

Newcastle “Land and Freedom” Conference Paper:
Grant Morris, Department of History, University of Waikato

“A simple nullity”: Chief Justice Sir James Prendergast, The Treaty of Waitangi and *Wi Parata v The Bishop of Wellington* (1877)

1. Introduction

During the last decades of the twentieth century, New Zealand as a nation has increasingly focused on Maori and Pakeha relations. At the forefront of debate has been the Treaty of Waitangi. This debate has taken many forms; political argument, academic analysis and legal reasoning. The Treaty debate has also transformed a late nineteenth century New Zealand Supreme Court case into the most notorious judicial decision in New Zealand history. In 1877 Chief Justice Sir James Prendergast declared in the case, *Wi Parata v The Bishop of Wellington*¹ that the Treaty of Waitangi was “a simple nullity”. This decision heavily influenced New Zealand law until being challenged during the mid-1980s.

My doctoral thesis is entitled “Chief Justice Sir James Prendergast and the administration of New Zealand colonial justice, 1862-1899”. In this study, I am focusing upon Prendergast’s role in the development of the New Zealand legal system. While Prendergast’s career included many important achievements, it is his decision in the *Wi Parata* case for which he is remembered today. The *Wi Parata* decision has been discussed in-depth by various legal commentators, but Prendergast’s role in the decision has not yet been viewed in historical context. This paper will provide what has been, up till now, a two-dimensional historical event, with an important third dimension. To understand the pivotal decision, it is vital to know the relevant background facts of Prendergast and the case itself. A close analysis of the entire decision reveals that there is much more to it than the simple quotation reveals. A brief outline of the decision’s influence will be provided to assess its historical legacy, and modern academic opinion will be explored.

¹(1877) 3 NZ Jur (NS) 72 (SC).

Finally, this paper will provide a tentative assessment of the role of Prendergast in this controversial decision. This role was consistent with Prendergast's British heritage and earlier legal career.

2. *Background to the case*

A knowledge of certain events in James Prendergast's background is important in helping to view the *Wi Parata* decision in context. Prendergast was born in London in 1827. His father was Michael Prendergast, an eminent Queen's Counsel.² James Prendergast had all the educational opportunities a young middle-class Englishman needed to pursue a successful career; St Paul's School, Cambridge University and Inner Temple.³ In his early twenties, Prendergast already demonstrated an ambitious, albeit conservative approach to life.⁴ The first experience Prendergast had with colonial society was his adventurous decision to join the gold rushes in Victoria, Australia during the early 1850s. A fortune made from gold-mining proved elusive and Prendergast began to appreciate the awesome challenges facing colonists in a new and alien

²Judith Bassett and J.G.H. Hannan, 'James Prendergast', in *A Dictionary of New Zealand Biography: Vol. 1*, edited by W.H. Oliver (Wellington: Allen & Unwin/Department of Internal Affairs, 1990), p. 354.

³G. H. Scholefield (ed.), *A Dictionary of New Zealand Biography: Vol. 2* (Wellington: Department of Internal Affairs, 1940), p. 184

⁴James Prendergast, University of Cambridge, personal letters to father Michael Prendergast QC, 1846-1850, MS-1791, Alexander Turnbull Library, Wellington.

land.⁵ Prendergast returned to London four years later to be called to the English Bar. Prendergast found it difficult to make headway in an overcrowded profession.⁶ James' older brother, Michael, was enjoying success in New Zealand as a lawyer-politician and convinced James to join him in Dunedin, currently blessed by the discovery of gold. James Prendergast arrived in Dunedin in 1862 to begin work as a New Zealand lawyer.⁷ He never looked back.

⁵James Prendergast, Victoria, Australia, personal letters to Michael Prendergast QC, London, 1852-1855, MS-1791, Alexander Turnbull Library, Wellington.

⁶Bassett and Hannan, p. 354.

⁷*Otago Daily Times*, 21 November 1862, p. 4.

After only three years as a successful Otago barrister, Prendergast was appointed Attorney-General, a position he held for ten years. Prendergast became well-known for his consolidation of criminal law and his hardline approach in dealing with the Maori 'disturbances' during the late 1860s.⁸ In 1875 Prendergast was made New Zealand's third Chief Justice, a spectacular rise for the ambitious colonist.⁹ By this stage in his career, Prendergast had become a key figure in the New Zealand settler establishment with a firm commitment to creating a stable and prosperous colony free from dissension. After two years of his twenty-four year career as Chief Justice, Prendergast and his Wellington judicial colleague, Christopher William Richmond, heard the case of *Wi Parata v The Bishop of Wellington* in 1877.

The facts of the case stretched back almost three decades to a period of increasing European dominance in New Zealand. In 1848 the Ngati Toa tribe in the south-west of the North Island reached an agreement with the Anglican Bishop of New Zealand to place a parcel of land aside for educational purposes. This land was held under native or aboriginal title. In 1850 Governor George Grey issued a Crown Grant to the Bishop without the consent of Ngati Toa.¹⁰ During the intervening twenty-seven years, no school was established and Maori numbers in the area substantially diminished. Wi Parata, a Maori member of Parliament and a Ngati Toa chief,

⁸Bassett and Hannan, p. 355.

⁹'The New Chief Justice', *Colonial Law Journal*, (1865-1875), pp. 24-26.

¹⁰George Grey, Governor of New Zealand, Crown Grant of Porirua land to George Augustus Selwyn, Bishop of New Zealand, 28 December 1850, MS-Papers-5449-2 *Wi Parata versus the Bishop of Wellington, and others - Papers [1898-1905]* found under Church of the Province of New Zealand. Wellington Diocese: Further records (89-008), Alexander Turnbull Library, Wellington.

decided to take the case to the Supreme Court in an attempt to recover the entrusted land for his tribe.¹¹

¹¹*Wi Parata* at 72.

The events leading up to the 1877 decision were not unique and therefore served as a test case for similar situations in the colony. A Royal Commission in 1869 had shown that many similar trusts around the colony had also failed to achieve their purpose. As Frederika Hackshaw argues, “the political implications of that claim are self-evident: a favourable decision for the plaintiff would open the floodgates to native demands for the return of every similarly situated trust property.”¹² The case was potentially a political time-bomb. Parata petitioned the Court for the return of the land to its original Maori owners on the basis that the grant had been issued without the tribe’s consent and the expected school had not been built.¹³ The judges who were assigned the task of hearing *Wi Parata’s* case could not avoid controversy.

Prendergast’s present historical reputation rests on his decision in *Wi Parata v The Bishop of Wellington*. Only a few legal commentators, when discussing the case, have emphasised that the decision was a cooperative effort made by two judges.¹⁴ Both James Prendergast and Christopher William Richmond were responsible for Supreme Court decisions in the Wellington judicial region. Richmond, like Prendergast, was an English lawyer from a privileged background.¹⁵ Arriving in the colony in 1853 Richmond and the extended Richmond-Atkinson clan secured a leading position in colonial politics. The blame for the controversial Taranaki War (1860-61) has been partly attributed to Richmond by some commentators.¹⁶ Richmond was no stranger to

¹²Frederika Hackshaw, ‘Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi’, in *Waitangi: Maori and Pakeha Perspectives of the Treaty of Waitangi*, edited by I. H. Kawharu (Auckland: Oxford University Press, 1989), p. 110.

¹³*Wi Parata* at 72-73.

¹⁴See David V. Williams, ‘Te Tiriti o Waitangi - Unique Relationship Between Crown and Tangata Whenua?’, in Kawharu, p. 87; Stuart C. Scott, *The Travesty of Waitangi: Towards Anarchy* (Christchurch: Caxton Press, 1995), p. 25; E. J. Haughey, ‘A vindication of Sir James Prendergast’, *New Zealand Law Journal* (July 1990), p. 230.

¹⁵Judith Bassett, *Sir Harry Atkinson, 1831-1892* (Auckland: Auckland University Press, 1975), pp. 2-5.

¹⁶Principally early New Zealand historians such as Saunders, Rusden and Miller, but also contemporaries such as William Martin and Octavius Hadfield. Richmond’s critics are answered and his conduct defended in, W. Downie Stewart, *Mr. Justice Richmond and the Taranaki War of 1860: A Great Judge Vindicated* (Wellington: Reed, 1947), especially pp. 7-9.

difficult decisions regarding Maori land rights. When viewing the *Wi Parata* decision in context it is necessary to appreciate the supporting role of Richmond in formulating the Court's decision.

It is also necessary to highlight the influence of another key legal player in the *Wi Parata* drama. The barrister for the plaintiff, *Wi Parata*, was an Irish lawyer named George E. Barton. Barton was a colourful character, often finding himself at the centre of controversy.¹⁷ During 1877, Barton was prominent in a number of important Supreme Court cases tried in Wellington. A clash of personalities had seen a bitter feud develop between Barton and the two judges, Prendergast and Richmond. Indeed, only two months before the decision in *Wi Parata* was handed down, Barton had submitted a formal petition to Parliament to force the resignation of Prendergast and Richmond for alleged bias against Barton and his clients and judicial incompetence.¹⁸ In January of 1878 Barton would make colonial legal history for being found in contempt of court by Prendergast and imprisoned for one month.¹⁹ The experience of Prendergast and Richmond with Maori affairs and their bitter relationship with Barton must be considered when analysing the intricate *Wi Parata* decision.

3. *The decision*

The decision in *Wi Parata v The Bishop of Wellington* was far from just a simple one-line quotation. Prendergast's judgment was complex and discussed a variety of related issues. The landmark decision stated that unless native customary title was supported by a Crown Grant it could not be accepted or enforced by the Courts. The Crown Grant made to the Bishop was unable to be annulled by the Court and the existence of this grant implied that the Crown had used its sovereign powers to extinguish any existing native title. When the Crown acquired the North Island of New Zealand by occupation and the South Island by discovery, it also acquired

¹⁷Iain Gallaway, 'Otago', in *Portrait of a Profession: The Centennial Book of the New Zealand Law Society*, edited by Robin Cooke (Wellington: Reed, 1969), p. 332.

¹⁸Report on Petition 172 - G. E. Barton complaining of improper and partial conduct on part of certain judges of SC and asking for inquiry and relief, *Appendices to the Journals of the House of Representatives* (AJHR), 1877, I-2 p. 7.

¹⁹In the case *Gillon v MacDonald* (1878) discussed in, *New Zealand Jurist*, Vol. III, Part 2 (Feb 1878), p. 28.

the exclusive right of extinguishing aboriginal title. This right was accompanied by a treaty-like duty to protect Maori against infringement of their right of occupancy. Land transactions with Maori were a matter for the Crown only, and the Court had no jurisdiction to diminish the Crown powers.²⁰

Instead of only discussing the nature of Crown Grants and native title, Prendergast ventured further beyond the scope of the case facts to pass judgment on the Treaty of Waitangi. To justify his opinion that New Zealand was acquired by occupation and discovery, vital to his reasoning, Prendergast had to somehow dispose of the Treaty. The method Prendergast used became the most notorious example of legal reasoning in New Zealand history. The Chief Justice stated that,

²⁰*Wi Parata* at 78-79.

So far indeed as that instrument [The Treaty] purported to cede the sovereignty - a matter 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.²¹

New Zealand was peopled only by “primitive barbarians” and “savages” who had no sovereignty to cede nor existing body of customary law. After giving a landmark judgment on the most controversial aspect of New Zealand history, Prendergast returned to the specific facts in question. Prendergast applied the doctrine of *cy pres* and decided that the land would not revert to the surviving donors in any case, but to the Crown.²²

²¹*Wi Parata* at 78.

²²*Wi Parata* at 83.

While Prendergast adjudicated upon several issues relating to Maori land, *Wi Parata* is remembered for three words, “a simple nullity”. If these three words are preceded by “The Treaty of Waitangi is...”, all three articles of the Treaty, according to Prendergast, would be null and void. But Prendergast’s judgment did not state this. Instead it related “nullity” to the ceding of sovereignty. Both the Maori and English versions of the Treaty discuss more than sovereignty. Other issues include possession of Maori land, forests, fisheries and other taonga, the Crown’s preemptive right of purchase and the imparting of the rights and privileges of British subjects to Maori.²³ This perspective has been argued before by E.J. Haughey and forces one to examine the exact case language in more detail.²⁴ While there seems little doubt that Prendergast was seeking to sidestep the Treaty, he did not necessarily condemn it entirely. In his judgment, Prendergast made an attempt to widely canvass existing law, both statute and common.

In the course of his *Wi Parata* judgment, Prendergast referred to previous landmark cases dealing with aboriginal title and the Treaty of Waitangi. Prendergast provided a confused reference to the 1847 New Zealand Supreme Court case of the *Queen v Symonds*.²⁵ Prendergast stated that ‘Our view of this subject [indigenous peoples’ rights] is in accordance with previous decisions of this Court.’²⁶ The Chief Justice then discussed the *Symonds* case as an apposite example, implying concurrence with its findings. Later in his judgment, Prendergast took issue with specific arguments made by Chapman J in deciding the *Symonds* case.²⁷ Modern commentators have argued that Prendergast either ignored²⁸ or misunderstood the *Symonds* judgment which recognised aboriginal title.

²³From the Texts of the Treaty of Waitangi (Text in English, Maori and Translation of Maori text by I. H. Kawharu) in Kawharu, pp. 316-321.

²⁴Haughey, p. 230.

²⁵(1847) NZPCC 390 per Chapman J.

²⁶*Wi Parata* at 78.

²⁷*Wi Parata* at 80.

²⁸“There can be no doubt that Prendergast CJ was calculatedly putting the New Zealand jurisprudence on a different footing from that of the American.” P. G. McHugh, ‘From Sovereignty Talk to Settlement Time: The Constitutional Setting of Maori Claims in the 1990s’, in *Indigenous Peoples’ Rights in Australia, Canada, & New Zealand*, edited by Paul Havemann (Auckland: Oxford University Press, 1999), p. 449.

This raises the possibility that Prendergast manipulated relevant precedent to reach a judgment favourable to contemporary colonial land policy. Analysis of Prendergast's judgment in *Wi Parata* could lead to a number of conclusions. Prendergast may have purposely engineered a line of legal reasoning to aid in the alienation of Maori land, or given a sincere but mistaken judgment in an effort to clarify a complex area of law. Finally, Prendergast may have provided an accurate decision in accordance with convincing precedent demonstrating wise and logical legal reasoning. Between the polarities of an ethnocentric conspiracy and a triumph of justice is where the answer lies.

4. *The influence of the decision*

When describing the *Wi Parata* decision as the most notorious in New Zealand history, it is with reference to the legal legacy of the case rather than just specific ethnocentric statements. Prendergast's 1877 decision in the Supreme Court created a precedent that resulted in the alienation of large amounts of Maori land. Effectively, any Maori land not bolstered by a Crown Grant could not be claimed as native title. Native or aboriginal title could not be recognised by the New Zealand Courts. In 1909, Prendergast's reasoning was incorporated into statute form with the passing of the Native Land Act 1909 (s84) and later the Maori Affairs Act 1953.²⁹ Prendergast's judgment was relied upon to defeat Maori claims in several important twentieth century cases, for example, *Re the Bed of the Wanganui River* [1962]³⁰ and *Re Ninety-Mile Beach* [1963].³¹

The triumph of the *Wi Parata* line of reasoning was not without legal dispute, as demonstrated by the controversial Privy Council decisions in *Nireaha Tamaki v Baker* (1901)³² and *Wallis v Solicitor-General* (1903).³³ The Privy Council stated that it was "rather too late in the day" to

²⁹Haughey, p. 231.

³⁰[1962] NZLR 600.

³¹[1963] NZLR 461.

³²(1901) NZPCC 371.

³³(1903) NZPCC 730.

argue before a New Zealand Court that there was no customary Maori law which the courts could recognise.³⁴ While the Privy Council harshly criticised the actions of the New Zealand Supreme Court, the Council stated that *Wi Parata* had been correctly decided on its own facts.³⁵ It was not until the mid-1980s that Prendergast's decision would be challenged directly and. It could be argued that by this time the damage had been done.

³⁴*Nireaha Tamaki* at 382.

³⁵*Nireaha Tamaki* at 384.

In 1986 Williamson J recognised Maori customary fishing rights in *Te Weehi v Regional Fisheries Officer* [1986].³⁶ This decision, according to some commentators, successfully challenged Prendergast's decision in *Wi Parata*.³⁷ Paul McHugh heralded Williamson's decision as the end of Prendergast's legacy, "The common law doctrine of aboriginal title has returned to New Zealand at the cost to the personal reputation of the primary adjudicator against it, Chief Justice Prendergast".³⁸

While the *Te Weehi* case challenged Prendergast's views on aboriginal title, the landmark case, *NZ Maori Council v Attorney-General* [1987],³⁹ addressed another controversial issue raised by *Wi Parata*, the validity of the Treaty of Waitangi. This case concerned the effects of section 9 of the State Owned Enterprises Act 1986 which declared that Government actions must accord with the principles of the Treaty. In interpreting what these principles were the President of the Court of Appeal, Justice Robin Cooke, stated that "those principles require Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith."⁴⁰ The *Wi Parata* decision in relation to the Treaty was briefly discussed and criticised in the *NZ Maori*

³⁶[1986] 1 NZLR 680.

³⁷McHugh, 'From Sovereignty Talk to Settlement Time' in Havemann, p. 458.

³⁸McHugh, 'Constitutional Theory and Maori Claims', in Kawharu, p. 51.

³⁹[1987] 1 NZLR 641.

⁴⁰*New Zealand Maori Council* at 667 (Cooke P).

*Council case.*⁴¹

⁴¹“With the advent of legislation invoking recognition of the principles of the Treaty no longer is it to be regarded as a ‘simple nullity’ (as in *Wi Parata v Bishop of Wellington*)”, in *New Zealand Maori Council* at 715 (Bisson J).

The role of the Treaty of Waitangi in New Zealand society is possibly the most important and controversial issue facing modern New Zealanders. In Treaty jurisprudence, recent commentators have found it necessary to analyse the *Wi Parata* decision, either briefly⁴² or in-depth.⁴³ The result of this analysis has been an overwhelmingly negative view of Prendergast's decision. Therefore, the *Wi Parata* decision is arguably the most notorious in New Zealand's history. The lack of recognition given to the Treaty before 1975 is the principal reason for the relatively recent revisionist attention given to Prendergast's judgment by academics.

5. Academic opinion on the decision and the role of Prendergast

Recent academic opinion on Prendergast's decision in the *Wi Parata* case has been divided. This division has not been balanced, with most commentators condemning the decision as incorrect at best and manipulative ethnocentrism at worst. In his ground-breaking research into the common law concept of aboriginal title, Paul McHugh has dismissed *Wi Parata* as an example of misguided judicial activism. Far from following established law, Prendergast propagated the view of a small, unrepresentative group of English writers.⁴⁴ By disregarding the doctrine of aboriginal title, Prendergast steered New Zealand law off course for over a century. McHugh's research is of a jurisprudential nature and does not include in-depth discussion about Prendergast himself. Frederika Hackshaw, who like McHugh, completed a doctorate concerning aboriginal title, has also argued that Prendergast's decision did not reflect established law.⁴⁵ The arguments of these academics influenced Williamson J in his *Te Weehi* decision, highlighting the importance of Prendergast in New Zealand Treaty jurisprudence.

Another legal academic, David V. Williams, also comments negatively on Prendergast's role in the *Wi Parata* decision. Williams has described Prendergast's approach to Maori attempts to

⁴²Claudia Orange, *The Treaty of Waitangi* (Wellington: Bridget Williams Books, 1987), pp. 186-87.

⁴³For example, Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991).

⁴⁴McHugh, *The Maori Magna Carta*, pp. 113-14.

⁴⁵Hackshaw, p. 113.

enforce the terms of the Treaty as “racial chauvinism”.⁴⁶ Unlike McHugh, Williams finds similarities between Prendergast’s viewpoint and that of other Commonwealth colonial judges. Prendergast was not alone in his refusal to recognise indigenous rights.⁴⁷ Williams also stresses the importance of using Treaty based arguments instead of common law doctrine.⁴⁸

⁴⁶Williams, p. 72.

⁴⁷Williams, pp. 86-87.

⁴⁸Williams, p. 89. Compare with the arguments of McHugh which emphasises the importance of common law doctrine.

While the views of McHugh, Hackshaw and Williams have attained some degree of orthodoxy in recent years, several commentators have argued the validity of Prendergast's now notorious decision. The most convincing argument vindicating Prendergast was presented by E.J. Haughey, a former Maori Land Court Judge. Haughey emphasised the fact that Prendergast had only ruled in relation to Article One of the Treaty while seemingly confirming Article Two, which guaranteed Maori ordinary proprietary ownership.⁴⁹ While Haughey stated that Prendergast was acting in accordance with well-established international law, his discussion is brief and lacks the complexity and depth of McHugh, Williams and Hackshaw.

The most controversial use of Prendergast's judicial legacy has been by Stuart C. Scott. Scott's "The Travesty of Waitangi", released in 1993, captured headlines, became a best seller and gained a reputation for being an anti-Treaty handbook. Scott used Prendergast's judgment to support his claim that the Treaty of Waitangi is not a valid document and should be ignored. Little legal argument is used by Scott and Prendergast's usefulness is primarily in his "simple nullity" quotation.⁵⁰ Like other commentators, Scott does not delve deeply into the historical context of the *Wi Parata* decision and the role of James Prendergast.

6. Was Prendergast a judicial aberration?

⁴⁹Haughey, p. 230.

⁵⁰Scott, p. 25.

The uniqueness of Prendergast's decision in a global context is a controversial issue in New Zealand legal historiography. Williams provides a number of examples from other Commonwealth nations, in particular, African countries such as Uganda and Swaziland, in an attempt to place the *Wi Parata* decision in global context.⁵¹ The conclusion reached is that Prendergast was not "a judicial pariah who wantonly disregarded the 'true' colonial law".⁵² Williams argues that Prendergast was also not alone in the British Empire in reaching decisions favourable to colonial governments.⁵³ As already noted, Richmond J aided in the formulation the *Wi Parata* judgment, immediately dismissing the notion of a 'one-man stand' by Prendergast. Both Richmond and Prendergast shared conventional, reactionary views on indigenous people's rights.

In his role as Chief Justice, Prendergast was the acknowledged leader of the New Zealand judiciary. Prendergast's views on Maori land differed to those of New Zealand's first Supreme Court judges, Chief Justice William Martin and Henry Chapman. The dismissal of the validity of aboriginal title in *Wi Parata* diverged from the more tolerant views of Martin and Chapman. But it does not follow that Prendergast was a poor representative of judicial attitudes during the later half of the nineteenth century. Both Chapman and Martin were criticised during their careers at the bench for favourable decisions towards Maori and provide better examples of judicial individualism and aberration than Prendergast. Prendergast's *Wi Parata* judgment stood virtually unchallenged by New Zealand judges until 1986. In comparison, Chapman's decision in *Symonds* lasted only thirty years before being superseded by Prendergast's judgment in 1877, demonstrating the strong institutional support for the *Wi Parata* decision.

In his *Wi Parata* decision, Prendergast described Maori as "primitive barbarians" and "savages".

The inability to appreciate cultural difference due to ethnocentric biases was a common trait among New Zealand's ruling class during the late nineteenth century. Even leaders, such as George Grey, steeped in knowledge of Maori

⁵¹Williams, pp. 66-75.

⁵²Williams, p. 86.

⁵³Williams, pp. 86-87.

society, took a paternalistic attitude towards Maori people.⁵⁴ The few powerful figures who fought for Maori rights, including William Martin and Arthur Gordon,⁵⁵ were often unpopular amongst other colonists. Placed in historical context, Prendergast's views on Maori culture were not unique and show him to be a man of his times. These views did not prevent Prendergast from being widely admired by his peers and colleagues.

⁵⁴See for example, Edmund Bohan, *To be a hero: Sir George Grey: 1812-1898* (Auckland: HarperCollins, 1998).

⁵⁵Gordon and Prendergast clashed over Prendergast's assenting to the invasion of Parihaka in 1881. Prendergast was Acting-Governor in Gordon's absence. James Prendergast, Chief Justice, to W. Jervois, Governor, 27 January 1883, G 17/9 5 Governor's papers and 4 September 1883 G 17/9 21 Governor's papers, National Archives, Wellington.

Prendergast was praised by leading figures throughout his career for his judicial integrity and dedicated leadership of the bench.⁵⁶ Prendergast's loyalty to the British Empire and the New Zealand colonial government made him a highly respected figure during the late nineteenth century. Recently Prendergast has featured in New Zealand historiography being criticised for his *Wi Parata* judgment and his support of the infamous Parihaka invasion.⁵⁷ When these events occurred, Prendergast received the opposite reaction from many of his European peers. Prendergast lacked the humanitarianism of Martin and outspoken reputation of Gordon, but his present role as ruthless imperialist is undeserved.

7. Conclusion

In analysing the role of Prendergast in the *Wi Parata* legacy, the historian must be wary of judging the past by the values of the present. Prendergast may have been guilty of devastating ethnocentrism, *actus reus* (in action), but continuing research suggests that he was less guilty, *mens reas* (in mind). The subjugation of the Maori race and the destruction of their culture was not the aim of James Prendergast. Instead, Prendergast hoped to lay the foundations for a thriving colonial society, where Maori could play a supporting role. To a modern audience, this seems

⁵⁶Obit. *Dominion*. 28 Feb. 1921, p. 4; Obit. *Evening Post*. 28 Feb. 1921, p.6; 'The retiring chief justice'. *New Zealand Mail*. 1 June 1899, p.41.

⁵⁷Condemning references to Prendergast's role in the Parihaka invasion occur in Ranganui Walker, *Struggle without end = Ka whawhai tonu matou*, (Auckland: Penguin, 1990), p.158.

blatantly paternalistic, but it is far from genocidal.

Prendergast's privileged, conservative background and his wide experience with colonial law positioned him perfectly to make a legal decision supporting the established ruling order. Aided by Richmond, Prendergast's decision strengthened the colonial government and guaranteed the defeat of those wishing to challenge this order, including George E. Barton. The *Wi Parata* decision is in danger of becoming a simplified quotation, taken out of context as an example of the worst kind of racism. The case is very complex and viewed in context, the quotation does not completely condemn the Treaty of Waitangi. While the legacy of the decision is tragic, the continued alienation of Maori land, several commentators argue that Prendergast was merely following established legal precedent, or at least, attempting to follow it. Prendergast was a man of his times, who displayed a moderate amount of cultural superiority. Compared with judicial activists such as William Martin, it is Prendergast's decisions that appear conventional.

Prendergast failed to rise above the prejudices of his society and quite possibly misunderstood the legal precedent surrounding indigenous people's land. The *Wi Parata* decision was not a triumph of justice and left a devastating legacy of Maori land alienation and economic breakdown. But Prendergast's decision was followed by many judges and incorporated into statute by many politicians who shared similar views to Prendergast. Chief Justice Sir James Prendergast does not deserve his role as the arch-villain of New Zealand legal history. Instead, Prendergast was a small player in a powerful social and cultural phenomenon beyond the influence of any one person. The implementation of the British legal system in a troubled land.