crown, that he leaves open; it might be that a Crown grant of land cannot be attacked after it is made, on that he expresses a tentative view later; but it does not follow that Maori have no title that can be relied on in any way in a court of law, whenever the Crown contends their title is extinguished. When he then immediately goes on to say that it is rather late in the day for such an argument to be addressed to a New Zealand court, he means that whatever might have been argued in the early stages of the colony such an argument is now precluded by statute. He then proceeds immediately to discuss the relevant statutory provisions: sections 3 and 4 of the Native Rights Act 1865.

In *Wi Parata* Chief Justice Prendergast had been scathing about these provisions.<sup>32</sup> However, Prendergast CJ did acknowledge that section 3 purported to require the Court to determine questions of native title according to “the Ancient Custom and Usage of the Maori people”. He then immediately remarked, “But a phrase in a statute cannot call what is non-existent into being”. In the context of his discussion this remark is more a gratuitous criticism of the Act (and of traditional Maori society) than a premise of his argument, for he ultimately avoids most of the obligation laid on the courts by the statute by saying that the Crown, not being named in the statute, is clearly not bound by it. (Here he applies a presumption of interpretation that the Crown is not bound by a statute unless this is expressly stated or implied.) Hence, he says, the statute does not remove the Crown’s prerogative right to conclusively determine when native title has been extinguished.<sup>33</sup> However, Lord Davey treats the remark quoted above as an attempt to get rid of the obligation, unequivocally imposed on Courts by sections 3 and 4 of the Act, to determine questions touching the titles to land held under Maori custom and usage according to that custom and usage.

Of course, if Prendergast CJ had been right that no such body of custom and usage existed, then obviously no court could fulfill the obligation imposed by the statute. But I take his Lordship’s position to be that courts have a duty to attempt to adjudicate on this basis, if necessary referring questions of fact to the Native Lands Court under section 5 of the Act, and that a mere assertion by a judge, based on no evidence, that no such body of custom and usage exists is not sufficient to eliminate

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<sup>32</sup> Supra n1 at 79.

<sup>33</sup> Ibid at 80.

that obligation. (In any event, the statute itself only required that titles or interests in land be determined according to such custom and usage, “so far as the same can be ascertained”.<sup>34</sup>)

Lord Davey then goes on to remark that prior Imperial and Colonial legislation dealing with land, a summary of which he has given earlier,<sup>35</sup> is consistent with this understanding of the Native Rights Act, for that legislation commonly assumed the existence of a right of native title at common law. Indeed, much of it, he says, would make no sense if there were no native title in fact or if it were not recognisable by the law. Of course, it is basic law, which Lord Davey would have understood, that a wrong assumption by the legislature about the existing state of the law does not make the law that which it was wrongly assumed to be.<sup>36</sup> However, I take his Lordship’s point to be that the earlier legislation provides important background to the Native Rights Act 1865. For, assuming it were not already the law in 1865 that native title should be recognised in the courts, the 1865 Act explicitly *enacts* the law assumed in the earlier legislation. His Lordship, therefore, concludes that (as a consequence of this enactment) the Supreme Court is 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. The balance of the passage then makes clear why such title is involved in the present case.

If this account is right, even in this passage Lord Davey does not commit the Privy Council to the view that a right of native title existed under the common law prior to the Native Rights Act 1865. His position is that though it seems likely that such a right exists under the common law (for he signals in many places that he favours that position<sup>37</sup>), it is unnecessary to rule on that point for the purpose of the present case, because the Native Rights Act 1865 has put the issue beyond argument. Further, there is, I think, nowhere else in his judgment that Lord Davey

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<sup>34</sup> Section 5.

<sup>35</sup> 576-571.

<sup>36</sup> This follows from the constitutional premise that the only way Parliament can make law is to enact a statute or act under the authority of a statute; it cannot make law by displaying a false understanding of the existing law. The authority for this proposition is old: see eg *Dore v Gray* (1788) 2 TR 358, 365. The point is briefly touched on in *Wi Parata v the Bishop of Wellington* supra note 2 at 79 as it applies to merely declaratory acts, but Prendergast CJ there fails to observe that the Native Rights Act 1865 is not merely declaratory.

<sup>37</sup> In addition to the passage at 567 discussed in the text above, supra n26, see 579-580.

commits the Judicial Committee to the view that native title exists at common law.

We can turn now to the dictum in which the Privy Council gave limited support to the decision in *Wi Parata*. Near the end of his judgment Lord Davey comments that the decision in *Wi Parata* was that the Court has no jurisdiction by *scire facias*<sup>38</sup> or other proceeding to annul a Crown grant for matter not appearing on its face. He then immediately remarks:<sup>39</sup>

If so, it is all the more important that the natives should be able to protect their rights (whatever they are) before the land is sold and granted to a purchaser.

In fact, Lord Davey's account of the finding in *Wi Parata* is inaccurate: the finding was that the Court has no such jurisdiction *except*, possibly, by *scire facias* or other proceeding by or on behalf of the Crown to annul a Crown grant for matter not appearing on its face.<sup>40</sup> However, Lord Davey's mistake indicates the concern that was in his mind when he made these remarks on *Wi Parata* near the end of his judgment. It was a concern to protect the reliability of a crown grant of land. This concern had been stressed in argument before the Court by counsel for the respondent, who had asserted that the doctrine that it is for the Crown alone to decide whether the title of natives in the Colony has or has not been extinguished "has become the foundation of all titles to land in the Colony".<sup>41</sup> Immediately after the comment quoted above, Lord Davey remarks that the *dicta* in *Wi Parata* go beyond what was necessary for the decision, and comments specifically on the limited effect the case gave to section 3 of the Native Rights Act 1865. He then continues:

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.

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<sup>38</sup> *Scire facias* means literally "to cause him to know". The proceeding could be used to require a party to show cause why a warrant or grant should not be revoked on the grounds set out in the writ.

<sup>39</sup> *Supra* n2 at 579.

<sup>40</sup> Although *scire facias* was technically a proceeding by the Crown, Attorney Generals often allowed it to be used to facilitate a private challenge to a Crown grant (in a manner similar to relator proceedings). By the second half of the nineteenth century conventions existed about when an Attorney-General should give such consent: see Parke B in *The Queen v Eastern Archipelago Co* (1853) 23 LJQB 82, 99.

<sup>41</sup> At 565.

The “conclusion” he refers to is clearly the conclusion, which he has just mistakenly attributed to the Court in *Wi Parata*, that a court has no jurisdiction by *scire facias* or other legal proceeding to annul a Crown grant for matter not appearing on its face. However, the difficulty with this *dictum* is that the Court in *Wi Parata* used three different arguments<sup>42</sup> to support its, slightly different, finding that a Crown grant could not be challenged except, possibly, in *scire facias* or other proceeding by or on behalf of the Crown. If we ignore Lord Davey’s mistake we can no doubt understand him as giving tentative approval to one or more of these grounds. The problem is he does not make clear which of them he is supporting. Still, it is not too difficult to work this out. The first two grounds that Prendergast CJ relied on in *Wi Parata* for his relevant finding were substantive. If correct, they would have blocked any proceedings at all by the plaintiff, regardless of their procedural form. They were: (1) that at the commencement of the colony the only rights of Maori to occupation, and the only duties of the Crown to protect them, were rights and duties *jure gentium* (ie international law), and not under the common law; and (2) that transactions by the Crown with the Maori for surrender of native title were akin to acts of state and could not be investigated in the courts. If Lord Davey intended to endorse either or both of these findings, then he must have taken the view that prior to the 1865 Act Maori had no title that could be recognised at common law. The dictum was often read that way by New Zealand judges in the years immediately after the decision in *Nireaha Tamaki*.<sup>43</sup> However, it is most unlikely that he intended to endorse these findings. Firstly, they are irrelevant to the concern about the stability of Crown grants that plainly was on his mind when he made these comments. Secondly, for him to have endorsed these findings would be inconsistent with the whole tenor of his judgment. As I have tried to show in the analysis above he leans towards favouring the existence of native title at common law, but he is careful not to make any ruling about this either way.

The third ground Prendergast CJ relied on for his relevant finding came later in his judgment and was separated from the earlier two by several other arguments and comments. It was purely procedural: it was that the

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<sup>42</sup> In an addendum to this article, I have included a structural analysis of the judgment in *Wi Parata v Bishop of Wellington* that will help clarify the arguments employed in it.

<sup>43</sup> See Stout CJ, in *Hohepa Wi Neera*, supra n7 at 667, Williams J, *ibid* at 671; “Protest of Bench and Bar” (1903), reported in (1938) 1 NZPCC 730, per Stout CJ at 732, Williams J at 749.



only *process* by which a Crown grant could be avoided for a matter not appearing on its face was a writ of *scire facias* or other similar proceeding taken by, or in the name of, the Crown. However, behind this rule of procedure lies the substantive concern that Crown grants, particularly crown grants of land (for there could be Crown grants of patents, licences, and the like), should be reliable: they should not be challenged unless the Crown had agreed to the process. It is, I think, clear that it was only this finding, particularly as it applied to Crown grants of land, to which Lord Davey intended to give tentative support.

#### HOW THE JUDGMENT'S LACK OF CLARITY PROVED SIGNIFICANT

It is not fair to blame the Privy Council for not ruling on whether native title was recognisable under the common law. Such a ruling was not needed to decide the case in front of them, and, more importantly, the issue had not been argued in detail before the Court.<sup>44</sup> However, it is fair to complain about the obscurity of the judgment. Lord Davey could have made clear that the Court was not endorsing the *Wi Parata* view on this point - the view that had been followed in the judgment on appeal - and identified the point as one that might need careful consideration in a future case. As things turned out, it is likely that would have had a significant effect on the course of subsequent New Zealand legal history.

In 1901, the New Zealand authorities on the status of native title were delicately balanced. In *R v Symonds*,<sup>45</sup> in 1847, Chapman J and Martin CJ in the Supreme Court had stated clearly that native title was a right under the common law,<sup>46</sup> although this statement was not a *ratio* of their decisions. In 1872, this view of the law was employed by the Court of Appeal as a *ratio* of its decision in *In re the Landon and Whitaker Claims Act 1871*.<sup>47</sup> In a later case in the same year, the Court of Appeal assumed this view of the law, although not as part of a *ratio*.<sup>48</sup> Then, as we have already noted, in 1877 Prendergast CJ and Richmond J in *Wi Parata* in the Supreme Court held that native title was not recognisable in the courts, claiming that had been the law applied in the courts from

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<sup>44</sup> See the argument of counsel *supra* n2 at 564-566.

<sup>45</sup> Printed in 1 NZPCC 1840-1932 (1938) 387.

<sup>46</sup> Chapman J 390-392, Martin CJ 393 (citing Kent), 394, and 395.

<sup>47</sup> (1872) 2 NZCA 41, 49. The finding is a *ratio*, because to reach its decision the Court had to determine whether the lands in question were “crown lands”, in the sense of the 1866 Act, notwithstanding the existence of the native title.

<sup>48</sup> *R v Fitzherbert* (1872) 2 NZCA 143, 172.

the beginning of the colony.<sup>49</sup> In 1894, the *Wi Parata* view on this point was followed in the New Zealand Court of Appeal in *Nireaha Tamaki v Baker* itself.<sup>50</sup> Edwards J then gave limited support to the *Wi Parata* view as one of five judges in the Court of Appeal in 1896 in *Teira Te Paea v Roera Tareha*.<sup>51</sup> Then, apparently on the basis of that sole finding, as one of five judges in the Court of Appeal in *Mueller v The Taupiri Coal-Mines Limited*<sup>52</sup> in 1900, he said:

.. as was held in [*Wi Parata*] and in *Teira Te Paea v Roera Tareha* 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.

Since the Court of Appeal had made no such finding in *Teira Te Paea*, all we can extract from this is a finding by one judge out of five in two Court of Appeal cases approving the judgment of the (lower) Supreme Court in *Wi Parata*.

If any Privy Council decision before 1901 from another jurisdiction than New Zealand had held that native title was a right under the common law that would have been binding in New Zealand, but I know of no such decision.<sup>53</sup> According to the understandings of the time, even a high English decision would have been considered binding, but, again, I know of no such decision.

Given this state of the authorities, how did the matter stand in terms of general principle? It is quite plain, I think, that on this front the better arguments supported the *Symonds* view. Here are five points that favour it:

1. Basic considerations of justice require that a country acquiring a new territory respect the territorial possession of existing inhabitants.

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<sup>49</sup> Supra n1 at 78 and 79. This was despite the fact that Richmond J had been a member of the court in *In re the Lundon and Whitaker Claims Act 1871*: supra n47 at 44.

<sup>50</sup> (1894) 12 NZLR 483, 488.

<sup>51</sup> (1896) 15 NZLR 91, 114.

<sup>52</sup> (1900) 20 NZLR 89, 123.

<sup>53</sup> See the remarks, supra n13.

2. This concern was stated at the very beginnings of the tradition of learning we now call International Law.<sup>54</sup> By the nineteenth century it had evolved into established doctrines and practices. With regard to native people judged not to have a developed system of law and to need the protection of the Crown or, as in the US after independence, the State the law was that “discovery” and settlement gave a claim to sovereignty as against other European states but the title of the Crown or state to land in the colony was subject to a right of occupation by the native inhabitants. Only the Crown or State had the right to acquire title from the native people.<sup>55</sup> Well before 1840, English common law accepted the rule that general principles and customary rules of international law (although not treaties) applied within domestic law when relevant,<sup>56</sup> and the judges in *Symonds* got the international law on native title right.<sup>57</sup> By the 1870’s, common lawyers tended to view international law as just a structure of custom operating between nations (primarily European or “civilized” nations) and this view then sometimes restricted the reception of international law within domestic common law.<sup>58</sup> However, the old reception rule was certainly in force in 1840 and it was never abolished: indeed there was no sound case for abolishing it.
3. By 1840, the view that because of International Law native title was a right under the common law had been widely relied on in British colonial practice,<sup>59</sup> a point that may not have been decisive as a matter of law, but which was at least relevant in the courts.

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<sup>54</sup> Francisco de Vitoria, *De Indis (Of the Indians)* trans JP Bate, (Carnegie Institute, Washington, 1917).

<sup>55</sup> See the extensive review of European practice in *Johnson v McIntosh* (1823) 8 Wheat 543 and J Story, *Commentaries on the Constitution of the US* (1833) 3-20. The latter was clearly a major source for Chapman J’s judgment in *Symonds*.

<sup>56</sup> See H Lauterpacht, “Is International Law Part of the Common Law?” (1939) 25 *Transactions of the Grotius Society* 51; *Trendtex Corporation v Central Bank of Nigeria* [1977] QB 529; F Hackshaw, “Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi” in IH Kawharu, ed, *Waitangi: Maori and Pakeha Perspectives*, Oxford University Press, Auckland, 1989, 92, 94-96.

<sup>57</sup> *Story*, supra n54; Keith and Anderson JJ in *Attorney-General v Ngati Apa*, supra n3, [136] – [140]. For the application of this law in *Symonds* see supra n46, 390-392, 393-394.

<sup>58</sup> See *Hackshaw*, supra n56.

<sup>59</sup> See P McHugh, “Aboriginal Title in New Zealand Courts” [1984] *Canterbury Law Review* 235, 238-239; *Story*, supra n54.

4. The view that native title would become a right under the common law had been assumed in the framing of the Treaty of Waitangi,<sup>60</sup> so that to abandon it was to overturn a central promise that the Crown intended to make to Maori in the Treaty.

5. A general principle that local law continued (subject to a new sovereignty) upon the acquisition of new territory by the British Crown was established in English common law well before 1840.<sup>61</sup> One important ground for that principle was a concern to protect local property rights. This law did not apply in full to native people who were judged not to have a developed system of law - we have already noted the modified recognition of property rights that applied to such native people - but no good reason existed why the principle should be abandoned altogether in the case of such native people.<sup>62</sup>

So far as I can see, the only argument in favour of the *Wi Parata* view was that it protected the reliability of Crown grants of land. That concern features extensively in the support of New Zealand judges and lawyers for the *Wi Parata* view in the thirty or so years after that decision.<sup>63</sup> Plainly, it was also a concern in the colonial community. Alex Frame, in his biography of John Salmond, quotes the Hon Mr Carroll, speaking in the House of Representatives in support of the Native Land Bill in 1909:<sup>64</sup>

.. it is provided [in the Bill] that the Native customary title shall not be available against the Crown .. This principle is essential to the security of the title of all Crown land and private land in the Dominion. It is a most important step, as it removes all possibility of future litigation with regard to Native-land titles.

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<sup>60</sup> See the comment by Chapman J in *Symonds* supra n44 at 390. See also P McHugh, "Constitutional Theory and Maori Claims" in IH Kawharu, ed., *Waitangi: Maori and Pakeha Perspectives*, Oxford University Press, Auckland, 1989, 25, 30-32.

<sup>61</sup> The leading authority is *Campbell v Hall* (1774) 1 Cowp 204; Lofft 655. Extensive additional authority is listed in *McHugh*, supra n60, footnotes 117, 120 and 121.

<sup>62</sup> See Lord Haldane in *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, 407.

<sup>63</sup> See eg Richmond J, delivering the decision of the Court of Appeal in *Nireaha Tamaki v Baker*, supra note 50 at 488; "Protest of Bench and Bar" supra n43, per Stout CJ at 746, per Edwards J at 757; Salmond as Solicitor-General in *Tamihana Korokai v Solicitor General* (1912) 32 NZLR 321, 331-332.

<sup>64</sup> *Salmond: Southern Jurist*, Victoria University Press, Wellington, 1995, 113.

The concern, I take it, was that if Crown grants could be challenged after they were made, Maori other than those from whom the Crown had obtained a title might seek to upset that title after a Crown grant – so titles generally would be unstable. However, it was always wrong to believe that this concern could support the *Wi Parata* view of native title. A concern to secure the stability of a Crown grant of land was no doubt one proper justification for the cautious rules about the availability of *scire facias* and other like remedies to challenge a Crown grant *after* it had been made. But that concern was irrelevant to the status of native title *before* such a grant was made, as Lord Davey correctly pointed out. The views taken about the status of native title in *Wi Parata*, that (1) native title was a right only under the *jus gentium* and (2) negotiations by the Crown for its surrender were akin to acts of state that could not be questioned in the domestic courts, were either right or wrong on their merits. For a court to have held explicitly that these things were so merely because it was considered expedient that they should be so, would clearly have been improper. Thus, for a court to be influenced by this consideration without any explicit holding was equally improper.

In fact, the findings by Prendergast in *Wi Parata* on the two points noted above were unsound. The finding that native title is a right only under the *jus gentium* misunderstood the judgments in *R v Symonds* and ignored a *ratio* of a Court of Appeal decision that had held it is a right under the common law.<sup>65</sup> Prendergast CJ also misunderstood the American authorities that had been relied on in *Symonds*, which clearly were concerned with a right under domestic law. This is plain enough in all the cases and texts, but it is made clear beyond question in a passage in *Johnson v McIntosh* in which Marshall CJ speaks of “the Indian title” as “entitled to the respect of all courts”.<sup>66</sup> Plainly, he is not speaking of courts under international law, for in 1823 there were none.

Prendergast CJ’s finding that transactions by the Crown with Maori for the surrender of native title are akin to acts of state and hence could not be investigated in the courts was based on three cases that, when examined, provide no support at all for that proposition. Two of them merely held that treaty rights cannot be relied on in domestic courts.<sup>67</sup> So far as relevant, the third held only that the Crown’s *annexing* of territory was an act of state and could not be challenged in a domestic

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<sup>65</sup> *Supra* n47.

<sup>66</sup> (1823) 8 Wheat 543, 592.

<sup>67</sup> *Rustomjee v the Queen* (1876) 45 LJQB 249; *Nabob of Arcot v East India Co* (1793) 4 Br CC 181, 29 ER 841.

court.<sup>68</sup> It said nothing about the law that came into force when a common law country acquired new territory, whether by annexing it or by any other method. As Paul McHugh has pointed out, this finding by Prendergast CJ also had the odd result that it treated the Crown as involved in an act of state when negotiating with its own citizens.<sup>69</sup>

Such was the emotional commitment to the *Wi Parata* view of native title among New Zealand judges in the early years of the twentieth century that even if Lord Davey had signaled clearly that this view was questionable, it is not clear that it would have been overturned in the New Zealand Court of Appeal. However, if the signal had been given, it is likely that early on the issue would have been properly researched and fully argued before the Court of Appeal. Sooner or later a case in which it was directly relevant would have gone to the Privy Council itself for a definitive ruling.

A comment is now needed on *Wallis v Solicitor-General for New Zealand*,<sup>70</sup> which went to the Privy Council in 1903, for that might seem to have been just such a case. In fact, this was not a case in which the status of native title should have been relevant. The proceeding was an application by Anglican Bishops to vary the terms of the charitable trust that had been disputed in *Wi Parata* to permit them to use the money they had accumulated from renting the land to establish a school in an entirely different area. As the reader will recall, the trust had been established by a grant from Governor Grey in 1850, following a gift for the purpose of the trust from the Maori owners. Even if, as the Privy Council clearly assumed in its decision, the beneficial interest in the trust came from the Maori owners rather than the Crown, the settlers of the trust were not required parties, or even appropriate parties, to such an action. The Solicitor-General was a party, not because the Crown was deemed the donor, but only because of the Solicitor-General's role as defender of charities on behalf of the public. He had, however, chosen to attack the trust and assert that the land had reverted to the Crown, an argument accepted by the Court of Appeal. That the Court of Appeal had even considered this argument in these proceedings was one ground of the Privy Council's complaint about the procedure that had been allowed in the Court of Appeal.<sup>71</sup> However, given that the Court of Appeal had held that the trust was void and that the land had reverted to the Crown,

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<sup>68</sup> *Doss v Secretary for State for India* (1875) 19 LR Eq 509.

<sup>69</sup> P McHugh, *The Maori Magna Carta*, Oxford University Press, Auckland, 1991, 110.

<sup>70</sup> [1903] AC 173.

<sup>71</sup> *Ibid* 186.

the nature of the Crown's original interest in the land became relevant in the Privy Council. Thus, by an odd turn of fate, this case might have provided an opportunity for a clear announcement on native title in the Privy Council. As things turned out, Lord MacNaghten, who delivered the decision of the Judicial Committee, made bad mistakes about both native title and the Court of Appeal's view about it that produced confusion rather than clarity.

One mistake was to assert that the legal basis of native title derived from the Treaty of Waitangi,<sup>72</sup> rather than from the common law (which the English version of the Treaty had expressed), a view that was plainly wrong, given that treaties are not a source of law in domestic law within legal systems based on English law. Lord MacNaghten's second bad mistake was to fail to understand that the judges in the Court of Appeal had assumed that Maori had no legally recognisable interest in the land, so that in their view the beneficial interest came from the Crown to whom the land had reverted through failure of the objects of the trust. In the Court of Appeal the Attorney-General had stated that the Crown was concerned that if the Court were to allow the Bishops to vary the trust and build a school in another area that would prevent the Crown from carrying out its *moral* obligation as owner of the land to the original donors, a consideration taken into account by the Court of Appeal. Because Lord MacNaghten assumed that the Crown had no interest in the land, he misconstrued the Court of Appeal's consideration of this concern as undue deference by the Court to the executive.<sup>73</sup> Consequently, he made adverse comments about the independence of the Court of Appeal that provoked wrath in New Zealand. Lord MacNaghten had been a member of the Privy Council in *Nireaha Tamaki*, so, if the judgment in that earlier case had been clear, it is unlikely he would have made these bad mistakes.

The sequel to the Privy Council judgment in *Wallis* was the well-known "Protest of Bench and Bar",<sup>74</sup> made against it two months later in Wellington. In this protest, the New Zealand judges who spoke misunderstand the basis of the Privy Council decision almost as badly as it had misunderstood the basis of the Court of Appeal's decision. Williams J did, however, manage to recognise that the difference between the two courts lay partly in different perceptions of who was, in law, the donor of the land: the Maori owners or the Crown. He then considered the various possibilities under which the Maori donors might

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<sup>72</sup> Ibid 179 and 187-188.

<sup>73</sup> Ibid 186-189; cf "Protest of Bench and Bar" supra n43 at 754-756.

<sup>74</sup> Supra n43.

have had a legally recognisable interest in the land, and rejected each of them. However, because the basis of native title had been so carelessly stated in *Wallis*, and had been left so murky in *Nireaha Tamaki* (which he discussed), he failed to consider the possibility that its foundation lay in the common law.<sup>75</sup> This whole muddle merely entrenched the New Zealand view about native title.

In 1909, the New Zealand legislature significantly reduced the range of cases in which native title could be relied on.<sup>76</sup> Perhaps that would have happened anyway, even if it had been recognised that native title existed under the common law; but at the least it would have been more difficult. In any event, despite the statute, cases in which the status of native title was relevant continued to occur.

The first case of importance after that date was *Tamihana Korokai v Solicitor-General*, in 1912.<sup>77</sup> The plaintiff had lodged a claim with the Native Land Court to the bed of Lake Rotorua. Through the Solicitor-General the Crown claimed that the bed of the lake was Crown land. The issue was whether that claim precluded the Native Land Court from hearing the plaintiff's claim. All five judges in the Court of Appeal held that it did not, the basis of their decision being that the only way the Crown could preclude such an action was by issuing a formal proclamation under section 95 of the Native Land Act 1909 that the land was free from native customary title: a mere assertion by the Solicitor-General would not do.

However, it is not the decision, but the way the case was argued and the grounds of the judgments that are of interest here. With the possible exception of Cooper J, who seems to have entertained the idea that rights of native title existed before the statutes,<sup>78</sup> but who also relied on the statutes, all the lawyers involved treated native title as having only a statutory basis. This included counsel for the plaintiff, who argued that domestic legislation had given effect to the rights guaranteed by the Treaty of Waitangi.<sup>79</sup> He relied on *Nireaha Tamaki* in support, although he suggested that the judgment in that case “did not depend on the Native Rights Act, 1865, alone, but also on the whole of the Native land

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<sup>75</sup> Ibid 747-750.

<sup>76</sup> Native Land Act 1909 ss 84-89 and 100.

<sup>77</sup> (1912) 32 NZLR 321.

<sup>78</sup> Ibid 353.

<sup>79</sup> Ibid 328.



legislation.”<sup>80</sup> On the other side, John Salmond, as Solicitor-General, argued as follows:<sup>81</sup>

In *Nireaha Tamaki v Baker* the Privy Council considered two distinct questions: 1 Is Native title available against the Crown? 2 Is Native title a ground upon which any action may be brought in the Supreme Court? They found it unnecessary to decide the first question, as they decided there was no claim against the Crown, so the judgment of this Court [ie the judgment of *Nireaha Tamaki* in the Court of Appeal] on that question stands. The second question was answered in the affirmative, the sole ground of the decision being the Native Rights Act 1865.

This argument is technically correct, except that it ignores the conflicting finding on the status of native title in the earlier Court of Appeal in *In re the Landon and Whitaker Claims Act 1871*,<sup>82</sup> which later in his argument Salmond dismisses as a dictum.<sup>83</sup> However, Salmond’s argument is also inclined to be misleading as suggesting, wrongly, that the Privy Council precluded any other basis for native title than the Native Rights Act 1865.

All five judges grounded their decision on the plaintiff’s statutory rights, although it was not now the right to rely on native title in the Courts that they referred to, for that had been severely restricted by the Native Land Act 1909;<sup>84</sup> it was the right to have a claim to native title investigated by the Native Land Court.<sup>85</sup>

The New Zealand understanding of the law on native title was now firmly set in a pattern. The basic ideas were: (1) the Treaty is not binding in domestic law, although it gave rights under the *jus gentium* and created a moral obligation on the Crown, and (2) that obligation had been fulfilled by domestic legislation. As it happens, a decision that, had it been carefully studied in New Zealand, ought to have changed that fixed understanding was given by the Privy Council on an appeal from New Zealand the very next year. The case, *Mana Kapua v Para*

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<sup>80</sup> Ibid, 337.

<sup>81</sup> Ibid 332.

<sup>82</sup> Supra n47.

<sup>83</sup> Supra n77 at 332.

<sup>84</sup> Sections 84 and 88(2).

<sup>85</sup> Supra n7, Stout CJ at 344-345, Williams J at 348, Edwards J at 349, Cooper J at 353, and Chapman J at 356-357.

*Haimona*,<sup>86</sup> turned on the effect of an Order in Council made on 2 September 1865 that confiscated land of a tribe that had been in rebellion, but excluded land of loyal Maori. Viscount Haldane, who delivered the judgment of the Court, held that the Order left that part of the land that represented the interests of loyal Maori in the hands of those Maori. He said:<sup>87</sup>

Their Lordships are of the opinion that the Order in Council of September 2, 1865, did not extinguish the native title of any loyal inhabitant.

Since the Native Rights Act 1865 did not come into effect until 26 September 1865, he is clearly speaking of a native title at common law. In 1874 a Crown grant was made of a portion of the total area of land covered by the 1865 Order to 88 loyal Maori from two different tribes. This represented their share of the total area covered by the original confiscation order. Lord Haldane described the condition of this land prior to the Crown grant as follows:<sup>88</sup>

Prior to the grant.. the land in question had been held by the natives under their customs and usages, and these appear not to have been investigated. As the land had never been granted by the Crown, the radical title was, up to the date of the grant, vested in the Crown subject to the burden of the native customary title to occupancy.

Although the Native Rights Act 1865 was in force at the time of this grant Lord Haldane did not rely on it for this finding; indeed that Act is not mentioned in the judgment. So, again he is relying on the position at common law. The dispute in the case was about the proper principle to be applied in partitioning this land between the 88 loyal Maori. A variety of special tribunals had ruled on this before the case reached the Privy Council. Some of them had followed the principle of dividing the land according to the ancient holdings of the two tribes to which these Maori belonged; others had ignored these holdings and treated equally those of equal tribal blood. Lord Haldane held that because the loyal Maori had held the land under customary title up to the date of the grant the former was the correct principle.<sup>89</sup> Thus, the Court's finding that native title in the land existed prior to the grant was a *ratio* of the case.

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<sup>86</sup> [1913] AC 761.

<sup>87</sup> Ibid 764.

<sup>88</sup> Ibid 765.

<sup>89</sup> Ibid 766-768.

This finding was not noticed in New Zealand.<sup>90</sup> One reason, no doubt, was that it was imbedded in an argument about the effect of an Order under the New Zealand Settlement Act 1863 - the legislation used to effect confiscations of land from rebel Maori - and issues under that Act must already have been arcane by 1914. Another reason was that by that time little in New Zealand case-law would have led lawyers to look for authority outside the established orthodoxy, as *R v Symonds* was not readily available.<sup>91</sup> In any event, no one did. Indexes indicate that the case was not cited in a reported judgment in the New Zealand Law Reports until 1990.<sup>92</sup>

In the meantime the old approach continued unabated. Almost exactly a year after *Mana Kapua*, in *Waipapakura v Hempton*, in 1914, Stout CJ said:<sup>93</sup>

...it is clear from the decision of the Privy Council in *Nireaha Tamaki v Baker* that, until there is some legislative proviso as to the carrying-out of the treaty, the Court is helpless to give effect to its provisions. .. In that case their Lordships relied upon the provisions of the Native Rights Act, 1865.

In 1921, in the Privy Council in *Amodu Tijani v The Secretary, Southern Nigeria*,<sup>94</sup> Viscount Haldane gave a detailed judgment the whole of which was about the nature and status of native title. In the course of his judgment he stated<sup>95</sup>: “A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners...”. He meant the rights of an indigenous people holding under a system of tenure analogous in many ways to the Maori system. Again, this case was not noticed in New Zealand. It was cited in *In re the Bed of the Wanganui River*, in 1962, but not on the status of native title; it was not then cited again until *Te Weehi v Regional Fisheries Officer* in 1986 - the first case in New Zealand to challenge the old orthodoxy.<sup>96</sup>

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<sup>90</sup> John Salmond was, however, counsel for the Crown before the Privy Council (although he was not called on), so he at least ought to have appreciated the significance of the finding.

<sup>91</sup> It was not printed in New Zealand until 1938 when it was published in New Zealand Privy Council Cases 1840–1932, H F Von Haast ed.

<sup>92</sup> In *Te Runanga o Muriwhenua Inc v AG* [1990] 2 NZLR 641, 645. I have searched the indexes to the New Zealand Law Reports to 1963 and Lexis-Nexis, which has the New Zealand Law Reports from 1958 and other sources.

<sup>93</sup> (1914) 33 NZLR 1065, 1071.

<sup>94</sup> [1921] 2 AC 399.

<sup>95</sup> Ibid 407.

<sup>96</sup> [1986] 1 NZLR 680. I have searched the same sources as in n92.

Between 1914 and 1963 the established orthodoxy had been repeated in at least two cases.<sup>97</sup> When the Court of Appeal was asked to consider a claim by two Maori tribes to the foreshore of Ninety-mile Beach in 1963,<sup>98</sup> given that the foreshore had not been included in the Crown grants of adjacent land, it was this orthodox view that eventually determined the case. The Maori Land Court had held that before 1840 the two tribes had owned the foreshore of the beach according to their custom and usage, but it then stated a case for the opinion of the Supreme Court on whether the Maori Land Court had jurisdiction to issue a freehold title in the circumstances. In the Court of Appeal, counsel for the appellants (the Maori tribes) vigorously defended the position that the Maori Land Court had such jurisdiction. He argued that according to the established cases:<sup>99</sup>

Whatever were the native rights as at the Treaty, they were to be protected and preserved, and, while the Crown may have become owner of all the land, it was under a recognised obligation to give the Maoris a freehold title to what could be proved to have been held according to their custom and usage.

Pushed by the Court as to whether this was a recognised obligation, morally or legally, he responded:<sup>100</sup>

I say, legally, resting on the Native Land Act 1862 and the Native Rights Act 1865.

The three judges agreed that this, and later, legislation had given Maori a right to have their claims to title investigated by the Native Land Court, by then renamed the Maori Land Court.<sup>101</sup> However, they also held that if a title had been granted to high-water mark following such an investigation this extinguished all claims in the area, including those to land below high-water mark. In short, the statutory right was satisfied by the investigation by the Maori Land Court, following which the Court could determine where the boundary should be, and this then settled the title to land on both sides of high-water mark. Once the statutory right

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<sup>97</sup> *Te HeuHeu Tukino v Aotea District Maori Land Board* [1939] NZLR 107, 120; *In re the Bed of the Wanganui River* [1955] NZLR 419, 425, 432, 441, 462-463, 470.

<sup>98</sup> *In re Ninety-Mile Beach* [1963] NZLR 461.

<sup>99</sup> *Ibid* 463.

<sup>100</sup> *Idem*.

<sup>101</sup> *Ibid*, North J at 468-472, T A Gresson J at 475-478.

had been exhausted, no other right remained.<sup>102</sup> One of the judges, T A Gresson J, also relied on s 147 of the Harbours Act 1878, which precluded a “grant” of the shore of the sea without an Act of the General Assembly.<sup>103</sup> But, since, if Maori had a title at common law, they needed no grant from the Crown, this argument also depended on the premise that no title existed at common law.

It was not until scholars began to work over the history again with care in the late 1970’s and early 1980’s that the misunderstandings by New Zealand courts that had prevailed since *Wi Parata* in 1877 were recognised.

## CONCLUSION

The judgment in *Wi Parata* on the status of native title was unprincipled and wrong. Notwithstanding its defects, this judgment took a powerful hold on the minds of New Zealand judges and lawyers. Plainly, one reason for that was that the position it took was congenial to colonists: it gave the Crown autocratic power in dealing with Maori claims and it allayed the fears of settlers about potential challenges to titles that were based on a Crown grant. However, another influence was the current view of international law as a body of custom between civilized nations having little or nothing to do with domestic law. This led judges into the mistake of treating general principles and customs of international law as having the same status within the common law as rights under treaties.

Given the importance of the issue, the mistake in *Wi Parata* needed to be corrected by a higher court. When the New Zealand Court of Appeal confirmed the *Wi Parata* position in *Nireaha Tamaki*, it was important that the mistake be corrected in the Privy Council.

That almost happened. Lord Davey’s instinct was that the drafters of the relevant Imperial and Colonial legislation had been correct to assume that Maori had a legal right under the common law. But it did not quite happen. Judicial caution and the fact that the issue had not been argued fully held Lord Davey back from asserting this, and careless drafting of his judgment caused him not to make his position plain. The result was an obscure judgment that if not read with great care could be interpreted as holding that *Wi Parata* was right to the extent that it held no native title existed without statutory authority. That interpretation was taken by

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<sup>102</sup> Ibid, North J at 473, T A Gresson J at 478-4479. Gresson P concurred with both of the other judges.

<sup>103</sup> Ibid at 479-480.

New Zealand courts and it rapidly became entrenched. After 1903, and certainly after 1914, a New Zealand lawyer looking only at the reported New Zealand cases, and not having access to *R v Symonds*,<sup>104</sup> would have found it hard to see any other possibility. In any event, no one did. The Privy Council decisions of 1913 and 1921 that were contrary to the New Zealand law were simply not noticed within New Zealand. So, for eighty-five years after the decision in *Nireaha Tamaki*, New Zealand courts, its administrators, and its politicians continued to deal with issues of native title on the basis of a serious legal mistake. Courts began to correct that mistake in 1986, and the Court of Appeal definitively corrected it in *Attorney-General v Ngati Apa*<sup>105</sup> in 2003; but outside of the courts its influence continues, as the political sequel to *Ngati Apa* showed.

I do not want to suggest that the judgment in *Nireaha Tamaki* was solely responsible for this history: the aberrant judgment of Prendergast CJ in *Wi Parata* and the inability of New Zealand judges in the early twentieth century to question his view of the law bear more responsibility. Lord MacNaghten's careless decision in *Wallis* also contributed. But small things can sometimes make a large difference in human history. From that point of view, it is interesting to reflect how different New Zealand legal history might have been if Lord Davey's judgment in *Nireaha Tamaki* had been clear.

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<sup>104</sup> See supra n91.

<sup>105</sup> Supra n3.



## Addendum

### **A Structural Analysis of *Wi Parata v the Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72**

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*Wi Parata v the Bishop of Wellington* is a hard case to understand. The following analysis of its structure may help those wanting to study it with care. (In the account below, I refer to the text by page, column, and line, separated by points: eg 76.2.16 means page 76, column 2, line 16. Lines are counted from the top of the page, except when “up” is used when they are counted from the bottom of the page; footnotes are ignored in both cases.)

The proceedings were an application by *Wi Parata*, a Ngatitōa chief. They sought a declaration that land gifted by the tribe to Bishop Selwyn, Bishop of New Zealand, to assist the establishing of a school at Witireia, and subsequently transferred by the Crown to Bishop Selwyn, be declared to be part of native lands lawfully reserved for the use and benefit of the Ngatitōa tribe, and for other related declarations, including a declaration that the Crown grant of the land to the Bishop be declared void. The second defendant to the proceedings was the Attorney-General representing the Crown. He entered a demurrer claiming that the pleadings disclosed no cause of action because a grant from the Crown could not be declared void for a matter not appearing on its face, except after the issue of a writ of *scire facias*. The first defendant, the Bishop, had also entered demurrers. The case was an argument on the points of law raised by the demurrers.

The court upheld most of the demurrers and dismissed the plaintiff’s action. Prendergast CJ gave four grounds for the decision and then sketched three “obstacles” to the plaintiff succeeding that were not relied on as grounds for the decision. Two distinct reasons were given for one of the grounds, both involving points of law, and incidental comment was inserted between some of them. The four grounds were:

1. (76.2.16 – 77.1.4) The pleadings do not allege that the trusts imposed on the Bishop by the Crown grant of 1850 were any different to those expressed in the deed of cession by the Maori



owners. (The deed was not produced, but the fact that there had been a deed was stated in the Crown grant.)

*Comment:* Plainly, the deed of cession by the Maori owners was not available at the time of this case. The pleadings refer to an oral agreement and allege that the trusts imposed on the Bishop by the Crown grant were contrary to this oral agreement. The problem was that there could be no guarantee that the oral agreement coincided with the (unavailable) deed to which the Crown grant itself referred. If there had been a difference, then obviously the deed would have prevailed over the oral agreement. Without a pleading that there never had been a deed, the oral agreement could not properly be asserted. Alternatively, if the plaintiffs wished to bring evidence about the contents of a lost deed they needed to plead those contents. The pleadings did neither of these things. As it happens, we know from *Hohepa Wi Neera v the Bishop of Wellington*<sup>1</sup> and *Wallis v Solicitor-General*<sup>2</sup> that a deed (or letter) of cession by the Maori owners did in fact exist, for by the time of these later cases it was available. It is salutary to discover that its terms conformed broadly to those stated in the Crown grant and were inconsistent with the alleged oral agreement that was pleaded in *Wi Parata*. Because there was always a danger that might be so, this ground for the decision was sound and would have been sufficient on its own to dispose of the case.

2. (77.1.5 – 80.2.14) The court has no jurisdiction to avoid a Crown grant either on the ground that the Crown has not conformed in its grant to the terms on which the aboriginal owners have ceded their rights in the land or that the native title has not been extinguished, except perhaps in proceedings by *scire facias* or similar proceeding, on the prosecution of the Crown itself. Two reasons are given:

- 2.1 (77.1.16 – 78.2.16up) The only rights and duties relating to native title that existed from the foundation of the colony were rights and duties under *the jus gentium* (ie international law) only.

Prendergast CJ then states that the reason for this is that no body of law or custom capable of being understood and administered by the courts of a civilized country existed among Maori. He goes on to state that the Treaty of Waitangi makes no difference to this finding

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<sup>1</sup> Supra n7.

<sup>2</sup> Supra n68.

(78.1.12up – 78.2.8) and that this finding conforms to previous decisions of the court (78.2.9 – 78.2.16up).

2.2 (78.2.15up – 80.2.14) Transactions with natives for the cession of their title to the Crown are acts of state, or akin to acts of state, and therefore not examinable in the courts.

Having stated this supposed law, and given these two reasons for it, Prendergast CJ argues that the Native Rights Act 1865 makes no difference to it (79.1.19up - 80.1.16up). He then argues that this law is supported by the policy of some recent legislation (80.1.15up – 80.2.14). Then follows some extraneous argument criticising Chapman J in *Symonds* for saying that the American courts would allow a Crown grant (or its equivalent) to be challenged in a suit by a native Indian on the ground that the native title had not been extinguished.

*Comment on this last point:* Prendergast CJ may have been right that the American courts would not have allowed a challenge to a State grant on the ground that the native title had not been extinguished; but Chapman J was right to believe that the American authorities treated the Indian right of occupancy as capable of protection in the courts. In *Cherokee Nation v State of Georgia*,<sup>3</sup> the case relied on by Chapman J, the Cherokee failed in the US Supreme Court because the court held by a majority of three to two that the Cherokee were not a “foreign nation”, as that term was used in the Constitution, and therefore the Supreme Court did not have original jurisdiction to hear the case. However, there are many indications in the judgments that if the case had come up through the Courts in a regular way, and the evidence supported the pleadings, the Court would have protected the Indian title.

3. (81.1.13 – 81.1.9up) The pleadings allege that at the time of the gift by the Maori the lands were part of a reserve set aside by the Government for the exclusive use of Ngatitōa, but they do not disclose any power in the Governor to create such a reserve. (It is not entirely clear whether this is separate ground for the decision or just a passing observation, but I have treated it as the former as it seems to be self-contained.)

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<sup>3</sup> (1831) 5 Peters 1.

*Comment:* This point depends on the finding in the earlier case, *R v MacAndrew*,<sup>4</sup> that the Governor had no power in the early period of the colony to set aside reserves for Maori, except perhaps with the advice of the Legislative Council. This point is not developed with any care in *Wi Parata*, but the suggestion seems to be that the native title in the land had been extinguished sometime before the Maori made the gift to the Bishop and that the reserve of the relevant land to the tribe made by the Governor at that time was invalid. So, the tribe had no interest in the land at the time of the gift.

4. (81.1.6up – 82.2.15) The *procedure* followed was inappropriate: a Crown grant cannot be avoided for a matter not appearing on its face, except on a writ of *scire facias*, or similar procedure, taken in the name or on behalf of the Crown.

*Comment:* This is the finding that I argue in the text was the only finding of the court in *Wi Parata* on *scire facias* to which the Privy Council in *Nireaha Tamaki* gave tentative approval.

Then follow the three “obstacles” that are expressed but not relied on. They are: (1) even if the alleged (oral) trust for children of Ngatitōa only were established, the trust, being charitable, could be applied *cy pres* (ie to analogous purposes) (82.2.16 – 83.1.10); (2) the same applies to the different trust referred to in the Crown grant (83.1.11 – 83.2.10); (3) in any event, in law the Crown was the donor, not Ngatitōa (83.2.11 – 83.2.16).

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<sup>4</sup> (1869) 1 NZCA 172.

