THE ABORIGINAL RIGHTS OF THE NEW ZEALAND MAORI
AT COMMON LAW

By P.G. McHugh, Sidney Sussex College, Cambridge.

A thesis submitted for the degree of Doctor of Philosophy
in the University of Cambridge.

Lent Term 1987

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ABSTRACT

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In 1840 the indigenous Maori tribes of New Zealand ceded the sovereignty of New Zealand to the British Crown in return for the protection of the chiefs' rangatiratanga (internal government of the tribe) and the tribes' lands, forests, and fisheries. This agreement is known as the Treaty of Waitangi. This thesis considers the extent to which the common law of England recognised the rights embodied in the Treaty of Waitangi upon the Crown’s assumption of the territorial sovereignty over New Zealand.

Since the principles of the common law developed in an organic manner through the history of British relations with non-Christian societies the present study has used comparative material of an historical as well as strictly legal character. It is believed previous studies of Maori rights upon British annexation have suffered from the failure to assess the Maori tribes’ position in terms of a continuum of British colonial constitutional history. Having isolated the relevant common law principles from the body of British practice and other sources, each of the three Parts ends with the particular application of these principles to the New Zealand setting.

The thesis is based upon the distinction between imperium (a right of government) and dominium (rights of private ownership) and is divided into three Parts. The first Part looks at the principles governing the Crown’s erection of an imperium over non-Christian societies. Part II looks at the effect of British sovereignty upon the customary law of the Maori tribes. Finally, Part III assesses the common law’s recognition of the traditional property rights of the Maori. The conclusion reached is that the common law recognised the continuity of Maori customary law and property rights but qualified this by limiting any viability of the customary code to Maori relations inter se and restricting the alienation of the tribal title to the Crown. To that extent the Treaty of Waitangi was not so much a source as declaratory of rules which would have applied in any event.

The present study does not consider at length the contemporary status of these post-annexation rights given the Maori by the common law. However, it has significance for contemporary as well as historical Maori claims and amounts to a revision of previous assessments of the common law’s response to British annexation of New Zealand.
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P.G. McHugh
**ABBREVIATIONS**

**NOTE:** The abbreviations for the sources of the legal material (statutes and cases) have not been included. Fuller references are located in the Bibliography.

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<th>Abbreviation</th>
<th>Description</th>
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<td>AJHR</td>
<td>Appendices to the Journals of the House of Representatives (New Zealand). Reference is to year, volume and paper number.</td>
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<td>AJIL</td>
<td>American Journal of International Law.</td>
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<tr>
<td>Am Qly</td>
<td>American Quarterly.</td>
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<tr>
<td>Am Hist Rev</td>
<td>American Historical Review.</td>
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<tr>
<td>Auck L R</td>
<td>Auckland Law Review.</td>
</tr>
<tr>
<td>BPD</td>
<td>British Parliamentary Debates. Reference is to series, volume and page.</td>
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<tr>
<td>Cath Hist Rev</td>
<td>Catholic Historical Review.</td>
</tr>
<tr>
<td>CO</td>
<td>Colonial Office archives (Public Record Office). Reference is by series, volume and folium.</td>
</tr>
<tr>
<td>CLP</td>
<td>Current Legal Problems.</td>
</tr>
<tr>
<td>CTS</td>
<td>Parry, C ed, Consolidated Treaty Series.</td>
</tr>
<tr>
<td>ECC</td>
<td>Cawston and Keene. The Early Chartered Companies.</td>
</tr>
<tr>
<td>FO</td>
<td>Foreign Office archives (Public Record Office). Reference is by series, volume and folium.</td>
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<tr>
<td>HEL</td>
<td>Holdsworth, W A History of English Law.</td>
</tr>
<tr>
<td>Herts Comm Tr</td>
<td>Hertslet's Commerical Treaty series.</td>
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<tr>
<td>HRA</td>
<td>Historical Records of Australia. Reference is to series, volume and page.</td>
</tr>
<tr>
<td>HRNZ</td>
<td>McNab, ed Historical Records of New Zealand.</td>
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<tr>
<td>IYBIL</td>
<td>Indian Year Book of International Law.</td>
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<tr>
<td>Jur Rev</td>
<td>Juridical Review.</td>
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<tr>
<td>Lords Committee</td>
<td>&quot;Lords Committee... into the Present State of the Islands of New Zealand&quot; British Parliamentary Papers (1837-1838), XXI, #680.</td>
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R v Brampton (1808) 10 East 283, 103 ER 782 (KB)
R v Cobby (1883) 4 LR (NSW) 355
R v Congo Murrell (1836) 1 Legge 72 (NSW SC)
R v The Earl of Crewe, ex parte Sekgome [1910] 2 KB 576
R v Eyre (1867), referred to in Forsyth Opinions (1869),15
R v Fitzherbert and others (1872) 2 NZ (CA) 133
R v Kojo Thompson (1944) 10 WACA 201
R v Koonungnak (1963) 45 WWR 282 (NWTTC)
Te Weehi v Regional Fisheries Officer. Unreported, High Court Christchurch, 19 August 1986. See appendix.

Teira Te Paea and Others v Roera Tareha and another (1896) 15 NZLR 91 (CA)
Thompson v Byree (1824) BILC 20 (Ch)
Thompson v Powles (1828) 2 Sim 194 (Ch)

Town of Pawlet v Clark and others (1815) 9 Cranch 292, 3 Law Ed 735

Union Government (Minister of Lands) v Estate of Whittaker [1916] AD 194 (SCSA)
United States v Kagama (1886) 118 US 375 (SC)

Vajesingji Joravasingji v Secretary of State for India in Council (1924) LR 51 Ind App 357 (PC)
Van Ness v Packard (1829) 2 Peters 137 (USSC)
Veale v Brown (1868) 1 NZCA 152

The Vilander Concessions Syndicate v Cape of Good Hope Government [1907] AC 186 (PC)
Waipapakura v Hempton (1914) 33 NZLR 1065 (SC)

Walbank (Admr) v Ellis (1853) 3 Newf L R 400 (Newf SC)
Walker v Baird [1892] AC 491 (PC)
Wallis v Solicitor-General [1903] AC 173 (PC)
West Rand Central Gold Mining Co v R [1905] 2 KB 391
Wheaton v Peters (1834) 8 Peters 591 (USSC)

Wi Parata v The Bishop of Wellington and the Attorney-General (1877) 3 NZ Jur (OS) 72 (SC)
In re Wi Tamahau Mahupuku (deceased), Thompson and another v Mahupuku [1932] NZLR 1397 (SC)

Williams v Attorney-General for New South Wales (1913) 16 CLR 404 (HCA)

Worcester v State of Georgia (1832) 6 Peters 515 (USSC)
Yisa Dawodu v Suwebatu Danmole [1962] 1 WLR 1053 (PC)
Yonge v Blaikie (1822) 1 Newf LR 277 (Newf SC)

Yrisarri v Clement (1823) 2 Car & P 223 (CP)
This thesis is my own work and includes nothing which is the outcome of work done in collaboration. During the course of research leading to this dissertation I have published various papers on the question of Maori rights under the common law. This activity has been prompted by the topicality of the subject. One of these papers was first written in support of an application for a Research Fellowship at Sidney Sussex College and eventually published as "Aboriginal Title in the New Zealand Courts" (1984) 4 Canterbury Law Review 235. Part III of this dissertation draws upon this paper, particularly chapter 8, but in an expanded and re-evaluated manner which includes material omitted from the earlier, less sophisticated account. This dissertation is not substantially the same as any submitted for a degree, diploma or other qualification at any other University. The word limit set by the Department of Land Economy for dissertation length has been exceeded with the kind permission of the Department's Degree Committee (26 January 1987).

P.G. McHugh
Let us cede the whole of this area, with its pine-covered mountain ridge
To gain the goodwill of the Trojans. Let us draw up a treaty, fair to
Both sides, and invite them to partner us in the Kingdom...

The Aeneid, xi, 320-322
CHAPTER ONE

INTRODUCTION

At the beginning of the nineteenth century the islands of New Zealand were under the control of the indigenous Maori tribes. Although Captain Cook had visited the islands towards the end of the previous century, itinerant whalers and traders following soon afterwards, it was not until the second decade of the nineteenth century that the trickle of British colonisation, missionaries and their families, began. By the mid 1830s British interests and settlement in New Zealand had grown and threatened to increase to such an extent that the Crown’s formal intervention was both necessary and inevitable. In 1840 the Crown’s representative in the islands entered into a treaty with the indigenous tribes by which they ceded their sovereignty in return for a guarantee of their lands, forests and fisheries and, so the Maori text signed by most chiefs provided, the retention of rangatiratanga (self-government). This pact was called the Treaty of Waitangi after the idyllic site in the Bay of Islands in New Zealand’s northern island where it was first signed. The same year the Crown formally annexed the islands and New Zealand became a British colony.

At the time of annexation traditional Maori life had certain features which, inevitably, were being affected by British settlement. Over the previous centuries the Maori had developed their own code of social behaviour as embodied in their customary law and tribal concepts of leadership, decision-making and land tenure. The stewardship of Maori society was vested in the chiefs (rangatira) of the sub-tribes (hapu) and paramount chief (ariki), if any, of the tribe (iwi) who acted in counsel with the tribal elders (kaumatua). Land was the source of conflict between the tribes, the whole of the country being divided among the various tribes whose boundaries were frequently contested. Land was viewed as a tribal resource exploited for the communal benefit. Hence the early to mid-nineteenth century Maori ideas of alienation conceived the ‘sale’ of tribal land to a European as no more than a grant of permission to come and live upon the tribal land so that the tribe might obtain such material benefits from the Pakeha (non-Maori) presence as blankets, guns and suchlike. Occupation of the tribal land gave the tribe member turangawaewae, meaning literally a standing place for the feet. In emphasizing an individual’s association with the

1 Varying estimates of pre-contact Maori numbers have been made, some identifying a figure as high as 1 million. The accepted analysis is Lewthwaite “The Population of Aotearoa: Its Number and Distribution” (1950), 71:1 NZ Geographer, 35. Lewthwaite’s estimate of 240,000 is accepted by Pool The Maori Population of New Zealand 1760-1971 (1977), 49.

2 See Firth R Economics of the New Zealand Maori (1959) passim; Metge The Maoris of New Zealand, rev ed, 1-28.

3 Lords Committee (1838), evidence: Flatt, 39-41; Fitzroy, 171; Montefiore, 57; William Webster Claim (1925) [1926] AJIL 391 at 393 (Anglo-American Claims Tribunal).
lands whereupon the spirits of his ancestors roamed and its conferral of status within the tribe, *turangawaewae* gave Maori society a spiritual and social continuity. Land was thus central to the structure of traditional Maori society. Traditional notions of leadership were equally as important. The chiefs, who mostly obtained status by birth, were the jealous custodians of their authority. A chief’s subordination of his own gain to that of his people increased his stock of *mana* (dignity, standing) and, hence, authority. Although a chief had no greater right in the tribal land than an ordinary sub-tribe member, the *hapu* being the primary land-holding group, his status was soon recognised as giving him paramount powers in relation to the ‘sale’ of land to Europeans. He was, in a more general sense, the ultimate determinant of his people’s welfare although it was the rare (and foolhardy) chief who ignored his elders, lesser chiefs and the prevailing tribal sentiment. The chief’s status and authority were described as *rangatiratanga*:

At its most general, *rangatiratanga* (being derived from ‘rangatiratanga’: chief) means ‘evidence of breeding and greatness’. Here, ‘breeding and greatness’ allude to the two main criteria for leadership: primogeniture (generally male) and proven ability. ‘Evidence’, for its part, turns on the concept of ‘mana’. Mana is that power and authority that is endowed by the gods to human beings to enable them to achieve their potential, indeed to excel, and where appropriate, to lead. It is in the nature of a spiritual contract mediated by the priests, chiefs and elders of a tribal group between an individual member of the group and their deities. What is looked for, then, in a *rangatiratanga* is evidence of a working out of a high order of spiritually sanctioned power and authority. Primogeniture, insofar as it refers to proximity by way of a line through the ancestors to the supernatural source of such power and authority, may thus be called the prescribed factor in *rangatiratanga*, and ability the achieved factor. Implicit in all of this is the matter of reciprocity: between the individual and his god, and between the individual and his tribal community. Both sets of relationships are specific and closed to the community, both operate only within the laws and checks and balances of its political system. A *rangatiratanga* is a trustee for his people, an entrepreneur in all their enterprises.

Given the characteristics of traditional Maori society, in particular the emphasis upon land and the *mana* of the chiefs, it was not surprising that the Maori chiefs only agreed to British sovereignty on the basis that both aspects of tribal life were apparently to be unaffected, indeed, expressly protected by the Crown.

The chiefs who signed the Treaty of Waitangi believed that their *rangatiratanga*, that is the internal government and regulation of the tribe, was to be respected. Although there was no like provision in the English text of the Treaty, indeed the language would have struggled to find an equivalent term, the Maori text of the Treaty expressly reserved the *rangatiratanga* of the chiefs. They ceded to the Crown the *kawanatanga* of the islands, a

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4 *Lords Committee* (1838), evidence: Watkins, 27; Flatt, 37, 39-42; Montefiore, 63; Polack, 82-3; Wilkinson, 100-1; Mackay to the Native Minister, 17 March 1890, *OVANT*, 1-2; Martin *The Taranaki Question* (1860), 2-6; Clarke to Fitzroy, 1844, *OVANT*, 8-9; Hadfield, evidence to the New Zealand House of Representatives, August 1860, id, 9-10.

5 Kawharu "Sovereignty vs. Rangatiratanga" (1984), 5.
transliteration from the English word ‘Governor’. The meaning of the word kawanatanga was discussed extra-judicially by the first Chief Justice of the colony, Sir William Martin, in his pamphlet *The Taranaki Question* (1860):6

The rights which the Natives recognised as belonging thenceforward to the Crown were such rights as were necessary for the Government of the Country, and for the establishment of the new system. We called them "Sovereignty"; the Natives called them "Kawanatanga", "Governorship".

This interpretation was underlined by the context in which the missionaries had previously used the term kawanatanga in contradistinction to rangatiratanga. The term had been used, for example, to describe the office held by Pontius Pilate as Governor of Jerusalem with authority not the supreme power held by Caesar or God.7 To the Maori kawanatanga had connotations of maintenance of order and peace and protection rather than the interposition of a new and local authority. Were the term rangatiratanga used to describe the authority ceded to the Crown by the chiefs in article one of the Maori version of the Treaty there can be no doubt they would not have signed. Indeed most of the chiefs’ misgivings concerning the Treaty expressed during the negotiations of 5 February 1840 had related to this point. To give a strong example, Tareha, chief of the Ngatirehia, was reported by Colenso to have addressed the assembly in these words:8

"No Governor for me - for us native men. We, we only are the chiefs, rulers. We will not be ruled over. What! Thou a foreignor, up, and I down! Thou high, and I, Tareha, the great chief of the Ngapuhi tribes, low! No, no; never, never... If all were to be alike, all equal in rank with thee - but thou, the Governor up high - up, up, as this tall paddle" (here he held up a common canoe paddle), "and I down, under, beneath! No, no, no. I will never say ‘Yes, stay.’"

Kawharu has found:9

The Maori people’s view... could only have been framed in terms of their own culture; in other words, what the chiefs imagined they were ceding was that part of their mana and rangatiratanga that hitherto had enabled them to make war, exact retribution, consume or enslave their vanquished enemies and generally exercise power over life and death. It is totally against the run of evidence to imagine that they would have wittingly divested themselves of all of their spiritually sanctioned powers - most of which powers, indeed, they wanted protected. They would have believed they were retaining their rangatiratanga intact apart from a licence to kill or inflict material hurt on others, retaining all of their customary rights and duties as trustees for their tribal groups. A counterpoint to this is the fact that many of those

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6 Martin *The Taranaki Question* (1860), 9-10.
7 Ross "Te Tiriti o Waitangi" (1972) 6:2 NZIH, 140-1; Waitangi Tribunal Finding... on the Manukau Claim (1985), 90-1; Kawharu "Sovereignty vs Rangatiratanga",5. The missionaries used the term rangatiratanga to describe the Kingdom of God in the Maori version of the Lord’s Prayer.
9 "Sovereignty vs Rangatiratanga", 9.
who opposed the Treaty did so precisely because they took the view that they had no need of the Crown’s protection of their rangatiratanga, or else that protection would compromise it.

The Maori interpretation of the Treaty of Waitangi, one directly supported by the Maori text which most chiefs signed, as a guarantee and protection of their rangatiratanga has remained consistent throughout the history of their relations with the Crown.

In signing the Treaty of Waitangi the chiefs were assured that the tribal lands as well as their rangatiratanga would be preserved and protected by the Crown. The Treaty guaranteed the tribes’ “full, exclusive and undisturbed possession of their lands and estates, forests, fisheries, and other properties which they may collectively or individually possess”. In many ways the chiefs would have associated the land guarantee with the protection of their rangatiratanga in as much as they believed the ancestral land would continue to be governed by the customary law. Thus the Waitangi Tribunal recently advised the Government:

We consider that the Maori text of the Treaty would have conveyed to Maori people that amongst other things they were to be protected not only in the possession of their fishing grounds [i.e. property rights] but in the mana to control them and then in accordance with their own customs and having regard to their cultural preferences.

We consider that this is the proper interpretation to be given to the Treaty, because the Maori text is clearly persuasive in advancing that view....

In a nutshell, the reservation of rangatiratanga and the land guarantee together constituted the Maori belief as to the consequences of British sovereignty. The Crown acquired the mere kawanatanga, the power “to make laws for the good order and security of the country but subject to an undertaking to protect particular Maori interests”. Unsurprisingly, in reaching this belief the Maori looked not to the general principles of English constitutional law, in which they could hardly have been versed, but the promise of the Crown in the Treaty of Waitangi. As the settlement of the country progressed and the Maori called the promises in the Treaty of Waitangi into question, they returned constantly to the Treaty as their take or cause of action and basis of right. On behalf of their people the chiefs demanded of the Crown the recognition of their rangatiratanga and protection from the loss of their tribal lands to European interests.

The Maori certainly had their own view as to the consequences which their agreement to British sovereignty was to have had but to what extent did the principles of English constitutional law recognise Maori rights upon the Crown’s assumption of sovereignty? Was

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10 Ross “Te Tiriti o Waitangi”, 133.
13 Waitangi Tribunal Manukau Claim, 90.
the Maori impression justified as a matter of law? This inquiry forms the basis of this thesis.

The term "aboriginal rights" has been used as a compendious term to describe those Maori rights which are recognized by the common law to derive from the original tribal occupation of territory before the time of European settlement, the phrase "since time immemorial" being often and misleadingly used. The term captures the catholic dimension of the relevant constitutional principles in that they had developed and evolved (and continued to do so after the British annexation of New Zealand) from the Crown's formal relations with tribal societies throughout the non-Christian globe. The primary source of these constitutional principles is "colonial law", in particular that part of English law affecting the Crown's acquisition of an imperium (right of government) in foreign territory and the consequential status of local rights. By the early nineteenth century the common law had developed certain principles on this question, Lord Mansfield's judgment in *Campbell v Hall* (1774) being an influential tidemark.

An important common law source of colonial law was the established and formal practice of the Crown. The rationale for this, and it is one which we will see constantly, was that the Crown's formal conduct was assumed to be consistent with if not governed by legal principle and hence a source from which the principles could be isolated. Thus Chapman J could say in *R v Symonds* (1847) that the "certain established principles" applicable to the Crown's "intercourse... with the aboriginal Natives of America and other countries" were to be found in "a line of judicial decision, the current of legal opinion, and above all, the settled practice of the colonial Governments". These sources had "concurred to clothe with certainty and precision what would otherwise have remained vague and unsettled". The identification of the relevant constitutional principles which cumulatively allowed the common law to give expression to 'aboriginal rights' is to be made, therefore, from the formal conduct of the Crown so much as the caselaw, opinions of the law officers and other sources as treatises, pamphlets and suchlike.

'Aboriginal rights', then, are those common law rights derived from the legal principles governing the Crown's acquisition of an imperium in territory inhabited by tribal societies. This thesis is concerned with the aboriginal rights of the New Zealand Maori. As one might expect with such a body of constitutional principle touching upon an aspect of the Crown's prerogative, its recognised right to conduct the international relations of the United Kingdom (which includes the right to acquire territory) free from judicial restraint, there are some

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14 Technically the phrase means since the commencement of the reign of Richard I (1189): Halsbury's *Laws of England* (4th ed),XII,para 407. Aboriginal claimants have never been required to prove occupation from this date.

15 The Colonial Laws Validity Act, 1865, 28 & 29 Vict c 63, section 7 defined "Colonial Law" to "include Laws made for any Colony by such [colonial] Legislature as aforesaid or by Her Majesty in Council". The term therefore comprehends the relevant statutory and common law sources.

16 (1774) Loftt 655, 98 ER 848; 1 Cowp 204, 98 ER 1045; 20 St Tr 239 (KB).

17 (1847) [1840-1932] NZPCC 387 (NZSC), 388.

18 Id.
aspects of the Crown’s relations with tribal societies which give rise to enforceable rights whilst others do not. Enforceability must, however, be always distinguished from cognisability. It is clear that certain 'aboriginal rights', such as the Crown’s usual recognition of tribal sovereignty (or some such capacity) in its formal establishment of an imperium over that society, may be recognised by the courts notwithstanding their inability to require the Crown’s continued subscription to such a position in its future relations with other tribal societies.

The Treaty of Waitangi recognised certain rights of the Maori tribes but were these part of the corpus of constitutional principles herein termed 'aboriginal rights'? Earlier these Treaty rights were divided into two aspects, those associated with rangatiratanga (self-government) and those concerning land rights. The distinction is artificial, at least from the Maori view, for the chiefs, like the medieval rulers of Europe, viewed government and land tenure or ownership as one. Nonetheless English constitutional law affecting the Crown’s acquisition of territory distinguished imperium, a right of government over the region and its inhabitants, from that of dominium, the ownership of land. The distinction in the constitutional theory between imperium and dominium corresponds with that taken between rangatiratanga and the tribes’ rights of land ownership according to the traditional tenure.

The distinction between imperium and dominium underlies the format of this thesis which divides into three major Parts. The first Part considers the Crown’s acquisition of an imperium, that is the government of the Maori people. By the mid-nineteenth century there were certain established principles affecting the means by which the Crown established and exercised an authority over non-Christian societies. The origins of these principles are noted and their application to the New Zealand context is discussed. The second Part considers the introduction of English law into New Zealand and the extent to which British sovereignty disrupted the customary code de jure. Particular attention is paid to the rules concerning the common law status of colonies, their function and relationship to the position of the Maori tribes. Influential misconceptions have grown about the legal consequences of New Zealand’s common law status as a ‘settled’ colony. This Part challenges these misinterpretations. The third Part focuses on the question of dominium, the Maori ownership of their ancestral land. This particular aspect of ‘aboriginal rights’ has become known as the ‘doctrine of aboriginal title’. Part three assesses the applicability of the doctrine to the land rights of the Maori.

Since the present study is primarily concerned with the origins and basis of the aboriginal rights of the Maori, the inhibitions of length have restrained any lengthy progression onto the contemporary status of these rights. This is an inquiry which the writer has pursued elsewhere. Nonetheless general comments and conclusions of a contemporary

character showing the continued importance of aboriginal rights to present-day Maori claims have been offered where appropriate. The response to these constitutional principles comprising the aboriginal rights of the Maori has been heartening, the Government,20 Waitangi Tribunal,21 and, most dramatically, the courts22 having reacted positively.

The present study is surprisingly novel. Previous studies have touched upon the constitutional status of Maori rights upon the Crown’s assumption of sovereignty but usually as incidental to a general historical inquiry into Maori-European relations through the nineteenth century. These writers have generally restricted themselves to the material dealing specifically with the New Zealand frontier and, lacking legal expertise, understandably have treated the legal dimension as but part of the overall historical picture. Occasional forays into the question of Maori rights have been made by constitutional historians with a notable superficiality of approach. These writers have eschewed the isolation of the relevant constitutional principles in favour of the incantation of late nineteenth century judicial utterances on the question, themselves not remarkable for their grasp of the constitutional record.23 Slattery has termed such occasions "judicial day excursions",24 a description and deprecation as apposite for most New Zealand as Canadian judicial treatments of aboriginal rights. Generally speaking the various studies and judicial ‘excursions’ neglect the comparative and historical dimension essential to the isolation and comprehension of the relevant principles: New Zealand was not annexed in a constitutional vacuum. By 1840 the Crown had over two centuries of relations with the Indian tribes of North America and the Mughal Empire. It was simultaneously consolidating and pacifying its settlements in Canada, obtaining a foothold in Africa by treaty with the native tribes and settling Australia. New Zealand in the mid-nineteenth century was part of a larger imperial picture, a long playing one at that. It would be chauvinistic to think that the constitutional principles employed by the Crown and its advisors for New Zealand were substantially dissimilar to those applied in other regions. Nonetheless, the neglect or at best token reference to the constitutional continuum underlying British colonial practice characterizes the prevailing approaches to the aboriginal rights of the Maori. It will be seen, for instance, that constant referral was made during the 1840s to the applicability within New Zealand of certain principles of American law regarding the character of the tribal title to land. Most commentators, commencing with

22 Te Weehi v Regional Fisheries Officer. Unreported judgment of the High Court, Christchurch, 19 August 1986. See appendix. The Crown has indicated it will not appeal Williamson J’s decision.
Prendergast CJ’s judgment in *Wi Parata v The Bishop of Wellington* (1877), have vaguely acknowledged this relevance yet neglected to inquire into its importance and ramifications for Maori claims. The point is noted here simply as illustrative of the proposition that one cannot begin to understand much less identify the character of the aboriginal rights of the Maori without joint resort to the local and larger context. One must be aware both of the stock of contemporaneous legal norms obtaining at the time of the assumption of sovereignty as well as the detail of the historical process by which that sovereignty was acquired and maintained. The historians have generally focused on the latter aspect to the cost of the former. As a rule, legal inquiries have shown familiarity with neither.

Apart from the present writer’s work and an article by Hookey, the most recent treatment of the aboriginal rights of the Maori has tried to break the mould of earlier judicial and academic approaches by looking at the historical context and attempting to isolate, with no great success it must be admitted, the contemporaneous legal norms. This writer reaches a similar conclusion as those whose intellectual and methodological strictures he has criticised, finding that English constitutional law affecting the colonies took little or no stock of Maori rights. This conclusion facilitates a ‘neo-Marxian’ approach in which the whole of the events of 1840 acquire conspiratorial overtones in as much as the Treaty of Waitangi is characterized as a device to guarantee the Maori certain rights which English law was not equipped to recognise. This interpretation is crudely cynical and violates the legal and historical record.

It is submitted that the annexation of New Zealand and consequential question of the aboriginal rights of the Maori cannot be divorced from a colonial and constitutional tradition dating, at the latest, from the first days of British relations with non-Christian societies. These principles, which had in turn evolved from a medieval, feudal and Christian background, developed in an organic manner through the centuries of British imperial activity and were in a certain state of development at the time of the annexation of New Zealand. This organic body of rules was constantly evolving and growing in sophistication. If this is a warning against the attempt to overlay some kind of retrospective blueprint upon the whole of British relations with tribal societies, it must nonetheless be admitted that beneath the rich variety of British encounter and idiosyncratic responses to particular non-Christian societies there lay certain well-established and fundamental premises. These were never substantive restraints upon British activity, except perhaps in the excuse, so much as guidelines to the manner and form of the Crown’s relations with non-Christian and, more particularly, tribal societies. These principles were incorporated by the common law into colonial law.

25 *(1877) 3 NZ Jur (OS) 72 (SC).*
28 Letter to the writer, 1 November 1983.
It will become plain as the thesis progresses that the present study is wide-ranging and ambitious. Its basic theme is that the aboriginal rights of the Maori must be assessed in terms of the contemporaneous legal norms understood in their organic character and particular application to the New Zealand setting. Unavoidably this has required the reduction, consolidation and elimination of a great deal of comparative as well as the more local material. The writer has concentrated upon those aspects of colonial law and New Zealand legal history which he feels to be of particular importance although in places this has left some incompleteness of detail. An attempt has been made to identify such failings and areas of potential future research in the text.

In closing this Introduction it may be noted that this thesis implicitly combines two tasks. On the one hand it is primarily a study in colonial legal history concerned to isolate the state of the constitutional art in the 1840s as the Crown asserted its sovereignty over New Zealand. On the other hand it is more than an exercise in historical and constitutional explanation since the conclusions it offers have significant consequences for contemporary Maori claims. This combination of historical inquiry and contemporary relevance should be kept in mind as the thesis is read.
PART I

BRITISH SOVEREIGNTY OVER NEW ZEALAND
PART I

CHAPTER TWO

THE GENERAL PRINCIPLES AFFECTING THE CROWN'S ACQUISITION OF AN IMPERIUM IN TERRITORY OCCUPIED BY NON-CHRISTIAN SOCIETIES

A. INTRODUCTION

The Treaty of Waitangi was regarded by the Crown as meeting a necessary prerequisite to its formal annexation of New Zealand. The recognition of the requirement of Maori consent to British government over the islands was in keeping with long-established British practice in relation to the acquisition of an imperium, that is a right of government, over non-Christian societies and their territory. The Crown consistently presumed the juridical capacity of non-Christian societies to grant rights of government, both long before and well after the events of 1840. In this sense the Treaty of Waitangi was part of established British practice. The requirement of the non-Christian society's consent to the British imperium within their territory, and certainly at least over their society, was much more than a moral imperative. The Crown treated the requirement as legal in character notwithstanding its unenforceability, as opposed to cognisability, in the English courts. This will become plain in the present chapter. In the following chapter we will see the particular application of this legal pre-requisite to New Zealand taking the form of the Treaty of Waitangi.

1. Imperium

The Crown has the prerogative power to conduct the foreign relations of the United Kingdom.1 Under this prerogative it enjoys the power to acquire rights of government (an imperium) within territory beyond the realm. Having acquired or in contemplation of the acquisition of such rights, the Crown may use its prerogative power to constitute judicial, legislative and executive bodies for the territory wherein these rights may run.2 In certain circumstances the Crown may also hold a general legislative (as opposed to constituent)

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1 4 Co Inst, cap xxvi; 1 Bla Comm, cap 7; 16 Vin Abr, M &; Chitty, Prerogatives of the Crown (1820), cap 4; Com Dig, tit prerogative cap B.

2 See the opinions in Chalmers Opinions of Eminent Lawyers, on various points of English Jurisprudence (1814), 129-57; Hope Scott "Report on British Jurisdiction in Foreign States" (1843), App VI in Jenkyns British Rule and Jurisdiction Beyond the Seas (1902), 242 at 256; Forsyth Cases and Opinions on Constitutional Law (1869) 169,170,186 (erection of courts of justice); Roberts-Wray Commonwealth and Colonial Law (1966),145.
power in relation to the territory beyond the realm.3

The acquisition and constitution of an imperium over foreign territory are separate acts involving the exercise of two different powers. The rights of government will be acquired through the Crown’s conduct of its foreign relations as, for example, by treaty, conquest or usurpation from the local authorities. The imperium so acquired may or may not receive formal constitution from the Crown. Where no such constitution is forthcoming the imperium may be termed informal and lacking royal authority lies beyond the reach of English law. Where this informal imperium is exercised by British subjects over persons other than the subjects of the Crown it will generally take effect as a delegation under local law.4 Where, however some power of government (judicial or otherwise) is exercised by British subjects over British subjects without formal constitution from the Crown, English law will regard this as unlawful.5 The Crown will usually constitute an imperium over territory beyond the realm through the grant of letters patent under the Royal Seal.6

A formal imperium may establish either personal or territorial rights of government. The personal form of imperium is usually associated with an extraterritorial jurisdiction whilst the latter is linked with the assumption of territorial sovereignty or establishment of a Protectorate.7 The difference between the two positions is that a territorial right recognises some form of sovereignty in the Crown over the particular region whilst an extraterritorial jurisdiction imports a disavowal of any sovereign title to the territory limiting the Crown’s

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3 In colonies of the Crown this power is subject to the rules in Campbell v Hall (1774) 2 Crw 204 as amended by statute, see below, chapter 4. Some writers have felt that prior to the Foreign Jurisdiction Act 1843, the Crown lacked any ordinary legislative power in foreign territory not a colony: Jenkyns British Rule and Jurisdiction, 153 and Piggott Extraterritoriality (1907), 18-22. The charters issued by the Crown prior to that Act indicate, however, that the Crown considered it had some capacity to constitute powers of legislation (albeit limited) in territory to which it did not claim any territorial sovereignty.

4 For example, the zamindary over regions of Bengal acquired by the East India Company from the Mughal authorities during the early eighteenth century, these rights of government receiving no formal constitution or authorization from the Crown. Also Papayanni v Russian Steam Company (1863) 15 ER 862 (PC); Faunceforte, memorandum, 1876 (nd) FO 97/497:np; Wright and Davidson, memorandum, 19 December 1887 FO 97/562/5736:#18,16-20.

5 It appears, however, that British subjects forming settlements in unoccupied territory for which the Crown refused (as with the British Honduras during the late eighteenth to early nineteenth century) or lacking knowledge of its existence does not (as with the Pitcairn Islands during the nineteenth century) exercise a constituent power have some inherent right to provide their own legislative, judicial and executive bodies: Phillips v Eyre (1870) LR 6 QB 1, Roberts-Wray Commonwealth and Colonial Law, 151. For the laws (notably ‘Burnaby’s Laws’ (1765)) enacted by the British Honduras settlers Burdon, ed Archives of British Honduras, I, passim (Burnaby’s laws at p 100); and for the Pitcairn Islands, Brodie Pitcairn Island and the Islanders in 1850 (1851), 84-91.

6 Procedural formalities see Com Dig, tit "Patent", cap 4; Chitty Prerogatives of the Crown, 389-90. Note Letters Patent Act, 1863, 26 & 27 Vict c 76 and see Roberts-Wray Commonwealth and Colonial Law, 144-145. After 1843 an imperium not involving the claim to the territorial sovereignty (that is, an extraterritorial jurisdiction or Protectorate) was erected by means of an Order in Council under the Foreign Jurisdiction Acts. The Act gave the Crown concurrent constituent powers for a foreign jurisdiction - the late nineteenth century charters to the African Companies were issued on this basis (Law Officers to Salisbury, 8 August 1885: FO84(2275) of Hall Foreign Powers (1894), 10.

7 Until 1892 a Protectorate was considered a species of extraterritorial jurisdiction, after that date it was treated as a form of sovereign right (acquisition of the 'external sovereignty') over the protected region, see below B.3.ii.
imperium to certain classes of person. This, however, is the modern understanding. In reviewing the historical development of the principles affecting the Crown's acquisition of an imperium in non-Christian territory it is not helpful to associate a personal form of government with a mere extraterritorial jurisdiction. The Crown's charters for North America, to take an important example, constituted a personal of government yet also contained clear declarations of some sovereign title over the New World. In reviewing early British practice one has the problem, therefore, of discerning the character of the imperium (and, consequently, its relation to the indigenous inhabitants) from the terms of royal instrumentation and practice which did not strongly distinguish personal from territorial rights of government. Some confrontation of this problem is necessary in order to understand the historical development of British practice in relation to the acquisition of an imperium over non-European territory.

2. jurisdiction by legislation distinguished

The hallmark of an imperium (in both the formal and informal aspects) is that it confers a local power upon the Crown. This distinguishes an imperium from what may be termed 'jurisdiction by legislation'.

From Tudor times the Crown made English subjects abroad liable for the commission of certain crimes in territory wherein the Crown claimed no imperium. Admiralty jurisdiction on the high seas excepted, this amenability to trial for major crimes abroad derived from Act of Parliament. The basis of this liability was the ongoing allegiance a subject took to the Crown wherever he ventured, a bond not severed by departure from British shores. This form of subjection was asserted as early as the Acts 33 Hen 8 c 23 (1541-2) and 35 Hen 8 c 2 (1543-4) which allowed a commission to be issued for trial on British soil of any person found guilty or acting as an accessory to any offence of treason, murder or manslaughter committed inside or outside British territory. The Act 10 Will 3 c 25 (1699) made any theft, robbery, murder or other felony upon land in Newfoundland and adjacent islands capable of being tried as if committed within England. The liability of the British subject for any acts of treason, murder or manslaughter was placed on a more organised

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8 An extraterritorial jurisdiction is a delegation from the local authority allowing the bodies formally constituted by the Crown to exercise the powers conceded within the framework of the lex loci: Hope Scott "Report", 243; Papayanni v Russian Steam Company: The Laconia (1863), 2 Moo PC (NS) 161, 15 ER 862; Forsyth Opinions, 233; Hall Foreign Powers and Jurisdiction of the British Crown (1894), 135; Japanese Imperial Government v P & O Co (1895) AC 644; Secretary of State v Charlesworth (1901) AC 373; Casdaghi v Casdaghi (1919) LR App Cas 145; Piggott Extraterritoriality, 5,41.


11 Discussed in Hall Foreign Powers, 13; Jenkyns British Rule and Jurisdiction, 138. Note amending legislation and consolidating statute 24 & 25 Vict (1861), c 100.

12 Section 13. Amended (1802) 4 Geo 3, c 85.
footing with the Murders Abroad Act 1817 and the Imperial Act 9 Geo 4 c 31.

This legislative practice was not a form of imperium over the territory wherein the British subject might commit the crime for which he could be held culpable under the relevant Acts. The practice involved no local jurisdiction but merely established the susceptibility of the alleged offender to trial on British soil. This still required the suspect to come onto British soil for proper trial with all the requisite presentation of evidence and proof. A subject was as notionally liable to trial for acts of treason committed in some European country as in barbarous lands or deserted islands. In short, such legislation was not considered nor was it treated as the assumption of an imperium within the land affected by the legislation.

In the strict theory of English law it has always laid within the power of Parliament to assert any form of imperium over any person in any territory. The now-hackneyed example of a modern commentator is that if Parliament wanted to prohibit the smoking of a cigarette on the streets of Paris it lay within its theoretical competence to do so and English courts would be required to give the law effect. In practice, however, Parliament refused to legislate for non-British subjects in territory wherein an imperium had not been obtained previously by the Crown. In 1832 a Bill relating to New Zealand was rejected by Parliament on the grounds that it would not legislate unilaterally for foreign territory in a manner which affected other than British subjects. Similarly the West Africa Settlements Act 1871 and the Courts (Straits Settlements) Act 1874 claiming jurisdiction for courts in British territory over foreigners committing offences within the immediate vicinity of the respective British possessions were justified on the basis that the foreign offender had come onto British soil and thus "may be said to have submitted himself in some form or other to British jurisdiction; he has by his own act come within the allegiance of the Crown". A draft Bill of 1881 erecting courts with jurisdiction over Pacific natives for offences committed in non-British territory lapsed, it being thought inappropriate for Parliament to erect unilaterally an imperium over the natives not previously acquired by the Crown through conduct of its

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13 57 Geo 3 c 53. Note other examples of this practice 9 Geo 4 c 83 (crimes in Pacific to be tried in Australian courts); 6 & 7 Will IV c 57 (Cape of Good Hope Punishment Act repealed and re-enacted in 26 & 27 Vict c 35, also 53 & 54 Vict c 37); 24 & 25 Vict c 31 (Sierra Leone, also 53 & 54 Vict c 37); 3 & 4 Will 3 c 93 (China, see also 6 & 7 Vict c 80). Generally, see Johnston Sovereignty and Protection (1973), ch 2.

14 Cases under this jurisdiction are discussed in Lewis On Foreign Jurisdiction (1859), 17-27; also Queen v Most (1881) LR 7QB 244.

15 Dicey The Law of the Constitution (1885), 39-40; British Coal Corporation v The King [1935] AC 500,520 per Lord Sankey: "But that is theory and has no relation to realities".


17 34 & 35 Vict c 8.

18 37 & 38 Vict c 38.

19 Jenkyns to Herbert, 4 April 1882 CO 225/11.

foreign relations. To the extent, therefore, that Parliament enacted legislation affecting territory beyond the realm any statute was either for territory wherein the Crown had obtained an imperium from the local power or, secondly, was limited to British subjects making them liable to trial on British soil for serious crimes committed beyond those shores. This position was modified in 1875 and 1878 when jurisdiction by legislation became a form of imperium to the extent the Crown conferred upon itself by statute the power to constitute local courts in uncivilised territory with jurisdiction limited to British subjects. Even here the Crown’s advisors recommended the trial of British offenders should best take place on board a British ship so as to give the proceedings some colour of ratione loci.

We turn now to consider British practice in relation to the acquisition and establishment of an imperium in non-Christian territory. Although this practice was organic and constantly evolving it is nonetheless possible to analyse it in terms of three general periods or stages of development. The first period begins in the sixteenth and ends in the mid-eighteenth century. During this period the rules underlying British practice were, at best, in a crude state of development. During the late eighteenth to early nineteenth century definite and more sophisticated rules began to underlay British practice. This second period transformed about the mid-nineteenth century into a third period which although emerging some years after the conclusion of the Treaty of Waitangi was to have a crucial effect upon judicial interpretations of the Treaty’s guarantees to the Maori.

B. BRITISH IMPERIUM OVER NON-CHRISTIAN SOCIETIES

1. The early practice (fifteenth to mid-eighteenth century)

a) British imperium in the East

i) British practice in the Ottoman Empire and the European precedents

Formal British relations with the infidel societies of the ‘Old World’ began with the Capitulations of the Porte (1580) by which trading and certain judicial privileges in internal matters were granted to English merchants in the Ottoman Empire. These privileges obtained by treaty, or capitulation as it was known, were formally constituted by Elizabeth I through

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21 Law Officers to Hicks Beach, 20 March 1879 CO 225/4:23-5; Jenkyns to Herbert, 4 April 1882 CO 225/11:21-6; Earl of Derby, note, 31 January 1883 “The Bill is a complete innovation in regard to its theory”, id, 18. Some officials unsuccessfully argued otherwise Bramston, memorandum, 2 May 1881 and Kimberley, minute, 22 May 1881 CO 225/9:303-10 (further see Selborne to Kimberley, 30 May 1881, id, 299-300).

22 Pacific Islanders Protection Act 1875 38 & 39 Vict c 51.

23 Foreign Jurisdiction Act 1878 41 & 42 Vict c 67.

24 Paunceforte, minute, 15 October 1881 CO 225/9:313.

25 The term derived from the capitula, paragraphs or headings into which the early grants were divided.
a licence of trade (1581)\textsuperscript{26} and royal commission (1582),\textsuperscript{27} the latter instrument appointing a consul with judicial powers according to the terms of the Ottoman grant. Over the following decades the privileges of the Levant Company, the body as which the merchants became incorporated, were renewed by the Crown,\textsuperscript{28} eventually being made perpetual with the judicial and legislative power over the English merchants being given to the Governor and Deputies of the incorporated Fellowship (1605).\textsuperscript{29} This charter recited how the English merchants had "there peaceable and safe traffique against the Turkes Galleyes by reason of the capitulacon of intercourse holden by us with the Grand Signior and by the residence of our Ambassador within his Domynions".\textsuperscript{30} The charter proceeded to empower the Governor and his assembled deputies "to make ordaine and establishe statutes lawes orders constitucions and ordinances as well for the good rule and government of the said Governor and company of merchants of England trading into the levant seas and their successors as of all and singular other subjects of us our heirs & successors entermedling or by anie means exercizing merchandize in anie part of the Signorie of Venice or the Domynions of the Graund Signior".\textsuperscript{31} The Company's legislative power extended over all English traders in the Levant irrespective of formal membership of the Company and to that extent the power was more than a mere capacity to pass by-laws incidental to incorporation. This legislation, like the exercise of the judicial powers, beside the usual provision for non-repugnancy to English law was not to be "contrarie repugnant or derogatorie to anie treatise league capitulacions or covenants betwene us... and anye other Prince or Potentate made or to be made..."\textsuperscript{32} The judicial powers received further provision in the capitulations of 1641 and 1675.\textsuperscript{33}

The form employed by the Crown to give effect to the arrangements with the Ottoman Empire were much if not exactly the same as those the Crown had already employed in relation to her subjects trading and establishing merchant communities in Europe. During the late-medieval period English merchants in Europe had sought constituent instruments from the Crown much like those being given within the realm for guilds and boroughs. Royal permission and constitution was solicited for a number of reasons. First, the Crown held the

\textsuperscript{26} PN, II, 57.
\textsuperscript{27} Id, 64.
\textsuperscript{28} PN, II, 370 (1592) SC, 30 (1600).
\textsuperscript{29} Text in Epstein The Early History of the Levant Company (1908), 153. This charter remained the Crown's constituent instrument for its jurisdiction in the Levant until 1825: Hope Scott "Memorandum", 248.
\textsuperscript{30} Epstein, supra, 156.
\textsuperscript{31} Id, 186.
\textsuperscript{32} Id, 188.
\textsuperscript{33} 13 CTS 429.
a licence of trade (1581)\textsuperscript{26} and royal commission (1582),\textsuperscript{27} the latter instrument appointing a consul with judicial powers according to the terms of the Ottoman grant. Over the following decades the privileges of the Levant Company, the body as which the merchants became incorporated, were renewed by the Crown,\textsuperscript{28} eventually being made perpetual with the judicial and legislative power over the English merchants being given to the Governor and Deputies of the incorporated Fellowship (1605).\textsuperscript{29} This charter recited how the English merchants had "there peaceable and safe traffique against the Turkes Galleyes by reason of the capitulacion of intercourse holden by us with the Grand Signior and by the residence of our Ambassador within his Domynions".\textsuperscript{30} The charter proceeded to empower the Governor and his assembled deputies "to make ordaine and establishe statutes lawes orders constitucions and ordinances as well for the good rule and government of the said Governor and company of merchants of England trading into the levant seas and their successors as of all and singular other subjects of us our heirs & successors entermedling or by anie means exercizing merchandize in anie part of the Signorie of Venice or the Domynions of the Graund Signior".\textsuperscript{31} The Company's legislative power extended over all English traders in the Levant irrespective of formal membership of the Company and to that extent the power was more than a mere capacity to pass by-laws incidental to incorporation. This legislation, like the exercise of the judicial powers, beside the usual provision for non-repugnancy to English law was not to be "contrarie repugnant or derogatorie to anie treatise league capitulacions or covenants betwene us... and anye other Prince or Potentate made or to be made..."\textsuperscript{32} The judicial powers received further provision in the capitulations of 1641 and 1675.\textsuperscript{33}

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\textsuperscript{33} 13 CTS 429.
prerogative power to licence overseas trade. Secondly, it held the power of incorporation from which the power to pass by-laws was derived. In addition, the Crown held the power to forbid passage out of the kingdom. Cumulatively these meant that any trading enterprise intending to do business beyond the realm without royal constitution faced a great if not insuperable initial handicap. The Crown was only too willing to assist its subjects in such enterprise and made important grants of privileges to English merchants in Pisa (1391 and 1485), the Hanse (1404), Netherlands (1407) and Norway (1408). These royal instruments established a local jurisdiction amongst the English merchants with a royal functionary exercising a judicial and limited legislative rule styled on English law. Since the Crown was constituting a local jurisdiction which excepted, if only partially, her subjects from the lex loci, the permission of the local ruler was treated from the first as a necessary antecedent to the Crown's formal grant. All the late medieval grants were founded on this basis. The Tudor and early Stuart monarchs continued the practice of constituting bodies of merchants in order they might trade in Europe. Elizabeth I, for example, granted charters to the Merchant Adventurers (1564), the Muscovy Company (1566) and Eastland Merchants (1579). James I, to give more examples, granted charters to merchants trading to Spain (1605) and France (1611). Like their late medieval predecessors, these charters were used

34 YB 40 Ed III, 17,18; Coke "Notes of Prerogative" SP Dom Eliz I, ccxxxvi, 8l. The power was affirmed in East India Co v Sandys (1683-1685), 10 St Tr 371, at 571 and Opinions of Sawyer (1681) and West (1718), Forsyth Opinions 422 and 423, but also held that the Crown could not grant the right to enforce such a monopoly by forfeiture: Horne v Ivy (1670) 1 Sid 441 (Canary Island Co); Nightingale v Bridges (1690) 1 Show KB 135 (Royal African Co). The power was no longer claimed after the late seventeenth century: Baker An Introduction to English Legal History, 2nd ed (1979), 379, and by the late eighteenth century this claim to a prerogative was unlawful (Cor Dig tit "Trade", D 1; Chitty Prerogatives of the Crown, 163; Forsyth Opinions, 421,433-435.), all such monopolies requiring statutory authority (for example, Nicholl v Verelst (1778) 2 Blac 1277 (CP), Camden v Anderson (1796) 6 TR 723 (KB)).

35 1 Bla Comm 475; Carr "Introduction", SC, xi-lxxxvii. The power to pass by-laws was an inherent attribute of incorporation: Norris v Staps (1617), Hobart 211, 80 ER 357 at 358. Occasionally licences of trade were given without any incorporation: grant to the Barbary merchants (1585), PN, IV,268, grant to merchants between the Senegal and Gambia (1588), id, 285; merchants of the 'Seralen' region, SC, xlv.

36 This will normally be exercised by a writ ne exeat regnum (other means see Vin Abru, tit "Prerogative of the King", cap GB 1; Chitty Prerogatives of the Crown, 21). The origins of the prerogative are of some doubt (Turack "Early English Restrictions" (1968)). See Opinion of Thomson (1718), Chalmer's Opinions, 246; Hawkins A Treatise of the Pleas of the Crown 2nd ed (1724); Opinion of Macdonald (1788), Forsyth Opinions, 164

37 Rymer's Foedera, vii, 693.

38 Id, xii, 389.

39 Id, viii, 360.

40 Id, 464.

41 Id, 511.

42 Hope Scott "Memorandum", 247; Hall Foreign Powers, 132-133. The indenture between England and Florence (Rymer's Foedera, xii, 389) would contradict these writers' view of the 1485 letters patent as exceptions in not resting upon actual consent of the local sovereign.

43 Text in Cawston and Keene The Early Chartered Companies (1896), 254; see also Rymer's Foedera, 464 (charter of 1407) and Cawston and Keene, op cit, 249 (charter of 1505).

44 PN, I, 313 (first grant of privileges from Russia); id (first charter, 1554); id, II, 73,85,279,355 (subsequent Russian grants); 8 Eliz 1 c 17 (1566) and 10 & 11 Will 3 c 66 (1698) (Parliamentary re-incorporation).

45 Text in Sellers, ed The Acts and Ordinances of the Eastland Company (1906), 142; confirmed by Proclamation of Charles I (1629), text in Cawston and Keene Early Chartered Companies, 63. See also PN, I, 170 and Rymer's Foedera, vii, 511 (earlier charters) and PN, I, 122,139 (first grant of privileges without incorporation).

46 SC, 62.
to erect a local jurisdiction in territory over which the Crown made no territorial claim and were based upon the permission of the local ruler. The power of government in the territory given by these instruments was always expressed in personal terminology. Elizabeth I's charter to the Merchant Adventures (1564), for example, made it clear the local jurisdiction therein constituted arose "by force of any privileges, Powers, Liberties, Grants, preheminences or Authorities hereafter to be granted or made to the said Fellowship... by any the Lord or Lords, Govr of the said Foreign Countries & Townes or of any of them or of any part of them..."47 The charter gave the Governor and his Assistants "full Jurisdiction, power, and Authority lawfully to Rule and Governe the same Fellowship... and pacify all manner of quest8 discords and variances, between themselves & between them or any of them and other Merchants... in the said Foreign Countries".48 The power to hold courts and enforce the laws of the Fellowship affected any English subject coming within the Company's sphere of operations, an indication that the Company's powers were not limited to its own members and hence, were powers going beyond mere incorporation. The jurisdiction constituted by the charter was, therefore, expressed in personal terms and arose not only from the royal grant but the consent of the ruler in whose lands it was to be exercised.

The Crown's formal practice in relation to the acquisition and constitution of an imperium in the Ottoman Empire was a carryover from its settled European practice. The same forms and underlying principles were observed for the formal requirements of the British merchants trading to this non-Christian part of the globe were not so radically different from those for European trade. This practice was clearly predicated upon a recognition of the international personality of the Ottoman Empire. The rights of government obtained were limited to English subjects and constituted in a personal manner. No rights were sought or exercised over any indigenous inhabitants of the Levant,49 indeed the consular jurisdiction obtained by capitulation was initially applied only imperfectly amongst the British merchants of these parts.50 The Crown's capitulatory regimes in Morocco (1721) took an almost identical format as that for the Ottoman Empire.51

ii) Early British practice in the East Indies

In 1600 the Crown granted a charter to the East India Company to enable the exploitation of the trading privileges its subjects had obtained in the East from the Mughal

47 Cawston and Keene Early Chartered Companies, 269.
48 Id, 264.
49 Although certain rights obtained in mixed suits - see Capitulations of 1675: 13 CTS 429.
50 Bullard Large and Loving Privileges, 20.
51 Articles of Peace and Commerce between Great Britain and Fez and Morocco (14 January 1728), 33 CTS 79; Additional Articles between Great Britain and Morocco (10 July 1729), 33 CTS 217. Also see Bullard Large and Loving Privileges, 24-25.
authorities. The East India Company was incorporated and given exclusive trading privileges in those parts of the East Indies not "in the lawful and actual possession of any such Christian prince or state, as at this present is, or at any time hereafter shall be in league or amity with us". The charter was renewed in 1609 and made permanent in 1612. These charters neither contemplated nor made provision for territorial acquisition, presupposing, as well, that any powers of rule exercised by the Company were to be limited to its own members and their servants. The laws and ordinances passed by the Company were to be "for the good government of the same Company, and of all factors, masters, mariners, and other officers, employed or to be employed in any of their voyages". The earliest charters for the East Indies clearly contemplated that the exercise of any imperium was limited to British persons and derived from the consent of the Mughal authorities.

The format which British trade took in the East Indies differed from that of Europe and the non-Christian regions where the 'capitulations' applied. In those parts the British merchants mostly lived, traded and mingled amongst the local population. In the East Indies, however, the Company established 'forts' or factories as they became known which acted as bases for British trade. These factory sites were purchased and established with Mughal permission and upon the understanding that the Company would supervise and regulate its own affairs within. The charter to the East India Company of 1661 acknowledged the 'factory' format which British trade had taken, giving the Governor and Council of the Company the power within their factories to "Judge all Persons belonging to the said Governor and Company or that shall live under them in all Causes whether Civil or Criminal according to the Laws of this Kingdom and to execute judgment accordingly". Thus, unlike the earlier charters, this one acknowledged the factories of the Company and provided for their government but still defined the imperium in a personal manner. This personal imperium also extended over all British subjects and employees of the Company beyond the factory towns. Again the basis for this imperium was the permission of the Mughal authorities.

Throughout the seventeenth century the Company consolidated its control of the factory towns. Letters patent of 1726 constituted an imperium, first, over all British subjects and

52 Text in Mukherji, ed Indian Constitutional Documents (1600-1698), I, 1 at 13.
53 Carr, SC, xlviii; Archbold Outlines of Indian Constitutional History (1926), 13-14.
54 Indian Constitutional Documents, 1,13.
55 The difference between the capitulatory and factory forms of imperium is stressed by Cornwell Lewis On Foreign Jurisdiction, 17, Forsyth, Opinions, 231-232 (notes); Jenkyns, British Rule and Jurisdiction, 149.
56 Article ccxxix, The laws or standing orders of the East India Company (1621).
57 The first factory was established at Surat on this basis (1612): Kaye The Administration of the East India Company (1853), 65; Jain Outlines of Indian Legal History, 2nd ed (1966), 12-14; Setalvad The Common Law in India (1960), 5; Fawcett The First Century of British Justice in India (1934) xvi.
58 Archbold Outlines of Indian Constitutional History, 15; Jain Outlines of Indian Legal History, 10-11. This charter appears to have been a copy of a charter obtained from Cromwell in 1657, since lost: Ilbert The Government of India, 16.
59 El Co Tracts, np.
Company employees within the East Indies and, secondly and most importantly, over all persons within the Presidency Towns of Bombay, Madras and Calcutta making them amenable to judgment in civil and criminal matters according to English law. The first aspect of these letters patent, the continuation of the personal imperium over British subjects and Company employees throughout the East Indies, was simply in line with the recognised practice under Mughal permission. The second aspect, however, was an assertion of a territorial imperium in as much as the Crown claimed jurisdiction over all the inhabitants of the Presidency Towns.

Bombay had been ceded by Portugal to the Crown in 1660 so here the Crown’s territorial sovereignty was clearly established, however Madras and Calcutta had been obtained within the framework of and subject to Mughal sovereignty. The erection in 1726 of a government over all persons in Madras and Calcutta transformed what had until then been a personal into a territorial imperium. Prior to that what powers of government the East India Company had practiced over native inhabitants of these towns it justified as delegations from the Mughal authorities. In Madras English magistrates had exercised a jurisdiction since 1654 in place of the native Adijar in choultry courts. In Calcutta jurisdiction over the local natives and those of the surrounding towns was exercised in zemindary courts established under Mughal authority in 1698 and 1717. The 1726 letters patent were not treated as disrupting the operation of these courts despite the ostensible extension of English law to all inhabitants of the town. Indeed, letters patent of 1753 declared the applicability of Muslim and Hindu law to the native inhabitants of the Presidency towns. Lord Brougham observed in The Mayor of the City of Lyons v East India Company (1836):...

"... enough has been said to show that the settlement of the Company in Bengal was effected by leave of a regularly established Government; in possession of the country, invested with the rights of sovereignty, and exercising its powers: that by permission of that Government, Calcutta was founded, and the factory fortified, and a district purchased from the owners of the soil, by permission of that Government, and held under it by the Company, as subjects owing obedience, as tenants rendering

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60 Text in EI Co Tracts, np.
61 Herts Comm Tr, II,21.
62 Kemal "The Evolution of British Sovereignty in India" [1957] IYBIL 143; Jain, Outlines of Indian Legal History, 17-18 (Madras), 45-49 (Calcutta); Cowell History and Constitution, 8.
63 Advocate-General of Bengal v Ranee Surnomoye Dossee (1863) 9 Moo Ind App 427, 19 ER 786 (PC).
64 Fawcett British Justice in India, 208.
65 Id, 209.
66 Id, Archbold Outlines of Indian Constitutional History, 32.
67 Text in EI Co Tracts. In Bombay the 1726 letters patent’s extension of English law to all inhabitants had been taken literally, a result which eventuated in the 1753 letters patent: Fawcett British Justice in India, 224-225.
68 (1836), 1 Moo PC 175, 18 ER 66, 103-4.
rent, and even as officers exercising, by delegation a part of its administrative authority. At what precise time, and by what steps, they exchanged the character of subjects for that of Sovereign, or, rather, acquired by themselves, or with the help of the Crown, and for the Crown, the rights of sovereignty, cannot be ascertained; the sovereignty has long since been vested in the Crown..."

This development illustrates that by the early eighteenth century a factory could entail either an extraterritorial (personal) or territorial form of imperium. The failure of the 1726 charter to distinguish the two forms indicates, perhaps, that the Crown was not thinking in such terms but simply intended and constituted its factories as sites of a thorough English imperium without pondering the type of imperium therein erected. Whatever the form of imperium, its acquisition and even enlargement clearly related in some way to the consent of the indigenous authorities: By 1726 the Company's control of Madras and Calcutta had grown so comprehensive that the unwitting declaration of a territorial sovereignty over the towns in 1726 may be justified as a de jure reaction to what had already occurred de facto. One other explanation suggested in 1757 and, it will be seen, perhaps more applicable to the factories contemplated in Africa, was that the Mughal authorities in permitting the factory thereby vested both the property and the sovereignty in the Crown. This explanation which blends imperium with dominium does not square with the British practice which shows the territorial sovereignty over Madras and Calcutta to have been gradually rather than instantaneously obtained.

It was observed above that during the early eighteenth century the Company was exercising some administrative and judicial functions under Mughal authority over the native population not only within but surrounding the Presidency towns. The zemindary of Calcutta, in particular, had grown to cover approximately 800 square miles of the Bengal by 1757. The exercise of such powers received no formal authorization from the Crown until the end of the century and so took effect simply and strictly as a delegation from Mughal law. This function was strictly informal not being constituted by royal instrumentation.

Clive's famous victory at Plassey (1757) brought a large area of the Indian subcontinent under British control. It is interesting and not without significance that the Company did not seek to enforce any rights as conqueror for the Crown but obtained a grant of diwani

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69 Letter of the Judges of the Supreme Court to the Secretary of the Board of Commissioners for the Affairs of India (September, 1830), paras 5 & 6, text in PP (1831), VI, Part 5 (No 26, Encl 4 at p 117). Cowell History and Constitution, 15; Setalvad The Common Law in India, 12.
70 Watson "Fortifications, Force and English Trade in India" (1980), 88 Past and Present, 70 at 81-82; Morton, note to Commaul ul Deen v Goring [1777] Ind Dec (OS)64, n 104.
71 Opinion of A-G Pratt and S-G Yorke in El Co. Tracts, np. A misleadingly abbreviated version of this opinion was reprinted in Chalmers Opinions, I, 195.
72 Archbold Outlines of Indian Constitutional History, 44.
73 The Act of Settlement, 1781 21 Geo 3 c 63. This Act authorized the enactment of Regulations for the administration of justice in the region: below, note
74 Archbold Outlines of Indian Constitutional History, 44; Jain Outlines of Indian Legal History, 45-49; Setalvad Common Law in India, 11.
(1765) from the defeated Emperor. This gave the Company important functions of government over the population of Bengal, Bihar and Orissa, the ‘Mofussil’ as it became known, under the ostensible umbrella of Mughal sovereignty. Although the Mughal’s sovereignty was in reality a fiction, the officers of the Company initially maintained that the grant of divani had done no more than give the Company certain powers under the Mughal, a position which would have secured the Company from interference by the British government. By this view any imperium in the Mofussil would be, at best, extraterritorial and pursuant to the charters of 1726 and 1753 limited to British subjects and the employees of the Company. By the time of the Regulating Act (1773) it was difficult, however, if not impossible to deny the Crown’s territorial sovereignty over the Mofussil. Although no clear declaration of this sovereignty was made until 1813, the inference had been overwhelming and local courts proceeded upon that basis. The relevant constituent instruments issued after the Regulating Act, however, only extended English law to ‘British subjects’ and the employees of the Company leaving the indigenous population with their own laws applied in the Mofussil courts organised, first, by Hastings and later pursuant to the 1781 legislation. This gave some basis for the argument that the Crown held no sovereignty over the Mofussil. The problem as to the character of Crown’s imperium over the Mofussil does

75 Text in 43 CTS 217,219.
76 Cowell History and Constitution, 24-25; Jain Outlines of Indian Legal History, 82-84.
77 Cowell History and Constitution, 19; Archbold Outlines of Indian Constitutional History, 44, 62; Firminger Fifth Report, vii – xiii. Warren Hastings initially took the view that the sovereignty remained in the Mughal. His Regulations of 1772 for the administration of justice in the Mofussil (establishing the adalat courts) were predicated on that assumption: letter from the President and Council to the Directors of the East India Company, 3 November, 1772; text in Archbold Outlines of Indian Constitutional History, 53-59. His position modified after the Regulating Act (1773): Firminger, op cit, xiii,xxi.
78 13 Geo 3 c 63. This Act spoke of the “territorial acquisitions and revenues” of the East India Company.
79 The Charter Act 1813 53 Geo c 155 declared the "undoubted sovereignty" of the Crown. The Act was taken as declaratory: Mayor of the City of Lyons v East India Co. (1836), 1 Moo PC 175, 18 ER 66 and enacted as a result of The Fifth Report from the select committee on the affairs of East India (1812).
80 Connaul ul Deen Ali Khan v Goring and others [1777] Ind Dec (OS) 64, n 104 per Impey CJ and Chambers J, contra vide Hyde J; Reporters’ note, ibid; letter of the Supreme Court Judges (1830), PP (1831), VI,Part 5, (no 26, enr 4, at 117), 12-15. See also references in Firminger Fifth Report, xiii-xxi; Cowell History and Constitution, 32; R v Shaik Boodin (1846) 4 Ind App (OS) 397, 422-424; Stephen The Story of Nuncomar and the Impeachment of Sir Elijah Impey (1885), I, 129 observed that the authors of the Regulating Act "wished that the King... should act as sovereign of Bengal, but they did not wish to proclaim him to be so".
81 See, most notably, the letters patent establishing a Supreme Court in Calcutta (1774), text in Gen App 1 "Report on the Administration of Justice, and c. in the East Indies" in (1781) Reports from Committees of the House of Commons (1st series), vol V; Act of Settlement, 1781, 21 Geo 3 c 63. The failure to define precisely the extent of the applicability of English law granted by these charters led to major clashes between the Supreme Court at Bengal and the Company - classic account is Stephen Nuncomar and Impey, II. Also, letter of The Supreme Court Judges (1830), supra, paras 26-33; Cowell History and Constitution, 37-58.
82 Hastings Regulations of 1772: letter from The President and Council of Bengal, 3 November 1772, text in Archbold Outlines of Indian Constitutional History, 53-59. These Regulations were enacted under the authority of the divani, Hastings doubting whether the Regulating Act conferred any legislative power over the Mofussil: Rama Fois, Legal and Constitutional History of India, II, 253-4.
83 21 Geo 3 c 63. This gave the Governor-General and Council a legislative power over the Mofussil under which Regulations were passed organising the native courts, collection of revenue and c. These Regulations, which were not subject to a requirement of non-contravention of English law, were codified as the Cornwallis Regulations (1793). The legislative power assumed by the Company in the Mofussil was probably in excess of that conferred: Cowell History and Constitution, 36; ibert Government of India, 59; Rama Fois, Legal and Constitutional History, II,254. The power received further provision: 37 Geo 3 c 142. The Regulating Act (1773) and letters patent thereunder (1774) had exercised no constituent power in relation to the native courts.
not alter, however, what for present purposes was the important feature of British practice: Whatever form it had, extraterritorial or territorial, the Crown's *imperium* over the inhabitants of the Mofussil was clearly based upon the grant of *diwani* and thus originated from formal Mughal submission.

In reviewing British practice in the East Indies until the mid-eighteenth century it may generally be observed that British *imperium* was established with Mughal consent. There was a clear recognition at this time, and it was one which subsequently received judicial acceptance,84 of the Mughal authorities' capacity to enter into treaty relations with the Crown. Until the grant of *diwani* (1765) the Crown had limited its formal *imperium* to British subjects and the employees of the Company except in the Presidency towns where, in the case of Madras and Calcutta, its control had become thorough. In other words the Crown's formal *imperium* was territorial in the Presidency towns and personal elsewhere. The grant of *diwani* eventually became treated as the basis of a territorial sovereignty over the Mofussil, this *imperium* being implicitly recognised by the Regulating Act (1773) and charter issued under its authority. Whilst the constituent instruments for India were often unclear in their identification of the *imperium* therein constituted (extraterritorial or territorial), whatever rights of government were claimed by Britain over the native population through these formal royal instruments or by the informal means of mere grant from the Mughal authorities (zemindary courts, for example) had a clear foundation in native submission. This submission was signified by formal treaty or grant (*diwani*, zemindary) or by the natives placing themselves under the Company's rule (native employees and those visiting or inhabiting the Presidency towns).

iii) Early British practice in Africa

Although the Levant and East Indies were the major theatres of early British activity in the eastern parts of the non-Christian globe, the Crown had also issued some constituent instruments in relation to African territory prior to the mid-eighteenth century. As with the earliest Crown grants for the East Indies and those for the Levant the first charters for Africa were simply licences for trade and constitution of the merchants trading in the particular region. The Crown made no provision for territorial acquisition in these early charters85 but, recognising some juridical status in the African chiefs typically authorised, trade into any territory being "under the obedience of any King, State, or Potentate of any

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84 *Nabob of Arcot v East India Co* (1793), 4 Bro CC 180, 29 ER 841, 2 Ves Jun 56, 30 ER 521; *Amerchund Burdeechund v United East India Co* (1826) 4 Ind Dec (OS) 547; *East India Co v Syed Ally, Habiboon Nissa Begum* (1827), 7 Moo I A 555; *Mayor of the City of Lyons v East India Co* (1836) 1 Moo PC 175, 18 ER 66; *R v Shaik Boodin* (1846), 4 Ind App (OS) 397; *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859), 7 Moo Ind App 500, 19 ER 388; *Ha’ri Bha’nji v Secretary of State for India in Council* (1882), 5 ILR (Mad) 273.

85 *Grant to the Exeter merchants* (1588), PN, IV,285-291; *grant to Gregory and others* (1592), PN, V,54-5 (extract); *grant to the African Company* (1618), SC, 99.
region dominions or county in Gynney or Brynney..." By the Restoration, however, the Crown was granting letters patent for Africa on the basis that the grant of factory sites by native rulers conferred a territorial sovereignty upon the Crown. After constituting the Company with the requisite powers over its members, the letters patent to the Royal African Company, for example, stipulated that the Company "shall have the ordering rule and government of all such forts factories and plantations as now are or shall be at any time hereafter settled". As with the 1726 letters patent for the East India Company these do not appear to have been issued with any awareness of the result of claiming a jurisdiction over all persons within the factory towns, namely the establishment of a territorial sovereignty. Without using a formal distinction between the two types of imperium the African letters patent simply constituted the factories as sites within which the British could assume full control, the same approach taken in the East Indies in the early eighteenth century. As a result, the African charters treated factories from the first as a form of territorial imperium. Although this view of the consequences of a grant of a factory site by a native ruler was unwarranted in the East Indies, it appears to have been an interpretation upon which the Crown's formal practice for Africa was able to proceed. In short, the Crown implicitly anticipated a simultaneous grant of territorial imperium and dominium.

These post-Restoration charters for Africa coupled with the 1757 interpretation of the letters patent for the East Indies suggest that factories in non-Christian parts of the globe were by the early eighteenth century generally considered as pockets of British territorial jurisdiction. This assumption could be justified in terms of the intention behind the establishment of such factories, namely the erection of a base for English traders within the narrow confines of which British control would be complete.

"The laws and usages of Eastern countries where Christianity does not prevail are so at variance with all the principles, feelings, and habits of European Christians that they have usually been allowed by the indulgence and weakness of the Potentates of those countries to retain the use of their own laws, and their Factories have for many purposes been treated as part of the territory of the Sovereign from whose dominions they come".

This understanding was certainly the basis upon which it was suggested during the 1830s that the Crown establish factories within the New Zealand islands from which some control of the lawless British subjects might be made.

(iv) The Publicists' approach.

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86 Grant to the African Co (1618), SC,99 at 103.
87 Charters of the Royal Adventurers into Africa (1660 and 1662), SC, 172; also charter of the Royal African Co (1672), SC, 186.
88 Advocate-General of Bengal v Ranee Surnomoye Dosee (1863), 9 Moo Ind App 427, 19 ER 786; cf Piggott Extraterritoriality, 12 (municipal control of a factory does not import territorial sovereignty).
During the sixteenth to mid-eighteenth centuries British practice for the non-Christian East employed similar manner and form as that used by the Crown in its dealings with Christian nations. The Crown’s main interests in these regions were trading rather than territorial. What territorial claims were made in royal instruments were probably inadvertent or unwitting but limited to the factory sites and designed to facilitate and encourage English trade. An important aspect of such encouragement was the creation of some local jurisdiction through the constituent instrument given the community of Englishmen in these foreign and non-Christian regions. As in Europe the jurisdiction erected by the Crown was personal although the Crown began claiming a territorial jurisdiction within the factory towns of the East Indies and Africa. Whatever the power of government established by the Crown, personal or territorial, it was nonetheless founded upon some acquiescence by the non-Christian power over whose territory the English jurisdiction was to run. The practice necessarily imported, first, a recognition by the Crown of the sovereignty (or suchlike juridical capacity) of the particular infidel society and, secondly, an acceptance of the derivative character of any English rights of government within their territory.

These two important postulates implicit in British practice in infidel parts of the ‘Old World’ were made explicit in the work of the publicists and propagandists of the sixteenth to mid-eighteenth centuries. Continental theorists such as Bodin (1577), Cacheranus (1566), Grotius (1604 and 1625), Suarez (1621), de Freitas (1625), Lyserus (1676) and Pufendorf (1688) found Christian princes might enter into treaty relations with non-Christian powers but in the main limited the treaty-making power to trade and commerce. Grotius’ work, in particular, enjoyed some influence within England being used, ironically, against him and in support of English claims against the Dutch to exclusive rights of trade in the East Indies by reason of Mughal grant (1613). De Freitas apart, these writers stressed the secular aspects of relations between the Christian monarchs and heathen princes of the East. These relations arose mainly for reasons of trade, it was accepted, rather than from any Christian duty to take the work of God eastwards.

91 De Jure Praedae Commentarius (1604), trsl ed 1950,220. Also Alexandrowicz, supra, 45-9.
92 De Jure Belli ac Pacis Libri Tres (1625), Trsl ed 1925, 397.
93 De Trippici virtute theologica (1621), Trsl ed 1944, section VI.
94 De justo imperio Iustianorum Asiatico (1625), discussed by Alexandrowicz, supra, chapter 3.
95 Disputatio Politica de Foederibus cum Infidelibus (1676), discussed by Alexandrowicz, supra, 88.
96 De Jure Naturae et Gentium Libi Octo (1688). Trsl ed 1934 esp at 233, 340-341. Pufendorf’s work did not distinguish Christian from non-Christian societies other than to state their equal subjection to the same principles of the jus gentium.
97 Clark “Grotius’s East India Mission to England” (1934), 20 Trans Grot Soc 45. The Dutch had a long tradition of treaty relations with the polities of Asia, see the many treaties of the Dutch East India Company in 227-231 CTS. The treaty-making practice of the European nations in this part of the globe is described in Alexandrowicz History of the Law of Nations in the East Indies.
Within England the various writers and cases took a virtually identical tack. Gentili (1589), Protestant refugee and reader in civil law at Oxford, Zouche (1650) and Pott (1682) found it was lawful for Christian Kings to enter into treaty relations with infidel monarchs. Coke appeared to contradict this position in Calvin's Case (1606) when he pronounced all infidels to be perpetual enemies of the Crown with whom no relations were permissible. This position was not only contradicted by what had become the established practice of the Crown but Coke's own position in Michelborne v Michelborne (1609) and the Institutes. In an Anonymous case (1640) Coke's comments on infidel status were dismissed as residual Crusading zeal. Molloy's text De Jure Maritimo (1682), called the first text on colonial law by no less an authority than Chalmers and in its 4th edition by 1688, found that treaty relations with infidel powers were lawful. The same assumption underlay East India Company v Sandys (1682-85). The recognition of infidel sovereignty implicit in the Crown's practice was certainly plain by 1757 when the Attorney and Solicitor-General advised that the Crown's rights of sovereignty over the Presidency towns of the East Indies arose from grant of the "Mogul". The opinion not only recognised the legality of treaty relations with the Indian princes but held the Crown's rights of territorial sovereignty arose from their consent (or, the opinion proceeded, conquest).

It is plain that from the sixteenth century the Crown recognised, even if only passively, some juridical status in the infidel societies of the East. It transacted with these societies on that basis adapting and applying the tools of its European practice to the East. Its powers of government in these infidel regions were erected and exercised with infidel consent and support. Indeed were such support not forthcoming the exercise of even a personal jurisdiction over English subjects of the Levant and East Indies could not have succeeded. These features of British practice may not have been strictly governed by but they were at least consistent with the theory of the likes of Grotius, Gentili and Pufendorf. Certainly British practice was wholly consistent with a recognition of an infidel sovereignty which by the mid-sixteenth century had become accepted not only by the various publicists on both sides of the Channel but within the Crown's own courts.

b) British imperium in the New World (to the late eighteenth century).

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99 Iuris et Iudicii, sive, Iuris Inter Gentes (1650), Trsl ed 1911, 101.
100 De Foederibus Fidelium cum infidelibus (1686) discussed by Alexandrowicz Law of Nations in the East Indies, 87.
101 (1608), 7 Co Rep 1a at 176; 77 ER 377.
102 (1609), 2 Brownl & Golds 296, 123 ER 952 (CB)
103 4 Institutes 155.
104 (circa 1640), 1 Salk 46, 91 ER 46 (CP).
105 History of the Revolt of the American Colonies (1782), Reprinted 2 vols (1972), I, 173.
106 De Jure Maritimo et Navali (3rd ed, 1682), 113-114.
107 (1683-1685), 10 St Tr 371.
It is usual to date European claims in the New World from the Papal Bull *Inter Caetera* (1493) issued in the year after Columbus’ voyage. By this Bull Alexander VI divided the non-Christian world between Spain and Portugal. Subsequently vilified by the Protestant nations as a donation which it was not in papal hands to make, the Bull appears to have been intended not so much as a grant to title to these lands as a demarcation of zones in which the Iberian powers were to have exclusive responsibility for conversion of the heathen.\(^{109}\)

Soon after this Bull Henry VI granted a series of letters patent authorizing adventure into and acquisition of land in the New World.\(^{110}\) These letters patent showed token deference to papal authority,\(^{111}\) the grants of 1501 and 1502 were to a joint Anglo-Portuguese enterprise, but in the main the Crown asserted from the first the right of Christian princes "to find, discover and investigate whatsoever islands, countries, regions or provinces of heathens and infidels, in whatsoever part of the world placed, which before this time were unknown to all Christians".\(^{112}\) Having made this or similar protestations, Henry VI’s letters patent proceeded to authorise the grantees upon discovery of such lands to "conquer, occupy and possess, as our vassals and governors lieutenants and deputies therein, acquiring for us the dominion, title and jurisdiction of the same towns, castles, cities, islands and mainlands so discovered".\(^{113}\) Discovery and conquest were thus laid down as the conditions precedent to English right over territory in the New World. The grantees were empowered to rule the land so acquired as conquests. The letters patent of 1501 and 1502 also went on to give the grantees "full power and authority to rule and govern all and singular the men, sailors and other persons removing and making their way... to the islands, countries, provinces,

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\(^{108}\) Text in Davenport, ed *European Treaties bearing on the History of the United States* (1917), 61. The Bull of May 1493 purported to "give, grant and assign forever to you and your heirs and successors, Kings of Castile and Leon, all and singular the aforesaid countries and islands thus unknown and hitherto discovered by your envoys and to be discovered hereafter, provided however they at no time have been in the actual temporal possession of any Christian owner, together with all their dominions, cities, camps, places and villages, and all rights, jurisdictions and appurtenances of the same". The grant was clarified in the Bull *Dudum Sequidem* (26 September 1493) and modified by agreement of Spain and Portugal in the Treaty of Tordesillas (2 July 1494) subsequently confirmed by Julius IT in the bull *Ex Quae* (1505).

\(^{109}\) Initially the Bulls were treated as a grant of title over these lands: Pagden *The fall of natural man* (1982), 28-30. However during the early sixteenth century the Spanish jurists and theologians cast doubt upon the temporal authority of the Pope and limited the Bulls to the spiritual sphere: Las Casas *Brevissima relacion de la destruccion de las Indias* (trsl ed 1583), fol C 1 v; Vitoria *De Indis et de invre belli Relectiones* (1539), trl ed 1917; lib 3, cap 10; Suárez *De Triplici virtute theologica* (1621), trl ed 1944, 744. Also see Muldoon "Papal Responsibility for the Infidel: Another Look at Alexander VI’s *Inter Caetera*" (1978), LXIV Cath Hist Rev 168; Donelan "Spain and the Indies" in Bull and Watson, eds *The Expansion of International Society* (1984), 75; Baitori "The Papal Division of the World and its Consequences" in Chiappelli, ed *First Images of America* (1976), 211.

\(^{110}\) Letters patent to J. Cabot and sons (1496), text in Biggar, ed *Precursors of J. Cartier* (1911), 7; letters patent to S Cabot (1498), id, 22; letters patent to R Warde, F Fernandez et al (1501), id, 41; letters patent to H Eliot, J Gonzales et al (1502), id, 70.

\(^{111}\) Goebel *The Struggle for the Falkland Islands* (1927), 57-59.

\(^{112}\) Letters patent to Warde (1501) in Biggar, ed *Precursors of J. Cartier*, 41 at 51.

\(^{113}\) *Id*, 7 (1496 letters patent); 51 (1501 letters patent); 81 (1502 letters patent).
mainlands and places before-mentioned". The grantees were authorised "to make, set up, ordain and appoint laws, ordinances, statutes and proclamations for the good and peaceful government of the said men, masters, sailors and other persons aforesaid". The letters patent of Henry VI constituted a power of government over all English persons going to the New World but as against the "heathens and infidels" set up no such right other than to authorize their conquest.

ii) The Salamanca Divines

In the period between these letters patent issued in the giddy days of the New World's first discovery and the Elizabethan charters to Gilbert (1578) and Raleigh (1584) the debates of the Spanish theologians, the Salamanca Divines as they became known, had given some meaning to the term "conquest" as applied to the New World. The Spanish Crown had consistently worried about the manner of its subjection of the Indian societies of the New World and sought to give it some colour of law, witness the Requirement (1514), Valladolid Disputation (1550-1), laws of Burgos (1512) and the laws of the Indies (1542). The prevailing opinion was that the duty to Christianize the heathen societies justified their conquest but only after their voluntary submission to the word of God had been refused.

The Salamanca Divines, notably Las Casas and Vitoria, specified the grounds upon which it was lawful for a Christian prince to assume an imperium over the Indians and their lands. Vitoria, probably the best and certainly the most sophisticated and influential example from the Spanish school, argued that Spanish title over the Indians derived lawfulness from one of six and possibly seven grounds. These grounds involved either the forcible conquest of the Indians or their voluntary submission to Spanish rule. Vitoria stated that conquest of the Indians must proceed from a just cause. Such causes arose upon the Indians' breach of the jus gentium, the law of nations or nature and were either secular or religious
in character. Thus the refusal of the Indians to allow Spain to exercise its rights of trade and commerce in their territory presented the Spanish with a just and secular cause to engage them in a defensive war. Propogation of Christianity gave the Spanish another possible title over the Indians, a religious right of war which arose if the Indians prevented the Spaniard's exercise of their right (and, after Inter Caetera (1493), duty) to preach the Gospel in their lands:122

"...if there is no other way to carry on the work of religion, this furnishes the Spaniards with another justification for seizing the lands and territory of the natives and for setting up new lords there and putting down the old lords and doing in right of war everything which is permitted in other just wars, but always with a regard for moderation and proportion, so as to go no further than necessity demands... and with an intent directed more to the welfare of the aborigines than to their own gain".

The argument of the Salamanca Divines was certainly known in Elizabethan England.123 Las Casas' Brevissma Relacion (1542) was translated into English in 1583 with extracts being included in Hakluyt's Discourse of Western Planting (1584).124 Purchas included an account of the Valladolid Disputation in his Hakluytus Posthumus (1625)125 which like Hakluyt's work enjoyed great popularity in its day. The Spanish influence was evident in the work of Bacon126 and Gentili127 as well as other tracts,128 some admittedly propagandist in character, of the late Tudor and early Stuart period.

iii) Elizabethan charters

The argumentation of the Salamanca Divines had some bearing upon the interpretation of Elizabeth I's charters to Gilbert (1578) and Raleigh (1594) authorising adventure and settlement of the New World. These charters permitted the grantees "to discover, search, find out, and view such remote heathen and barbarous lands, Countries and territories, not actually possessed of any Christian Prince or people, as to him, his heirs and Assigns... shall seem good".129 The charters went on to provide that the grantees:

"...shall have, hold, occupy, and enjoy, to him... forever, all the soil of such lands,

122 Id.
123 Generally Porter The Inconstant Savage, passim.
124 Text in Taylor, ed The original writings and correspondence of the two Richard Haklayts (1935), I, 257.
125 Purchas Hakluytus Posthumus or Purchas His Pilgrimes (1625), 1905-07 ed, VXIII,80.
126 Bacon "An Advertisement Touching an Holy War" (1622) in Spedding, Ellis and Heath, eds The Works of Francis Bacon (1859), VII, 10 and "Of Plantations", Works, VI,457.
127 De Jure Belli Libri Tres (1589).
128 Keymis The Discoverie of the Large, Rich and Bewtiful Empyre of Guiana (1596); Anon "Nova Britannia : Offering Most Excellent Fruites By Planting in Virginia" (1609) in Force's Tracts, I,6; Councell of Virginia "A True Declaration of the Estate of the Colonie in Virginia" (1610); R Hakluyt The Discovery and Conquest of Terra Florida by Don Ferdinando de Soto translated out of Portuguese (1611). See generally Porter, The Inconstant Savage, ch 8.
129 CRNC, I,6 (Gilbert's patent, 1578) and 13 (Raleigh's patent, 1584).
Countries, and Territories so to be discovered or possessed as aforesaid and of all Cities, Castles, Towns, villages, and places in the same... to be had or used with full power to dispose thereof, and of every part thereof, in fee simple or otherwise according to the order of the laws of England, as near as the same conveniently may be... to any person then being... within the allegiance of us... reserving always to us... for all services, duties and demands, the fifth part of all the ore of gold and silver, that from time to time... after such discovery, subduing and possessing, shall be there gotten..."

On the face of it such provision would seem to indicate the Crown was asserting an extensive right of government over large areas of territory by simple act of discovery. Gone, it might appear, was the stipulation of Henry VI's charters that English rights of government over the Indian tribes derived from their conquest. This, however, was not the case despite the rather large claims made by Elizabeth I. Such claims were directed against Spain rather than the Indian tribes. The term "discovery or possession" was meant in a conjunctive sense. This left open the questions as to how that "possession" was actually to be made, much like Henry VI's charters had left unspecified the meaning of "conquest". The conquest or consent of the Indian tribes, probably along the lines given by the Salamanca Divines, was considered relevant to the question of "possession". In addition the power of government erected by these letters patent was defined wholly in personal terms from which the tribes were excluded. The grantees obtained

...full and mere power and authority to correct, punish, pardon, and rule, by their, and every or any of their, good discretions and policies, as well in causes Capitall or criminal as civil, both marine and other, all such, our subjects and others, as shall, from time to time hereafter, adventure themselves in the said journeys or voyages, habitative or possessive, or that shall, at any time hereafter, inhabit any such lands, Countries, or territories as aforesaid, or that shall abide within two hundred leagues...

In other words, the Crown established by charter a machinery of government limited to her wayfaring subjects.

This interpretation is wholly borne out by a neglected but important True Reporte (1583) accredited to Sir George Peckham and published between the grants to Gilbert and Raleigh. The sophistication is absent but in general thrust this work, which Hakluyt subsequently included in his Principall Navigations, is identical to that of the Spanish school. The Reporte set out for Elizabeth I "her higeffe lawfull Tytle" unto the New Founde Lands

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130 Id, 6 (1578) and 13 (1584).
131 Juricek "English Territorial Claims in North America under Elizabeth and the Early Stuarts" (1975), 7 Terra Incognitae 7.
132 CRNC, I, 8 (1578) and 15 (1584).
133 PN, Vi, 42. Other materials relating to the 1578 and 1584 voyages are discussed by Porter The Inconstant Savage, chs 11 and 12.
134 Peckham A True Reporte of the late discoveries (1583), fol c i.
taken in her name by Gilbert under his charter of 1578. The writer alleged Elizabeth I's title to the lands discovered for her by Gilbert to be good as against other Christian nations by right of discovery soon to be supplemented by English settlement. As against the "Sauages", however, the English claimed the right to trade and plant in these lands. Peckham divided planting into "two sortes", the first "when Christians by the good liking and willing assent of the Sauages, are admitted by them to quiet possession". The second form of planting arose "when Christians being unjustly repulsed, doo seeke to attain and maintaine the right for which they doo come", this being the conversion of the Indians and, Peckham implied, the conduct of "trade and traficke". Although the purpose of this tract was primarily propagandist it indicated the general premises of the Spanish school, that Christian princes' rights of government over tribal societies of America derived from the latter's consent or conquest on religious or secular grounds, were incorporated into British practice. These premises underlaid the Elizabethan charters for the New World.

iv) The Stuart charters

The subsequent royal charters for North America commencing with the first charter to the Virginia Company (1606) contained geographic limitations and declared fuller rights of government than those of previous times. The 1606 charter referred to "that parte of America commonly called Virginia, and other parts and territories in America either appertaining unto us or which are not nowe actually possessed by anie Christian prince or people..." The charter avowed the purpose of English settlement to be "the furtherance of soe noble a worke... in propagating of Christian religion to suche people as yet live in darkness and miserable ignorance of the true knowledge and worshippe of God". Such terminology declaring the right and duty of all Christian nations to spread the word of God had two functions. First it rejected the papal authority to donate to the Iberian powers exclusive spiritual responsibility for the heathen soul. Secondly and implicitly, it took up the argument of the likes of Vitoria and the early seventeenth century publicists such as Grotius and Gentili who saw in the exercise of this religious duty some basis for the acquisition of rights of government over the tribes. The first Virginia charter gave the grantees title to all lands within fifty miles coastwards and one hundred miles inland of the first settlement. This still left the settlement to be established and the charter gave no indication if this was to be achieved by purchase or cession from the Indian tribes or mere usurpation. Neither did the charter make clear whether the Company's rights of government

135 Id, fol c ii.
137 TCVC, 1.
138 Id, 2.
139 Juricek, "English Territorial Claims in North America", 12.
within this 100 x 50 mile region were personal or territorial. Certainly the charter gave no
more than personal rights of government outside the 100 x 50 mile area and within the
specified degrees of latitude. The indications are that the same applied to those lands
within the settlements' boundaries. The instructions supplementary to this charter directed all
persons of the settlement to "well entreate those salvages in those parts and use all good
means to draw the salvages and heathen people of the same several places and of the
territories and countries adjoining to the true service and knowledge of God". The tribes
within and without the 50 x 100 mile area were, therefore, not considered subject to British
government. Given this, it cannot be said the first Virginia charter claimed a British
jurisdiction over the Indian tribes. This would have been impossible to enforce- the de jure
position under this charter was not so far removed from that which obtained de facto. The
Crown used its constituent power not only to brush aside the claims of other Christian
nations to territory over which they had not established prior rights by occupation but also
to constitute judicial, legislative and executive authority over its subjects in these parts.
There is no indication in the charters for the New World up to and including the first
Virginia charter of an attempt to erect any right of government over the Indians by mere
sweep of the royal pen.

The Crown's territorial claims in North America became more comprehensive with the
second Virginia charter (1609) which set the tone for most of those that followed over the
next century. The charter opened with reference to "that parte of America commonlie called
Virginia, and other part and territories in America either apperteyning unto us or which are
not actually possessed of anie Christian prince or people..." The charter went on to

"... give, grante and confirme unto the said Tresorer and Companie... under the
reservations, limitacions and declaracions hereafter expressed, all those lands,
countries and territories scituat, lieinge and beinge in that place of America called
Virginia... togeather with all the soiles, groundes, havens and portes, mynes, as well
royal mines of gold and silver as other mineralls, pearles and precious stones,
quaeries, woods, rivers, waters, fishings, commodities, jurisdictions, royalties,
priviledges, franchises and preheminences within the said territorie and the precincts
there of whatsoever..."

Unlike its predecessor which gave title (also as of the manor of East Greenwich at Kent)
over lands within a 50 x 100 mile area of the prospective settlement, this charter purported
to grant title over all land between the specified degrees north latitude. This grant of title
was however only as full as that which "wee by our lettres patent male or cann grante", a

140 TCVC, 5.
141 "Articles, Instructions & Orders supplementary to the Virginia Charter" (1606), TCVC, 13 (issued under the royal
Sign Manual).
142 TCVC, 27.
143 Id, 42-43.
144 Id, 43.
saving provision for Indian rights. Similarly no power of government over the tribes within the compass of the grant was erected for like previous charters the jurisdiction of the judicial, legislative and executive authorities was still formulated in personal terms limited to British and the "entremedling" subjects of other Christian princes.

Successive charters continued the practice of granting title to extensive areas of the New World, the "anie Christian prince" provision disappearing from those charters for regions over which the Crown considered its title as against other Christian nations to be settled. These charters contained no claim to a jurisdiction over the Indian tribes, the powers of government therein constituted being usually expressed in personal or at least terms which by necessary implication excluded the independent tribes. An example of this implied exclusion may be found in the charters' constant references to "Barbarous Nations" as a class distinct to that of the "English subjects" amenable to the authorities constituted by charter. Where the Crown was intending to constitute any government over the natives of a particular region this was recognised in express terms. Thus the charter of Rhode Island and Providence Plantations (1663) noted how the Narraganset Indians had agreed "of their own acorde, to subject themselves, their people and landes, unto us..." Similarly the letters patent to Merifield for the islands of St Christopher, Nevis, Barbadoes and Montserrat (1625) gave the grantees "full power and authority for us... to order and dispose of any Lands or other things... and to governe rule and order all and singular persons... as well our natural borne subjects as the Natives and Savages of the said Islands..."

v) The Marshall Court Judgments

The royal charters for the New World claimed a territorial right for the Crown yet erected an imperium with a jurisdiction which might be termed personal inasmuch as it excluded the indigenous tribes from the legislative and judicial powers therein given the colonial authorities. Unlike the imperium obtaining in the East these charters had no basis in

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146 The Crown conferred "full and absolute power and authority to correct, punishe, pardon, governe and rule all such the Subjects of us... as shall from time to time adventure themselves in anie voiadc thither or that shall at anie tyme hereafter inhabit in the precincts and territorie of the said Colonie as aforesaid, according to such order, ordinances, constitution, directions, and instruccions as by oure said Councell, shall be established...", TCVC, 52. This class would excluded the Indian tribes.
147 Letters patent to the Newfoundland Company (1610), SC, 51; New England charter (1620), CC, III, 1827; grant of the province of Maine (1622), CC, III, 1621; charter of Avalon in Prowse A History of Newfoundland from the English, Colonial and Foreign Records, 2nd ed, (1896), 131; charter for Carolina (1629) CRNC, 64; charter of Massachusetts Bay (1629), CC, III, 1846; charter of Maryland, CC, III, 1679; grant of the province of Maine (1639), CC, III, 1625; charter of Connecticut, CC, I, 529; charter for Carolina (1663), CRNC, 78; charter of the Hudson's Bay Company (1670), in Martin The Hudson’s Bay Company’s Land Tenures (1898), 163; commission for New Hampshire (1680), CC, IV, 2446; charter of Pennsylvania (1681), Minutes of the Provincial Council of Pennsylvania (reprint 1968), 17; commission for New England (1688), CC, III, 1863; charter for Georgia (1732), CC, II, 765 and see the opinion of A-G Ryder and S-G Strange (1737) which presupposes this interpretation of the 1732 charter: Chalmers Opinions, II, 298. The examples above are not exhaustive.
148 CC, VI, 3211 at 3212.
149 Text in Burns History of the British West Indies (1964), App E, 768.
the consent of the local non-Christian polities. It may be said then that the Crown claimed an inherent right to constitute an imperium in these parts unrelated to the consent of the local (tribal) authorities but limited to the Crown’s own subjects (and ‘enterming’ European nationals).

These features of the American charters received consideration by Chief Justice Marshall in a series of celebrated cases in the Supreme Court of the United States during the early nineteenth century. These cases provided the classic formulation of the legal status of the American Indian subsequent to the Crown’s claim (through these charters) to the territorial sovereignty of large regions of the continent.

The competition amongst the European powers for the New World Marshall found to have been underpinned by a doctrine of discovery:

"... as they were all in pursuit of nearly the same object, it was necessary in order to avoid conflicting settlements, and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. The principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession".

Although this over-simplified European practice, Marshall’s basic premise that the European nations claimed rights over regions of America exclusive of fellow European nations was wholly accurate. The ‘doctrine of discovery’ one might say to have been relative rather than absolute in scope: The European nations’ claims against one another did not affect the rights held by the native tribes against the European state claiming sovereign title over their territory. The sovereign title assumed over North America by the Crown merely diminished tribal sovereignty to the extent it disallowed tribal relations with any other European power. Nonetheless the Crown’s sovereignty became paramount leaving the Indian tribes as "domestic dependent nations". This residual sovereignty left the Indians with the inherent right to internal self-government, a vital postulate from which American Indian law has developed. Put another way, Marshall had found that the sovereignty over North America had been divided between the Crown (holding the paramount sovereignty) and the Indian tribes.

150 Johnson v McIntosh (1823), 8 Wheat.543; Cherokee Nation v State of Georgia (1831), 5 Peters 1; Worcester v State of Georgia (1832), 6 Peters 515; Mitchel v United States (1835), 9 Peters 711.

151 Johnson v McIntosh (1823), 8 Wheat 543 at 573. Also Hurley “Children or Brethren: Aboriginal Rights in Colonial Iroquioa” (Ph D,1985), passim.

152 Worcester v State of Georgia (1832), 6 Peters 515 at 543-544.

153 Cherokee Nation v State of Georgia (1831), 5 Peters 1 at 17.

154 Cherokee Nation v State of Georgia (1831), 5 Peters 1 at 16-17; Worcester v State of Georgia, (1832), 6 Peters 515 at 556-559; also Prucha American Indian Policy in the Formative Years (1790-1834) (1962), esp at 211; Congress passed the Intercourse Acts (1790-1834) dealing with Indian-European relations but in all other matters the Indians were left with the power of self-government deriving from their internal sovereignty.
Eventually such a regime would become known to English law as a 'Protectorate', meaning an arrangement by which the Crown assumed the 'external' sovereignty of a region leaving the local authorities with the 'internal' sovereignty. However, at the time Marshall assessed the legal status of the North American Indian the Protectorate was unknown to English law so to this extent his assessment broke new legal ground. His position, it may be added, was thoroughly consistent with the constitutional principles which had animated the founding fathers. The American Constitution enshrined the division of the sovereignty of the United States between the federal and state authorities: Marshall’s recognition of residual tribal sovereignty simply added a third component to the equation.

Although Marshall’s judgments quickly became known and admired across the Atlantic there was no real need during the early nineteenth century for the incorporation of such principles into the contemporary British practice governing the acquisition of an imperium beyond the realm. By Marshall’s time the distinction between the two forms of imperium, extraterritorial jurisdiction and territorial sovereignty, had become the cornerstone of British practice. At that time English lawyers were unable to conceive any departure from this practice even if only as an explanation of the Crown’s earlier conduct. During the early nineteenth century Britain was entering into numerous treaties of protection with the native rulers of the East Indies but the practice was not producing any theoretical dilemma requiring Marshall-like recognition of a third form of imperium intermediate between the two types. Positivist theory increased the rigidity of this distinction during the mid-nineteenth century when intensifying British activity in Africa and the Pacific was presenting a real need for acceptance of something resembling Marshall’s approach. Austinian thought shunned any division of sovereignty which was the cornerstone of Marshall’s formulation of tribal status and so hamstrung the Crown’s imperial practice until the 1890s when finally English lawyers recognised the Protectorate as a distinct form of territorial imperium.

For present purposes the importance of Marshall’s judgments was the finding that the Crown had not unilaterally erected an imperium over the American Indian tribes. Although

155 Roberts-Wray Commonwealth and Colonial Law, 112-115; Jenkyns British Rule and Jurisdiction Beyond the Seas (1902), ch IX; Hall International Law (1902), 50-51.
157 For instance treaties of 10 November 1801 and 6 June 1802 in 56 CTS 251 & 341; 27 September 1803 and 12 June 1804 in 57 CTS 211 & 273; 17 April 1805 in 58 CTS 127; 5 December 1810 in 61 CTS 3; 23 December 1812, 62 CTS 111; 1,9,12,17 November and 23 December 1817, 6,13 January, 26 February, 26 March in 68 CTS, 121,155,179,183,227,299 and 319; 31 July, 5 October, 11,12 and 25 December 1818, 10 January 1819 in 69 CTS 77,263,387,391,437 & 453.
158 Generally Johnston Sovereignty and Protection, passim.
159 Austin The Province of Jurisprudence Determined (1832), 237-241.
160 Bramston, memorandum on Protectorates, 20 February 1891 CO417/69/4373 approved by Law Officers to Knutsford April 17, 1891 CO417/69/7948; R v The Earl of Crewe, ex parte Sekgome [1910] 2 KB 576; Sobhuza II v Miller [1926] AC 518. Also Johnston Sovereignty and Protection, ch 7; Roberts-Wray Commonwealth and Colonial Law, 114-116; cf Hall Foreign Powers and Jurisdiction 221-222.
the charters established a sovereign title which the Crown’s courts could hardly challenge.\(^{161}\) He found that the Crown had not purported to achieve the tribes’ legal submission by simple sweep of the royal pen. The legal and actual submission of the tribes were treated as virtually synonymous. Any British *imperium* over the Indian tribes Marshall held to have been (and so far as the United States was concerned was still being) obtained through their voluntary submission in treaties or, less usually, conquest.

vi) colonial legislative and judicial practice

The legislative and judicial practice within the British colonies in North America under the Crown’s charters appears to have been mostly consistent with Marshall’s assessment. Although it is inappropriate to engage in a comprehensive survey it appears that generally the legislative\(^{162}\) and judicial practice affecting the Indians within the North American colonies distinguished amongst three groups:\(^{163}\) The first group, occasionally termed the ‘foreign nations’, were treated as independent political communities under the Crown’s subjection but over whom the colonial authorities had no jurisdiction. This group was equivalent to the ‘domestic dependent nations’ which Marshall recognised as retaining their internal sovereignty. The second group was the tributary tribes under the protection and varying degrees of dependence upon the nearby colonial authorities. It appears these ‘plantation Indians’ were generally left to their own devices in civil and most criminal matters *inter se* but in disputes with Englishmen the colonial authorities were apt to intervene. In Massachusetts this intervention was agreed by treaty and normally entailed conference or negotiation between the two races rather than formal submission to the ordinary colonial courts which, however, assumed jurisdiction over serious crimes involving Englishmen and plantation Indians.\(^{164}\) The third group consisted of individual Indians living in white society as servants, slaves or freemen without tribal affiliation.

This tripartite classification is wholly consistent with the terms of the Crown’s charters. The plantation and individual Indians became amenable to the jurisdiction of the colonial authorities by reason of their submission (voluntarily or by force). Not having submitted to the colonial authorities but establishing a relationship reminiscent of that between vassal

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\(^{161}\) Johnson *v* M’Intosh, (1823), 8 Wheat 543; Cherokee Nation *v* State of Georgia (1831) 5 Peters 1 at 17-18; Worcester *v* State of Georgia (1832), 6 Peters 515.


state and feudal overlord,165 the ‘domestic dependent nations’ were beyond the ordinary legislative and judicial reach of the colonial authorities.

The Royal Proclamation of 1763 provided an emphatic confirmation of this general practice.166 This famous Proclamation issued soon after the Treaty of Paris (1763) treated the legislative and judicial authority of the colonial authorities constituted under the various letters patent for North America as extending to "all Persons inhabiting in or resorting to Our said Colonies". This class of persons would cover all European persons, the plantation and individual Indians but was clearly intended to exclude "the several Nations or Tribes of Indians, with whom we are connected, and who live under Our Protection". The Proclamation treated these two classes as distinct. Moreover the Proclamation authorised the apprehension of all fugitive Europeans taking refuge in tribal territory, the military and officers charged with the administration of Indian affairs being expressly enjoined and required to go into tribal territory for this purpose. This was an indication that the Crown did not consider the ordinary legislative and judicial power of its constituted authorities to reach into tribal territory. Marshall confirmed this interpretation in Worcester v State of Georgia (1832).167

vii) the influence of the early publicists

Soon after the discovery of the New World the Salamanca Divines had begun theorising over the legality of Spain's subjection of the American Indian. The English were aware of this and, it has been seen, traces of the Salamanca's general argumentation underlaid the Elizabethan charters to Gilbert and Raleigh. This theme was carried over to the Stuart charters for the Americas in that they continued the theme of proselytization initiated by the Papal Bull Inter Caetera (1493) and developed by the Salamanca Divines.168 Beyond this it would require much greater investigation than that necessary for present purposes to assess the precise extent to which the Crown actually conditioned its colonial activity in the New World to the general dictates of the early publicists of the law of nations. The work of such writers as Grotius, Gentili and Suarez was certainly known in Britain but it is doubtful whether it influenced the Crown beyond the charters' invariable token protestations of a duty

165 The analogy is drawn by Marshall in Worcester v State of Georgia (1832), 6 Peters 515 at 560-561; also Slattery "Land Rights of Indigenous Canadian Peoples" (1979) 108; Jennings The Invasion of America, ch 7.
166 Text in Brigham, ed British Royal Proclamations Relating to America, 212-8.
167 (1932), 6 Peters 515 at 548-549.
168 To give some representative examples: The charter of the Newfoundland Company (1610), SC 51, recited its purpose as "principally to increase the Knowledge of the Omnipotent God and the propagation of our Christian Faith"; the third Virginia charter (1612) TCVC 76 was granted "for the propagacion of Christian religion and reclayminge of people barbarous to civilitie and humanitie..."; the New England charter (1620) speaks of "the reducing and Conversion of... Sauages", CC III, 1827 at 1829; the Connecticut Charter (1662) CC, I, 529 at 534 stated conversion of the natives "is the only and principal End of this Plantation"; the charter of Pennsylvania (1681), Minutes of the Provincial Council, 17, spoke of the task "to reduce the Sausage natives by gentle and just manners to the love of civill Societie and Christian Religion".
to Christianise America. The more sophisticated writers of the later times began to secularise the theory of international relations, a trend which matured with Vattel’s *Le droit de gens* (1758), holding that a Christian power enjoyed no inherent right to proselytise in non-Christian territory. The British, however, were late incorporating this into their practice and throughout the seventeenth and into the eighteenth century maintained that the duty to convert the Indians of North America justified colonisation. Still there was no general attempt by the Crown unilaterally to erect a government over the Indian tribes unrelated to their consent or conquest and to this extent British practice was consistent with the theorists who insisted that any right of *imperium* over the tribes emanated from their consent or just conquest.

c) some observations on early British practice

During the sixteenth to mid-eighteenth century the Crown’s erection of the various rights of *imperium* in the non-Christian East and North America was made against a backdrop of treaty relations with the indigenous societies and an absence of any claim to an original jurisdiction over them. Two important principles were implicit in this practice: The first was a recognition of the capacity of these societies to enter into treaty relations with the Crown, in other words, a recognition of infidel sovereignty. The second principle, a corollary of this recognition, was an acknowledgement that any British *imperium* over these societies was derivative: To have claimed any original right would pretend to a similar power as that for which the Papal Bulls of 1454 and 1493 were villified.

It is important to remember that these principles were no more than notional starting points and underlying predicates which acted as guidelines to manner and form rather than substantive constraints upon imperial designs. These principles had been identified and discussed by the various publicists and commentators from the sixteenth century onwards however the extent to which such theorizing determined British practice during this period remains moot. There was some apparent influence: The British charters for the East Indies and Africa stressed rights of trade and made no reference to Christianisation whereas those for the New World emphasized the mission, the same approach to the different regions taken by the publicists during the sixteenth and seventeenth centuries. Nonetheless the precise connection between British practice and any theory of international relations in the period prior to the mid eighteenth century is still largely a matter of speculation. For present purposes, the most that can be said is that to the extent British practice was predicated

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171 The royal charters for North America, the last being the charter for Georgia (1732), consistently declared the duty to proselytise in this part of the world. Molloy argued similarly *De Jure Maritimo* (1682), lib 3, ch 5.
however unwittingly on the above two principles (which also were recognised by the various publicists) some harmony existed between the theory and practice.

The instruments issued under the royal constituent power during the sixteenth to mid-eighteenth century supposed that any British imperium over non-Christian societies was derivative in character, that is an emanation from the indigenous society's consent or conquest. In North America the 'plantation' Indians and individual Indians living in white society could be seen to have consented to British government as was the case with the native servants of the East Indian Company and those persons coming into or living under the protection of factory towns within which a territorial authority had been assumed. To the extent that the charters for the non-Christian parts of the globe did not attempt to establish any jurisdiction over the indigenous societies unrelated to their consent (or, much less desirably, forcible submission), it is possible to identify a consistent theme to British practice in vastly different regions and situations.

The relevance of a non-Christian society's consent to the Crown's exercise of any government over them or their lands was consistent with the intellectual tradition flourishing in Europe and, more particularly England during the seventeenth and eighteenth centuries. During this period various English writers, most in reaction against Stuart excesses, had stressed the consensual origins of lawful government. The constitutional settlements of the late seventeenth century which produced the constitutional orthodoxy of the sovereignty of the Crown in Parliament were a tangible manifestation of this tradition. So far as the Crown's relations with non-Christian societies were concerned the prerequisite requirement of their consent to the Crown's exercise of any power of government over them can perhaps be seen as part of a more general theme of post-Reformation political and constitutional theory.

The Crown's position in the period prior to the mid-eighteenth century relative to the exercise of an imperium within non-Christian territory was identified both by reference to the terms of the constituent instruments and British practice pursuant to these charters. The Crown's position regarding infidel societies was seen as more implicit than explicit in the terms of its charters. These charters were concerned primarily with, first, the Crown's assertion of its rights against other Christian nations and, secondly, the constitution of some form of government for its natural-born subjects as they established trading posts and/or permanent settlements beyond the realm. The position of the indigenous societies of the particular region affected by the royal grant was largely peripheral to the exercise. This dual function meant that the Crown was using its formal instruments to at once declare and constitute rights of imperium. In retrospect this was a rather messy way of proceeding for it blended what were really two separate processes, the one being the public iteration of some

right of government over foreign territory, an act not properly involving any exercise of a royal constituent power, the other being the constitution of these rights of government. This practice did not clearly differentiate a territorial from a personal form of imperium, a result acknowledged both by the Marshall Courts’ judgments recognising an intermediate imperium between extraterritorial jurisdiction (wholly personal) and territorial sovereignty and the late-eighteenth century arguments over the nature of the Crown’s imperium in the Mofussil. It was not until the late-eighteenth and into the nineteenth century that the declaration of territorial sovereignty became separated from the exercise of the constituent power. This facilitated the better identification of the character of the Crown’s imperium over territory beyond the realm.

2. British practice during the mid-eighteenth to early nineteenth centuries

The mid-eighteenth to early-nineteenth century was an extremely formative period for British imperial practice. The political and intellectual climate of this period obtained an intensity which was to have a considerable impact upon the principles affecting British imperial activity. For present purposes two developments occurred during this period which were to have a bearing upon British practice in relation to the acquisition of an imperium over non-Christian societies.

First, the distinction between the two basic forms of imperium became established. The British now recognised two exclusive forms of imperium over foreign territory these being either an extraterritorial jurisdiction or territorial sovereignty. This development was evident in the separation of the declaration of territorial sovereignty from the exercise of the constituent power. As seen, previously one had to infer the character of the Crown’s imperium over territory beyond the realm from the terms of the exercise of the constituent power. From the late eighteenth century regions claimed by the Crown as territorial sovereign were normally, first, formally proclaimed British territory (annexation) before, secondly, the constitution through royal letters patent of the local government. Such a two-step procedure was not adopted for erection of an extraterritorial jurisdiction because this involved no claim to any right of sovereignty, the Crown’s right deriving from a delegation

173 This development may be linked to the synonymity of sovereignty with territorial jurisdiction, a postulate which had matured during the eighteenth century and which was stressed by virtually all the publicists of the nineteenth century: Maine Ancient Law (1861) 84 termed it a postulate lying “at the threshold of the International Code, and it is also one which could not possibly have been subscribed to during the first centuries of modem European history”; also, for example, Manning Commentaries on the Law of Nations (1875), 92; Creasy First Platform of International Law (1876), 113; Twiss The Law of Nations (1884), XV; Lawrence The Principles of International Law (1895), 48, 136; Hall Foreign Powers and Jurisdiction (1884), 2; Walker The Science of International Law (1893), 43.

174 Although normal procedure by the nineteenth century Hertslet advised in 1884 that, “no generally recognized Form” was practiced in relation to an effective annexation: Memorandum, 18 October 1884 in FO 84/1813.
by the local sovereign exempting English persons from the *lex loci*. During the late-eighteenth to mid-nineteenth century examples of this two-step procedure of annexation followed by constitution occurred in Australia, West Africa and, significantly, New Zealand.

The second important development affecting British practice in relation to the acquisition of an *imperium* beyond the realm, and one which was underlined by the adoption of the two-step procedure, was the emergence of the matured, secularised doctrine of independent and equal state sovereignty. Previously the theory of international relations had been explicitly underpinned (albeit with diminishing intensity) by Christian doctrine. Once this ingredient was expunged or at least diluted so that Christian nations could no longer claim an inherent right over non-Christian societies (namely, the right of uninterrupted proselytisation), in theory at least a more punctilious regard for the rights of non-Christian societies should have eventuated. This secularisation was, however, not enough of itself to bring the theory into a closer rein with the actual conduct of international relations. It was, nonetheless, an important sign that the study of the law of nations was losing its heavily philosophical and theological overtones and becoming (to use a clumsy word) more ‘practical’. The tidemark of this process was Vattel’s *Le droit de gens* (1758) which although mostly a synthesis of Wolff’s (vastly more philosophical) work contained a descriptive exposition of the law of nations soon accepted in England as elsewhere as authoritative. More crucially, the secularisation of the theory of international relations matched a development in the actual state of European relations: The medieval notion of a single society of Christendom had finally broken down into that of the sovereign independent national state. Vattel’s work, “the first to adopt this view of the international system”, became an invaluable handbook simply because it appeared to bring theory and practice together.

The essence of Vattel’s theory of international relations lay in the conception of independent and equal state sovereignty. Nations or states, the subjects of the Law of Nations (“the science of rights which exist between Nations or States”), Vattel defined as "political bodies, societies of men who have united together and combined their forces, in

175 Hope Scott "Report", 243; *Papayanni v Russian Steam Company: The Laconia* (1863), 2 Moo PC (NS) 161, 15 ER 862; Forsyth *Opinions*, 232; Hall *Foreign Powers and Jurisdiction*, 135; *Japanese Imperial Government v P. & O. Co.* (1895) AC 644; *Secretary of State v Charlesworth* [1901] AC 373. Paunkoforte "Papers relating to Foreign or Ex-territorial Jurisdiction" (1892) in HO 97/497.
176 HRA, I, 1, 9 (New South Wales); III,6,600 (West Australia).
177 (1821), 1 & 2 Geo 4 c 28 and Roberts-Wray *Commonwealth and Colonial Law*, 783 & 785 (Gambia and the Gold Coast).
179 Hinsley *Sovereignty*, 193-5.
180 Id, 195.
181 *Le droit de gens* (1758), Introduction.
order to procure their mutual welfare and security". Clearly this definition was wide enough to encompass non-Christian and most tribal societies as well as the more sophisticated nations of Europe. Indeed, Vattel recognised the sovereignty of the dwarf state as much as the "most powerful kingdom". He was not blind to international reality, however, and accepted that a weaker state might place itself under one stronger for purposes of protection "without, however, divesting itself of its right of self-government and of its sovereignty". This right of self-government was "the most important" right and hallmark of a state. It meant a foreign nation had no inherent right of interference or government over another state, as by some claim to a right to send missionaries without the permission of the host sovereign. The lawfulness of the exercise of any such right originated in the consent of the grantee state no matter how 'dwarf'-like its international stature.

Although Vattel was unequivocal in his position that no right of government, however partial, could be acquired other than with the consent of the local state (the right of war he limited to self-protection) he argued that no state could "lawfully appropriate an extent of territory entirely disproportionate to its needs". The Law of Nations, he said, "will only recognise the ownership and sovereignty of a Nation over unoccupied lands when the Nation is in actual occupation of them, when it forms a settlement upon them, or makes some actual use of them". Here he drew a distinction between states which laid claim to territory within which "certain districts" were left "wild and untilled" and those of the New World, "a vast territory in which are to be found only wandering tribes whose small numbers cannot populate the whole country". Accordingly he would exclude from the territory of the tribal states of America those "lands which the savages have no special need of" and of which they were making "no present and continuous use". These lands Vattel felt to be open to original acquisition by other nations. Other tribal territory, that within its actual occupation, he included in the general rules governing the acquisition of rights of government by one state over the territory of another. So far as this territory was concerned the new sovereign's rights could only be derivative. Ever an admirer of British colonial practice he noted, however, that the English had not dealt with the Indians of New England and Pennysylvania as though their waste lands (hunting grounds) were open to original

182 Id, I, 1, para 1.
183 Id, I, paras 5-6, Introduction, para 18.
184 Id, I, ch 16.
185 Id, II, 4, para 54.
186 "It clearly follows from the liberty and independence of Nations that each has the right to govern itself as it thinks proper, and that no one of them has the least right to interfere in the government of another": idem.
187 Id, II, 4, para 54.
188 "It is therefore certain that no one may interfere, against a Nation's will, in its religious affairs, without violating its rights and doing it an injury": id, II, 4, para 59.
189 Id, II, 7, para 86.
190 Id, I, 18, para 208.
191 Id, I, 18, para 209.
192 Id.
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182 Id, I,1,para 1.
183 Id, I,1,paras 5-6, Introduction,para 18.
184 Id, I, ch 16.
185 Id, II,4,para 54.
186 "It clearly follows from the liberty and independence of Nations that each has the right to govern itself as it thinks proper, and that no one of them has the least right to interfere in the government of another": idem.
187 Id, II, 4, para 54.
188 "It is therefore certain that no one may interfere, against a Nation's will, in its religious affairs, without violating its rights and doing it an injury": id, II,4,para 59.
189 Id, II,7,para 86.
190 Id, I,18,para 208.
191 Id, I,18,para 209.
192 Id.
acquisition. Instead they had acted with "moderation" and purchased these lands from the natives despite their possession of a charter from the King.

Vattel's argument regarding the acquisition of waste lands appears to have been largely speculative for he gave no clarification of the means by which nations were to discern the reservation of "certain districts" "wild and untilled", from the claim to a "disproportionate" territory. His praise of the English acquisition of (the full) territorial sovereignty over the "disproportionate" regions of Pennsylvannia by derivative rather than original means might indicate his preference for the former notwithstanding his recognition of the latter. Still the European nations were free to acquire as of right only the unused territory of North America. The territory legitimately occupied by the tribes was not open to the original acquisition.

As Britain's imperial interests and activities spread during the second half of the eighteenth century and into the nineteenth the conduct of her relations with non-European polities took a format explicable on no basis other than subscription to something approaching Vattel's theory of independent and equal state sovereignty. This position is evidenced by the greatly increased regularity with which the Crown entered into treaty relations with non-European polities. Although the increased pace and growth in British imperial interests during this period inevitably meant more frequent contact between the Crown and non-European societies, the fact that this growth in relations took a certain formality signified the Crown's willingness to treat these societies as sovereign and independent.

Britain's willingness to recognise and respect non-European sovereignty in its formal relations appears to have extended to any body enjoying a minimal degree of perceptible political organisation, the precondition for statehood set by Vattel. Thus treaty relations between the Crown and Indian tribes of North America became more frequent and regular following the re-organisation and consolidation of Indian policy subsequent to the Treaty of Paris and Royal Proclamation (1763). The United States continued this pattern of treaty relations with the independent tribes. In Africa treaty-making with the tribes of the western coast commenced as Britain established trading posts along the coastal region. In

193 Id.
194 Jones License for Empire. Colonialism by Treaty in Early America (1981), passim; Hurley "Children or Brethren", passim (relations with the Six Nations). Also Simon v R [1985] 2 SCR 387 (SCC) at 400-1 per Dickson CJ (juridical capacity of Indian tribes recognized).
195 Must of these post-Revolutionary treaties can be found in Kappler Indian Affairs, Laws and Treaties (1904), 2nd ed, vol 2 which are often, in turn, reprinted from United States Statutes at Large. Significantly many such treaties were included in the various Martens' treaty series, an important indication from the early-nineteenth century of the contemporary acceptance of tribal sovereignty. The treaty-making practice was stopped by Congressional legislation in 1871.
196 The first British treaty with an African tribe given by Hertslet is the treaty of cession by the United Chiefs of Sierra Leone, August 1788 (MAT, 3rd,26). In the period 1788-1845 104 treaties or formal agreements were entered into by the British Crown with African tribes (SCI, 84-102). As to treaty-making practice in southern Africa and the recognition of tribal sovereignty see Merivale, Memorandum for Cabinet, April 1851, CO 879/1:XX.
the East the Crown entered into various treaties with the Asian powers.\textsuperscript{197} The British had come to place such an emphasis upon the consent of the local sovereign to their exercise of rights of government over non-British subjects that a formal grant of diwani was obtained from the Mughal Emperor (1765) notwithstanding the comprehensive British victory at the Battle of Plassey (1757). In other regions of the non-Christian globe the Crown concluded treaties with the local states clearly acting on the basis of mutual capacity to enter into such relations.\textsuperscript{198} The only significant departure from this treaty-making pattern, and this the proverbial exception which proved the rule, was with the Australian Aborigine whose social organisation appeared so primitive to the eighteenth century eye that the British had difficulty believing them human let alone perceiving any semblance of political organisation.\textsuperscript{199}

From the mid eighteenth century the Crown incorporated a principle of independent and equal state sovereignty into her formal relations with non-European polities. The subscription to this position acted not so much as a substantive restraint as guideline to the manner and form of these relations. The reality of such formalism may have revealed the gross imbalance of bargaining position and hence artificiality of the doctrine but it was one to which the Crown nonetheless subscribed. To take an example, King Burungai Sonko of Barra, reportedly a habitual drunkard, entered into 'the Ceded Mile Treaty' (1826)\textsuperscript{200} surrendering a mile-wide band of land along the Gambia River after a convincing and sobering display of British gunboat diplomacy:\textsuperscript{201} If in the reality the sovereignty of the lesser, unpowerful 'states' was easily abused that does not alter the fact that the recognition of their sovereignty had been made.

This result was too much for some commentators from the later school of thought which distinguished 'civilised' from 'uncivilised' nations. Butler and Macoby (1928), for example, found it "difficult to imagine a closer-packed bundle of fallacies" as Vattel's undiluted theory of state equality and commented that its application "was to go ludicrously far in the naturalistic direction".\textsuperscript{202} By the criteria of some late nineteenth and early twentieth century commentators that may have been so, nonetheless it was during the period when the theory

\begin{itemize}
\item \textsuperscript{197} Prior to the grant of diwani (1765; text in 43 CTS 217,219) the SCI lists 22 British agreements or treaties with the Indian princely states and neighbouring polities, most of these falling in the period after the Battle of Plassey of 1757 (19 treaties). In the period 1765-1845 Britain entered into 301 treaties with the polities of this region (SCI, 209-259). Further East, formal treaty relations date from 1786 (Cession of Prince of Wales Island or Penang, 49 CTS, 447), 28 treaties being concluded with the Malaysian polities in the period 1786-1845 (SCI, 306-310).
\item \textsuperscript{198} The Crown entered into 40 treaties with the polities of Arabia and the Persian Gulf in the period 1798-1845 (SCI, 178-186). Three treaties were concluded in Borneo with Sulu (SCI, 318).
\item \textsuperscript{199} The Select Committee on Aborigines (1837) PP,7,#425 reported (at 82): "So destitute are they even of the rudest forms of civil polity, that their claims, whether as sovereigns or as proprietors of the soil, have been utterly disregarded. The land has been taken from them without the assertion of any other title than that of superior force, and by the commissions under which the Australian Colonies are governed Her Majesty's sovereignty over the whole of New Holland is asserted without reserve..."
\item \textsuperscript{200} Text in MAT, 367 and 76 CTS 281.
\item \textsuperscript{201} Gray, A History of the Gambia (1940), 341.
\item \textsuperscript{202} The Development of International Law (1928), 253.
\end{itemize}
and practice of international relations stood astride its earlier Christian/non-Christian and later 'civilised'/’uncivilised' dichotomies that the Crown acquired the territorial sovereignty of New Zealand. Later in this Part the Crown will be seen to have expressly adopted Vattel-like principles as it established its territorial sovereignty over the country.

3. British Practice from the mid nineteenth century

a) The standard of civilisation

Although Vattel’s conception of independent and equal state sovereignty harnessed the theory to the Crown’s formal conduct of its relations with non-European polities it did so in a manner which frequently reduced the supposition of equality to almost farcical levels. In many situations the notional equality between the Crown and the indigenous rulers was plainly contradicted by the disparity in bargaining position. The imbalance was accentuated by the emergence from the early nineteenth century of the European states system which saw the European nations undertaking regular and sophisticated relations on matters such as extradition and postal services. Such relations lay beyond the reach of the less-sophisticated states. Moreover, the European states increasingly required some guarantee from a state that it could protect the nationals of another who might be in its territory with laws regularly and impartially enforced. Schwarzenberger thus observed: "the test whether a state was civilised and, thus, entitled to full recognition as an international personality was, as a rule, merely whether its government was sufficiently stable to undertake binding commitments under international law, and whether it was able, and willing to protect adequately the life, liberty, and property of foreigners".

As a result the European nations began to distinguish by means of a standard of civilisation those countries able to enter into such relations from those unable so to do. This standard, with its strong connotations of the old distinction between Christian and infidel nations, became incorporated into European state practice during the second half of the nineteenth century.


204 Such treaties were limited to the ‘civilised’ states: Lewis On Foreign Jurisdiction (1859), 35 et seq.; Gibbs Extradition Treaties (1868), passim.

205 These treaties are listed chronologically in the SCI, II, pt 2, 123 et seq. These treaties became frequent from the second quarter of the nineteenth century, the ‘uncivilized’ states being largely excluded from this treaty-making activity.


207 Many of the publicists indicated the standard had its origins in the requirements and practice of Christian civilisation; for example: Mackintosh Discourse (1799), 5 and 62; Wheaton Elements of International Law (1836), 50-51; Abdy, ed Kent’s Commentaries (1866), 11; Woolsey Introduction to the Study of International Law, esp at 3-5; Lorimer The Institutes of the Law of Nations (1883), 113-126; Holland Studies in International Law (1898), 113-114; of Oppenheim International Law (1905), 31-32.
century and was recognised by the major works on international law written and available in English during this period. Although it is possible to see the germination of the standard of civilisation in Anglo-American treatises of the early nineteenth century,208 its full effect dates from the second half of the nineteenth century, as European practice exemplified by the admission of Turkey,209 Japan210 and China211 to full international ranks,212 and its emphatic presence in the texts of the period combined to give it an increasing juridical standard.

The development of a standard of civilisation in international law by itself was not an abnegation of the sovereignty of the uncivilised states so much as a recognition drawn from the actual state of international relations that certain forms of regular sophisticated relations were not possible with these states. The standard was never founded upon a disqualification of all status in the uncivilised polities for it was generally recognised by the European nations that relations could be conducted with these people and that certain rights could accrue from engagements with them. These rights generally related to the establishment of an imperium within the non-European territory. A late nineteenth century tidemark of this position was the Conference of Berlin (1885) at which the various European powers used treaties with indigenous African polities as a basis for excluding other European nations from particular regions.213 Although the circumstances behind the conclusion of such treaties may have left something to be desired, the European nations took the position at the Conference that the native polities were able to grant them an imperium over their territory, a stance necessarily recognising some juridical status in the uncivilised communities.

208 Mackintosh Discourse (1799) at 61-62; Martens (trsl Cobbett) The Law of Nations (1829), 5, and translator's note ibid; Wheaton, Elements (1836), 50-54.

209 Traditionally dated from the Treaty of Paris 1856, article 7 CTS: Wheaton Elements (1866, ed Dana), 19; Phillimore Commentaries (1879) 86-93; Twiss, The Law of Nations (1884), 88-92; Oppenheim International Law (1905), 32-33; Westlake International Law (1910), 47-48; Holland Lectures on International Law (1933), 38; cf Wood "The Treaty of Paris and Turkey's Status in International Law" (1943), AJIL 64; Gong The Standard of 'Civilization' in International Society (1984), 106-119; and Naff "The Ottoman Empire and the European States System" in Bull and Watson, eds. Expansion of International Society, 143.

210 Oppenheim International Law (1905), 33; Møller International Law in Peace and War (1931), 5; Holland Studies in International Law (1898) 113-114 (Japan's status doubtful) and Lectures (1933) 39 (Japan admitted to the "charmed circle"); and, generally, Gong Standard of 'Civilisation', 164-200 and Suganam "Japan's Entry into International Society" in Bull and Watson, eds. Expansion of International Society, 185.

211 Oppenheim International Law (1905), 33-34 and Holland Lectures (1933), 39 (China's status still doubtful); Møller International Law, (1931), 5 and, generally, Gong Standard of 'Civilisation', 130-163 and "China's Entry into International Society" in Bull and Watson, eds Expansion of International Society, 171.

212 For the status of other states such as Persia, Siam, Abyssinia and Liberia, see, for example, Oppenheim International Law (1905), 32-34; Westlake International Law (1910), 40 and Holland Lectures (1933), 38-39 and generally, Gong Standard of 'Civilisation' and Bull and Watson, eds Expansion of International Society.

213 The Final Act of the Berlin Conference (articles 34 and 35) created a notification system amongst the European powers in relation to their 'possessions' in Africa. Some writers argued that (as with the New World) Africa was considered res nullius: Westlake Chapters on International Law (1894), 144-155; Walker A Manual of Public International Law (1895), 27-31; Lawrence The Principles of International Law (1895), 143-156; Oppenheim International Law (1905), 278-279; Westlake International Law (1910), 93-94; Smith International Law (1918), 105. This position was contradicted by established European treaty-making practice in Africa: SCI 3 (Belgian treaties with African tribes); 5 (French treaties); 75 (German treaties); 83 (British treaties); 327 (Italian treaties); 339 (Dutch Colonial Agreements) and see, generally, Alexandrowicz The European-African Confrontation (1973); Lindley The Acquisition and Government of Backward Territory in International Law (1926), 140-148 and Bull "European States and African Political Communities" in Bull and Watson, eds Expansion of International Society, 99 esp at 111-112.
Most publicists of the period acknowledged if, but inferentially that the standard of civilisation had imported a two tier character of sovereignty into international relations. They did this either negatively by limiting their discussion to the European Law of Nations or, more positively, by acknowledging some status in uncivilised societies but excluding them from the club of civilised nations. Those writers adopting the more positive approach often expressed such sovereignty in terms of 'semi' or 'demi-sovereignty' and frequently used the feudal analogy of suzerain and vassal state to describe the relationship between European nations and those uncivilised societies who had placed themselves under European protection. These writers recognised that for all its other limitations an uncivilised nation's sovereignty extended at least to the capacity to confer an imperium upon a European or civilised nation. Manning, for example, wrote of the acquisition of territorial sovereignty, the fulmost imperium, over uncivilised territory:

"The only two modes of acquiring territory in modern times are 'Occupation' and 'Cession' by treaty, whether following upon a war or not. It would seem at the present day that a right by Occupation is strictly limited to the case of land absolutely uninhabited, and that in the case of colonising an already inhabited country, annexation of territory can only take place by interposing the fiction of a spontaneous cession on the part of persons representing the government of the native inhabitants".

Similarly Phillimore distinguished the general principles of International law binding upon all nations from those of the positive "European Code" which bound only European (civilised) nations. Whilst uncivilised or 'infidel' nations were not subject to the latter code they were nonetheless valid subjects of international law to whom the former code applied. Thus:

"The great point, however, to be established is, that the principles of international justice do govern, or ought to govern, the dealings of the Christian with the Infidel Community. They are binding, for instance, upon Great Britain, in her intercourse with the native powers of India; upon France, with those of Africa; upon Russia, in her relations with Persia or America; upon the United States of North America, in their intercourse with the Native Indians".

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214 Most writers, including those not expressly dealing with the status of uncivilised societies defined international law as the rules governing the conduct of European states at large (as opposed to inter se) for example: Martens The Law of Nations (1829, trsl Cobbett), 3-5; Wheaton Elements (1836), 54; Hallock International Law (1861), 43-51; Abdy, ed Kent's Commentaries (1866), 6 and 11; Amos Lectures on International Law (1874), 13; Twiss The Law of Nations (1884), 145-149; Phillimore Commentaries (1879), 349; Maine International Law (1894), 32-35; Mackintosh Discourses (1799), 61-63.

215 Levi International Law (1887), 83-84; Twiss The Law of Nations (1884) 27; Wharton A Digest of the International Law of the United States (1887), II, 533, Maine International Law (1894), 58-59; Creasy First Platform (1876), 94-98.

216 Also Twiss The Oregon Question (1846), 251-252; Lorimer Institutes of the Law of Nations (1883), I, 101-103, 216-18; Field Outlines of an International Code (1876), 2-3, 30 (of his position at 18); Maine International Law (1894), 71-75; Fiore International Law Codified (1918, trsl Borchard), 423-426. See Lindley's review of the publicists' positions, Acquisition and Government of Backward Territory 12-23.

217 Commentaries (1875), Bk 3, ch 3.

218 Commentaries (1879), 22-23.
These writers are representative of the continued recognition of some juridical status in the uncivilised communities notwithstanding the development of a standard of civilisation. The exception to this continued recognition of some juridical status in uncivilised communities was a small group of late-nineteenth century English writers who took the position that international law was the law between (as opposed to the law governing) civilised nations. This group of writers, dismissed by Lindley as unrepresentative on the point,\(^\text{219}\) considered territory occupied by uncivilised nations to be *res nullius* so demoting treaty relations with these polities to a moral rather than legal plane.\(^\text{220}\) The difficulty with this position, condemned by Phillimore as a "detestable" as well as erroneous doctrine,\(^\text{221}\) was that it misinterpreted long-standing European practice (not least that of the British Crown) which had always proceeded on the basis of some juridical capacity in such societies. This failing is surprising given the self-styled positivism of these writers who set their positive law of nations in the actual practice of the civilised states. More particularly, British practice, contemporary as well as historical, contradicted any view which treated uncivilised territory as *res nullius*. The development of a standard of civilisation in international law, much less the influence of the likes of Oppenheim, Walker, Lawrence and Westlake, did not disrupt the essential continuity in the Crown’s recognition of the juridical status of uncivilised communities. We turn now to consider this practice as it developed during the second half of the nineteenth century.

b) The Crown’s acquisition of an *imperium* in uncivilised territory.

The development of a standard of civilisation in international law disrupted neither the Crown’s recognition of the juridical status of uncivilised communities nor its adherence to the long-established requirement of their voluntary consent to a British *imperium* over them. The essential continuity is evident from British practice during the second half of the nineteenth century in relation to the acquisition of what by then had become the two rigid forms of *imperium* over foreign territory, namely territorial sovereignty and extraterritorial jurisdiction.

i) territorial sovereignty

\(^{219}\) *Acquisition and Government of Backward Territory*, 18-23,47.

\(^{220}\) "To characterize any conduct whatever toward a barbarous people as a violation of the law of nations, only shows that he who so speaks has never considered the subject": JS Mill "A Few Words on Non-Intervention" in *Dissertations and Discussions* (1875) III, 152; also Westlake *Chapters* (1894), 143-184; Walker *Manual of Public International Law* (1895), 26; Lawrence *Principles of International Law* (1895), 68-69 (American Indians and East Indian polities), 146-156 (barbarous communities); Oppenheim *International Law* (1905) 33-34 (Persia, Siam, China etc), 268-269, 276-281 (treaties with tribal polities); Holland *Lectures* (1933), 101; Möller, *International Law* (1931), 6-7.

\(^{221}\) *Commentaries* (1879), 349.
During the second half of the nineteenth century the Crown entered into many treaties of cession with ostensibly ‘uncivilised’ societies. In 1892, to take but one year from the period when the standard of civilisation was at the height of its influence upon international law, the Crown entered into seven treaties of cession with various chiefs in Central Africa. In Fiji the Crown accepted the cession of territorial sovereignty of the islands from King Cakombau in 1874. Clearly the Crown considered these uncivilised polities to have the capacity to cede such rights and used such treaties as the basis of its title at international law.

English courts were developing the theory of recognition during the nineteenth century in relation to claims brought before them by and against foreign governments and the Crown on matters arising from the conduct of its foreign relations. The most fundamental rule recognised during this period was that the recognition of the sovereign status of a foreign power was essentially a political act of the Crown. Where no proof of the Crown’s position was available the court would make its own inquiry but where it was, as by the Crown’s entry into treaty or diplomatic relations with the foreign polity or the appropriate certification from the responsible Secretary of State, the court was obliged to give this recognition the appropriate effect in municipal law. Thus, in those many instances where the Crown’s territorial sovereignty over societies not recognized as civilized derived from a treaty of cession with the local authorities English courts were obliged to accept the sovereign status of the ceding party simply by virtue of the Crown’s entry into such formal relations. It hardly lay within the judicial province to inform the Crown it had entered into a treaty with a legal nonentity bereft of any sovereignty.

This position is evident in many cases of the late nineteenth and early twentieth century which proceeded on the basis that treaties of cession between the Crown and the uncivilised polities of the East Indies and Africa were arrangements concluded by two sovereign

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222 See British treaty-making practice in SCI 83-326 (“Colonial Practice”).
223 Id., 170-171 and Herlis Comm Tr XX 25-29.
224 Instrument of Cession 10 October 1874, text in CO 881/4: #44, pp 9-10; Fiji Government Gazette, October 1874 Proclamation of British sovereignty by Sir Hercules Robinson dated the same day.
225 Maine International Law (1894), 71-75; Lindley Acquisition and Government of Backward Territory, 24-44; Hertslet “Memorandum on formalities necessary for effective annexation”, 18 October 1884 FO 84/1813:246-65, points 4 and 6.
226 “The Pelican” - Burke (1809), Edw (App) iv (PC); In re the Government of Peru (1823) BILC 12 (Ch); Jones v Garcia de Rio (1823) T & R 297 (Ch) at 299.
227 As, for example, Yrisarri v Clement (1825) 2 Car & P 223 (CP); Forester and others v Secretary of State for India in Council (1872) LR Ind App Sup Vol 10 (PC); Rajah Salig Ram v Secretary of State for India in Council, id, 119 (PC).
228 English law developed the distinction between de facto and de jure sovereignty during the early nineteenth century in response to the claims to statehood of the newly independent former European colonies in the Americas. Generally speaking de facto recognition developed as a form of tentative recognition given those governments (of the new American nations) whose political control was lacking in an established tradition and pattern of stability; Smith Great Britain and the Law of Nations. A state recognized de facto could allow a British imperium over its territory. Thus Cakombau, recognized only as the de facto sovereign of Fiji, was considered able to make a cession of the sovereignty of the islands: Confidential Instructions to Layard, August 1873 in CO 881/13 : #37.
powers. It can be seen in the 'act of state' cases of this period as well as such African cases as *In Re Southern Rhodesia* (1919) where Lord Sumner found the Crown had recognised the sovereignty of King Lobengula over the Mashona and Matabele tribes in 1888:

"The British Government stated to the Portuguese Government that he was 'an independent King', 'undisputed ruler over Matabeleland and Mashonaland' who had not parted with his sovereignty, though his territory was under British influence; and in 1889 the Colonial Secretary wrote to Lobengula himself, saying that he, Lobengula, 'is King of the country' (i.e. of Matabeleland), 'and no one can exercise jurisdiction in it without his permission'. Lobengula's sovereignty over what is now Southern Rhodesia is therefore the starting point..."

Therefore, during the second half of the nineteenth century the Crown, and in consequence its courts, continued to recognise the juridical capacity of uncivilised societies to make a valid cession of the territorial sovereignty over their lands. The development of a standard of civilisation in international law did not disrupt this long-established position.

ii) Extraterritorial jurisdiction and the Protectorate

Although generally irrelevant to English courts consideration of those situations where the Crown had entered into a treaty of cession with an uncivilised power, the standard of civilisation obtained a more direct presence in English law by virtue of the Foreign Jurisdiction Act 1843. This Act was necessitated by two developments. First, a Law Officers' opinion of 1826 had cast doubt upon the lawfulness of the exercise by consular authorities of some powers of fine and imprisonment over British subjects in the Ottoman Empire. These powers had gradually grown in excess of those formally granted by capitulation. Secondly, one George Maclean had been exercising an extraterritorial jurisdiction amongst British subjects beyond the confines of the Gold Coast forts without the

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229 For instance: *Nabob of Arcot v East India Co* (1791) 1 Ves Jun 370, 2 Ves Jun 56; *Doss and the Estate of the Ex-King of Delhi* (1867) 11 Moo Ind App 277 (PC); *Friith v The Queen* (1872) LR 7 Ex 365; *Mayor of the City of Lyons v East India Co* (1836-37) 1 Moo PC 175 (sovereignty obtained gradually with Mughal permission); *Advocate-General of Bengal v Ranee Surnomoye Dossee* (1863) 9 Moo Ind App 387 (PC); *Doss v Secretary of State for India in Council* (1875) LR 19 Eq 509; *Damodar Gordhan v Deoram Kangi* (1876) LR 1 App Cas 332 (PC); *Secretary of State for India in Concl v Bai Rajbai* (1915) LR 42 Ind App 229 (PC); *Vajesingji Joravasingji v Secretary of State for India in Council* (1924) LR 51 Ind app 357 (PC); *Rustomjee v R* (1876) 1 QBD 487, 2 QBD 69.

230 Similar cases presupposing the juridical capacity of African tribes to enter into treaties of cession or Protection: *Cook v Sprigg* [1899] AC 572 (PC); *West Rand Central Gold Mining Co v R* [1905] 2 KB 391; *R v Earl of Crewe, ex parte Sekgome* [1910] 2 KB 576; *O1 de Njogo v Attorney-General* (1913) 5 EALR 70 (EA Protect, HC); *Tshekedi Khama v High Commissioner* (1936) 11 CTR (Bchl Spec Ct); *R v Buganda Cotton Company* (1930) 4 ULR 34 (Ug HC); *Amodu Tijani v The Secretary, Southern Provinces* [1921] 2 AC 399; *Oyekan v Adele* [1957] 2 All ER 785 (PC).

231 Phillimore to Foreign Office, opinion, 31 March 1865 CO 885/10: 323A.

232 6 & 7 Vict c 94.

233 Hope Scott "Report", 250; Hall *Foreign Powers and Jurisdiction*, 9.

234 Hall *Foreign Powers and Jurisdiction* 133, 149-50.
bother of any formal grant from the tribal authorities. James Stephen, the influential Under-Secretary of the Colonial Office, had despaired over finding any means of legalizing the latter situation thinking its retroactive legitimation by Parliament a usurpation of tribal sovereignty. The Hope Scott Report and consequential Foreign Jurisdiction Act provided the remedy which had escaped Stephen. Although declaratory in tone the Act was clearly innovatory in character. The preamble of the Act declared that the Crown could acquire an extraterritorial jurisdiction in foreign territory by "treaty, capitulation, grant, usage, sufferance, and other lawful means". The Act empowered the Crown to constitute such rights of imperium by the new means of an Order in Council. The words "grant, usage, sufferance and other lawful means" were particularly significant for they recognised that an extraterritorial jurisdiction could be acquired other than by formal treaty with the local power.

This implicitly laid a basis for the distinction between civilised and uncivilised nations to find its way into British practice in the acquisition of an extraterritorial imperium. This infiltration became evident in Papayanni v Russian Steam Company ("The Laconia") (1863) where Dr Lushington indicated that any extraterritorial jurisdiction in a civilised country constituted under the Foreign Jurisdiction Act was governed strictly by the terms of the treaty whereas extraterritorial rights in uncivilised countries were not under the same limitation to the terms of the formal grant. Nonetheless the predicate of the Foreign Jurisdiction Act was that any extraterritorial jurisdiction within foreign territory was still derivative in character notwithstanding the possibility of a less than perfect, informal acquisition in uncivilised countries. The Foreign Jurisdiction Acts became very important tools of British imperial activity during the nineteenth and early twentieth centuries as the frequency of Orders in Council under their authority would indicate. The Acts empowered English courts to recognise the less formal acquisition of an imperium in uncivilised territory than in civilised countries.

Despite this utility the Foreign Jurisdiction Act suffered from a number of defects which hampered British practice in relation to the acquisition and constitution of satisfactory rights of government in uncivilised territory over which no claim to the territorial sovereignty was made.

In the first place, the "treaty, capitulation, grant, usage, sufferance, and other lawful means" terminology of the Preamble presupposed some local authority from whom the

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235 Metcalfe Maclean of the Gold Coast (1962) 170-171,177; Johnston Sovereignty and Protection, 58-59. As to the legality of Maclean's jurisdiction Stanley to Hill, 16 December 1843 CO 96/5; Maclean argued (unsuccessfully) Britain held the sovereignty de facto of the region: Maclean to Stanley, 2 February 1844 (ibid).
236 Stephen to Hope, 26 December 1842 CO 96/2.
237 cf Papayanni v Russian Steam Company (1863) 2 Moo PC(NS) 161, 15 ER 862 at 870.
238 Supra.
239 For the many regions in respect of which Orders in Council under the Foreign Jurisdiction Acts had been issued by 1894 see Hall Foreign Powers and Jurisdiction, "Index of Orders in Council" at 298. See also Herts Comm Tr, XXII, 626-46 listing British treaties of jurisdiction and Orders in Council establishing such rights.
Crown's foreign jurisdiction might be obtained by formal or informal means. This supposition worked smoothly enough in European and Asian regions where the jurisdiction was designed to exempt English subjects from a regular \textit{lex loci} however in Africa and the Pacific, the new, active theatres of British imperial activity during the second half of the nineteenth century, there was no mistaking the function of the Foreign Jurisdiction Act as a means of bringing some order to regions where none had previously existed (at least in British eyes).

So far as the acquisition of an extraterritorial jurisdiction in African territory was concerned, the Crown's advisors proceeded on the basis that jurisdiction over British subjects and the native inhabitants could be derived from treaty, grant, usage or sufferance of the native rulers.\textsuperscript{241} The Crown had difficulty adopting such a position in the Pacific, not through any objection in principle to the recognition of some juridical status in the island societies\textsuperscript{242} - its practice in Africa precluded that, but because of doubts as to the stability of the native governments of the islands.\textsuperscript{243} The reports of its officers from the Pacific\textsuperscript{244} depicted island communities in a constant state of warfare with no tribal ruler ever in a prolonged and stable ascendency\textsuperscript{245} so as to facilitate relations with the Crown from which a jurisdiction by treaty, grant, usage or sufferance might be derived. Although the development of a standard of civilisation in international law when coupled with (in contrast

\textsuperscript{240} The Crown's foreign jurisdiction in Eastern countries (such as Turkey, Persia, China and Japan) was usually distinguished from that obtaining in 'barbarous' (ie tribal) regions: Hall \textit{Foreign Powers and Jurisdiction}, 122; Jenkyns \textit{British Rule and Jurisdiction}, ch VIII and IX; Paunceforte "Papers relating to Foreign or Ex-territorial Jurisdiction" in FO 97/497:nf.

\textsuperscript{241} Instructions to Lieu.-Gov.Hill, 16 December 1845 in CO 96/2:121-32. The Bond of 6 March 1844 with the Fanti Chiefs (96 CT2 235) was concluded to regularise British jurisdiction in the Gold Coast (Hill to Stanley 6 March 1844 CO 96/4:98); Merivale, Memorandum for Cabinet, April 1851, CO 879/1: XX; Holland, minute 25 June 1874 CO 96/113:416-27; Law Officers to Kimberley, 3 August 1880 in CO 48/498:81; Law Officers to Granville, 21 April 1886 FO 84/2275:81. Also the following Orders in Council: Africa (1889 applying to "natives of Africa, being subjects of any native King or Chief, who, by Treaty or otherwise, consents to their being subject to the jurisdiction" and 1892); West Africa (1885); Gold Coast (1844, 1854, 1874 and 1887); Sierra Leone (1850,1853,1895); Gambia (1893); Lagos (1887); Niger Region (1872); Mashonaland and Matabeleland (1894); South Rhodesia (1899); Northwest Rhodesia (1899); Northeast Rhodesia (1900); Bechuanaland (1885 and 1891); East Africa (1897 and 1899).

\textsuperscript{242} The Crown was in theory quite prepared to recognise the sovereignty of the Pacific island communities for the purposes of the Foreign Jurisdiction Acts: Stanley to Jones, 14 September 1863 FO 58/124:31; Law Officers to Stanley, 30 October 1866 FO 83/2314:286-9; Reilly, note accompanying Draft Order in Council for Fiji, 16 January 1868 FO 58/124:162-8; Law Officers to Granville, 11 January 1870 CO 881/4:#20,111-3; Law Officers to Granville, 17 February 1871 FO 83/2314:376-81; Draft Order in Council, 3 August 1874 FO 881/4:No 42; Carnarvon to Law Officers, 10 April 1875 CO 83/8:33-6.

\textsuperscript{243} Foreign Officer reference to Law Officers, 18 October 1866 FO 83/2314:282-4:302-5; Law Officers to Stanley, 18 May 1868 FO 83/2314; Foreign Office to Colonial Office, 2 February 1869, FO 58/124:20,28; Law Officers opinion, 22 July 1871 in FO 83/2314; Law Officers to Carnarvon, 10 April 1875 CO 83/8:33-6; Paunceforte "Memorandum on H.M. Jurisdiction in Western Polynesia", 1876 (nd) FO 97/497:nf.

\textsuperscript{244} Two influential British officials in the Pacific, Jones and Thurston, determined the British position on the juridical standing of the island communities: Jones to Foreign Office, 6 October 1864, FO 58/124:35-8; Jones to Foreign Office, 24 November 1865, id:65-8; Jones, "Report on the Present Social and Political Conditions of the Fiji Islands", enclosure in Jones to Foreign Office, 18 July 1867, id:80-9; Jones' influence noted in Law Officers to Stanley, 18 August 1868 FO 83/2314:308-11; Thurston to Belmore (NSW), 22 July 1868 CO 881/4:#20,38-9; Thurston to Colonial Office, 2 September 1892 and 22 December 1894 cited by Scarr \textit{Fragments of Empire}, 255; Thurston to Colonial Office, 22 December 1894 CO 225/45.

\textsuperscript{245} In as much as British doubts over the sovereignty of Pacific Island Chiefs turned on this question the position may be compared with British doubts during the early-nineteenth century over the sovereignty of the newly-independent American states (on which see Smith \textit{Great Britain and the Law of Nations}, I, 149 et seq.).

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to Africa)\(^{246}\) the relative novelty of British activity in the Pacific islands may have accentuated the apparent deficiencies in the island societies' systems of government it was not the cause of the Crown's doubts over their capacity to grant a jurisdiction for the purposes of the Foreign Jurisdiction Acts. Colonial officials insisted during the late 1870s that the Crown could unilaterally erect an imperium over the natives and its own subjects resorting to uncivilised territories.\(^{247}\) By then only the latter aspect of this view had gradually come to be held.\(^{248}\) Special and innovatory\(^{249}\) legislation was passed, namely the Pacific Islanders Protection Act 1875\(^{250}\) and the Foreign Jurisdiction Act 1878\(^{251}\) modifying the system of 'jurisdiction by legislation' into a limited form of imperium. These Acts gave the Crown a local jurisdiction which might be established through special Order in Council for its own subjects in a particular uncivilised territory. This jurisdiction was limited to British subjects and those natives voluntarily submitting to its exercise.\(^{252}\) These Acts are thus significant examples from the late nineteenth century of the Crown's continued refusal to claim or erect unilaterally an imperium over the native inhabitants of territory beyond the realm.

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\(^{246}\) British recognition of tribal sovereignty in Africa was recognised, it was seen earlier, from the earliest royal charters for Africa.

\(^{247}\) Gorrie (Chief Justice of Fiji) to Hicks Beach, 16 September 1878 CO 225/1; Hicks Beach to Law Officers, 4 January 1879, id:303,310; Law Officers to Hicks Beach (jurisdiction over natives requires Order in Council under Foreign Jurisdiction Act or territorial sovereignty), 20 March 1879 CO 225/4:23-5; Herbert, note regarding Sir A. Gordon's (Western Pacific High Commissioner) complaints re lack of jurisdiction over natives, 15 January 1880 CO 225/3:213-4; Kimberley and Bramston, Minutes (sympathising with the colonial authorities), 22 May 1881 CO 225/9:303,310; Selborne LC, note stipulating any such legislation despite the "theoretical... difficulty" should "be carefully limited to acts of murder or other violence... in order to bring it, as distinctly as possible within recognised principles of jurisprudence", 30 May 1881, id:314; Draft Bill of 1881 giving Her Majesty power to erect courts to try natives for "any crimes of violence" with the proviso that this "Act shall not be deemed to confer on Her Majesty any dominion or sovereignty over the Pacific Islands or the inhabitants thereof" CO 225/11:19-20; Jenkins to Herbert, note (agreeing with Law Officers opinion of 20 March 1879, condemning the Draft Bill which subsequently lapsed: Johnston Sovereignty and Protection, 138), 4 April 1882, id:21-6; Earl of Derby, note (the Draft Bill was "a complete innovation in regard to its theory"), 31 January 1883, id:18. In 1865 the Law Officers had condemned an American Act of Congress, similar to the Draft Bill of 1881, as incapable of conferring a jurisdiction upon American Consuls over natives who had not conceded or recognized American authority, Law Officers to Russell, 5 May 1865 FO 83/2314; Russell to Jones, 11 May 1865 FO 58/124.

\(^{248}\) Law Officers to Stanley, conceding for the first time that Imperial legislation might be used to give a Commissioner "limited jurisdiction in Civil and Criminal Cases over the British subjects" in the Pacific Islands where a jurisdiction could not be got from native authorities under the Foreign Jurisdiction Act, 18 August 1868 FO 83/2314:308-11. Reilly's Draft Bill (encl in Memorandum, 1 January 1869 FO 58/124:227) to like effect eventually lapsed (Vivian to Holland, 4 April 1871, id:312-5) but the principle resurfaced in the Pacific Islanders Protection Act 1875.

\(^{249}\) Paunceforte, "Memorandum on Her Majesty's Jurisdiction in Western Polynesia", 1876 (nd) FO 97/497:mf.

\(^{250}\) 38 & 39 Vict c 51; see permissive opinion of Law Officers to Carnarvon, 10 April 1875 CO 83/8:33-6.

\(^{251}\) 41 & 42 Vict c 67; the 1875 Act was used as the precedent for this Act passed in response to problems in the Congo: Memoranda, Reilly (17 January 1878) and Jenkyns (3 July 1878) FO 97/489:mf.

\(^{252}\) In the Pacific the Colonial Office insisted (note to Foreign Office, 26 August 1892 FO 58/273) and Law Officers (17 November 1892, id.) agreed that any jurisdiction held by the Western Pacific High Commissioner under the Pacific Orders in Council under the 1875 Act was "dependent on an explicit or implied grant by the protected Sovereign... in whom such jurisdiction was (in theory at any rate) originally vested". As to the High Commission's acquisition of such jurisdiction by treaties and Resident Commissioners see generally Scarr Fragments of Empire, 252-289. The SCI includes only the Tonga treaties (at 322: the sovereignty of the Tongan Kings, unlike that of other island communities, was recognised as early as 1864 when Jones urged a treaty be concluded with the reigning chief "King George", see Jones to Foreign Office, 6 October 1864 CO 58/124:35-8), excluding the treaties with the Gilbert and Ellice Island chiefs (see Scarr, supra, 255).
A more crucial shortcoming in British practice arose not so much from the actual terms of the Foreign Jurisdiction Act as in the legal theory underpinning its application. The Act was applied on the basis that the only forms of *imperium* which the Crown might constitute beyond the realm were an extraterritorial jurisdiction, the regime governed by the Act, or territorial sovereignty.\(^{253}\) The extraterritorial jurisdiction, it has been seen, was personal in that it might apply to British subjects and the indigenous inhabitants. This was well and good in the Levant, Middle and Far East where the personal restraint attending extraterritorial jurisdiction supplied the Crown with a jurisdiction adequate for British purposes, that is the exemption of British subjects from the *lex loci*, however as European competition grew during the second half of the nineteenth century in Africa and the Pacific these personal limitations came to be sorely tried. The Crown considered an uncivilised state equipped only to grant an *imperium* for the purposes of the Foreign Jurisdiction Act binding upon its own and British subjects.\(^{254}\) Short of the grant of territorial sovereignty (which the Crown recognised it was in uncivilised states to cede) the uncivilised states, not being members of the club of civilised nations, were unable to grant an *imperium* to a civilised state over the subjects of another in the uncivilised region. The rationale for this was expressed neatly in a minute of 1887 in which Davidson, then legal advisor to the Foreign Office, indicated that since uncivilised tribal nations lacked the ability (unlike the Eastern potentates) to enforce their criminal law nor was there any question of its enforcement amongst the European population of their territory, they could hardly grant the Crown a power over foreigners which they themselves lacked. A nation could grant jurisdiction to another whilst in many cases retaining its sovereignty, said Davidson, "it could part in theory either with all it possessed or with any portion of it but not with more than it possessed or had by showing itself able to enforce - reduced, so to say, into possession".\(^{255}\)

This position, one not shared with the other European nations,\(^{256}\) became particularly troublesome as Britain established Protectorates in Africa and the Pacific during the second half of the nineteenth century. Outright annexation of large regions of Africa and the Pacific

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\(^{253}\) Law Officers to Hicks Beach, 20 March 1879 CO 225/4:23-5; Hertslet, "Memorandum on Protectorates", 24 April 1883 FO 84/2275:60-1; Law Officers Report on British Jurisdiction in Protectorates, 29 June 1887 FO 64/1208:121-2; Davidson, note, nd (circia June/July 1887), id; Memoranda of Wright and Davidson, 19 December 1887 FO 97/562:No.5736,#18,16-20. This position underpinned *Papayanni v Russian Steam Company: The *Laconia* (1863),* 2 Moo PC(NS)161, 15 ER 862.

\(^{254}\) Law Officers to Russell, 5 May 1865 FO 83/2314:280-1; Law Officers' opinion, 12 March 1870 CO 881/4:20,82-3; Law Officers and Dr Deane to Granville, 13 January 1874 FO 834/11:#113,84; Law Officers to Hicks Beach, 20 March 1879; Law Officers to Kimberley, 3 August 1880 CO 48/498:124-7; Law Officers to Salisbury, 8 August 1885 FO 84/2275:75-6; Law Officers to Stanley, 10 August 1885 CO 417/8:46-55; Law Officers to Salisbury, 30 September 1885 FO 85/2275:79-80; Law Officers to Granville, 21 April 1886 id,81; Law Officers Report on British Jurisdiction in Protectorates, 29 June 1887 FO 64/1208:121-2; Wright, Memorandum, 18 November 1888 CO 97/562:4nf.

\(^{255}\) Note (nd circia June/July 1887) FO 64/1208:117-8; similarly Law Officers to Camarvon, 10 April 1875 CO 83/8:33-6.

\(^{256}\) In particular the Germans took the position during the late nineteenth century that a Protectorate gave jurisdiction over all foreigners: Hatzfeldt, notes verbale, 11 May and 29 August 1886 FO 64/1152; Law Officers Report (*Inter alia* on the German Law), 29 June 1887 FO 64/1208:121-2; Salisbury to Hatzfeldt (draft), August (nd) 1887 FO 97/562:4nf. Scott "Memorandum on German Laws" 13 September 1887, *id.*
Islands was usually unpalatable (though a British Protectorate often became a precursor to eventual annexation) and inconsistent with the ostensible justification adopted by the European nations to explain the 'scramble' for Africa and the Pacific. The backward nations required protection, it was argued, and tutelage in the ways of civilisation - the so-called 'sacred trust of civilisation'. The annexation of large areas of uncivilised territory by any European nation would have been inconsistent with this notion of temporary wardship and would have exacerbated European rivalry in Africa and the Pacific. This scramble thus became a race to obtain native agreement to European protection, a race in which Britain no less than the other European powers was an active participant. Protection involved the assumption of control over an uncivilised country's external relations, effectively the right to exclude other European nations from the region, without the claim to the underlying territorial sovereignty. The rigorous distinction in English law throughout the nineteenth century between extraterritorial jurisdiction and territorial sovereignty as supplemented by the Crown's unwillingness to recognise the competence of uncivilised states to grant a personal imperium to the Crown over the subjects of other civilised nations meant, however, that English law was unable to accommodate effectively this notion of a Protectorate: The Crown could not constitute any form of government over European nationals without the consent of that government. It was not until 1891 that the Crown became prepared to accept that a Protectorate over uncivilised territory involved an arrangement somewhere between extraterritorial jurisdiction and territorial sovereignty, a willingness which then produced a third, intermediate form of imperium.

The distinguishing characteristic of this intermediate form of imperium, the Protectorate (as opposed to the 'Protected State' which remained a class of extraterritorial jurisdiction), was that it involved no claim to the underlying territorial sovereignty. This required the Protectorate to be formally constituted by Order in Council under the Foreign Jurisdiction Act. Nevertheless the Protectorate became recognised as conferring certain territorial rights upon the Crown, namely the right of government over all the subjects of civilised states (British and otherwise) within the region. Any imperium over native inhabitants and British subjects emanated, as before, from native consent (by "treaty, capitulation, grant, usage, sufferance and other lawful means") however the Crown's jurisdiction over European subjects was inferred from the proceedings at the Conference of Berlin (1890).

257 The following British territories were initially British Protectorates: Southern Rhodesia (annexed 1923) although British sovereignty arose earlier by conquest of Lobengula in 1894: Re Southern Rhodesia [1919] AC 211; Kenya (annexed 1920); Basutoland (annexed 1871); Gold Coast or Ghana (annexation of areas under Her Majesty's protection but not part of Her dominions, 1901); New Guinea (annexed 1888); Gilbert and Ellice Islands (annexed 1915).

258 Alexandrowicz "The Juridical Expression of the Sacred Trust of Civilisation" (1971) 65 AJIL 149.

259 Fairfield, minute, 9 January 1891 CO 417/48:249-55; Bramston, minute, 11 February 1891 CO 417/72; Bramston, Memorandum, 20 February 1891 CO 417/69:578-87; Law Officers to Knutsford, 17 April 1891, id,118-24; Salisbury to Knutsford, 5 March 1891 CO 417/70; Gray to Bergne, 4 December 1891 FO 84/2274; Law Officers to Rosebery, 16 November 1892 FO 834/17; Law Officers to Ripon, 17 November 1892 CO 225/40; Ripon to Griffith, 11 March 1895 CO 96/264; and, generally, Johnston Sovereignty and Protection, 229-269.
When English courts came to assess the legal status of the native inhabitants of a Protectorate during the early twentieth century they found that the Crown had acquired the 'external' sovereignty of the region leaving them with the 'internal' sovereignty. This 'internal' sovereignty left the indigenous institutions and laws intact and ensured the native polities' nominal retention of the status of territorial sovereign. The recognition of the 'internal' sovereignty did not imply that in establishing a Protectorate the Crown had deprived the native state of its 'external' sovereignty. The 'uncivilised' status of these communities meant they had never possessed this attribute of sovereignty. In assuming the duties of protecting power the Crown had stepped into the breach and donned this external sovereignty until such time as by civilisation the native polities had grown into it themselves. In this way English law accommodated a third form of imperium.

The recognition of a third form of imperium harmonised the Crown's long-standing recognition of the treaty-making capacity of non-European polities with the comparatively recent emergence of the standard of civilisation in international law. The capacity to confer an imperium over British subjects and themselves could be characterised as an emanation from the tribal societies' internal sovereignty whilst their lack of an external sovereignty was consistent with their non-compliance with the standard of civilisation. In this sense English law had qualified with the word 'internal' the sovereignty which Vattel had accorded "political bodies, societies of men who have united together and combined their forces, in order to procure their mutual welfare and security". This formulation was highly reminiscent of Marshall's formulation of the status of the American Indian tribes subsequent to the Crown's grant of charters laying claim to sovereign title over vast regions. However this new form of imperium differed from Marshall's formulation in one important respect: A native community could only retain an 'internal' sovereignty where the Crown did not claim the underlying territorial sovereignty. This prevented the application of Marshall's approach and the Protectorate analogy to the Canadian Indians, the Maori tribes and other native polities which retained an internal coherence notwithstanding the Crown's claim to the territorial sovereignty over their lands.

c) the influence of Austinian theory

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261 Publicists stressed the separation of internal from external sovereignty, the former not implying the latter, for example: Levi International Law, (1887), 85; Lawrence Principles of International Law (1895), 56-57 (both separate attributes required for international personality); Keith, ed Wheaton's Elements (1929), 41-45 (both separate attributes required for international personality).

262 Le droit de gens (1758), I,1,para 1.

263 Some nineteenth century writers associated the Marshall formulation with British Protectorates over non-European territory: Dana, ed Wheaton's Elements (1866) 48-50; Creasy First Platform (1876), 94; Levi International Law (1887), 83-84; Halleck International Law (1893), 72; Jenkyns British Rule and Jurisdiction (1902), 167; Keith, ed Wheaton's Elements (1929), 101-105; cf Westlake Chapters (1894), 151; Lawrence, Principles (1895), 68-69.
It remains to be considered why it was that English law struggled during the second half of the nineteenth century to find a legal solution similar to that reached by the Marshall Court in the United States to explain the juridical status of native communities in Africa and the Pacific Islands in whose territory the Crown was seeking to establish an *imperium* adequate to its needs (yet short of annexation). The answer to this lies in the influence of Austinian theory during the second half of the nineteenth century.

In a series of celebrated and highly influential lectures the English jurist John Austin (1790-1859) considered the character of sovereignty. Since his theory was not incorporated in a wholesale manner into the principles affecting the Crown's acquisition of an *imperium* in non-European territory it is important to distinguish the indivisible character Austin assigned sovereignty from the other characteristics he gave it.

### i) The Austinian conception of sovereignty

Austin's theory of sovereignty flowed directly from his command theory of law. "Laws properly so called are a species of command" said Austin, but "being a command every law properly so called flows from a determinate source or emanates from a determinate author".264 This determinate authority was the sovereign of the society political and independent:

"... every positive law, or every law strictly so called, is a direct or circuitous command of a sovereign or sovereign number in the character of political superior: that is to say, a direct or circuitous command of a monarch or sovereign to a person or persons in a state of subjection to its author. And being a command (and therefore flowing from a determinate source), every positive law is a law proper, or a law properly so called".

Since international law was neither the command of a sovereign nor capable of enforcement Austin refused to treat it as law proper so much as a kind of international morality, a view challenged by most Anglo-American writers over the following century.266

The "sovereign portion" of a society was "that certain member of the society, or that certain body of its members, to whose commands, expressed or intimated, the generality or bulk of its members render habitual obedience".267 Austin held that the members of the society must either be dependent or subject to that sovereign: "By 'an independent political society', or 'an independent and sovereign nation', we mean a political society consisting of a sovereign and subjects, as opposed to a political society which is merely subordinate: that

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264 *The Province of Jurisprudence Determined* (1832, ed 1955), 133.
265 *Id*, 134.
266 Virtually all nineteenth century writers on international law insisted it had the character of "law". Those writers included Wheaton, Manning, Phillimore, Kent, Amos, Woolsey, Twiss, Lawrence, Walker, Maine, Westlake, Lawrence, Oppenheim, Keith, *of Holland Lectures* (1933), 6.
267 *Province* (1832), 194.
is to say, which is merely a limb or member of another political society, and which therefore consists entirely of persons in a state of subjection". The "distinguishing marks" of the sovereign were thus summarised:

"The generality of the given society must be in the habit of obedience to a determinate and common superior: whilst that determinate person or determinate body of persons must not be habitually obedient to a determinate person or body. It is the union of that positive, with this negative mark, which renders that certain superior sovereign or supreme, and which renders that given society (including that certain superior) a society political and independent".

Tribal society did not fulfill these criteria for sovereignty, Austin argued:

Inasmuch as the given society lives in the savage condition, or in the extremely barbarous condition which closely approaches the savage, the generality or bulk of its members is not in a habit of obedience to one and the same superior. For the purpose of attacking an external enemy, or for the purpose of repelling an attack made by an external enemy, the generality or bulk of its members, who are capable of bearing arms, submits to one leader, or to one body of leaders. But so soon as that exigency passes, this transient submission ceases; and the society reverts to the state which may be deemed its ordinary state. The bulk of each of the families which compose the given society, renders habitual obedience to its own peculiar chief; but those domestic societies are themselves independent societies, or are not united or compacted into one political society by general and habitual obedience to a certain and common superior. And, as the bulk of the given society is not in a habit of obedience to one and the same superior, there is no law (simply or strictly so styled) which can be called the law of that given society or community. The so-called laws which are common to the bulk of the community, are purely and properly customary laws: that is to say, laws which are set or imposed by the general opinion of the community, but which are not enforced by legal or political sanctions. The state which I have briefly delineated, is the ordinary state of the savage and independent societies which live by hunting or fishing in the woods or on the coasts of New Holland. It is also the ordinary state of the savage and independent societies which range in the forests or plains of the North American continent. It was also the ordinary state of many of the German nations whose manners are described by Tacitus.

The application of Austinian criteria denied sovereignty to tribal societies although the Asian polities might probably have met the above criteria. These criteria clearly favoured the 'civilised' states with a post-customary system of law

268 Id, 195.
269 Id.
270 Id, 208. Austin was following Bentham in finding an absence of a legislator and habitual obedience in tribal societies: Bentham A Fragment on Government (1776, ed 1948), para 20; Bentham's position was probably, in turn, derived from Hobbes Leviathan (1651, reprint ed 1985), I,xiii,63.
271 Austin dismissed customary law as "general opinion" (Province, 154) unless it was supported or recognised by the political superior's tribunals (id, 163). In this way he recognised the customary basis of the common law whilst also disqualifying most other and especially tribal systems of customary law.
with the development of a standard of civilisation in international law. Nonetheless the two were separate developments and the extent to which the Austinian formulation of sovereignty affected the Crown’s position towards uncivilised societies is moot.

For their part the English courts adhered to the position that the recognition of another society’s sovereignty was above all a political act of the Crown to which they would attach the appropriate legal consequences. To the extent therefore that Austin’s formulation of sovereignty could have had any effect it must be found primarily in the formal relations of the Crown. It certainly did not inhibit the Crown’s practice in Asia and Africa where the treaty-making pattern of previous times continued unabated. It may be argued that Austin’s views were applied during the second half of the nineteenth century to the problems in the Pacific where the Crown equivocated over the sovereignty of the island communities. However this would apply a theoretical determination where more practical reasons consistent with but not governed by the theory might be found. The Crown’s reluctance to recognise the de jure sovereignty of Cakombau’s government over Fiji, to take the most notable example, rested on the grounds of its youth and British doubt over the effectiveness of its control of the island group. These reasons tie in with an absence of the Austinian requirement of habitual obedience but equally the requirement that the so-called sovereign enjoy the actual and long-established control of his territory and people was as much dictated by common sense as resort to a theoretical checklist of the hallmarks of sovereignty. It does not follow that in stating the obvious Austin was determining British practice on the question of recognition of the sovereignty of other societies.

The absolute, ‘all or nothing’ character which Austin gave sovereignty did, however, influence the late nineteenth century English writers such as Oppenheim, Westlake and Lawrence who saw the standard of civilisation as the absolute threshold of international personality. This rigidity which treated uncivilised states as bereft of any legal status whatsoever defied the subtleties of international practice and so required such qualification as to undermine these writers’ distinction between the relations of civilised states inter se (governed by international law) and these states’ relations with uncivilised nations (beyond the realm of international law). Even these writers were forced by the reality of state practice to resile if only implicitly from the position that states not meeting the standard of civilisation lacked any juridical status whatsoever.

ii) the indivisibility of sovereignty

272 Westlake Chapters (1894), 144 and 184 (native tribes incapable of allowing an imperium), 181 (no occupation found necessary for a Protectorate, implying treaty with native tribes was sufficient); Walker Manual (1895) 7 (barbarous peoples “dehors the dictates of International Law” but formal relations possible with some nations nearing the standard); Lawrence Principles (1895), 154-156 (treaty-making practice with tribal societies dismissed as dictated by “moral considerations” only); Oppenheim International Law, 33-34, 275-281 (international law limited to civilised states but some less civilised states can be partially within the ambit of international law); Holland Lectures (1933), 39-40,57 (international personality limited to civilised states but less civilised states may be considered as in “the outer courts of the charmed circle”).
Austin insisted that the sovereign was subordinate to no one, stating that "no government is sovereign and subject at once". Accordingly he rejected any concept of semi- or imperfectly sovereign states seeing this as a contradiction in terms. His position found widespread acceptance in England during the second half of the nineteenth century and prevented the incorporation into the principles affecting British imperial practice of something resembling the approach Marshall had taken to the status of the North American Indian tribes. It has been seen that by the early nineteenth century two forms of imperium, extraterritorial jurisdiction and territorial sovereignty, were recognised. This distinction worked adequately until the second half of the nineteenth century when the Crown began to establish Protectorates in Africa and the Pacific. Similar arrangements had been concluded in the East Indies from the late eighteenth century but the regime produced no crisis in the theory of English law until later. The Protectorate was initially treated as a form of extraterritorial jurisdiction importing no sovereign right over the territory (and hence jurisdiction over European nationals) since to have held otherwise would have fallen foul of Austin’s injunction against the divisibility of sovereignty. In 1888 Maine had stated that sovereignty was a bundle of rights each of which may be separated from the other. Others such as Jenkyns and Ilbert agreed but it was not until 1891 that this advice was accepted and the Austinian requirement of non-divisibility discarded so facilitating the recognition of the Protectorate as a third intermediate imperium.

d) relevance to Maori claims at common law

273 *Province* (1832), 241. The position was probably Hobbesian in origin: *Leviathan* (1651) II, xviii, & 12.

274 Hall *Foreign Powers and Jurisdiction* (1894), 206; Jenkyns "Application of Principles of International Law to Foreign Subjects in British Protectorates", 26 November 1888 in FO 97/562; Lyall "Indian Protectorates, A Note by Sir Alfred Lyall", 28 January 1889, encl in Ilbert to Pauncefort, 29 January 1889, id; and, generally, Johnston *Sovereignty and Protection*, 216-217.

275 For the period 1800-1840 the SCI lists 40 British treaties with Indian princely states which might be immediately identified as treaties of protection (221-259). Many others equivalent to the same arrangement were clearly concluded during this period.

276 Some commentators insisted that the Crown’s jurisdiction in the territory of the ‘protected’ Indian princes rested not on a foreign jurisdiction derived from their consent but on the fuller basis of territorial sovereignty: Creasy *First Platform* (1876), 94; Lyall "Indian Protectorates", 28 January 1889 CO 97/562; Lawrence *Principles* (1895), 68; Westlake *International Law* (1910), 41; Smith *International Law* (1918), 59-60; Keith, ed *Wheaton’s Elements* (1929), 104-5; Holland *Lectures* (1933) 69; cf: *Levi International Law* (1887), 83-84; *Maine International Law* (1894), 58-59; *Twiss Law of Nations*, 27-28; Ilbert "Memorandum upon Indian and African Protectorates", 24 January 1889 in CO 97/562. The ‘act of state’ cases of the mid- to late- nineteenth century proceeded upon the basis that the protected Indian princely states were generally not British territory.

277 *International Law* (1888), 58. The proposition was hardly novel. Many writers before Maine had recognized the divisibility and incompleteness of sovereignty in ‘semi-sovereign’ states. For instance: Wheaton *Elements* (1836), 62; Halleck *International Law* (1861), 62; Dana, ed *Wheaton’s Elements* (1866), 28; Woolsey *Introduction to the Study of International law* (1875), 28; Creasy *First Platform* (1876), 7; *Twiss International Law* (1884), 25; *Levi International Law* (1887), 83.


It may seem curious that so much attention has been given to developments after the conclusion of the Treaty of Waitangi in 1840. This observation would be correct to the extent that one need not appreciate subsequent developments in the principles affecting the Crown's acquisition of an imperium in non-European territory if the sole exercise is to understand why it was thought necessary to conclude an arrangement such as the Treaty of Waitangi in 1840. If this were the sole concern here this chapter would have stopped at the end of part 3, that is, some time in the early to mid-nineteenth century when the influence of the standard of civilisation and Austinian theory was slight. However the aim of this thesis is not only to isolate the intertemporal law which the Crown felt to govern its acquisition of an imperium in New Zealand during the 1830s but also to understand the common law status of the Maori tribes after British annexation. Subsequently the approach of New Zealand courts to questions of Maori rights at common law will be seen to be founded on misinterpretations of the relevant legal theory of the late nineteenth century and the unwitting adoption of unadulterated Austinian principles. The clarification of developments during this period is necessary, therefore, in order that the New Zealand judgments on the common law status of Maori (aboriginal) rights may be assessed.

The relevant developments in the principles affecting the Crown's acquisition of an imperium in non-European territory during the second half of the nineteenth century may be summarised thus:

1) English courts were required to look to the conduct of the Crown to see if it had recognised a foreign state. Evidence of recognition could derive from the entry into treaty relations with the foreign polity or, if needs required, the requisite certification from the responsible Secretary of State. The conduct of the Crown was treated as the primary determinant of the status of the foreign government.

2) The Crown continued to act through the mid to late nineteenth century on the basis that tribal societies enjoyed some juridical status notwithstanding the development of a standard of civilisation in international law and the influence of Austinian theory. The Crown still treated the consent of the non-European societies as a pre-requisite to its formal erection of an imperium (by annexation or Order in Council under the Foreign Jurisdiction Acts) over their territory.280 This position was qualified by Imperial legislation of 1875 and 1878 which provided for a local jurisdiction over the British inhabitants of uncivilised territory. However any imperium over the native inhabitants of these regions still required their voluntary submission (or, one may add, most unusually, submission upon royal conquest). In British eyes the difficulty attending the standard of civilisation developed by international law was

280 This conclusion coincides with O'Connell's more general conclusion (International Law, 2nd ed, 1970, I, 80-2) that international personality is not an absolute quality but gives a state the capacity to enter into a set of specific relations the range of which may vary from one state to another.
that short of the frequently unpalatable option of annexation the uncivilised societies were unable to grant the Crown jurisdiction over intermeddling European subjects. This problem was removed in 1891 when the Crown finally recognised the Protectorate as an intermediate form of *imperium* which was both personal and territorial. The limitation placed on the extraterritorial jurisdiction-conferring capacity of uncivilised societies hardly amounted to an abnegation of all juridical capacity for any jurisdiction in the Crown over its own subjects and/or the indigenous inhabitants of uncivilised regions still emanated from the consent of the native rulers.

3) The recognition of the third intermediate form of *imperium* (similar to that styled by the Supreme Court of the United States under Marshall CJ) was retarded by the Crown’s subscription during the nineteenth century to the non-divisibility of sovereignty. When this obstinacy disappeared in 1891 the Protectorate came to be recognised as a distinct form of *imperium* wherein the Crown claimed no territorial sovereignty but assumed the vacant ‘external’ sovereignty leaving the native polity with the ‘internal’ sovereignty. This notion of ‘internal’ sovereignty gave the standard of civilisation a more tangible role in English law which until then had been unwilling to distinguish semi- from full sovereignty.

4) Conclusion (2) above, i.e. the recognition of tribal sovereignty, was contradicted by Austinian criteria for sovereign status. It must be concluded Austinian theory had little or no bearing upon the Crown’s position towards the sovereign (or otherwise) status of foreign polities.

5) The intermediate type of *imperium* noted in (3) above became recognised through the repudiation of Austinian notions of the indivisibility of sovereignty. If Austinian theory had any relevance to the Crown’s practice during the second half of the nineteenth century in relation to the acquisition of an *imperium* in non-European territory it was on this count alone. Prior to its abandonment, this subscription to the non-divisibility of sovereignty hardly amounted to an abnegation of uncivilised states’ sovereignty.

C. CONCLUSIONS

Two consistent principles underlaid the Crown’s practice from the sixteenth century. The first was the recognition of some juridical status in the non-European societies or those described at various times as ‘infidel’ or ‘uncivilised’. This recognition is evident in the Crown’s tradition of treaty relations with these societies. Secondly the Crown acted on the basis that the acquisition of an *imperium* (be it personal or territorial) over non-European societies required their consent or, much less desirably, conquest.
It is necessary to understand these two principles in order to place the Treaty of Waitangi in the historical context of British practice regarding the acquisition of an *imperium* over non-European societies. The conclusion of the Treaty was governed by and totally consistent with the principles that the Crown had followed elsewhere since the sixteenth century. These principles are also crucial to an assessment of the common law status of Maori rights upon British annexation. It will be seen New Zealand courts, with the early and honourable exception of *R v Symonds* (1847), have consistently overlooked these simple principles with a consequent deleterious effect upon Maori rights at law. In an eloquent passage in *Symonds* Chapman J. acknowledged the incorporation of these principles (together with others relating to tribal land rights, to which we will return) into the common law:

The intercourse of civilised nations, and especially of Great Britain, with the aboriginal Natives of America and other countries, during the last two centuries, has gradually led to the adoption and affirmation by the Colonial Courts of certain established principles of law applicable to such intercourse. Although these principles may at times have been lost sight of, yet animated by the humane spirit of modern times, our Colonial Courts, and the Courts of such of the United States of America as have adopted the common law of England, have invariably affirmed and supported them; so that at this day, a line of judicial decision, the current legal opinion, and above all, the settled practice of the colonial Governments, have concurred to clothe with certainty and precision what would otherwise have remained vague and unsettled. These principles are not the new creation or invention of the Colonial Courts. They flow not from what an American writer has called the "vice of judicial legislation". They are in fact to be found among the earliest settled principles of our law; and they are in part deduced from those higher principles, from charters made in conformity with them, acquiesced in even down to the charter of our own Colony; and from the letter of treaties with Native tribes, wherein those principles have been asserted and acted upon.

The rules applied by the Crown to the acquisition of an *imperium* in non-Christian territory were consistently underpinned by these two ‘higher principles’ notwithstanding the organic character of British practice.

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281 (1847), [1840-1932] N2PCC 387 (SC) at 388.
CHAPTER THREE

THE CROWN’S ACQUISITION OF THE TERRITORIAL SOVEREIGNTY OF NEW ZEALAND

I. EARLY RESPONSES

A. EARLY ATTEMPTS AT A BRITISH JURISDICTION

From the closing years of the eighteenth and into the early nineteenth century the New Zealand islands were visited by the European. Beachhead communities were established by European traders in search of flax, naval spars and other supplies as well as British missionaries, such as Thomas Kendall and Samuel Marsden, anxious to convert and civilise the Maori. European land-buying and settlement did not become a feature of the New Zealand frontier until the years immediately preceding annexation (1840). These traders and missionaries as well as the escaped convicts from the British settlement of New South Wales across the Tasman, lived in lawless albeit not always unruly circumstances. This lawlessness was strongly underlined by such incidents during the early nineteenth century as the massacre of the crew of the *Boyd* (1810).

So far as the British subjects in New Zealand were concerned, there was never any question of their submission to Maori customary law (except where forcibly visited upon them) nor was there any British authority to keep those of an ill-disposed character in order save through the occasional visit by a warship. Faced with the problem of the New Zealand frontier, not then particularly pressing but nonetheless one of growing magnitude, it was not surprising that the Governor of New South Wales frustrated by the unresponsiveness of the authorities in London took matters into his own hands. These early nineteenth century attempts to establish British authority were predicated upon the territorial sovereignty of the islands being in the Crown.

Cook had landed at Poverty Bay in October 1769 and whilst circumnavigating and charting the North Island had taken formal possession of the lands around Mercury Bay (intending presumably the whole of the North Island) during November 1769.\(^1\) Some weeks later he performed a similar act at Queen Charlotte Sound, taking formal possession of the Sound and adjacent lands (presumably the whole of the South Island).\(^2\) These symbolic acts were of themselves insufficient to vest any sovereignty over the islands in the Crown for the ‘inchoate’ right claimed by Cook was not followed by effective occupation as required by

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\(^1\) Hight and Bamford *Constitutional History and Law of New Zealand*, 19.

\(^2\) *Id.*
international law. More crucially, and here is yet another example of the consistent British practice in relation to the acquisition of an imperium over tribal societies, Cook’s instructions had stipulated that he was to take possession of certain parts of the countries he might discover with native consent. Thus:

"You are also, with the consent of the natives, to take possession in the name of the King of Great Britain, of convenient situations in such countries as you may discover, that have not already been discovered or visited by any other European Power... but if you find the countries so discovered are uninhabited, you are to take possession of them for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors".

Being in contravention of his instructions, in that Maori consent had not been obtained, and receiving no subsequent approval from the Crown, Cook’s actions were precipitate and ineffective even were symbolic annexation of itself sufficient to establish the Crown’s sovereignty.

The earliest attempts to establish British authority in the New Zealand islands were made by Governor Macquarie of New South Wales. Relying upon the terms of his Commission giving him jurisdiction over "adjacent islands", Macquarie appointed Kent as a justice of the peace in New Zealand (1810) but the appointment never became effective. In December 1813 Macquarie proclaimed the Maori to be under British protection but (like Cook’s Proclamations of sovereignty) this unilateral action was unauthorised by the Crown, thus making its legality doubtful. His actions received no subsequent approval. Macquarie declared:

"And whereas the natives of all the said islands are under the protection of His Majesty, and entitled to the good offices of his subjects; all persons whatsoever charged by the oath of credible witnesses with any acts of rapine, plunder, robbery, piracy, murder, or other offences against the law of nature and of nations, against the persons and properties of any of the natives of the said islands, will, upon due conviction, be further punished with the utmost rigour of the law".

Macquarie followed this order with the appointment (1814) of Thomas Kendall, a Church Missionary Society missionary in the Bay of Islands, as Resident Magistrate. An Order was

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3 Mere discovery was not considered to confer a title to territory at international law: Vattel Le droit de gens (1758), I, 207; Phillimore Commentaries (1854), I, 247 and (1879) 349; Westlake Chapters on International Law (1895), 27; Smith Great Britain and the Law of Nations (1935), II, 1; Evatt "Acquisition of Territory in Australia and New Zealand", 22-26; Foden New Zealand Legal History, Part I. The Crown’s non-reliance on Cooks discovery as a source of sovereignty was authoritatively set out in Stephen, Memorandum, 18 March 1840, CO 209/8: 69. On discovery as a source of title cf Keller, Lissitzyn and Mann Creation of Rights of Sovereignty through Symbolic Acts 1400-1800 esp., 150-151.

4 HRNZ, I at 28.

5 Tapp Early New Zealand, 4,66; Adams, Fatal Necessity, 52. Later argued as proof of British sovereignty over New Zealand: Petition of London Merchants, 22 May 1840, RSCNZ (1840) App 1.

6 HRNZ, I at 317.

7 Government and General Order, 12 November 1814, id,329-30.
also addressed to British seamen in the New Zealand islands. It stipulated:

"His Excellency being equally solicitous to protect the natives of New Zealand and the Bay of Islands in all their just rights and privileges as those of every other dependency of the territory of New South Wales, hereby orders and directs that no master or seamen of any ship or vessel belonging to any British port, or to any of the colonies of Great Britain, resorting to the said islands of New Zealand, shall in future remove or carry therefrom any of the natives without first obtaining the permission of the chief or chiefs of the districts within which the natives so to be embarked may happen to reside, which permission is to be certified in writing under the hand of Mr. Thomas Kendall, the Resident Magistrate of the Bay of Islands, or of the Magistrate for the time being in said districts".

The Order went on to prohibit the landing of any British seamen in the islands without, again, the permission of the local chief(s) and certificate of the Resident Magistrate. The Order warned that disobedience would "subject the offenders to be proceeded against with the utmost rigour of the law on their return hither". The Chiefs "Dewaterra, Shunger and Kora Kora" were "invested with power and authority" for the purpose of ensuring compliance with the Order.

This Order had described New Zealand as a dependency of New South Wales, a strained interpretation of the jurisdiction over "adjacent islands" given the Governor in his commission as well as an unsound reliance upon Cook's symbolic acts. The Order did not, however, establish any imperium over the British subjects or Maori but simply advised the former of their vulnerability to the "utmost rigour of the law" on their return to New South Wales. To this extent the designation as 'Magistrate' given Kendall was misleading. There was certainly no legal basis upon which the British seamen's compliance with the Order could have been enforced in the New South Wales courts and so the Order which never became effective must be treated as mere bluff. Nonetheless it contained one of the earliest signs of what was to become a consistent feature of British practice in the New Zealand islands and which culminated in the Treaty of Waitangi. The Order recognised the power and authority of the Maori chiefs and purported to establish some British authority over its seafaring subjects through use of the chiefs' authority. By the 1820s this recognition of chiefly authority was quickly becoming the norm. British officials insisted that any British trading posts (or factories) must be established with Maori permission.

In 1819 Macquarie appointed Butler as a justice of the peace in New Zealand. In so doing he again described New Zealand as a dependency of New South Wales, a description which was clearly unfounded. Two years previously, imperial legislation, the Murders

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8 Government and General Order, 9 November 1814, id.328-9.
9 Hight and Bamford Constitutional History, 42; Adams Fatal Necessity, 52. British seamen did not take the appointment seriously: Nicholas, evidence, Lords Committee (1838), 11.
10 Macquarie to Bathurst, 24 June 1815, App no 2 in RSCNZ; Bathurst to Macquarie, 9 April 1816, id.
11 Hight and Bamford Constitutional History, 42-43.
Abroad Act 1817,\textsuperscript{12} had expressly disavowed any sovereignty over New Zealand.

Macquarie's successor, Brisbane, wrote to Bathurst, the Colonial Secretary, in February 1825 asking whether his commission gave him jurisdiction over the islands of the South Pacific and the extent of the term 'the Islands adjacent'.\textsuperscript{13} Although Brisbane's recall rendered any reply unnecessary, as Tapp observes,\textsuperscript{14} by redefining the Governor of New South Wales jurisdiction within a latitude bisecting the North Island, the Instructions and Commission to Governor Darling\textsuperscript{15} strongly indicated a negative response to Brisbane's inquiry. If this were not enough, Imperial legislation of 1823\textsuperscript{16} and 1828\textsuperscript{17} (besides that of 1817) was enacted on the clear basis of a lack of sovereignty over New Zealand.

\section*{B. JURISDICTION BY LEGISLATION}

The problem of lawlessness amongst the British seamen and traders in New Zealand became particularly pressing during the 1830s. A series of Imperial Acts had been passed during previous years establishing what was earlier termed a 'jurisdiction by legislation' over New Zealand. The Murders Abroad Act 1817 rendered British subjects liable to trial on British soil for offences committed in "Otaheite, New Zealand, the Honduras and other places not within His Majesty's dominions".\textsuperscript{18} This jurisdiction received further provision through Imperial legislation of 1823\textsuperscript{19} and 1828\textsuperscript{20} enabling the Crown's courts in Australia to try British subjects for serious offences committed in New Zealand. These Acts were expressly founded upon a disavowal of any sovereignty over New Zealand and deliberately avoided the erection of an \textit{imperium} in the islands.

The crucial shortcoming with jurisdiction by legislation was that it established no local authority but simply rendered the British subject liable to trial for serious crimes upon his return to British soil. The practical difficulty and hence impotence of this form of jurisdiction was revealed in the 'Elizabeth affair' (1831) although similar protestations had been made earlier.\textsuperscript{21}

During early 1831 a Captain Stewart of the \textit{Elizabeth} sailed Te Rauparaha, a Maori chief, and his war party to Akaroa to enable the slaughter of virtually all the Ngaitahu

\textsuperscript{12} 57 Geo 3 c 53.
\textsuperscript{13} Brisbane to Bathurst, 8 February 1825 \textit{HRA}, 1st ser,xi,296.
\textsuperscript{14} Tapp \textit{Early New Zealand}, 72.
\textsuperscript{15} \textit{HRA}, 1st ser,xi,496-7.
\textsuperscript{16} 4 Geo 4 c 96.
\textsuperscript{17} 9 Geo 4 c 83.
\textsuperscript{18} 57 Geo 3 c 53.
\textsuperscript{19} 4 Geo 4 c 96.
\textsuperscript{20} 9 Geo 4 c 53.
\textsuperscript{21} For instance Rev Marsden to Darling, 2 August 1830 CO 209/1: 15-18; Darling to Murray, 12 August 1830 CO 209/1: 11-14. The Admiralty felt similarly, eg Laws (HMS Satellite) to Admiralty, 11 March 1829 CO 201/175: 29; Barrow to Hay, 24 March 1832 CO 201/228: 27-31 (including abstract of Colonial Office correspondence on the topic); and, generally, Adams \textit{Fatal Necessity}, 59-60,66.
inhabitants and the capture of the chief Tamariharanui and his family (who were subsequently killed). In return Stewart obtained a cargo of flax. The British involvement was condemned by Governor Darling as "an Act of premeditated atrocity". He immediately set in train the machinery to prosecute the British participants under the Imperial Act 9 Geo 4 c 83 (1828) giving New South Wales courts jurisdiction under the Murders Abroad Act 1817. Darling's attempt to invoke this Act successfully against Stewart and his crew met difficulty at every turn. The Crown Solicitor of New South Wales expressed doubts whether the depositions disclosed "a sufficient body of facts to warrant a commitment by the Magistrates"). In addition he doubted if Stewart and crew had even committed an offence recognised by the criminal law of England. The two tribes had been in a state of "legitimate warfare, according to the usages of their own country" and so could not be considered to have murdered the hapless Ngaitahu victims. Given that, Stewart and his crew could hardly have been charged as accessories to murder. Moreover by the time bench warrants were obtained only Stewart could be detained, the others "keeping out of the way". No prosecutions eventuated.

This experience graphically underlined the argument then being made for some form of local British authority with power which might be exercised within the New Zealand islands over the Crown's miscreant subjects. The call for the exercise by the Crown of a constituent power establishing such an authority faced two problems. On the one hand, it was clear that the Crown could not exercise a prerogative constituent power erecting such an imperium for it had recognised the Maori tribes as "the owners and sovereigns of the soil". Any such jurisdiction required Maori consent as by grant of 'capitulations'. It must be recalled that the possibility of an informally acquired extraterritorial jurisdiction by informal grant, sufferance, or usage was not to be recognised in British practice until 1843 and was, therefore, an option unavailable for the New Zealand problem of the 1830s. In addition, it must also be recalled that the possibility of Imperial legislation unilaterally conferring a constituent power upon the Crown facilitating the creation of a local jurisdiction over its own subjects in uncivilised territory was also excluded - such legislation was not first to eventuate until 1875. Indeed, an attempt in 1832 to pass an Act giving New South Wales power to legislate for serious crimes committed by British subjects in New

22 Darling to Goderich, 13 April 1831 CO 209/1: 28-34 (with enclosures).
23 Moore to Colonial Secretary (NSW) 7 February 1831, encl in Darling to Goderich, id, 51.
24 So described in Goderich to Bourke, 31 January 1832 CO 209/1: 66 at 68.
25 Moore to Colonial Secretary, 12 April 1831, encl in Bourke to Goderich, supra, 53.
26 The same problems arose in 1836 regarding the prosecution of a Reverend Gate for sodomy: Busby to Colonial Secretary (NSW) 11 November 1836 CO 209/2: 279. To avoid the need for a warrant from Sydney Busby later sought to obtain one from the native chiefs (as "a bar to any action for false imprisonment" by litigious British miscreants) Busby to Hobson (HMS Rattlesnake), 1 July 1837 CO 209/2:356-7, 360 (chiefs' warrant). Hobson treated his transportation of the British culprits as being lawfully based on the chiefs' formal permission: Hobson, Report, copy encl in Bourke to Glenelg 9 September 1837 CO 209/2:30-37, encl A. In evidence Platt advised the Lords Committee (1838), evidence, 32, of two murders amongst the European population having gone unpunished because "Mr. Busby had not the power".
Zealand failed because of Westminster's refusal to legislate for foreign territory wherein the Crown through conduct of its foreign relations had not come to some arrangement with the local sovereign.28

There was, then, a lack of a prerogative or statutorily-derived constituent power in the Crown but, at the same time, an obvious need for some local British authority to be established in New Zealand. This need was heightened by the worry, unfounded it transpired, amongst the British population of the antipodes during 1831 that the French were about to annex the country.29 So worried were the British missionaries that Yate dispatched a petition of thirteen chiefs for Governor Darling to forward to William IV requesting the British government protect them from "the tribe of Marion" as well as those "troublesome" British subjects who were "vicious towards us".30 In April of that year Darling resolved31 and obtained permission32 to send a British Resident to protect British interests in New Zealand but the lack of any constituent power meant the Resident could not be equipped with formal power over British subjects. Consequently Bourke, who had waited in vain for the Bill of 1832 to be passed so that the Resident might be given some formal authority, was forced to instruct Busby:33

"You are aware that you cannot be clothed with any legal power, or jurisdiction by virtue of which you might be enabled to arrest British subjects offending against British or Colonial Law in New Zealand".

It had been intended to supply this defect by means of local legislation under authority of an Imperial Act, Bourke continued, but this had not eventuated:34

You can, therefore, rely but little on the force of Law, and must lay the foundation of your measures upon the influence which you shall obtain over the Native Chiefs. Something, however, may be effected under the Law as it stands at present".

Bourke advised Busby he might invoke the Act 9 Geo IV c 83, however, his description of the procedure under an Act which had proven so wanting in the case of Stewart and the

28 Bill of 7 June 1832, text in CO 209/1: 102; BPD 3rd ser, XLII, 505-6; Glenelg to Bourke, 28 October 1835 CO 209/1: 163-8; Stephen to Russell, 16 November 1839 CO 209/5: 51.
29 Lindsey to Goderich, 4 November 1831 CO 201/221: 272-3, 274-9 (encl); generally, Adams Fatal Necessity, 75-8.
30 Petition of Thirteen Chiefs to William IV signed in the presence of the Committee of Merchants, 5 October 1831 encl in Yate to Colonial Secretary (NSW) 16 November 1831 CO 201/221: 384-8 and CO 209/1: 96-98. The French were so described after the visit of their explorer Marion du Fresne which brought disastrous consequences for both sides: Tapp Early New Zealand, 80 n 63 and 3. Goderich to Maori Chiefs, 14 June 1832 CO 209/1: 104-5.
31 Darling to Goderich, 13 April 1831 CO 209/1: 28-34.
32 Goderich to Bourke, 31 January 1832 CO 209/1: 66.
33 Bourke to Busby, instructions, 13 April 1833 CO 209/1: 107-17 at 111. Busby had written a pamphlet recommending the appointment of an agent with Magisterial authority over British subjects to be exercised after treaties with the chiefs had been concluded: A Brief Memoir relative to the Islands of New Zealand, June 1831, CO 209/1: 183, 197-8.
34 Id.
crew of the *Elizabeth* only highlighted its inadequacy.\textsuperscript{35}

If, therefore, you should at any time have the means of sending to this Colony any one or more persons capable of lodging an information before the proper authority here of an offence committed in New Zealand, you will if you think the case of sufficient magnitude and importance send a detailed report of the transaction to the Colonial Secretary by such persons who will be required to depose the facts sufficient to support an information upon which a Bench Warrant may be obtained from the Supreme Court for the apprehension of the offender, and transmitted to you for execution. You will perceive at once that this process which is at best but a prolix and inconvenient operation... will be totally useless unless you should have some well founded expectation of securing the Offender upon or after the arrival of the Warrant..."

Admitting the impotence of jurisdiction by legislation across a sea hundreds of miles from the nearest British court, Bourke was forced, therefore, into advising Busby to work through the Maori chiefs.\textsuperscript{36}

These instructions, emanating as they did from the inability of the British authorities to give Busby any formal authority because of the Crown's lack of a constituent power in relation to New Zealand, placed Busby in a delicate position. There was no question of the application of Maori law to the "troublesome" and "vicious" British subjects within New Zealand but, equally, it was clear that no British subject could lawfully exercise any judicial or legislative authority over another without formal constitution from the Crown. This, it was seen earlier,\textsuperscript{37} was the ground for doubt over the legality of Maclean's jurisdiction along the Gold Coast during the 1830s and early 1840s. This was also the basis in 1870 for doubt over the legality of the 'courts of equity' in the Niger (Oil River) region wherein local British merchants and African representatives resolved disputes (mainly of trade) between United Kingdom subjects and the local population.\textsuperscript{38} Busby, then, had to keep a delicate balance between the recognition and judicious guiding of chiefly authority, this being permissible, and the assertion of an irregular, unlawful jurisdiction over British subjects. Recognising the fine line a Resident without formal authority would have to tread and the inevitability of its transgression, Goderich advised Bourke that given the absence of "any established system of Jurisprudence" among the tribes the Resident might take reasonable action against lawless British subjects. He thought such "measures of coercion and restraint... may be vindicated on the ground of necessity, even if they cannot be strictly defended as legal". Accordingly, he recommended the Resident be indemnified against "the risk of any litigation on such ground".\textsuperscript{39}

\textsuperscript{35} *Id* at 112.

\textsuperscript{36} Admiralty powers were restricted to naval commanders and therefore these limited powers could not be given to Busby.

\textsuperscript{37} *Supra* chapter two. Also, Wilde's opinion for the New Zealand Company, 14 November 1839 CO 209/4:641.

\textsuperscript{38} Chalmers to Granville, 3 June 1870 CO 96/86:#6001; Law Officers to Granville, 12 July 1870 FO 81/9:#3660, No 1, p 1.

\textsuperscript{39} Goderich to Bourke, 31 January 1832 CO 209/1:66.
It is doubtful whether the Resident's position, which at least from a legal point of view was precarious, might have been handled more effectively by a person of less officiousness and pettiness than Busby.40 Certainly Maclean of the Gold Coast, a man of greater ability and caniness as well as a contemporary of Busby, was unable an unwilling to control the Gold Coast by simple influence and reliance upon the indigenous authorities.41 Nonetheless the inability of the Crown to give the office of Resident formal constitution, and with it legal authority over British subjects in New Zealand, governed as it was by the recognition of Maori sovereignty, set the scene for the transformation of what was essentially a negative into a more positive recognition. Until the early 1830s the recognition of Maori sovereignty had been negative in that it was used as a restraint upon British involvement in the islands. However the need for some local and official British presence became too acute. The appointment in 1832 of a Resident without formal power over British subjects, placed in the delicate position described by Bourke in his instructions to Busby, inevitably meant that the recognition of Maori sovereignty would become more positive. The authority of the chiefs was the only means at hand (however impracticable it may appear in retrospect to have been) through which some order could possibly have been brought to the New Zealand frontier.

C. THE BRITISH RESIDENT

Having been delayed some months in Sydney as Bourke waited in vain for Imperial legislation authorising the grant to the Resident of some formal power over British subjects in New Zealand,42 Busby reached the Bay of Islands in mid-1833 convinced "how desirable it is that the chiefs of New Zeland, in any transaction which might considered of an international character, [be dealt with] in their collective capacity only".43 Busby was already talking of a "Confederation"44 of the Chiefs as the basis of an established Government for the Maori tribes. This concern - it became a virtual obsession, with the collective rather than tribal sovereignty of the chiefs was to characterise his office as British Resident.

One of Busby's first steps as Resident was to give some tangible expression to this 'Confederation'. After securing approval from New South Wales,45 he prevailed upon the chiefs in the vicinity of the Bay of Islands to adopt a national flag "for the Tribes of that

40 See the assessment of Busby's character in Adams Fatal Necessity, 64-71.
41 Maclean, it will be recalled (supra chapter two) had erected an irregular jurisdiction over British subjects and the native inhabitants of territory adjoining the Gold Coast forts.
42 Bourke to Goderich 2 May 1833 CO 209/1:106; The Bill of 1832 failed, supra n 30, as did similar proposals in late 1835 (Bourke to Glenelg, 26 December 1835 CO 201/248 enclosing "an epitome of the Bill prepared by the Chief Justice of New South Wales", clause 35) and August 1836 (draft Punishment Act for New Zealand, Glenelg to Bourke, 23 August 1836 CO 201/248:318-319; see Adams Fatal Necessity, 70).
43 Busby to Bourke, 13 May 1833 CO 209/2:210 at 211.
44 Id at 212.
45 Bourke to Stanley, 29 April 1834 CO 209/1:121,123 (extracts from Minutes of the Proceedings of the executive Council on 7 September 1833).
Country in their Collective Capacity," This measure was approved by the Colonial Office and Lords of the Admiralty who instructed the Commander-in-Chief on the East India station to recognise the register of vessels flying under the flag as "valid instruments [to be]... respected as such in the intercourse such vessels hold with the British Possessions".

Soon after, however, the weakness of the Resident’s position was revealed in the debacle surrounding the whaling barque Harriet (1834). This ship was wrecked off the Taranaki coast on 29 April 1834, the ship’s complement reaching the shore where they were attacked by Maoris. The survivors were taken prisoner. Eventually, amidst great slaughter, the prisoners were rescued at Bourke’s orders by HMS Alligator. No effort had been made to consult Busby or the missionaries or even to consider the Maori side of the matter. In reporting the rescue to the Colonial Office Governor Bourke stressed the weakness of the Resident’s position and the need either for a ship of war to be stationed permanently in New Zealand waters or for Busby to equipped with some real authority.

In moral suasion alone was insufficient. Bourke had stressed this point constantly in his dispatches to London during the mid-1830s although the long-awaited legislation establishing a constituent power over British subjects in New Zealand was never to eventuate.

During October 1835 Busby received a letter from a person styling himself the Baron de Thierry. This letter informed "His Britannic Majesty’s Consular Agent at the Bay of Islands" that he was about to establish a "Sovereign Government" upon his arrival in New Zealand. De Thierry’s ‘Address to the New Zealand settlers’ described his plan to lift the Maori tribes through European settlement, trade, and religious education under his auspices into an "Independent Sovereignty" (as opposed to a colony of Great Britain). Busby took immediate fright at de Thierry’s designs. He circulated an address to British subjects in the New Zealand islands noting that "His Majesty, after having acknowledged the Sovereignty of the Chiefs of New Zealand in their collective capacity, by the Recognition of their Flag" would not "permit his Humble and Confiding Allies to be Deprived of their Independence upon such Pretensions". Busby announced his intention to convene the Chiefs of the region to tell them of "this proposed Attempt on their Independence, and to advise them of what is Due to Themselves and to their Country". The northern chiefs assembled and on 28 October 1835 issued a ‘Declaration of Independence’. The first three articles of this
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46 Busby to Hay 3 April 1834 CO 209/1:121-4,213-36 (enclosures).
47 Aberdeen to Bourke, 21 December 1834 CO 209/1:129.
48 Barrow (Admiralty) to Hay (Colonial Office 24 November 1834, enclosure 2 in Bourke to Stanley, 29 April 1834, supra.
49 Bourke to Rice, 6 December 1834 CO 209/1:135-137.
50 Bourke to Stanley, 23 September 1834 CO 209/1:132; Bourke to Rice 1 February 1835 CO 209/1:139.
51 De Thierry to Busby, 14 September 1835 CO 209/2:85 (copy).
52 De Thierry “Address to the New Zealand Settlers” CO 209/2:87.
53 Busby The British Resident at New Zealand to His Britannic Majesty’s Subjects who are residing or trading in New Zeland (10 October 1835), copy in CO 209/2:94.
"1. We the hereditary Chiefs and Heads of the Tribes of the Northern Parts of New Zealand, being assembled at Waitangi in the Bay of Islands on the 28th day of October 1835, declare the Independence of our Country, which is hereby constituted and declared to be an Independent State, under the designation of The United Tribes of New Zealand.

2. All Sovereign power and authority within the Territories of the United Tribes of New Zealand is hereby declared to reside, entirely and exclusively in the Hereditary Chiefs and Heads of Tribes in their Collective Capacity: Who also declare that they will not permit any legislative Authority separate from themselves in their Collective Capacity to exist, nor any functions of Government to be exercised within the Said Territories unless by persons appointed by them and acting under the Authority of Laws regularly enacted by them in Congress Assembled.

3. The Hereditary Chiefs and Heads of Tribes agree to meet in Congress at Waitangi in the Autumn of each year, for the purpose of passing laws for the disposition of Justice, the preservation of peace and good order and the regulation of Trade; And they candidly invite the Southern Tribes to lay aside their private animosities, and to consult the Safety and Welfare of our Common Country by joining the Confederation of the United Tribes.

This Declaration, to which Busby promised to secure the adhesion of southern tribes, received wholehearted approval from the Governor of New South Wales and the Colonial Office save in one respect to which we are about to come. Significantly, the assertion of Maori sovereignty over New Zealand embodied in the Declaration was accepted without qualification or equivocation: It was simply a logical, if somewhat dramatic, corollary of all that had gone before. The second article, however, was criticised as an attempt by Busby to manipulate the recognition of the authority of the chiefs in their collective capacity to his own ends. In July 1834 one McDonnell had secured his own appointment as additional British Resident at Hokianga, not far from Busby’s seat in the Bay of Islands. This appointment had rankled Busby. Late in September 1835 McDonnell had persuaded the chiefs of the Hokianga neighbourhood to pass a law against the importation of ardent spirits into their district. Bourke approved this measure and notified the law in the colonial Gazette. Busby, jealous of his own position and obsessed with the collective rather than tribal character of Maori sovereignty, took exception to the law on the grounds that the sole legislative authority in the northern region was the United Tribes. This view he justified as an attempt to use Maori sovereignty to establish some lawful authority in the islands capable of enacting laws for all inhabitants. Busby insisted that to concede the chiefs had legislative authority in their tribal (as opposed, always, to collective) capacity over British subjects.

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54 Declaration of the United Tribes CO 209/2:102-3 (duplicate copy).
56 Colonial Secretary (NSW) to Busby, 12 February 1836 CO 209/2:16.
57 Rice to Bourke, 8 July 1834 CO 209/1:119.
58 Bourke to Glenelg, 10 March 1836 CO 209/2:10.
would "be little better than authorised outrage, in which... it would be derogatory to a
civilised nation to participate". The only sound native legislative authority Busby argued,
was one which was collective and over which the Resident exerted a strong guiding
influence.⁵⁹ Although the authorities in New South Wales and Britain were not persuaded by
this argument the recognition of the sovereignty of the Maori chiefs contained in the
Declaration was thoroughly endorsed.

Within a short while, events revealed the impossibility of an early convening of the
Congress of the United Tribes. By early 1836 it was conceded that for the time being the
use of the Confederation to establish more European-like authority over the islands was
unlikely to succeed.⁶⁰ On 18 January Busby wrote to Bourke advising him that the question
of formal British interference could "no longer be deferred... that interference should be
prompt, decided and effectual".⁶¹ Nonetheless Busby still clung to the idea of the Congress
of Chiefs despite its clear impracticability and at various subsequent moments used the
Congress for suggestions as to future British policy in New Zealand.⁶²

The experience with the United Tribes during late 1835 to early 1836 highlighted both
the unqualified recognition of tribal sovereignty then made by the Crown and the practical
difficulties with that recognition. Nonetheless the recognition had been made and was
reaffirmed with the Crown’s approval of the Declaration of Independence. Events by this
time, however, were moving to the stage that some formal British presence (that is, some
authority enjoying formal constitution from the Crown with, at least, jurisdiction over the
British subjects) in New Zealand was becoming inevitable. Missionary efforts aside, British
interests were moving swiftly from itinerant coastal trade to settlement. Land-purchasing
from the Maori tribes had begun and was on the increase bringing with it disputes between
and amongst the settlers and tribes.⁶³ The failure of the United Tribes was, in retrospect the
last gasp of the attempt to establish order in New Zealand through the exclusive agency of
Maori sovereignty. By 1836 and 1837, despite the Colonial Office’s inaction, it was
becoming clear that the Crown would have to establish some formal presence in New

⁵⁹ Busby to Bourke, 30 November 1835 CO 209/2:111. Several dispatches were exchanged on the matter of the
Hokianga laws, the controversy soon degenerating into a personal battle between Busby and McDonnell (see,
especially, Busby to Bourke, July 27 1836 CO 209/2:256-278).

⁶⁰ Busby to Bourke, 18 January 1836 CO 209/2:140; Busby to Bourke, 26 January 1836 CO 209/2:152; Church
Missionary Society clergy to Busby, 13 May 1836 CO 209/2:240; Busby to Bourke, 18 May 1836 CO
209/2:232; Petition of British Missionaries, 20 April 1837 CO 209/2:321; Hobson, Report to Governor Bourke, 8
August 1837 CO 209/2:30.

⁶¹ Supra.

⁶² Busby to Bourke, 20 February 1836 CO 209/2:160; Busby to Bourke, 12 March 1836 CO 209/2:178; Busby
"Memorandum for the Missionaries of the Church Missionary Society", 18 May 1836 CO 209/2:238; Busby to
Bourke, 15 June 1836, CO 209/2:248; Busby to Bourke, 22 March 1837 CO 209/2:311; and, especially, Busby to
Colonial Secretary (NSW), 9 November 1838 CO 209/4:6. Wards The Shadow of the Land, 14-22 argues that
after the Declaration the Crown recognized only the sovereignty of the United Tribes. In fact (as the Hokianga
law incident illustrated) the Colonial Office recognized Maori sovereignty as fundamentally tribal in character.

⁶³ For instance, Busby to the Governor of New South Wales, 26 January 1836 (supra); 20 February 1836 (supra);
30 January 1837 (supra); 28 March 1837 (supra); 16 June 1837 (supra) stating formal intervention was necessary
otherwise he could not "see the least prospect of any permanent peace".
Zealand. Inevitably, the way in which this would occur was governed by what had gone before. That is to say, the Crown's firm commitment to Maori sovereignty dictated the means by which this formal authority would eventually be established.

D. THE THREE PROPOSALS MADE DURING 1837

The Colonial Office did not begin to move positively towards the establishment of formal British authority in New Zealand until 1838. The possibility of strengthening the jurisdiction by legislation still obtaining came and went. A draft Punishment Act for New Zealand was prepared in August 1836 at the same time as the eventual Cape of Good Hope Punishment Act 1836 but was stillborn. In addition, legislation claiming and vesting a constituent power in the Crown over New Zealand territory (that is, the legislative erection of an imperium) unaccompanied by any Maori consent was considered out of the question, a position brought home to the Colonial Reform movement in November 1837.

In June and November of 1837 the New Zealand Association with Edward Gibbon Wakefield at the helm had submitted for Lord Glenelg's consideration the abstract of an Act of Parliament which would confer upon the Crown a constituent power to incorporate by charter the "Founders of Settlement" in New Zealand. Clause 5 of the draft Act of November presupposed the Crown held sovereignty over the land in New Zealand already acquired by purchase from the natives and authorised the Company to obtain further land by treaty with the sovereign chiefs:

"The Founders and the executive council to be appointed by them, shall enter into treaties with the natives, or other competent persons, for the acquisition of all or any parts of the Islands of New Zealand, and for the cession to Her Majesty of all sovereign rights; and the parts so acquired shall form part of Her Majesty's foreign possessions, and the Inhabitants thereof, shall be free, and thenceforth enjoy the same rights and privileges, as Her Majesty's free subjects in other foreign possessions; and they and all persons residing there, or trading thereto, shall be liable to all laws made under authority of this Act, Provided that nothing herein contained, shall prejudice the right already competent to the Crown, to the Sovereignty of New Zealand; nor affect the right of any aboriginal natives, to any lands at present occupied by them excepting in so far as voluntarily ceded".

Glenelg reacted to this proposal by insisting that the Crown could not exercise a constituent power over New Zealand, that is establish an imperium whether territorial or extraterritorial,

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64 Petition by British missionaries, 20 April 1837 CO 209/2:321; Petition by British merchants to Glenelg, 18 December 1837 CO 209/2:444.
66 6 & 7 Will 4 c 57. This Act was based upon the recognition of the sovereignty of the 'Kafir Nation': Merivale, Memorandum for Cabinet, April 1851, CO 879/1:XX.
67 Glenelg to Bourke, 26 August 1836 CO 209/2:20; Adams Fatal Necessity, 70.
68 Outline of a Bill for New Zealand drafted by the New Zealand Association, 14 June 1837 CO 209/2:388.
"1. It is difficult or impossible to find in the History of British Colonization an Example of a Colony having ever been founded in derogation of such Rights, whether of Sovereignty or of Property, as are those of the Chiefs and People of New Zealand. They are not Savages living by the Chase, but Tribes who have apportioned the country between them, having fixed Abodes, with an acknowledged Property in the Soil, and with some rude approaches to a regular System of internal Government. It may therefore be assumed as a basis for all Reasoning and all Conduct on this Subject, that Great Britain has no legal or moral right to establish a Colony in New Zealand, without the free consent of the Natives, deliberately given, without Compulsion, and without Fraud. To impart to any Individuals an Authority to establish such a Colony, without first ascertaining the consent of the New Zealanders, or without taking the most effectual security that the Contract which is to be made with them shall be freely and fairly made, would, as it should seem, be to make an unrighteous use of our superior Power".

The New Zealand Association had used the seventeenth century grants to Penn as a precedent for their proposed charter71 but this had not impressed Glenelg, at least on the question of Maori rights. The charters for the New World, it may be recalled, whilst being issued on the basis that the Crown held some constituent power over North America had been justified in relation to the Indian tribes by emphasis upon the Christian duty to convert the heathen, a duty not declared in charters for other parts of the non-Christian globe (such as Africa and the East Indies), and had carefully delimited the 'sovereignty' therein claimed in a personal rather than territorial manner. This, it was seen, left the sovereignty of the Indian tribes intact. By the nineteenth century these predicates no longer existed: International personality had become secularised over the eighteenth century and the territorial character of sovereignty was established orthodoxy. In short, the Crown could not unilaterally claim a personal sovereignty over New Zealand as it had done for North America during the seventeenth century. On this question at least the New World charters were unreliable precedents to lay before the Crown's Minister. A charter of colonisation could not be issued without some formal requirement of formal Maori consent.

Two other important suggestions regarding the establishment of formal British authority in New Zealand were made during 1837, although one of these, the report of Captain Hobson of HMS Rattlesnake, did not reach London until early 1838.

The first was 'the outline of a plan of Government' conceived by the British Resident, Busby, dated 16 June 1837. Busby's plan amplified and modified slightly his earlier position regarding the character of Maori sovereignty. Whereas previously he had tried to argue (and this lay at the heart of the controversy over McDonnell's laws) that Maori sovereignty resided only in the chiefs in their collective capacity he now conceded it vested in the chiefs in both their tribal and collective capacities. The latter he located, of course, in the United

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70 Memorandum from Glenelg, 15 December 1837 CO 209/2:409.
71 Outline of a Bill, 14 June 1837 CO 209/2:388.
Tribes of the Declaration of Independence. Referring to the Declaration Busby stated: 72

"The Articles of Confederation having centralised the powers of Sovereignty exercised both de jure and de facto by the Several Chiefs; and having established and declared the basis of a Constitution of Government founded upon the Union of those powers - I cannot, I think, greatly err in assuming that the Congress of Chiefs, the Depositary of the powers of the State, as declared by its constitution, is competent to become a party to a treaty with a Foreign Power, and to avail itself of Foreign assistance in reducing the Country under its authority to order; and this principle being once admitted, all difficulty appears to me to vanish".

He went on to propose that the Congress of the United Tribes should enact laws for all the population observing, contradictorily, that "in truth the present race of Chiefs could not be entrusted with any discretion whatever, in the adoption or rejection of any measure" 73 that the Resident might submit to them. Nonetheless he proceeded, albeit somewhat diffidently, to suggest the Chiefs might enact laws for the white as well as Maori inhabitants of New Zealand where the form of the legislation was supervised and controlled by Her Majesty’s Government. Busby then discussed the courts of civil and criminal jurisdiction over the white population which might be established by legislation of the Congress approved by the Crown. This Congress would be protected by the Crown from foreign interference in exactly the same way as the Ionian Islands and East Indian princely states. Should this option prove unfeasible Busby suggested the Crown should simply grant a charter to the settlers already established in New Zealand. Although not admitted by Busby, this last option presupposed the Crown had the sovereignty of the areas then in white settlement.

The second proposal framed during 1837 was a report written by Captain Hobson of HMS Rattlesnake in August after a tour of duty in New Zealand seas. Hobson saw that the real problem with the jurisdiction by legislation then obtaining over British subjects in New Zealand was the distance from the New South Wales courts. He therefore proposed the Crown establish its sovereignty over small pockets of New Zealand which he termed ‘factories’. These factories would be established with Maori consent. Having the sovereignty of these factories which would become dependencies of New South Wales, the Crown could then use a constituent power to erect local courts. Treaties would be concluded with the native chiefs of the regions surrounding the towns giving the factory courts’ jurisdiction over British subjects beyond the confines of the towns. 74

Busby and Hobson’s proposals took as their starting point the Crown’s recognition of Maori sovereignty but differed radically in the use to be put to this recognition. Busby’s proposals did nothing to give the Crown a constituent power over New Zealand territory and continuing the theme of the Declaration of Independence would have erected the Maori

73 Id, 76.
74 Hobson’s Report, 8 August 1837, encl in Bourke to Glenelg, 9 September 1837 CO 209/2:30.
chiefs into a European-styled system of federal government clearly at odds with the intense tribal character of their society. The weakness of the proposal was that it did not confront, indeed avoided, the need for some formal British authority, that is an imperium, within New Zealand. Busby's closing comments in which he suggested the Crown's assumption of territorial sovereignty as an alternative implicitly conceded this weakness in his proposal. Nonetheless his 'outline' expressly recognised the treaty-making capacity of the United Tribes, a point of some significance for it was to form the basis of the Crown's formal method of proceeding when annexation was eventually sought. Hobson's proposal, on the other hand, was founded upon British practice in the East Indies and used the Maori tribes' sovereign status, that is their capacity to enter into treaties with the Crown, as the foundation for the exercise by the Crown of a constituent power over limited portions of New Zealand territory. Glenelg's objections to the New Zealand Association's draft Bill very clearly illustrated the Crown's inability to exercise any such constituent power without the prior consent of the Maori inhabitants.

Three important proposals were placed before the Colonial Office during late 1837 to early 1838 as to the means by which the Crown might bring order and further British interests in New Zealand. These proposals took two separate starting points, one predicated upon the recognition of Maori sovereignty, the other its neglect. The Colonial Office, considering the Crown bound to acknowledge Maori sovereignty, rejected the latter approach altogether. This left the British with adopting a mode of proceeding which respected Maori sovereignty; The proposals of Busby and Hobson were the major representative examples of the different uses to which this recognition could be put. By 1838 the route argued by Busby, the erection of a Native Government, was clearly too precarious a manner of proceeding. A marginal comment beside Busby's proposed tribal legislative assembly had commented sarcastically "a Pretty Government" and certainly Busby's account of the (temporary, he bluffed) inability of the Congress of the United Tribes to convene peaceably strongly undermined the credibility of his proposal. It was clear to the British authorities, therefore, and this they accepted as early as late 1837, some weeks before receipt of Hobson's report, that an imperium would have to be obtained in the New Zealand islands. In December 1837, several days after a meeting on the question, Glenelg wrote to Durham offering the New Zealand Association a royal charter of incorporation similar to those issued in the seventeenth century for North America. Significantly, however, and this indicated there had been introduced no new qualification upon the previous recognition of Maori sovereignty, Glenelg insisted that any colonisation under the charter would have to be "effected, if at all, with the free consent of the existing Inhabitants, or of their Chiefs" and

75 Busby to Bourke, 16 June 1837 CO 209/2:333,341. The draft instructions to Hobson, 8 March 1839 CO 209/4:221,228 termed the erection of a Native Government with legislative powers "a mere fiction at once too palpable and too slight to bring with it any real authority".
76 Glenelg to Durham, 29 December 1837 CO 209/2:423.
limited to a portion of the country. The recommendations of the Select Committee on Aborigines earlier that year advising against the conclusion of treaties with tribal societies were dismissed by Glenelg as "inadequate to meet the existing Evil". He further indicated that any charter would provide for a Crown-appointed officer to have the power to sanction or disallow any contract made by the prospective grantees with the Maori chiefs. The New Zealand Association did not accept the offer which soon after was withdrawn.

During most of 1838 various advice continued to flow into the Colonial Office from interested sources, mainly missionary and mercantile. This advice generally accepted Maori sovereignty then took a tack similar to that of Hobson or Busby. That is to say, it usually recommended either that the Crown obtain a formal grant of right from the Maori chiefs so facilitating the establishment of an imperium (Hobson’s approach) or that it assist and elevate the Congress of the United Tribes or suchike to something resembling a European form of government. The Colonial Office inclined toward the former option and had hoped, in vain it transpired, for a green light from the Lords Committee’s report of mid-1838. By the end of the year the Colonial Office, surrounded by pressure from the humanitarian and planned colonisation movements and faced with increasing colonisation and the attendant lawlessness in New Zealand, was in a comer. Official intervention in New Zealand, something more effective than the appointment of an impotent Resident, was unavoidable.

E. PREPARATION FOR THE ACQUISITION OF AN IMPERIUM

By the end of 1838 the Colonial Office had seen that it would be necessary to establish a British imperium in the New Zealand islands. Busby still clung to the possibility of elevating the Maori tribes to an advanced structure of government and in doing so was at least consistent in the pursuit of an end necessitated by his instructions of 1835. Events, Busby’s inadequacies as well as those of his office, had both superceded and highlighted the weakness of this option. By late 1838 it was apparent that some formal British authority

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77 Commons Committee on Aborigines (British Settlements) BPP (1837), VII, #425. The committee had reluctantly conceded, however, that treaties obtaining extraterritorial rights from tribes might be condoned (at p 80).
78 Supra.
79 Id, 427.
80 Glenelg to Durham, 5 February 1838 CO 209/4:295; Adams, Fatal Necessity, 112-114.
81 Examples of missionary suggestions: CMS Resolutions 7 April and 1 May 1838 given by Coates as evidence, Lords Committee (1838), 274, 244; Chichester (CMS) to Glenelg, 24 June 1838 CO 209/3:566, Coates to Glenelg, 23 July 1838 CO 209/3:165 and Garratt, evidence, Lords Committee (1838), 282-3 suggesting the occasional sitting of New South Wales Courts in New Zealand (Stephen, note, 24 August 1838 CO 209/3:171 commenting upon the Crown’s lack of a constituent power in New Zealand and Coate’s mistake in thinking there a difference between the exercise of an occasional as opposed to permanent judicial power in the islands); missionaries’ position, generally, Adams Fatal Necessity, 82-3. Examples of mercantile suggestions and attempts to force the Crown’s hand: Bill for the Provisional Government of British Settlements in the Islands of New Zealand 1 June 1838, lost in the Commons 92 to 32 votes (see Evans, evidence, Lords Committee (1838), 327-9 explaining the Bill); Lyall to Grey, 28 December 1838 CO 209/3:317-320, 324-346 (encl) planning a Native Government under control of mercantile interests.
82 Busby to Gipps, 30 November 1838 CO 209/4:43; Busby to Glenelg, 25 February 1839 CO 209/4:47.
would need to be established in the New Zealand islands.

In December 1838 the Colonial Office sought the appointment of a Consul for New Zealand indicating, at least, an intention to obtain a consular jurisdiction in New Zealand. The Foreign Office approved and the Colonial Office, impressed by Hobson’s report of 1837, recommended him for the position of Consul. This recommendation and prospective appointment gave Hobson a formal input into the decision-making process at the Colonial Office.

On 21 January Hobson wrote to Glenelg after "a long careful perusal of the documents respecting the affairs of New Zealand". This letter was written "premising that Her Majesty recognises New Zealand as a free and independent state". Hobson repeated his plan for the establishment of British factories but recommended they be greater in area, a response to the great increase in land purchases from the Maori over the previous eighteen months, with greater power being vested in the ‘Superintendent’ of the factory town(s). He noted, however, that the acquisition from the Maori chiefs of the sovereignty of parts of the country would leave portions open to the intervention of foreign nations. Also, British subjects inevitably would buy land outside the factory limits without recognised title and these blocks would be bought and sold without any legal record, "creating confusion and strife". In consequence he recommended the Crown "at once resolve to extend to that highly gifted Land the benefit of civilisation and liberty, and the protection of English Law, by assuming the Sovereignty of the whole Country..."

The Colonial Office was thinking along similar lines. In a minute written the same day as Hobson’s lengthy letter James Stephen noted that colonisation of New Zealand was reaching such a pitch that the choice was between "lawless Colonisation, and the establishment of a Colony placed under the authority of law". He recommended the appointment of an agent "whether called Consul, or however else designated... authorised to acquire from the Chiefs, a Cession, on fair terms, of the Sovereignty of such parts of New Zealand as may be best adapted for the proposed Colony". The Consul would become the Governor of New Zealand upon the acquisition by treaty of the sovereignty over portions of the country and would be granted a constituent power to erect judicial offices. A charter of incorporation would also be granted to the New Zealand Company under whose auspices

83 Stephen to Backhouse, 12 December 1838 CO 209/3:111 and CO 209/5:28 (early draft).
84 Backhouse to Stephen, 31 December 1838 CO 209/3:107.
85 Stephen, note, 3 January 1839 CO 209/3:108r; Hobson to Glenelg, 1 January 1839 CO 209/4:83.
86 Hobson to Glenelg, 21 January 1839 CO 209/4:87.
87 Id.
88 Id., 93.
89 Id.
90 Memorandum (probably by Stephen), 4 May 1838 CO 209/3:374 adopting the ‘factory’ plan.
92 Id., 195.
colonization might proceed.

Soon after Stephen prepared the first draft instructions for Hobson. These were amended slightly and approved by Grey. The preamble of this draft referred to the problem of lawlessness and increasing purchases of New Zealand lands by British subjects and stated the basis upon which the Crown's reaction to the problem would rest: 93

"Her Majesty recognises the right of the Native Chiefs in New Zealand to the Sovereignty of those Islands. It is true indeed that amongst a people who have made so few advances in the arts of civilised life, there cannot exist a lawful dominion in that full and absolute sense in which it is ascribed to the Sovereign and ruling Powers in the more civilised Parts of the World. But this is not a distinction on which we would justly ground any claim to disregard the rights, imperfect and unartificial as they may be, which the common consent of the Inhabitants of New Zealand concedes to their chiefs. In order to the exercise of a lawful authority in those Islands, it is necessary that some parts of them should be brought under the Sovereignty of the Queen, and a title to that dominion can be legitimately acquired in no other method than that of the voluntary cession of it by the Chiefs in whom it is at present vested".

These words presaged the emergence of a standard of civilisation in international law but, significantly, rejected any such distinction as affecting the capacity of the Maori chiefs. Civilised or not, the sovereignty of the Maori chiefs was unqualified.

A second and different draft of the instructions to Hobson, again by Stephen and Grey, was prepared early in March. This draft acknowledged the Crown's recognition of Maori sovereignty in terms even more redolent of the late nineteenth century standard of civilisation: 94

Her Majesty's Government acknowledge in the Natives of New Zealand, an independent and national character as far as it is possible that such a character should be ascribed to a collection of separate Tribes of men occupying so extensive a Territory, without any definite union between the different Tribes or the possession by any of them of the Civil polity, or social Institutions of civilised Communities. With men in such a state of Society no international treaties can be formed which will not differ very widely from those which subsist between Nations properly so called. Yet as far as it is possible to establish such connexion with them, it is right that their title to be regarded as one independent Community should be observed in fact as well as acknowledged in theory. The Queen disclaims any pretension to regard their lands as a vacant Territory open to the first future occupant, or to establish within any part of New Zealand a sovereignty to the erection of which the free consent of the Natives shall not have been previously given".

This draft shows a movement towards the position taken more explicitly during the second half of the nineteenth century, namely the recognition of the inability of 'uncivilised' societies to enter into the sophisticated international relations of the European powers but

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93 Consular instructions, first draft, 24 January 1839 CO 209/4:203, 205-6.
94 Consular instructions, second draft, 8 March 1839 CO 209/4:221, 226-7.
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93 Consular instructions, first draft, 24 January 1839 CO 209/4:203, 205-6.
94 Consular instructions, second draft, 8 March 1839 CO 209/4:221, 226-7.
their capacity, nonetheless, to cede rights of sovereignty and/or jurisdiction to the Crown. These draft instructions proceeded to reject the line of formal policy advocated by Busby, the engagement of "the various Chiefs in a Confederation under Her Majesty's protection", as "impracticable or if practicable... inadequate to the Occasion". The need was constantly stressed to obtain a cession "from the Chiefs in full to the Queen of some part of the Territory of New Zealand, in order that within that Territory there may be established a Government derived from Her Majesty's prerogative, and administered according to the Laws of England in the same manner as in other British Colonies". The draft further noted:

"In some views the most simple and effectual measure would be to obtain from the Chiefs the Cession to the Queen of the Sovereignty of the Whole Country. But for the present at least such a measure would be a needless encroachment on the rights of the Aborigines".

By this time the New Zealand Association, Wakefield and Durham's reorganised enterprise soon to become known as the New Zealand Company, was forcing the Crown's hand. A draft Bill prepared by the Association's secretary, William Hutt, declared that the sovereignty of New Zealand was already held by the Crown through the land purchases of its subjects but this was diametrically opposed to the position of the Crown. Nonetheless the Association was determined to press ahead with the organised colonisation of the country irrespective of the status of formal British right in the islands. By May 1839 it became apparent to the Colonial Office that the dispatch of Hobson could be delayed no longer.

As the Commission and instructions to Hobson were drawn up during late May to August "two Cardinal points" were to guide the Crown. These were, first, the protection of the Maori and, secondly, provision of self-government for the colonists. Since the Crown could only exercise a prerogative constituent power to erect representative legislative bodies once the sovereignty of parts of New Zealand had been acquired, Parliamentary legislation allowing the establishment of a non-representative legislative body was necessary. The remedy to this problem was sought in the temporary annexation to New South Wales of the

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95 Id.
96 Id, 230.
97 Id, 230-1.
98 The New Zealand Colonization Association had started styling itself the New Zealand Company early in 1839 before the issue of the prospectus of 2 May 1839: Adams Fatal Necessity, 279.
100 Stephen to Labouchere, 15 March 1839 CO 209/4:326; Labouchere to Hutt, 1 May 1839 CO 209/4:546 (denying any sovereignty over the New Zealand islands); Stephen to Russell, 16 November 1839 CO 209/5:51; Stephen to Backhouse, Memorandum, 18 March 1840 CO 209/8:69 (encl).
101 Stephen to Labouchere, 15 March 1839 CO 209/4:326,327.
102 Campbell v Hall (1774) 1 Cowp 204; Stephen to Vernon Smith, 21 July 1840 CO 209/7:40.
territory to be acquired in sovereignty in New Zealand.\textsuperscript{103} Throughout the Colonial Office continued to stress that this sovereignty could only be acquired by formal cession from the Maori chiefs.

At this stage the Colonial Office was still speaking of the acquisition of parts of New Zealand notwithstanding Hobson’s opinion that the sovereignty of the whole country should be obtained, a view with which Stephen and Grey at least had some sympathy.\textsuperscript{104} This indicates that the Crown was not only thinking in terms of the acquisition of pockets of the country but also that it recognised the essentially tribal character of Maori sovereignty. This recognition was long-standing: Despite Busby’s insistence that the sole legislative capacity resided in the chiefs in their collective capacity only, the British authorities had been prepared, for instance, to accept the legislative authority of the Hokianga chiefs within their locality and hence uphold the ardent spirits law enacted at McDonnell’s importunity.

The final instructions from Normanby to Hobson were dated 14 August 1839 having been drafted by Stephen and amended by Labouchere some weeks earlier.\textsuperscript{105} Hobson had perused the draft and recommended some distinction between the tribes of the North and South Island, the latter being "wild savages" with whom "it appears hardly possible to observe even the form of a Treaty".\textsuperscript{106} This advice was not incorporated into the formal instruments although Normanby advised Hobson that whilst a formal cession from the southern chiefs was preferable, he was to use his own discretion as to the appropriate means by which sovereignty over the South Island was to be declared.\textsuperscript{107}

The instructions to Hobson stated:\textsuperscript{108}

"...we acknowledge New Zealand as a sovereign and independent state, so far at least as it is possible to make that acknowledgement in favour of a people composed of numerous, dispersed and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert. But the admission of their rights though inevitably qualified by this consideration, is binding on the faith of the British Crown. The Queen, in common with Her Majesty’s immediate predecessor, disclaims, for herself and for Her subjects, every pretension to seize on the islands of New Zealand, or to govern them as a part of the dominion of Great Britain, unless the free and intelligent consent of the natives, expressed according to their established uses, shall be first obtained. Believing, however, that their own welfare would, under the circumstances I have mentioned, be best promoted by the surrender to Her Majesty of a right now so precarious and little more than nominal, and persuaded that the benefits of British protection, and of laws administered by British judges, would far more compensate for the sacrifice by the natives, of a..."

\textsuperscript{103}Stephen to Labouchere, 18 May 1839 CO 209/4:243; Normanby to the Attorney-General, 30 May 1839 CO 209/5:76; Opinion of the Attorney- and Solicitor-General on the annexation of New Zealand as a dependency of New South Wales, CO 881/1:#25,7-8; Stephen to Normanby, 7 June 1839 CO 209/5:78; Stephen to Gairdner, Memorandum, 8 June 1839 CO 209/4:113.

\textsuperscript{104}Stephen to Labouchere, 15 March 1839 CO 209/4:326,329-30. As did Hobson’s eventual successor Fitzroy, evidence Lords Committee (1838), 11 May 1838, 166.

\textsuperscript{105}Handwritten draft instructions, 9 July 1839 CO 209/4:251.

\textsuperscript{106}Hobson to Normanby, 1-2 August 1839 (circa) CO 209/4:151.

\textsuperscript{107}Normanby to Hobson, 15 August 1839 CO 209/4:157.

\textsuperscript{108}Normanby to Hobson, instructions, 14 August 1839 CO 881/1:#25,1-2; also in HRNZ,1729.
national independence, which they are no longer able to maintain, Her Majesty's Government have resolved to authorize you to treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any parts of those islands which they may be willing to place under Her Majesty's dominion... Especially you will point out to them the dangers to which they may be exposed by the residence amongst them of settlers amenable to no law or tribunals of their own; and the impossibility of Her Majesty's extending to them any effectual protection unless the Queen be acknowledged as the sovereign of their country, or at least of those districts within, or adjacent to which, Her Majesty's subjects may acquire lands or habitations.

These instructions were embodied in the formal royal instruments accompanying Hobson. Some weeks earlier, almost as soon as the law officers had approved the scheme, letters patent (15 June 1839) had passed the Great Seal altering in futuro the boundaries of New South Wales as to include "any territory which is or may be acquired in sovereignty by Her Majesty" in New Zealand.109 Two commissions were issued formally appointing Hobson with the authority to obtain this sovereignty by the means (treaty with the Maori chiefs) described in Normanby's informal instructions. A Commission under the Great Seal (13 August 1839) appointed Hobson Consul for the purpose of negotiating for the recognition of the Crown's sovereignty by the chiefs of New Zealand.110 Another Commission (30 July 1839), under the Royal Signet and Sign Manual appointed Hobson Lieutenant-Governor "in and over that part of Our Territory... which is or may be acquired in Sovereignty in New Zealand".111

The meaning of the phrase "is or may be acquired" has been the source of some curiosity.112 The interpretation of "is" as meaning 'has been' is clearly contradicted by the Crown's thorough disavowal of any sovereignty over the New Zealand islands prior to 1840 notwithstanding argument of the New Zealand Company otherwise. If the word is read in the future tense it becomes mere surplusage. Rutherford suggests the use of the present tense was chosen deliberately to permit a line of policy along either route; that is, to treat previous sales of land by the Maoris as cessions of sovereignty as well as property should difficulty arise with the conclusion of any treaty of cession with the chiefs.113 The difficulty with this speculative explanation is that it challenges the strong distinction stressed by the Colonial Office throughout the late 1830s between sovereignty and property.

By August 1839 the formal and informal documentation appointing and instructing Hobson had been completed. The machinery was now in train for the Crown's acquisition of the sovereignty of parts or the whole of New Zealand. The royal instrumentation's use of

109 CO 881/1:#25,8.
110 Id. Also consular instructions from the Foreign Office accompanying Commission, 13 August 1839 CO 209/5:44-5.
111 Id, 9-10.
112 Discussed by Rutherford The Treaty of Waitangi and the Acquisition of British Sovereignty on New Zealand 1840 (1949), 14-15.
113 Id.
the term "acquired" and the appointment of Hobson as Consul clearly indicated some positive act of acquisition other than the mere issue of the royal instruments was essential to the Crown's sovereignty over New Zealand. This prerequisite was the formal cession from the Maori chiefs of the sovereignty of such parts of their territory as they were willing to grant to the Crown. Although the consistent acknowledgment of Maori sovereignty by the Crown from at least the early 1830s spelt it out, the requirement of Maori consent embodied in these royal instruments clearly was considered more than some moral imperative. Throughout the 1830s the Crown treated formal Maori consent as a legal prerequisite to its erection of an imperium (be it territorial sovereignty, extraterritorial jurisdiction or both) within New Zealand. The royal documents of mid-1839 reflected this position. Although the draft and final instructions to Hobson intimated that Maori sovereignty might not enable the tribes' enjoyment of full international relations it was undoubtedly considered sufficient basis for a cession of territorial sovereignty and/or jurisdiction.

II THE CROWN ACQUIRES THE TERRITORIAL SOVEREIGNTY OF NEW ZEALAND

A. INTRODUCTION

It can be seen that prior to 1840 the British Crown unequivocally disavowed any imperium in New Zealand be it an extra-territorial jurisdiction or territorial sovereignty. In 1839 Hobson was dispatched with the express purpose of obtaining the territorial sovereignty of such parts of the islands as the Chiefs might cede to the Crown. Attention is now turned to the events of 1840, the year in which the Crown obtained the sovereignty of New Zealand. Before this inquiry is made it is necessary to clarify the principles by which the Crown's courts determine whether sovereignty has been acquired over territory.

B. DETERMINING WHETHER TERRITORY HAS BEEN ACQUIRED BY THE CROWN

According to English law the 'dominions'\textsuperscript{114} of the Crown comprehend all those territories which are authoritatively claimed by the Crown at a given time. Once the Crown has asserted its sovereignty over an area, or engaged in activity tantamount to its assertion, that territory will be treated as British for municipal purposes. The non-compliance by the Crown with international criteria for the acquisition of territory cannot restrain a municipal

\textsuperscript{114} The term is not to be confused with the obsolete term "Dominion" once used to denote self-governing members of the Commonwealth: Halsbury's Laws of England (4th ed.), VI, para 803, p 322.
court from giving effect to an authoritative Crown claim.\textsuperscript{115}

Most usually, the Crown will provide a definitive statement of its territorial sovereignty through the formal annexation of the region.\textsuperscript{116} Formal annexation, however, is no more than evidence of the Crown's sovereignty\textsuperscript{117} and will not necessarily be the source of the Crown's title. It may be that the Crown has performed acts prior to the formal annexation from which the courts will find the territorial sovereignty to have been vested in the Crown. Thus in \textit{Attorney-General (British Honduras) v Bristowe} (1881)\textsuperscript{118} the Privy Council found British sovereignty over the Honduras dated at least from 1817 when grants of land had been made by the Crown. The Honduras were not formally annexed until a royal proclamation of 12 May 1862. This case illustrates the proposition, and it is one which has already been instanced by British practice in North America and the East Indies,\textsuperscript{119} that the acquisition of the territorial sovereignty of a region by the Crown might not be attributed to a single event. The question for British courts is not the moment of British sovereignty so much as the first authoritative claim by the Crown thereto.

It has been seen that the Crown made no authoritative claim but expressly disavowed any sovereignty over New Zealand prior to 1840. Given this, two questions arise: At what stage during 1840 (for it was undoubtedly during this year that New Zealand became British) was the earliest authoritative claim by the Crown made to the sovereignty of the New Zealand islands? What does this claim say of the status of the Maori tribes?

C. GIPPS' AND HOBSON'S PROCLAMATIONS (January 1840)

Hobson arrived in Sydney in the New Year of 1840. Soon after, Governor Gipps issued three Proclamations (dated 14 January 1840)\textsuperscript{120} based upon the formal instrumentation which had accompanied Hobson from England. The first of these declared the boundaries of New South Wales to have been altered to include the islands of New Zealand. The second proclaimed Hobson to have entered into the office of Lieutenant-Governor "of such parts of


\textsuperscript{116} The procedure of formally annexing territory acquired by settlement, conquest or cession dates from the late eighteenth century (above, chapter two) although this practice was frequent it was not invariable (Hertslct, "Memorandum on formalities necessary for effective annexation", 18 October 1884 FO 84/1813:246). Territory ceded by treaty or formal agreement requires no formal annexation (Roberts-Wray \textit{Commonwealth and Colonial Law}, 104) although this frequently eventuated. cf. Twiss \textit{The Oregon Question} (1846), 288.

\textsuperscript{117} Roberts-Wray \textit{Commonwealth and Colonial Law}, 107-8 lists annexation as a distinct form of territorial acquisition in English law but limits it to that territory, such as Antarctica, incapable of acquisition by conquest, cession or settlement.

\textsuperscript{118} (1880) 6 App Cas 143 (PC).

\textsuperscript{119} Above, chapter two. Also see \textit{Hemchand Devchand v Azam Sakarlal Chhotamlal} [1906] AC 212 (PC) (territorial sovereignty of the Crown not proven) and \textit{Williams v Attorney-General for New South Wales} (1913) 16 CLR 404 (HCA) at 439 (British sovereignty proven by but pre-dated constituent instruments for New South Wales).

\textsuperscript{120} Texts in CO 209/6:10-11. These proclamations were not published until 19 January 1840. Publication is a formal requirement for a valid proclamation although it need not be effected in any special manner or place: Chitty \textit{Prerogatives of the Crown}, 106-7.
the said territory as is or may be acquired in sovereignty". The third Proclamation advised British subjects that the Crown would not thereafter recognise the title of any British subject to land purchased from the Maori chiefs.

Williams suggests Gipps issued these Proclamations on the supposition of British sovereignty over New Zealand. This conclusion, reached largely by reliance on secondary sources, is extremely doubtful. Since a royal proclamation affecting territory beyond the realm can be as much a statement of royal intention as a substantive enactment it does not follow at all that Gipps' Proclamations were either the source or evidence of a sovereignty over New Zealand. It is equally consistent with the function of a royal proclamation that Gipps was doing no more than declaring the position to be taken by the Crown subsequent to the performance of certain conditions set as prerequisite to the annexation of the country. This prerequisite has been seen as formal Maori consent. Gipps' Proclamations were received in London without contrary remark and never became treated as the formal basis of British sovereignty over New Zealand. Shortly after the Proclamations, Gipps advised Hobson upon the appropriate treatment of foreigners (mostly the American and French traders) "until some portion of territory shall be acquired in sovereignty". In short, Gipps' Proclamations were a public iteration to British subjects of the consequences which would result from the expected acquisition of sovereignty over (parts of) New Zealand: the boundaries of New South Wales would thereupon be extended, Hobson would become Lieutenant-Governor and land purchases from the Maori chiefs post-dating 14 January 1840 would not be recognised. This interpretation of Gipps' Proclamations is consistent with the terms at least of the second Proclamation wherein the reference to territory which "is or may be acquired in sovereignty" appeared, Gipps own advice to Hobson, to Colonial Office non-reaction and the pressing need to advertise the Crown's position in Sydney. Any characterisation of Gipps' Proclamations as the first authoritative declaration of British sovereignty would make them ultra vires instruments, a conclusion neither compelled by the instruments themselves nor consistent with the historical record.

The day after his arrival in the Bay of Islands Hobson gathered the local British residents, in his own words, "to hear read Her Majesty's commission under the Great Seal,

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122 A Proclamation within the realm can only legislate for matters within the recognised prerogative of the Crown: The Case of Proclamations (1611) 12 Co Rep 74. Proclamations affecting territory beyond the realm stand on wider ground, however, such proclamations derive their legality (in respect of territory over which the Crown claims no sovereignty) from the Crown's prerogative power to conduct its foreign relations or its prerogative legislative power in its colonies (according to the rules accredited to Campbell v Hall (1774) 1 Cowp 204).
123 Gipps to Russell, 9 February 1840 CO 209/6:5-6; Russell to Gipps, 17 July 1840 CO 209/8:335: "Her Majesty's Government entirely approve of the measures which you adopted".
124 Gipps to Hobson, 25 January 1840 CO 209/6:30 (emphasis added).
125 Gipps to Russell, 9 February 1840 CO 209/6:5 reported public auctions of New Zealand land in Sydney.
126 Underlining this interpretation of Gipp's Proclamations was his attempt some weeks later on 14 February 1840 to induce a number of South Island chiefs then in Sydney by arrangement of several speculators to enter into a treaty of cession. The attempt was abortive: McClintock Crown Colony Government, 55-6.
extending the limits of the colony of New South Wales, and Her Majesty’s commission under the Royal signet and sign manual, appointing me Lieutenant-Governor of such parts of the colony as may be acquired in sovereignty in New Zealand”. Hobson then read and published two Proclamations. The first declared the boundaries of New South Wales to comprehend the islands of New Zealand and his assumption of the office of Lieutenant-Governor. The second stated the Crown’s intention not to recognise any titles in Her Majesty’s subjects (that is, British settlers) not derived from the Crown itself.

Doubt has been cast upon the legality of the first Proclamation in that it had not been preceded by the acquisition of formal Maori consent required by Hobson’s Commissions and Instructions. The general principle is that a Governor or royal functionary (other than a Viceroy) is a creature of the Crown whose actions derive their validity from the terms of the royal instrumentation. Acts in excess of any such authority or in violation of the Crown’s express stipulation are void. Hobson apparently considered himself Lieutenant-Governor of a small portion of territory in the Bay of Islands "conveyed by parchment deed" by the local chiefs to William IV as compensation for an attack upon Busby’s house in 1834. Busby disagreed with the interpretation Hobson put upon this conveyance, stressing that it had been one of the property and not the sovereignty. This interpretation was underlined by Normanby’s instructions to Hobson which had strongly distinguished the sovereignty of the islands from the title to land. This distinction was fundamental to the course of proceeding Hobson was about to adopt yet his first formal measure on New Zealand shores was one which fudged the question. Indeed, an early draft of his instructions had addressed this problem directly, noting that "it may be doubted whether the Aborigines are at all aware of the distinction so familiar amongst all Civilized Nations between proprietary and Sovereign Rights". The draft noted that in the chiefs' estimate "the Lands which they have given up have probably ceased to be theirs for every purpose whether of Dominion or of ownership". However, the draft instructions insisted against treating the chiefs' sale of land to Europeans as a concomitant cession of the sovereignty for

127 Hobson to Gipps, 4 February 1840 CO 209/6:13.
128 Texts enclosed id, 39-45; and CO 209/7:22-4.
129 Rutherford Acquisition of British Sovereignty, 19; McClintock Crown Colony Government, 57; Adams Fatal Necessity, 281 n 92; Buick The Treaty of Waitangi, 107.
130 Acts exceeding prescription in a Governor’s Commission see Cameron v Kyte (1835) 3 Knapp 332, 12 ER 678 (PC); Hill v Bigge (1841) 3 Moo PC 465 (PC); Musgrave v Pulido (1879) 5 App Cas 102 (PC). It is less clear whether restrictions given in Instructions, considered alone, will nullify acts of a Governor falling within the general terms of his Commission: Smith Appeals to the Privy Council, 597ff; Swinfen "The Legal Status of Royal Instructions to Colonial Governors" [1968] Jur Rev 21; Roberts-Wray Commonwealth and Colonial Law, 149-9. The Imperial Act 3 & 4 Vict c 62, applying to New Zealand rendered the distinction amongst the Governor’s commission, letters patent and instructions unimportant in that all were deemed equally binding upon the Governor (section 3).
131 Buick The Treaty of Waitangi, 104-5.
132 Second draft instructions to Hobson, 8 March 1839 CO 209/4:221,230-1. This advice was omitted from the final instructions apparently on the grounds of surplusage.
133 Inaccurately, it seems. There is evidence to suggest that at least in the 1830s and 1840s the Chiefs considered ‘sale’ to involve merely the grant of a licence to occupy tribal lands which could lapse upon failure to take it up.
134 Supra.
It may be noted that the other important British persons in New Zealand at the time, Captain Nias of HMS Herald and Busby, treated Hobson’s declaration of his Lieutenant-Governorship as premature and deferred instead to his office as Consul. Indeed, this office equipped Hobson with the requisite authority to discharge the condition precedent (the Maori cession of sovereignty) to his assumption of the Lieutenant-Governorship. Hobson, for reasons which remain unclear, opted instead and prematurely for the status of Lieutenant-Governor although, significantly, he signed the Treaty of Waitangi as Consul and Lieutenant-Governor. Whatever the basis for Hobson’s Proclamation of 30 January 1840 declaring himself Lieutenant-Governor of territory which according to his terms of office had not been then acquired in sovereignty for the Crown, the declaration if not invalid (as probably it was) were no more than a declaration of office which came into effect as and when the condition precedent to its effect were met. In other words, the extent of territory under Hobson’s Lieutenant-Governorship grew commensurate with his acquisition of the consent of the various tribes to British sovereignty over their regions.

D. THE TREATY OF WAITANGI

Besides issuing the two Proclamations on 30 January 1840 Hobson also prevailed that day upon William Colenso to use the missionary press to print circular letters addressed to the northern chiefs. Busby was still maintaining that the sovereignty of the country vested solely in the chiefs in their collective capacity as the Confederation of United Tribes under his Declaration of Independence. Hobson, however, as had his superiors, showed impatience with this argument and despite Busby’s insistence that only those chiefs signatory to the Declaration should be invited, required the circular be sent to all northern chiefs irrespective of membership of the Confederation.

On 5 February 1840 the chiefs gathered on the large lawn at the British Resident’s house at Waitangi in the Bay of Islands. In the preceding days Hobson assisted by the missionaries, most notably the elder and younger Williams, and Busby, had prepared a draft of a treaty of cession to be placed before the chiefs. After a day’s debate on 5
February the chiefs were due to retire for a day to consider the Crown’s invitation to cede their sovereignty. However things had reached the stage\textsuperscript{142} that early the next day a willingness to sign was indicated. Preparations were made forthwith and on 6 February 1840 45 chiefs, 26 of whom had signed the Declaration of Independence, signed the Treaty of Waitangi\textsuperscript{143} as translated into the native language by the two Williams. The relevant articles of the Treaty provided:\textsuperscript{144}

\begin{quote}
Article the First
The Chiefs of the Confederation of the United Tribes of New Zealand, and the separate and independent Chiefs who have not become members of the Confederation, cede to Her Majesty the Queen of England, absolutely, and without reservation, all the rights and powers of sovereignty which the said Confederation or individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess, over their respective territories as the sole Sovereigns thereof...
\end{quote}

\begin{quote}
Article the Third
In consideration thereof, Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection, and imparts to them all the rights and privileges of British subjects.

Now, therefore, we, the Chiefs of the Confederation of the United Tribes of New Zealand, being assembled in Congress at Victoria, in Waitangi, and we, the separate and independent Chiefs of New Zealand, claiming authority over the tribes and territories which are specified after our respective names, having been made fully to understand the provisions of the foregoing Treaty, accept and enter into the same in the full spirit and meaning thereof; in witness of which we have attached our signatures or marks at the places and the dates respectively specified.
\end{quote}

Rain prevented commemorative celebration until 8 February when HMS Herald fired a 21 gun salute.\textsuperscript{145}

The proceedings at Waitangi complete, Hobson indicated an intention to obtain the adherence of the other chiefs of New Zealand to the Treaty.\textsuperscript{146} He proceeded to Hokianga where on 12 February 1840 in front of a large assembly he obtained further signatures from the local chiefs who had been unable to attend the Waitangi negotiations.\textsuperscript{147} Further signatures were also obtained at Waimate on 10 and 15 February.\textsuperscript{148} Hobson reported to Gipps on 17 February that he now considered the Crown’s sovereignty of the “Northern districts” to be ”complete”. In consequence he proposed issuing a Proclamation (which never eventuated) “announcing that Her Majesty’s dominion in New Zealand extends from the North Cape to the thirty-sixth degree of latitude”. He added that he would “proceed

\textsuperscript{142} The Maori chiefs’ willingness was assisted by dwindling food stocks: Buick Treaty of Waitangi, 149-50.
\textsuperscript{143} Hobson reported 46 signatures: Hobson to Gipps, 6 February 1840 CO 209/6:46; McClintock Crown Colony Government, 58 and Adams Fatal Necessity, 159 give the number as 45.
\textsuperscript{144} Text in Hobson to Russell, 15 October 1840, enclosing “a certified copy of the Treaty both in English and the native Language” CO 209/7:102,114.
\textsuperscript{145} Nias to Maitland (Adm), 26 March 1840 CO 209/8:37-39.
\textsuperscript{146} Hobson to Gipps, 6 February 1840 CO 209/6:46; Hobson to Normanby, 17 February 1840 CO 209/7:38.
\textsuperscript{147} Hobson to Gipps, 17 February 1840 CO 209/6:58.
\textsuperscript{148} Buick Treaty of Waitangi, 258-59.
Southward, and obtain the consent of the Chiefs" so that he could "extend these limits by proclamation, until I can include the whole of the islands".149

On 1 March 1840 before he could commence this mission Hobson suffered a stroke and partial paralysis. Immediately upon learning this Governor Gipps dispatched Major Bunbury to complete the acquisition of the sovereignty. Gipps considered the task urgent on two counts.150 First, the New Zealand Company had established a settlement at Port Nicholson at the bottom of the North Island. Some months earlier the prospect of this settlement had raised anxiety in the Colonial Office and expedited Hobson's departure from England. By early 1840 the settlement had been established and the officers of the Company were purchasing land from the local chiefs and establishing their own forms of government beyond the pale of royal authority and English law. Secondly, Gipps also thought the acquisition of the sovereignty of the South Island a pressing matter. The reason for this concern is unclear151 although he may have had secret intelligence or even some premonition of French designs.152

By the time of Bunbury's arrival, Hobson had already deputed various officials and missionaries to obtain cessions of sovereignty from the various chiefs yet to sign the Treaty. These agents had each been given a copy of the Treaty signed at Waitangi on 6 February. "This instrument I consider to be de facto the treaty", said Hobson, "and all the signatures that are subsequently obtained are merely testimonials of adherence to the terms of that original document".153 These persons, the Reverends Brown, Maunsell, William and Henry Williams, with Shortland (Colonial Secretary) and Captain Symonds were sent throughout the North Island.154 Bunbury followed soon after, his destination the South Island, although Hobson requested155 he put into Bay of Plenty to obtain the signatures of the local chiefs.156

In early May reports began to reach Hobson of the acquisition of further signatures to the Treaty. Shortland had covered the Kaitaia region by late April.157 Soon after Bunbury put into the Coromandel Harbour where on 4 May 1840 further chiefs signed the Treaty with the exception of "an old chief named Piko and another of inferior note", the former seeing "no necessity in placing himself under the dominions of any prince or queen, who might

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149 Supra.
150 Gipps to Hobson, 4 April 1840 CO 209/6:93.
151 Adams Fatal Necessity, 159. Perhaps he was piqued by the refusal some months earlier of South Island chiefs to sign his treaty of cession.
152 The French frigate L'Aube reached New Zealand on 10 July 1840: Buick Treaty of Waitangi, 200. There were scares throughout the 1830s, most especially the 'scare' of 1831, over French designs upon New Zealand: Adams Fatal Necessity, 74-81.
153 Hobson to Bunbury, 25 April 1840 CO 209/6:126.
154 Captain Nias of HMS Herald and Henry Williams (CMS) had obtained some signatures at Waitemata, 4 March 1840: Buick Treaty of Waitangi, 259.
155 Technically, Hobson was unable to require a military man to perform the service: Gipps to Hobson, 4 April 1840 CO 209/6:93.
156 Hobson to Bunbury, 25 April 1840 CO 209/6:126.

91
govern the white men if she pleased, as he was desirous of continuing to govern his own tribe."158 William Williams, meanwhile, was successfully soliciting tribal agreement along the East Coast between Wairoa and East Cape.159 On the other side of the North Island, Symonds, assisted by the Reverends Maunsell and Whiteley, sought the addition of the Manukau and Waikato tribes to the Treaty.160 The refusal of the leading Waikato chief Te Wherowhero to sign the Treaty brought a hiccup to these proceedings but the missionaries' efforts continued notwithstanding this important failure.161 In the Bay of Plenty difficulty was also being encountered. Although the Reverend Slack had eased Bunbury's task considerably by obtaining some local signatures in advance,162 the missionaries were still unable to persuade the powerful chief Te Heuheu of Taupo. The influence of this chief was wide and extended to the Arawa tribe of the Rotorua region. One of Te Heuheu's brothers, Iwikau, and another lesser chief Te Korohiko had journeyed to Waitangi and to their overlord's rage signed the Treaty. The blankets given them as gifts were subsequently returned to the missionaries at Te Heuheu's command so bringing the formal meeting at Ohinemutu to an end.163 To the South in the Cook Strait region, Henry Williams164 eventually managed to obtain the cession of sovereignty from the local chiefs165 despite Wakefield's obstructive tactics. He was unable to report general coverage of the lower North Island, however, until mid-June 1840.166

Bunbury had proceeded to the South Island anchoring off Banks Peninsula on the evening of 24 May. The Ngaitahu population of the region were found in a rundown state, a direct legacy of Te Rauparaha's massacre which some years earlier had been assisted by the trading vessel Elizabeth. Signatures of two 'chiefs' were obtained.167 Bunbury sailed on for Stewarts Island which he found apparently deserted. In consequence he proclaimed the Crown's sovereignty "in the right (by the discovery of the late lamented Captain Cook) for

158 Bunbury to Hobson, 6 May 1840, CO 209/6:118; Buick, supra, 215-7.
159 William Williams to Hobson, 8 May 1840 CO 209/7:122; Buick Treaty of Waitangi, 207,266-7.
160 Symonds to Whitley, 8 April 1840 CO 209/7:128; Maunsell to Hobson, 14 April 1840, CO 209/7:114; Symonds to Shortland, 12 May 1840 CO 209/7:124; Buick, supra, 187-92.
161 Signatures added at Kawhia on 28 April, 25 May, 15 June, 27 August and 3 September 1840 under Whiteley's encouragement. Buick, supra, 262.
162 Bunbury to Hobson, 15 May 1840 CO 209/7:130. The small schooner Ariel had left copies with Slack in late-March 1840, Buick, supra, 208. Maunsell had done likewise for Symonds: Symonds to Whitley, 8 April 1840 CO 209/7:128.
163 Buick, supra, 222-9.
164 Hobson to H Williams, letter of authorisation, 23 March 1840 CO 209/7:55.
165 Signatures were obtained on 29 April (Wellington), 4 and 5 May (Queen Charlotte's Sound, South Island), 11 May (Rangitoto, SI) 14 May (Kapiti, Otaki, Manawatu), 16 May (Waikanae), 23 and 31 May (Wanganui), 4 June (Motu Ngarara): Buick, supra, 264-6.
166 H. Williams to Hobson, 11 June 1840 CO 209/7:140. Williams retained the services of the Ariel to cover the whole of the South Island. He referred to Cloudy Bay, Bank's Peninsula and Otako as the localities wherein "the signature of the whole of the tribes of the Southern Island would have been obtained". News of HMS Herald's voyage with Bunbury aboard meant this mission was unnecessary.
167 Bunbury to Hobson, 28 June 1840 CO 209/7:144. For the status of those 'chiefs' see Buick, supra, 230.
Her most Excellent Majesty.168 Bunbury proceeded northwards about the South Island obtaining signatures at Ruapuke and in the Otago. His coverage of the South Island had been far from complete when he obtained what were to be the final South Island signatures at Cloudy Bay on 17 June 1840.169 Immediately thereafter he consulted with Nias of HMS Herald who agreed sufficient signatures had been obtained from the southern tribes. Stating their commission "for that purpose", Bunbury and Nias formally declared the Crown's sovereignty over "Tarai Poenammoo" (South Island) by right of cession on 17 June 1840.170

The process of signature-gathering had continued in the North Island beyond May 1840. Bunbury continued to wend his way northwards securing re-agreement to the Treaty from Te Rauparaha (19 June 1840).171 Along the eastern rim of the Bay of Plenty, Fedarb, trading master of the schooner Mercury, working in cooperation with the missionaries obtained the agreement of several local chiefs.172 Whiteley's efforts in the Waikato-Manukau continued, further signatures being added as late as 27 August and 3 September 1840.173 During July and August George Clarke, by then officially appointed Protector of the Aborigines, successfully sought agreement from Maori chiefs at Tamaki and Russell.174

Ross finds that there were up to five English versions of the Treaty forwarded by Hobson to Sydney or London.175 The most material discrepancy amongst these versions arose in relation to the preamble used in two of the English versions. These were duplicates kept for local record of despatches sent to London on 17 February and 23 May 1840. This preamble was worded:176

"Her most Gracious Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with deep solicitude the present State of New Zealand arising from the extensive consequences which must result both to the Natives of New Zealand and to Her Subjects from the absence of all necessary Laws and Institutions has been graciously pleased to empower and authorise me William Hobson a Captain in Her Majesty's Royal Navy, Consul and Lieutenant-Governor in New Zealand to invite the Confederated Chiefs to concur in the following articles and conditions".

The preamble which has become the official text provided:177

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168 "Declaration of Sovereignty of The Queen of England over Stewart's Island", 5 June 1840 CO 209/7:173, CO 209/8:48; Buick, supra, 232.
169 Buick, supra, 261.
170 "Declaration of Sovereignty over Tarai Poenammoo", 17 June 1840 CO 209/7:77, CO 209/8:46. Gipps reported this to Russell, 24 July 1840 stating Her Majesty's sovereignty over the South Island was established "either by the acknowledgement of the chiefs, or (in the Middle and Southern Islands) by declaration on the right of discovery": BPP (1841), #311, 59; Nias to Commander in Chief, July (nd) 1840 CO 209/8:41 reporting the declaration as made after "the cession of the Middle [ie South] Island to Her Majesty was completed".
171 Buick, supra, 262. Te Rauparaha had already signed the Treaty before Henry Williams on 14 May 1840, id at 265.
172 Stack to Shortland, 23 May 1840 CO 209/7:137.
173 Buick, supra, 262. These signatures were sent to London in Hobson to Russell, 26 May 1841 CO 209/9:95.
174 Id, 260-1.
175 Ross "Te Tiriti o Waitangi", 134-5.
176 Id, 134.
177 Text in the 'certified copy' Hobson to Russell, 15 October 1840 CO 209/7:102,114.
HER MAJESTY VICTORIA, Queen of the United Kingdom of Great Britain and Ireland, regarding with Her royal favour the native Chiefs and Tribes in New Zealand, and anxious to protect their just rights and property, and to secure to them the enjoyment of peace and good order, has deemed it necessary, in consequence of the great number of Her Majesty's subjects who have already settled in New Zealand, and the rapid extension of emigration both from Europe and Australia which is still in progress, to constitute and appoint a functionary properly authorized to treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereign authority over the whole or any part of those Islands. Her Majesty, therefore, being desirous to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of necessary laws and institutions, alike to the Native population and to Her subjects, has been graciously pleased to empower and authorize me, William Hobson, a Captain in Her Majesty's Royal Navy, Consul and Lieutenant-Governor of such parts of New Zealand as may be or hereafter shall be ceded to Her Majesty, to invite the confederate and independent Chiefs of New Zealand to concur in the following articles and conditions.

The difference between the two versions of the preamble, at least for present purposes, would appear immaterial since the latter was but a more fulsome version of the former save that the former was addressed solely to the chiefs of Busby's Confederation. Nonetheless it is important also to remember that with the exception of the thirty-nine signatures made at the Waikato Heads in March-April 1840, the chiefs all signed the Maori version of the Treaty.

In October 1840 Hobson sent a "certified copy of the Treaty in both English and the Native Language" to London, informing Russell that he had "received ample and full reports from all the Gentlemen" whom he had commissioned "to treat with the native Chiefs for their adherence to the Treaty of Waitangi". The "long roll of parchment", listing 512 signatures, was received with commendation by the Colonial Office.

This, then, was the process by which Maori agreement to British sovereignty over New Zealand was obtained. The procedure could hardly be said to have been organised and methodical nor, more importantly, comprehensive in coverage. Important chiefs of the central North Island refused to sign the Treaty and it is probable several chiefs of the interior regions of both islands were not reached. But, whatever, the Treaty represented the means employed by Hobson to execute formally the requirement that he acquire the sovereignty of New Zealand from the Maori chiefs. This requirement, it has been stressed, was stipulated in his formal instruments of office and, more generally, was the corollary of the Crown's recognition of Maori sovereignty throughout the 1820s and '30s.

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178 *Id.*
179 So described by Stephen, note to Vernon Smith, 9 March 1841 CO 209/7:103. The appended signatures appear to be lost: Ross "Te Tiriti o Waitangi", 136.
180 Ross, *op cit*, 136.
181 Stephen and Vernon Smith, notes, 9 March 1841 CO 209/7:103.
182 Swainston to Shortland, 27 December 1842 CO 209/16:487.
The laborious process of signature-gathering was shortcircuited by formal measures adopted by Hobson on 21 May 1840. Hobson had been worried by reports from Port Nicholson that the New Zealand Company settlers had adopted their own frame of government under Articles of Agreement signed in London. British settlers, it has been seen, lack a judicial or legislative power over one another not derived from the Crown or, if the territory is not British, the local sovereign. Although the Company had gone through the farcical procedure of securing the local chiefs' approval of their constitution, a typically contradictory position taken by a mercantile body which blew hot and cold on the question of Maori (tribal) sovereignty, Hobson considered the settlers’ activities at Port Nicholson amounted "to high treason". Upon receipt of the information regarding their activity, he followed Gipps' advice and immediately issued two Proclamations declaring the Crown's sovereignty over the country. The preamble of the first announced the Crown's sovereignty over the North Island by right of cession:

Whereas by a treaty, bearing date the 5th day of February, in the year of Our Lord 1840, made and executed by me William Hobson, a Captain in the Royal Navy, Consul and Lieutenant-governor in New Zealand, vested for this purpose with full powers by Her Britannic Majesty, of the one part, and the Chiefs of the Confederation of the United Tribes of New Zealand, and the several and independent Chiefs of New Zealand, not members of the Confederation, of the other, and further ratified and confirmed by the adherence of the principal Chiefs of this Island of New Zealand, commonly called "The Northern Island", all rights and powers of sovereignty over the said Northern Island were ceded to Her Majesty the Queen of Great Britain and Ireland, absolutely and without reservation.

The second Proclamation simply declared the Crown's sovereignty over the South and Stewart Islands (as well, again and unnecessarily, the North Island "the same having been ceded in sovereignty to Her Majesty"). Two days later he issued a Proclamation commanding the Port Nicholson settlers, who in violation of their "allegiance" as the Crown's "liege subjects in New Zealand" had "attempted to usurp the powers" vested in him by the Crown's formal authority, to withdraw from their "illegal association". Hobson explained these Proclamations of sovereignty in a despatch to Russell:

Availing myself of the universal adherence of the native chiefs to the Treaty of

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183 Adams Fatal Necessity, 160; Foden New Zealand Legal History, 64.
184 Hobson to Russell, 25 May 1840 CO 209/6:146,150 and CO 209/7:41.
185 Gipps to Hobson, 4 April 1840 CO 209/6:93 informing him the activity of the settlers at Port Nicholson required "prompt measures... very urgently" and advising him to declare HM sovereignty promptly, by right of discovery over the South Island if needs be.
186 Text in CO 209/6:156 and CO 209/7:61.
188 Proclamation to Port Nicholson settlers, 23 May 1840 CO 209/7:63.
189 Hobson to Russell, 25 May 1840 CO 209/6:146,150. Russell to Hobson, 10 November 1840 CO 209/7:53. "As far as it has been possible to form a judgment, your proceedings appear to have entitiled you to the entire approbation of Her Majesty's Government".
Waitangi, as testified by their signatures to the original document in my presence, or to copies signed by me in the hands of those gentlemen who were commissioned and authorised by me to treat with them, I yielded to the emergency of the case arising out of events at Port Nicholson, and without waiting for Major Bunbury’s report proclaimed the sovereignty of Her Majesty over the Northern Island. Actuated by similar motives, and a perfect knowledge of the uncivilised state of the natives, and supported by the advice of Sir George Gipps previously given, I also proclaimed the authority of Her Majesty over the Southern Islands, on the grounds of discovery”.

Although Hobson acknowledged that signature-gathering was still in train in the North Island (those regions in the Coromandel and Bay of Plenty to which Bunbury had been directed) he still informed his superiors that the agreement of the North Island chiefs had been “universal”. This advice was presumptuous and, it transpired, incorrect. His despatch also overlooked certain points in relation to the South Island. First, Bunbury had been sent primarily to obtain the cession of the South and Stewart Island not merely the remaining pockets of the North Island as hinted by Hobson. Bunbury’s labours on this account, particularly his Proclamation of 17 June 1840 claiming the South Island for the Crown by right of cession, have been noted already. Secondly, although Gipps,190 as Normanby191 and Hobson192 himself, had distinguished the “wild savages in the Southern Islands” with whom it appeared “scarcely possible to observe even the form of a Treaty”193 from those of the north, both Gipps and Hobson made efforts to conclude treaties of cession with southern chiefs. In February 1840 Gipps had tried unsuccessfully to convince five South Island chiefs then visiting Sydney (courtesy of certain land speculators) to sign a treaty.194 Hobson, of course, had sent Bunbury on his southern mission. The real motive for Hobson’s Proclamations of Sovereignty was his concern over the “assumption of sovereignty” by the “demagogues” of Port Nicholson.195

The circumstances of Hobson’s Proclamation of 21 May 1840 together with the continued acquisition of tribal signatures after this date might suggest the Proclamations were intended as no more than a claim of authority over British subjects and those tribes which had already ceded their sovereignty. The precedent for this would have been the Crown’s charters for the New World which, it has been seen, left tribal sovereignty intact notwithstanding their claim to large areas of territory. By the nineteenth century, however, territorial sovereignty had taken its absolute, indivisible and territorial form and such qualification for unceded tribal sovereignty was theoretically and actually impossible. As a matter of English constitutional law, Hobson’s Proclamations, being published within the

190 Gipps to Hobson, 4 April 1840 CO 209/6:93,95.
192 Hobson to Normanby, circa 1-2 August 1839 CO 209/4:151.
193 The words belong to Hobson, id, 152.
194 Sweetman The Unsigned New Zealand Treaty, 60-65; Hight and Bamford Constitutional History and Law of New Zealand, 208-9.
Colony,\textsuperscript{196} approved by the Crown and notified in the \textit{London Gazette} (2 October 1840) established the sovereignty of the Crown over New Zealand. Although not the source these Proclamations were the first authoritative declaration of the Crown's sovereignty.

III CONCLUSIONS

A. INTRODUCTION

In the previous chapter two general conclusions were reached. First it was found that the Crown consistently recognised the juridical status of non-Christian and, more specifically, tribal societies from the earliest time of contact with these societies. Secondly, it was found that the Crown had consistently adhered to the position that the exercise of a constituent power for these societies required their consent. These two principles of British practice were clearly evident in the procedure by which the Crown acquired the territorial sovereignty over New Zealand. Attention is now focussed upon the application of each principle to the New Zealand setting and, finally, the legal character of the Crown's sovereignty over New Zealand.

B. THE TREATY OF WAITANGI AS AN INSTRUMENT OF CESSION

Evidence has amassed throughout this chapter indicating the Crown's consistent recognition of the sovereignty of the Maori tribes. This recognition, to repeat notable instances, underlied the Acts of Parliament denying any British sovereignty over New Zealand, the approval of the national flag and Declaration of Independence as well, of course, in the formal procedure represented by the Treaty of Waitangi. This recognition of Maori sovereignty was wholly within a long-standing British tradition going back, the previous chapter saw, to the earliest moments of British contact with non-Christian societies. The influence of the humanitarian movement gave this recognition of Maori sovereignty added potency and urgency, to be sure, but in the end it merely spotlighted an old and established principle of British practice.

Any argument that the Treaty of Waitangi was not a valid instrument of cession due to a lack of juridical status in the tribal signatories faces two important difficulties. First, it must dismiss as mere pretence the Crown's relations with the Maori tribes in the period prior to Hobson's Proclamations of sovereignty on 21 May 1840. The historical record cannot sustain the cynical view that Maori sovereignty was treated by the Crown as a moral rather than legal principle. The Crown clearly felt Maori sovereignty inhibited its exercise of a

\textsuperscript{196} The Proclamations were printed as handbills and posted throughout the country. For examples of this poster, see CO 209/6:156 and 158 and CO 209/7:61 and 62.
constituent power (i.e., the establishment of an imperium) in New Zealand. 'Moral' considerations alone cannot account for this inability: Legal forces actuated by the recognition of Maori sovereignty were at play. Secondly, any denial of the Treaty as an instrument of cession must also dismiss the Crown's practice in other parts of the globe, particularly North America, Africa and the Pacific wherein the recognition of tribal sovereignty also occurred. Over four centuries of British relations were regulated on the basis that these tribal societies enjoyed some juridical status provided they had reached a semblance of apparent political organisation. It is inconceivable that throughout this period the Crown was working with a mere fiction, the illusion of tribal sovereignty. This, again, would take a cynical view of British relations with tribal societies at odds with the historical record.

It is clear the Crown considered the Treaty of Waitangi to be a valid instrument of cession. Hobson had been formally required to treat with the Maori tribes to obtain the cession of sovereignty. The Treaty itself was in Stanley's words "officially promulgated and laid before Parliament". In a minute of 1842 James Stephen noted that it was "in virtue of the treaty, and on that basis alone that Her Majesty's title to sovereignty in New Zealand at this moment rests". In 1848 Louis Chamerovzow, Secretary to the Aborigines Protection Society, published his book The New Zealand Question. This book dealt specifically with the legal rights of the Maori. In an appendix to this important but strangely neglected work Chamerovzow included two lengthy opinions by Joseph Phillimore and Shirley F Woolmer, both eminent barristers with a reputation in the field of international and colonial law. So far as British sovereignty over New Zealand was concerned, all three were of no doubt the basis lay in the Treaty of Waitangi. Chamerovzow, who spent considerable effort on this question, found the Maori tribes had the capacity to enter into contractual relations with the Crown in virtue of both the Crown's recognition of their sovereignty and the tribe's compliance with Vattel's requirements for statehood. Quoting Vattel at length he insisted "savage tribes are not to be excepted from being considered as constituting part of that association of nations, recognized as forming the aggregate political not less than the natural world". The Maori tribes enjoyed statehood notwithstanding "certain theorists of over-diluted political sensibility", a thinly veiled reference to Dr Arnold who argued contrariwise in "eagerness to promote the advancement of the interests of the civilized nations" at cost to "the natural rights of Aborigines". Chamerovzow then cited Vattel's famous recognition.

197 Stanley to Fitzroy, 13 August 1844 CO 209/32:375.
198 Stephen to Hope, minute, 28 December 1842 CO 209/18:416; also Stephen to Vernon Smith, note, 9 July 1840 CO 209/6:33; Hope to Somes, 10 January 1843 CO 209/18:388.
199 Chamerovzow The New Zealand Question (1848), 27.
200 In fact Arnold had argued (1831) that property rights were a product of law in a civil society (Miscellaneous Works (1845), 155-8) but the Colonial Reform took his remarks as applying equally to sovereignty (an early, unwitting subscription to a standard of civilization and absolute character of territorial sovereignty). Hence the criticism of Arnold.
201 Le droit de gens (1758), 18.
of the dwarf so much as giant state.\textsuperscript{202} Phillimore also referred to the same passage, agreeing that "[r]elative magnitude (of states) creates no distinction of rights".\textsuperscript{203} Woolmer took a similar position\textsuperscript{204} although his finding of original tribal sovereignty emphasized the Crown's recognition more than the tribes' actual compliance with Vattel's prescription for statehood. All three concluded the Maori had the indisputable capacity to enter into a treaty of cession. In consequence the Treaty of Waitangi was a valid compact for purposes of international and English law and was the substantive basis of British sovereignty over New Zealand. The requirement of Maori consent to British sovereignty embodied in the Treaty of Waitangi all three acknowledged as a logical and legally-compelled result of Maori statehood. These sources indicate that at the time of and immediately after its conclusion the Treaty of Waitangi was certainly considered a valid instrument of cession.

Various commentators have either rejected that conclusion or undermined it with the qualification that the Treaty was born of moral rather than legal principle. The basis for this argument rests upon the supposition that the Maori tribes lacked any juridical status. Thus Adams observes:\textsuperscript{205}

Yet the Treaty of Waitangi was a constitutional and legal nullity. The cession by a certain number of chiefs did not make New Zealand British; it merely removed the chief political obstacle to its becoming so. Rather it was the Proclamations of 21 May 1840, issued by an authorised agent of the Crown, and the subsequent official gazetting of these Proclamations on 2 October 1840, that made New Zealand British in terms of English constitutional procedure and international law. And since the Proclamations themselves were based on a legally invalid treaty of cession and a non-existent right of 'discovery', it follows that New Zealand became a colony by an Act of State of the British Crown and was confirmed so by occupation and settlement.

Similarly McClintock in this ambivalent manner dismisses the Treaty as a valid instrument of cession:\textsuperscript{206}

In the final analysis, therefore, the fabric of British sovereignty over New Zealand vested, in the first instance, on the incontestable prerequisite that Hobson had secured from the natives a generous measure of support for the treaty. More pertinently, with respect to the South Island and Stewart Island, it vested in part upon native consent but more specifically upon rights of discovery together with the inescapable fact of settlement. As for the North Island, so far as native consent was withheld, it vested simply upon rights of settlement or occupation. On these grounds New Zealand passed to the Crown by an Act of State, as expressed by the publication of Hobson's May Proclamations in the \textit{London Gazette} of 2 October 1840. New Zealand therefore lies within the category of colonies acquired by occupation.

\textsuperscript{202} The New Zealand Question (1848), app, 6.
\textsuperscript{203} \textit{Id}, app, 26-8,40.
\textsuperscript{204} \textit{Id}, 40.
\textsuperscript{205} Adams \textit{Fatal Necessity}, 162.
\textsuperscript{206} McClintock \textit{Crown Colony Government}, 62-3.
Rutherford accepts the Treaty of Waitangi lacked any status as an instrument of cession although he adds that this leaves "its political or moral status unimpaired". Foden, having shown the Crown recognised the sovereignty of the Maori chiefs prior to annexation in 1840, then argues that the Treaty of Waitangi was not a valid instrument of cession at international law because the Maori lacked international personality:

...it could not possibly be given a place in this field of law. International law does not take cognisance of the dealings which a State belonging to the Family of Nations has with uncivilised tribes which are not members of that circle, because the subjects of international law are those States and those alone which the existing Family of Nations has recognised as such. No one would ever seriously suggest that the Maori tribes of New Zealand were qualified for admission to the family.

He proceeds to justify this position by reference to the group of late nineteenth century British publicists such as Hall and Westlake.

The classic authority for the proposition that the Maori's lack of juridical status nullified the Treaty of Waitangi as an instrument of cession is the judgment of Prendergast CJ in Wi Parata v The Bishop of Wellington (1877). Prendergast placed particular reliance upon Normanby's instructions to Hobson of 14 August 1839 which stated:

We acknowledge New Zealand as a sovereign and independent State, so far at least as it is possible to make such acknowledgment in favour of a people composed of numerous, dispersed and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate in concert.

This qualification, said Prendergast, "nullifies the proposition to which it is annexed". Thus he concluded that so far as the Treaty "purported to cede the sovereignty it must be regarded as a simple nullity". "No body politic existed", he added, "capable of making cession of sovereignty nor could the thing itself exist". This assessment has become the orthodox view of the country's constitutional history despite a substantial body of

207 Rutherford Acquisition of British Sovereignty, 47.
208 Foden Constitutional Development of New Zealand, 170.
209 Id, 180-1.
210 HRNZ, 1, 729.
211 (1877) 3 NZ Jur (OS) 72 (SC) at 77.
212 Id.
213 Id.
authority to the contrary.215

By way of preliminary comment on the Wi Parata view of the juridical status of the Maori tribes, it is interesting to note that this retroactive abnegation of Maori sovereignty was made at the very moment when the Australasian colonies were challenging Britain’s recognition of the sovereignty of the Pacific Island communities. A resolution passed at the Inter-Colonial Conference at Sydney, January 1881 expressed unhappiness with the Crown’s unwillingness to erect unilaterally an imperium in the Pacific Islands.216 This unwillingness, it was seen in the previous chapter, emanated from the same principle which had earlier restrained the Crown’s hand in New Zealand, namely, its lack of a constituent power over territory occupied by tribal societies from whom no right to erect an imperium had been obtained.

More crucially, and fatally, the Wi Parata position adopted the late nineteenth century standard of civilisation as the exclusive and absolute test of international personality. The standard of civilisation, it was seen in the previous chapter, was not incorporated into international law and practice until the last quarter of the nineteenth century. The standard was certainly not part of the intertemporal law in 1840 when the Crown concluded the Treaty. At this time Vattel’s secularised doctrine of independent and equal state sovereignty held sway. So far as the Maori were concerned the influence of the humanitarian movement simply gave the application of the doctrine to the Maori added potency. Throughout the 1830s Britain’s hands-off attitude towards the New Zealand frontier was justified (or, more aptly, excused) on the ground of Maori sovereignty unqualified by any ‘uncivilised’ standard of personality. Indeed, James Stephen, not the unquestioning disciple of the humanitarian movement as sometimes depicted, made explicit reference to this unqualified recognition of Maori sovereignty on several occasions. In one telling minute he referred to the judgments of the United States Supreme Court under Marshall CJ, decrying the doctrine of ‘domestic dependent nations’. This notion of a limited tribal sovereignty was seen by Stephen as some kind of adjudication against the rights of the Indian tribes.217

Whatever may be the ground occupied by international jurists they never forget the policy and interests of their own Country. Their business is to give to rapacity and injustice, the most decorous veil which legal ingenuity can weave. Selden, in the interest of England maintained the doctrine of what was called mare clausum. Vattel in the interest of Holland laid down the principle of open fisheries. Mr Marshall great as he was, was still an American, and adjudicated against the rights of the Indians. All such law is good, just as long as there is power to enforce it, and no


216 “Minutes of the Proceedings... with subsequent Memoranda” in AJHR (1881), A 3, 12-3. See rejoinder of Sir AH Gordon, Western Pacific High Commissioner, 26 February 1881, id, 36 esp at 38.

217 Stephen to Vernon Smith note, 28 July 1839, CO 209/4:343. Maine International Law (1894), 74 expressed similar unhappiness with Marshall’s doctrine of an original but limited tribal sovereignty (notwithstanding his belief in the divisibility of sovereignty).
longer.

Besides what is this to the case of the New Zealander? The Dutch, not we, discovered it. Nearly a hundred years ago Captain Cook landed there, and claimed the Sovereignty for King George the III. Nothing has ever been done to maintain and keep alive that claim. The most solemn Acts have been done in repudiation and disavowal of it. Besides the New Zealanders are not wandering Tribes, but bodies of men, till lately, very populous, who have a settled form of Government, and who have divided and appropriated the whole Territory amongst them... The two cases seem to me altogether dis-similar, and the decision of the Supreme Courts of the United States, though it may be very good American law, is not the law we recognise and act upon on the American Continent.

The notion of semi-sovereignty implicit in the Marshall doctrine of discovery was not, therefore, for Stephen who, it must be admitted, failed signally to concede the historical reasons (ie the charters of his own monarch) which had conditioned Marshall’s response. Stephen’s view of the absolute character of Maori sovereignty was undoubtedly influenced by the London School of Bentham, Mills and Austin who, it has been seen, took an absolute view of sovereignty. This combined with Stephen’s humanitarian sympathies in the unqualified recognition of Maori sovereignty. There was never any suggestion from the Colonial Office that the Maori tribes were other than the full sovereigns of New Zealand notwithstanding their primitive form of social organisation.

The Crown, it has been seen, freely entered into a variety of treaties with uncivilised societies throughout the nineteenth and into the twentieth century. This practice surely presupposed some juridical status in the uncivilised party. The retroactive nullification of such transactions implicit in the Wi Parata approach, based as it is upon some supposed lack of juridical status, not only called the validity of the Crown’s settled practice into question but more fundamentally, in point of English law, challenged the Crown’s prerogative power to conduct foreign relations. The recognition of a foreign sovereign has always been treated by the courts as a political act of the Crown. Where the Crown has recognised the sovereignty of a foreign polity judicial inquiry into that society’s international personality must cease. The Crown’s recognition of its sovereignty is a complete answer as a matter of English law. This position was certainly established law by 1840 and indeed by 1877, the year in which Wi Parata was decided. Any denial of Maori sovereignty at the time of the Treaty of Waitangi therefore undercuts the basic proposition of English
constitutional law that recognition of a foreign state is a matter for the Crown to which the
courts must give appropriate effect. Since the Crown solemnly and formally recognised the
sovereignty of the Maori chiefs the New Zealand courts were bound to respond accordingly. *Wi Parata* signalled their failure on this account.

It should be added that international tribunals have recognised the legal personality of
tribal societies. The Delagoa Bay Arbitration proceeded on the basis that native chiefs held
the capacity to cede territory.\textsuperscript{221} Similarly the International Court of Justice considered state
practice through the late nineteenth century, the period when the standard of civilisation (the
basis of the *Wi Parata* approach) was at its most influential: \textsuperscript{222}

Whatever differences of opinion there may have been among jurists, the state
practice of the relevant period indicated that territories inhabited by tribes or people
having a social organisation were not regarded as *territorium nullius*. It shows that in
the case of such territories the acquisition of sovereignty was not generally
considered as effected unilaterally through 'occupation' of *territorium nullius* by
original title, but through agreements concluded with local rulers. ...such agreements
with local rulers, whether or not considered as actual 'cession' of the territory were
regarded as derivative roots of title, and not original titles obtained by occupation of
*territorium nullius*.

More particularly, in the *William Webster Claim* the American and British Claims
Arbitration Tribunal expressly recognised British sovereignty over New Zealand as deriving
from the Treaty of Waitangi.\textsuperscript{223} On an earlier occasion the predecessor of this body, the
Anglo-American Claims Tribunal, in an opinion *circa* early 1854 concerning "Rogers and
Co", had observed without further comment that New Zealand had been acquired by cession
from the native chiefs.\textsuperscript{224}

Lindley has found no support for the view of some late nineteenth century British
commentators that tribal societies lacked any legal personality at all.\textsuperscript{225} The *Wi Parata*
approach to the status of the Maori tribes, which has nourished an orthodoxy in New
Zealand's constitutional history, was part of this exceptional body of legal opinion. The
evidence shows it difficult to sustain the argument that the Maori tribes lacked the juridical
status to enter into a treaty of cession.

C. THE REQUIREMENT OF MAORI CONSENT TO BRITISH SOVEREIGNTY

\textsuperscript{221} Moore *International Arbitrations*, II, 1865.
\textsuperscript{222} *Western Sahara Advisory Opinion [1975]* ICJ 12 at 39, para 80.
\textsuperscript{223} (1926), 20 *AJIL* 391. cf *The Cayuga Indian Claim*, id, at 574 and *Island of Palmas Arbitration* (1928), 22 *AJIL* 867 (PCA)
\textsuperscript{224} Report of Hornby BC in FO 97/32:125. I am grateful to Dr G Marston, Sidney Sussex College, for this
reference.
\textsuperscript{225} Lindley *Acquisition and Government of Backward Territory*, 24-47.
Throughout the history of its relations with tribal societies the Crown consistently recognised that any right of government over such societies was derivative in character. Conquest was possible but less preferable to the acquisition of their formal consent. This principle of British practice remained remarkably consistent notwithstanding the organic changes in the character of international law and relations, most especially the eighteenth century secularisation of international society and the development of a standard of civilisation over the second half of the nineteenth century. The general pattern of the Crown’s acquisition of an imperium in non-Christian territory has been shown to have been underpinned by this principle and by now its strict application to the New Zealand frontier during the 1830s has become clear. The Crown treated formal Maori consent as a legal prerequisite to the annexation of New Zealand. This position was inherent in the Crown’s protestations during the 1830s of its inability to erect unilaterally an imperium in the country. The same position was formalised in the instruments of office appointing Hobson Consul to treat with the Maori tribes for the cession of the sovereignty of their territory over which subsequently he would become Lieutenant-Governor. The Crown approved Hobson’s Proclamations of sovereignty on 21 May 1840 accepting his word that there had been ‘universal adherence’ to the Treaty of Waitangi. These Proclamations, it must be stressed, although the first authoritative declaration were not the source of the Crown’s sovereignty. The basis of British sovereignty was the consent of the Maori tribes.

It may be argued that this source of British sovereignty was challenged by Hobson’s Proclamations of sovereignty on 21 May 1840. These, recall, were made at a time when the process of signature-gathering was still in train. If Maori consent was some legal requirement, particularly in the light of its embodiment in Hobson’s formal instruments of office, does not that make the Proclamations of 21 May 1840 invalid or, at best effective only as against those tribes who had then signed the Treaty? Or, put another way, does not the interuption of the process of signature-gathering by Hobson’s Proclamations show Maori consent was being treated as a political rather than legal necessity capable of suspension at the Crown’s pleasure?

Such argumentation fails to grasp the subtleties of English constitutional law governing the Crown’s conduct of its affairs beyond the realm. The Crown has the prerogative power to conduct the foreign affairs of the nation. Under this power it may authorise or approve the acquisition of foreign territory by its subjects and in consequence, exercise the separate prerogative constituent power. The exercise of the power to acquire territory is beyond the review of English courts. The courts cannot challenge the means adopted or which may prospectively be adopted by the Crown.226 If the Crown choses to approve the unauthorised acquisition of territory: Johnstone v Pedlar [1921] 2 AC 262 (HL), per Atkinson LJ at 278, Summer LJ at 290; Baron v Denman (1848) 6 St Tr (NS) 525 (Ex); Attorney-General v Nissan [1970] AC 179 (HL) per Reid LJ at 207; Nissan v Attorney-General [1968] 1 QB 286 (CA) per Denning MR at 338; Stephen History of Criminal Law, II,61-5. 

226 The courts will not presume to review the Crown’s conduct of its international relations, including the acquisition of territory: Johnstone v Pedlar [1921] 2 AC 262 (HL), per Atkinson LJ at 278, Summer LJ at 290; Baron v Denman (1848) 6 St Tr (NS) 525 (Ex); Attorney-General v Nissan [1970] AC 179 (HL) per Reid LJ at 207; Nissan v Attorney-General [1968] 1 QB 286 (CA) per Denning MR at 338; Stephen History of Criminal Law, II,61-5.
acquisition of territory by one of its subjects its courts cannot subsequently challenge that acquisition on grounds of the subject’s original lack of authority. Nonetheless English courts will inevitably have to give effect to the fact of acquisition of territory by the Crown even though the ‘act of state’ doctrine prohibits any judicial attempt to challenge or interfere with the process of acquisition. On such occasions judicial inquiry into the Crown’s relations with the inhabitants of the territory before and during the process of acquisition will become necessary. The rules which the Crown has elected to observe in the acquisition of the territory, such as the recognition of the sovereignty of the local polities, then become judicially cognisable. Thus, for example, had a British subject been minded to sue a Maori chief refusing to observe the terms of a contract concluded prior to British annexation, English courts, noting the Crown’s recognition of tribal sovereignty, would hold that the contracts of a former sovereign cannot be enforced in the courts of the new.

English courts can, therefore, recognise the rules adopted by the Crown in the acquisition of new territory. As a matter of English law the adoption of these rules is a matter solely within the election of the Crown. Nonetheless it is clear that the Crown considered itself bound by certain rules in relation to the acquisition of an imperium in non-Christian territory notwithstanding the free hand given it by its own courts. The material presented in chapter two shows overwhelming evidence of the Crown’s belief that native consent was an important precondition to the exercise of a constituent power over such societies. The Crown’s subscription to this position was clearly actuated by more than a belief that such consent was morally desirable. It was felt to be as much a legal necessity as moral imperative. In the New Zealand context, the influence of the humanitarian movement served only to underline the legal character of this rule. English courts might have been unable to enforce the requirement against the Crown but in the Crown’s eyes that did not diminish the necessity for native consent to British sovereignty. This requirement was, as Chapman J

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227 It is accepted that acquisition of territory must be a State as opposed to private act: Vattel Le droit de gens (1758), 1, 207; Twiss The Oregon Question (1846), 277; Porter “Opinion on Measures for the Government of Orange River and British Kaffiria”, 25 March 1849 CO 879/1:1, 10 at 13; Westlake Chapters on International Law (1894) 162 and International Law (1910), 96 et seq; Jenkyns British Rule and Jurisdiction, 2-3; Jennings Acquisition of Territory in International Law, ch II; Roberts-Wray Commonwealth and Colonial Law, 99-101. “I have never heard that you can force a Sovereign to take territory” per Halbury LC in Staples v The Queen (unreported) quoted in R v The Earl of Crewe, ex parte Sekgome [1910] 2 KB 576 at 623 per Kennedy LJ.

228 Courts cannot question the validity of an act of state: Secretary of State in Council v Kamachee Boye Sahaba (1859) 13 Moo PC 22; Nabob of Arcot v East India Co (1793) 2 Ves 56; Gibson v East India Co (1839) 5 Bing NC 262; Doss v Secretary of State for India in Council (1875) LR 19 Eq 509; Rustumjee v R (1876) 2 QBD 69; Rajah of Coorg v East India Co (1860) 29 Beav 300; Sirdar Bhagwan Singh v Secretary of State for India (1874) LR 2 Ind App 38; West Rand Central Gold Mining Co v R [1905] 2 KB 391 at 408-10; Salaman v Secretary of State for India [1906] 1 KB 613; Civilian War Claimants Association Ltd. v R [1932] AC 14; Oyekan v Adele [1957] 2 All ER 785 (PC).

229 For instance: Salaman v Secretary of State in Council for India [1906] 1 KB 613 (CA) at 639-40 per Fletcher Moultin LJ; Secretary of State in Council for India v Bai Rajbai (1915) LR 42 Ind App 229 (PC) at 237; Rajah Salig Ram and others v Secretary of State for India in Council (1872) LR Ind App, Sup vol 119 (PC); Forester and others v Secretary of State for India in Council (1872) LR Ind App, Sup vol 10 (PC); Hemchand Dewhand v Azam Sakatkal Chhotamal [1906] AC 212 (PC) (territorial sovereignty of the Crown not established by proof of any act of state); Moore Act of State in English Law, 86-90; Walker v Baird [1892] AC 491.

230 As per Cook v Sprigg [1899] AC 572 (PC). See discussion of this case in Moore Act of State in English Law (1906), 80.
styled it in *R v Symonds* (1847) one of those "higher principles" embodied in the "intercourse of civilized nations, and more especially of Great Britain, with the aboriginal Natives of America and other Countries" which had become part of "the earliest settled principles of our law".\(^{231}\)

The material reviewed in this and the previous chapter indicates, therefore, that the Crown treated tribal consent as a legal prerequisite to the exercise of territorial sovereignty (or any other *imperium*) over their territory. This principle was applied, almost, one is tempted to say, *par excellence* by the Crown to the annexation of New Zealand. Hobson's Proclamations of 21 May 1840 coming as they did when tribal consent to British sovereignty had not been obtained throughout the country were no denial of the principle. So far as English courts are concerned these Proclamations were simply an authoritative statement that this formal requirement had been met. The fact that the courts cannot go behind this statement in no wise diminishes the recognition of the principle of tribal consent thereby proclaimed to have been met.

Although the requirement of Maori consent to British sovereignty was the logical corollary of the Crown's recognition of Maori sovereignty the two aspects are in theory separable. Some commentators have suggested that the Crown required Maori consent to British annexation independently of its position on Maori sovereignty. Thus Sutton argues "Maori sovereignty is not vital to an understanding of the Treaty's place in New Zealand's constitutional and legal system".\(^ {232}\) The Treaty, he suggests, was a *quid pro quo* for some root of legal accession to New Zealand. Similarly, commentators such as Roberts-Wray,\(^ {233}\) McNair,\(^ {234}\) Evatt\(^ {235}\) and Foden\(^ {236}\) accept the Treaty of Waitangi was not a treaty of cession at international law but nonetheless affirm Maori consent to British annexation to have been some legal prerequisite to the formal Proclamation of sovereignty. In other words, these writers accept the Maori tribes' lack of international personality but uphold the tribal capacity to approve British sovereignty over their territory. This position is to be congratulated for its implicit, albeit largely unwitting, recognition of some juridical status in the Maori tribes but the view of the law which it implicitly adopts belongs to the late nineteenth century. During this period, it has been seen, the Crown continued to enter into treaties and other arrangements with tribal societies facilitating the erection of an *imperium* (ie territorial sovereignty or extraterritorial rights under the Foreign Jurisdiction Acts) notwithstanding these societies' exclusion from the 'Family of Nations'. The juridical capacity to permit such an *imperium* was not a function of some standard of civilisation but

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\(^{231}\) (1847), [1840-1932] NZPCC 387 (SC) at 388.


\(^{233}\) *Commonwealth and Colonial Law*, 101-04.

\(^{234}\) *The Law of Treaties*, 54.

\(^{235}\) "Acquisition of Territory in Australia and New Zealand", esp 44-5.

\(^{236}\) *Constitutional Development in the First Decade*, 179-190; *New Zealand Legal History*, 77-93 and see Roberts-Wray *Commonwealth and Colonial Law*, 104.
subject to compliance with Vattel's notion of an 'organised, political society'. The argument of Sutton, Foden, Roberts-Wray, and to a much lesser extent McNair, is, therefore, an implicit subscription to the late nineteenth century position but also presupposes some juridical status in the Maori tribes notwithstanding the attempt to separate this question from that of the requirement of Maori consent to British annexation. One cannot recognize this requirement without implicitly conceding some juridical status to the Maori tribes for how else was such consent to have been obtained if not through the tribes? Such argument leaves the proverbial cart without the horse.

It is more possible that the Crown could have recognized Maori sovereignty whilst eventually choosing to dispense with the requirement of Maori consent before annexing the country. Only in this sense was the question of Maori sovereignty separable from the requirement of Maori consent to British sovereignty. Nonetheless this scenario in which one nation violates the sovereignty of another, common enough in the history of international relations, is absent from the process by which New Zealand became British. The Crown recognized Maori sovereignty and respected it by requiring tribal consent to British annexation. With annexation, the Crown's subscription to this position became a matter of judicial cognisance.

D. THE CHARACTER OF THE CROWN'S TERRITORIAL SOVEREIGNTY

Even were Hobson's Proclamations of sovereignty on 21 May 1840 in excess of his authority under his royal commissions (in that Maori consent had not been fully and properly obtained), their approval and formal publication on 2 October 1840 put the matter beyond doubt. Thereafter the Crown's sovereignty over New Zealand was fixed as a matter of English law. It is clear that prior to the formal annexation of New Zealand the Crown had recognized the sovereignty of the Maori tribes but, equally, it is certain that in point of English law this tribal sovereignty ceased with the Proclamation of British sovereignty. The principle of English law is that the Crown's sovereignty over its own territory is absolute and shared with no other.237

The common law's view of territorial sovereignty matured during the late eighteenth and early nineteenth century. Until then, sovereignty had not been associated with an exclusive power of government over a particular and fixed territory but had retained the feudal flavour of personal duty and right.238 This particularly affected the North American colonies for which the Crown had freely issued charters constituting an imperium over the English

237 Coe v Commonwealth of Australia (1979), 53 ALJR 403 (HCA) (Australian Aborigine); and see the cases concerning the status of the Six Nations who have consistently alleged separate nationhood: Sero v Gault (1921) 64 DLR 327 (Ont SC); Logan v Styres (1959) 20 DLR (2d) 416 (Ont HC); Davey v Isaac (1977) 77 DLR (3d) 481 (SCC) at 485 (allegation withdrawn).

238 Above chapter 2, also Holdsworth, HEL, VI,39-50.
settlements and claiming title to massive areas of land. These charters had been granted without the delay of antecedent tribal consent. Faced with this, Marshall CJ had formulated his 'doctrine of discovery' which located an original but limited sovereignty in the Indian tribes: European powers could assert a sovereign title in the New World founded on discovery and occupation good against fellow European monarchs but as against the 'domestic dependent' Indian nations any sovereign authority in the Crown required actual tribal submission. Curiously the Colonial Office overlooked the historical circumstances which had given birth to Marshall's doctrine of discovery and partial tribal sovereignty, most notably the seventeenth century formal activity of the Crown, and expressly repudiated any Marshall-like treatment of the Maori tribes as incomplete sovereigns.239 Had the Marshall approach, or something resembling it, been adopted the Crown could have exercised a constituent power for its subjects in New Zealand without reference to Maori consent. This, it has been laboured, was not done: The Crown recognised the full sovereignty of the Maori tribes.

The Crown's renunciation of the doctrine of discovery's potential application to New Zealand was noted on several occasions during the 1840s.240 A notable example was an article in a colonial newspaper in 1842. Having made the recognition of full Maori sovereignty ("THE ACT HAS BEEN DONE", the article stressed),241 the Crown could not revert to Marshall's doctrine of discovery:242

... whatever truth there may be in the doctrine of 'sovereign right' of a discovering power in other cases, it cannot now, by any law of England, or by any international law, reassert the right it has once so decidedly given up.

In 1848 Chamerovzow, Joseph Phillimore and Woolmer gave legal opinions finding the Crown had renounced any right of discovery it might have originally claimed over New Zealand. All stressed, particularly the first two, that no such right had ever existed even notionally given the existent of Maori sovereignty however 'dwarf-like' in stature.243

The application of Marshall's doctrine of discovery to the Crown's sovereignty over uncivilised territory was not, however, by the middle of the nineteenth century a simple matter for the Crown's election. By then the state of constitutional art meant that its value

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239 For instance: Glenelg, Memorandum, 15 December 1837 CO 209/2:409; Stephen to Vernon Smith, note, 28 July 1839 CO 209/4:343; Stephen, Memorandum, 18 March 1840 CO 209/8:69; Hope to Somes, 10 January 1843 CO 209/18:388; Stephen to Vernon Smith, note, 9 July 1840 CO 209/6:33.

240 Lords Committee (1838), evidence: Hinds, 129-30; the Select Committee on New Zealand appeared to endorse the notional applicability of the 'doctrine of discovery' to New Zealand, RSCNZ (1840), iii; see also EG Wakefield, evidence, id, 47-9; Busby to Stanley, 17 May 1842 CO 209/19:141-2; Somes to Stanley, 24 January 1843, CO 209/26:35-92.


242 Id. The application of the 'doctrine of discovery' was also advocated in the Petition of London Merchants, 22 May 1840 RSCNZ (1840), App 1, and in Fitzroy's submissions to the Lords Committee (1838), 175-6.

243 Chamerovzow The New Zealand Question (1848), chap 2-3; Opinions of Phillimore, 23 March 1848, id, appendix, 3; opinion of Woolmer, 4 February 1848, id, appendix, 25-8.
was simply as Marshall had used it - a retrospective explanation of the intertemporal
principles which had obtained in the seventeenth century rather than a potential guideline to
the future or present acquisition of territory inhabited by tribal societies. Secularised notions
of independent and equal state sovereignty, Vattel's form of international personality,
prevented its application to British relations with the Maori tribes.

Nonetheless one aspect of the Marshall position on Indian sovereignty did not occur to
the Colonial Office (nor, indeed, the editors of colonial newspapers) and this indicated the
way in which British constitutional theory had developed in the previous century as well as
d its divergence from the American. The limited sovereignty recognised by Marshall as vested
in the Indian tribes subsisted until it had been extinguished by their conquest or submission
notwithstanding the Crown's claim in its charters to their territory. This residual sovereignty
left the tribes with their institutions of internal government and law undisturbed and placed
them beyond the ordinary jurisdiction of the state and, especially, federal governments. By
the Marshall formulation, the tribes' right of internal government arose not from the
permission or sufferance of the Crown and, later, federal and state governments organised
under the Constitution but from the tribes' independent, residual sovereignty. This meant the
sovereignty of the United States was divided amongst the federal, state and Indian
governments, each responsible and independent within their own sphere. The state and
federal sovereignty was contained within the Constitution, the Indian sovereignty was
limited to their internal government. To nineteenth century English lawyers, however,
territorial sovereignty was an absolute attribute held by one sovereign of a territory and
incapable of division. As a result the Crown's Proclamations of sovereignty over New
Zealand established its absolute sovereignty notwithstanding the non-adhesion of several
tribes to the Treaty of Waitangi.

During 1842 and 1843 the first Attorney-General of New Zealand, William Swainson,
twice advanced an argument reminiscent of Marshall's doctrine of residual tribal
sovereignty.244

The first related to the applicability of English law to feuding tribes near Rotorua who
had not signed the Treaty. The second occasion concerned Te Rauparaha and Te Rangihata,
two southern chiefs who had participated in the Wairua massacre. Although both chiefs had
signed the Treaty, Te Rauparaha twice in fact, Swainson insisted that neither could be said
to have given "their intelligent consent to it, as it is now well known that, in common with
many others, they had not the most remote intention of giving up their rights and powers of
dealing, according to their own laws and customs, with the members of their own tribes, or
of consenting to be dealt with in all cases according to our laws".245 Hobson's Proclamations

244 Swainson to Shortland, 27 December 1847 CO 209/16:487; Opinion of 13 July 1843, enclosure in Shortland to
Stanley, 13 July 1843 (No 2) CO 209/22:245 at 285-293; also hinted at in his Report on Wairau Affair, 7 August

245 Opinion, 13 July 1843, supra.
of sovereignty on 21 May 1840 may have established the Crown's authority over the British and European population, Swainson argued, but the non-signatory tribes and those who imperfectly understood the Treaty retained their own sovereignty.246

I consider that the title of Great Britain to the sovereignty of New Zealand rests partly upon discovery, partly upon cession, partly upon assertion, and partly upon occupation; that from these sources conjointly, as against all other nations, and as to British subjects, I think Great Britain has a title to the sovereignty over the whole of New Zealand, and that she possesses the right of pre-emption of territory from the natives, and has the power to regulate trade and commerce with other nations; but as to those tribes who have never ceded the sovereignty and who refuse to acknowledge the Queen's authority, I think that Great Britain has not the right, nor would it be consistent with good faith to impose upon them her penal code.

Swainson did not base his opinion expressly upon the Marshall judgments although a virtually identical position was implicit in his finding that certain Maori tribes were not British subjects. Instead, Swainson located his justification in the Crown's unqualified recognition of Maori sovereignty and its formal commitment (embodied in the instruments of office given Hobson in 1839) not to acquire the sovereignty of any part of the country "unless the free and intelligent consent of the Natives, expressed according to their ancient usage, shall be first obtained".247 Where this consent had not been so obtained Swainson concluded that the Crown could not treat the particular tribe as subjects of the Crown.

This opinion received short shrift in London 248 as contrary to the fundamental rule of English law vesting in the Crown the absolute power to acquire new territory and to declare authoritatively when that territory had become British. Such authoritative statements or any other act by the Crown indicative of its territorial sovereignty bind the Crown's courts and subjects. Thus, commented Stephen:249

... the local attorney Gen1 wholly omits to notice that by three formal commissions under the Great Seal of the United Kingdom, and by every other formal and solemn act, the Queen has now publicly asserted her Sovereignty over the whole of the New Zealand islands. Admit, if it must be so, that this was ill-advised - unjust - a breach of faith - and so on, yet who can gainsay that such are the claims of the Queen and of the Nation for whom H.M. acts. That a subordinate officer should attempt to set such claims aside on his private judgement of what is prudent, or of what is right, seems to me utterly indefensible.

246 Quoted in Foden New Zealand Legal History, 97.
247 The words are from Normanby's instructions to Hobson, 14 August 1839. The emphasis is Swainson's: CO 209/16:487 at 488.
249 Stephen to May, 19 May 1843, supra.
This position was reaffirmed in 1869\(^{250}\) and 1870\(^{251}\) by the colonial Attorney-General Prendergast (who as Chief Justice some years later handed down the judgment in *Wi Parata v Bishop of Wellington* (1877)). Prendergast considered the status of tribesmen who had been involved in the ‘Maori Wars’ and dismissed the argument that these individuals had been taken as prisoners of a foreign nation at war with the Crown. He insisted the imprisoned individuals were no more than rebellious subjects of the Crown in breach of their duty of allegiance. The Crown had formally "assumed sovereignty over the whole of New Zealand, and none can be admitted to question her sovereignty"\(^{252}\).

As a matter of law such incidents illustrate the disappearance of Maori sovereignty with Hobson’s Proclamations of 21 May 1840 and their subsequent approval by the Crown indicated by publication in the *London Gazette* (2 October 1840).\(^{253}\) This, it is re-emphasized, did not diminish the recognition of Maori sovereignty which had gone before. Formal annexation was simply a declaration by the Crown to its subjects (and courts) that in its judgement the prerequisite to British sovereignty (Maori consent) had been met and that thereafter the Crown was the sole sovereign of New Zealand. As a matter of English law Maori sovereignty no longer existed nor could some residual sovereignty similar to that of the ‘domestic dependent nations’ of North America co-exist alongside that of the Crown. The Marshall formulation might have provided a constitutional means for the recognition of the *rangatiratanga* of the Maori tribes but by the mid-nineteenth century its application to the New Zealand frontier was incompatible with the contemporaneous state of constitutional theory. The chiefs could not claim a *rangatiratanga* independent of their subjection to the Crown. Any such right would have to arise within the framework of the Crown’s sovereignty.

Unfortunately it lies beyond the scope of the present inquiry to consider the distinction in English constitutional theory between ‘legal’ and ‘political’ sovereignty.\(^{254}\) Legal sovereignty is the unqualified *imperium* or power of government vested in the Crown in its prerogative and Parliamentary capacities whilst political sovereignty is a right vested in the Crown’s subjects. Often known as ‘popular sovereignty’, political sovereignty describes the on-going consensual relationship and hence constitutionality obtaining between the Crown and its subjects. The glory of the constitutional monarchy has traditionally been its accommodation of these competing views of sovereignty, the one seeing it as a devolution from above, the other as an emanation from below. In point of English law, however, political sovereignty is

\(^{250}\) "Opinion of Attorney-General Prendergast as to the legal status of the Maoris now in arms" 30 June 1869 in Turton, ed *Official Documents Relative to the Native Affairs*, part A, 191.


\(^{252}\) Id.

\(^{253}\) The status of unceded tribal sovereignty in the period 21 May to 2 October 1840 is speculative and purely academic in that whatever its status it disappeared upon the Crown’s approval of Hobson’s Proclamations.

\(^{254}\) Dicey *An Introduction to the Study of the Laws of the Constitution*, 75-76.
a concept bereft of justiciability except to the extent the will of the people is expressed in an Act of Parliament or through the electoral process. So far as one can generalise, the Maori interpretation of the Treaty of Waitangi has consistently been to treat it as some sort of social contract between the tribes and the Crown by which the rangatiratanga (basically, tribal integrity) of Maori society was to be protected and respected by the Crown in return for the cession of sovereignty. It is submitted that this interpretation of the Treaty is a form of political sovereignty in the assertion. The continued legitimacy and constitutionality of the Crown’s government over the Maori tribes depends upon its adherence to the Treaty of Waitangi. This argument would bring Maori claims to a residual sovereignty into the mainstream of political and constitutional theory upon the lawful origins of government. This, strictly speaking, is extra-legal territory since the political sovereignty of the Maori is a matter beyond the justiciability of the Crown’s courts under the country’s present constitutional arrangements (unlike the American position where the Constitution treats legal and political sovereignty as synonymous). The English common law recognises no such thing as a residual tribal sovereignty unlike the common law of the United States.

255 Id, 73.
256 This interpretation was advanced by Swainson and George Clarke, Protector of the Aborigines, as early as 1842: Foden New Zealand Legal History, 96-101. For example also Kawharu “Sovereignty vs Rangatiratanga” (1984), passim; Finding of the Waitangi Tribunal on the Manukau Claim (1985), part 8.
257 More fully McHugh “The constitutional theory of Maori claims”. The proposed constitutional entrenchment of the Treaty of Waitangi (draft Bill of Rights, clause 4, A Bill of Rights for New Zealand (1985)) would give the rangatiratanga or political sovereignty of the Maori some justiciability.
PART II

ENGLISH LAW AND MAORI CUSTOMARY LAW
A. INTRODUCTION

With the annexation of New Zealand, English law and institutions were introduced. What was the extent of this introduction and to what extent did Maori institutions and customs survive as a matter of English law? This question, it is stressed, is posed in an entirely legal sense. The Maori belief, and it was one expressly fostered by Hobson and the missionaries, was that British sovereignty would give the Crown authority over her own subjects and in disputes between Europeans and Maori. This belief was embodied in the term *kawanatanga*, a transliteration into Maori of the English word ‘governor’, used in the Maori version of the Treaty. The chiefs believed that they would retain their authority under customary law over internal tribal affairs. That is, they understood Maori customary law was not to be affected by the Crown’s sovereignty other than in the sense of *kawanatanga*. The omission of the word *rangatiratanga* from the Maori version of the Treaty, a word known to the missionaries to describe the operation of Maori customary law amongst the tribe members, wholly encouraged this belief. The central inquiry of this Part concerns the extent to which that belief was justified as a matter of English law.

The starting point is the common law status given the colony of New Zealand upon annexation. In 1840 the common law recognised two forms of colony: those acquired by ‘conquest or cession’ and those got by ‘settlement’. Despite its insistence upon the Treaty of Waitangi the Crown treated New Zealand as a colony of the ‘settled’ variety.

This constitutional classification has been used to make two closely related arguments. First, the status of New Zealand as a ‘settled’ colony is taken as a denial of the Treaty of Waitangi as a valid instrument of cession: If the Crown did not consider New Zealand a ‘conquered or ceded’ colony in virtue of the Treaty does not that indicate, the argument runs, Maori sovereignty was at best fictional? This argument would characterise as pretence the conclusions already reached in Part I above. Secondly, it is argued that the Crown’s classification of New Zealand as a ‘settled’ colony meant it was to be considered at common law as *territorium nullius* over which English law had thorough application as well to the Maori tribes as settlers. In short, the annexation of New Zealand is taken to have produced an *ipso jure* suspension of customary Maori law. This argument contradicts the interpretation of the Treaty held by the chiefs and encouraged by Hobson and the missionaries.
The conclusion reached by this Part is that neither argument can be sustained. Both turn upon the simplistic representation that the common law status of New Zealand as a 'settled' colony gave it the legal character of territorium nullius. It is difficult to sit such argument alongside the historical and legal record other than by recourse to conspiratorial and cynical interpretations of British behaviour. In point of law the above arguments are unsophisticated and ignore the subtleties of the common law principles affecting the Crown’s acquisition of colonies. Once these are understood conclusions are reached wholly less cynical and more in accord with the historical record: As a matter of common law British sovereignty of itself did not produce a blanket introduction of English law but left Maori customary law with a substantial degree of continuity.

This Part is divided into two chapters. The remainder of this considers the development of the common law principles affecting the acquisition of new territory. The development of the ‘settled’ colony is tracked. This chapter concludes that the designation of New Zealand as a ‘settled’ colony was never remotely considered as an abnegation of Maori sovereignty by the Crown but merely as an appropriate response to the position of the English settlers. The status of the Maori tribes was only indirectly relevant to the constitutional designation the Crown gave the colony.

The subsequent chapter considers the extent to which the common law recognised the continuity of Maori customary law subsequent to British annexation. The conclusion reached is that enough Maori customary law survived to justify a belief that there was substantial recognition at English law of rangatiratanga. The argument that Maori customary law did not survive British annexation in point of English law has tended to focus upon matters of kawanatanga, which the chiefs did cede, rather than rangatiratanga.

In chapter two it was seen that the Crown had granted charters to communities of Englishmen abroad from medieval times. Several important prerogative powers, most notably the power to licence foreign trade and the royal gift of incorporation, combined to make royal charters a virtual necessity for the medieval merchant communities established by Englishmen in Europe. Thus Richard II issued letters patent for the English merchants in Prussia (1391) enabling them to meet and elect a governor who was to rule over the traders, do speedy justice, settle disputes and award compensation. All and singular the merchants were enjoined to be helpful and to obey reasonable ordinances pro meliore gubernatione made in proper form with the requisite assents and confirmation. Over the next few years similar privileges were given to the Hanse merchants (1404), merchants trading to the

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1 The other prerogative powers included the Crown’s right to forbid passage out of the Kingdom and the requirements of lawful assembly: generally, Carr SC, xiii-xvii.
2 Foedera, vii, 693.
3 Id, viii,360.
Netherlands (1407)\textsuperscript{4} and Norway (1408).\textsuperscript{5} Similarly by letters patent to Lorenzo Strozzi (1485) Richard III provided for the creation of a royal magistracy exercising jurisdiction over English merchants and subjects in Pisa.\textsuperscript{6} By and large the power of internal regulation formally constituted by the Crown for these merchant bodies and communities tended to emulate local charters giving similar powers to guilds or trade associations.\textsuperscript{7}

Such grants were the earliest exercise by the Crown of a constituent power affecting territory beyond the realm. By the late fifteenth century the Crown was using the same power for territory in the New World. The letters patent to the Cabots (1496\textsuperscript{8} and 1498)\textsuperscript{9} contained no specific grant of internal rule other than a stipulation that the grantees might "conquer, occupy and possess" the lands which they discovered "as our vassals and governors lieutenants and deputys therein acquiring for us the dominion, title and jurisdiction of the same towns, castles, cities, islands & mainlands so discovered". The vague character of this power of government was corrected in the letters patent to the joint Anglo-Portuguese enterprise of Richard Warde and others (1501). These letters patent gave the grantees power "to make, set up, ordain, and appoint laws, ordinances, statutes and proclamations for the good and peaceful rule and government of the said men, masters, sailors & other persons"\textsuperscript{10} resorting to the discovered land. The same words appeared in the letters patent of the following year to the reorganised enterprise.\textsuperscript{11}

The above grants of internal rule to the (prospective) communities of Englishmen abroad were by later standards vague in their failure to specify the standard upon which internal government was to proceed. Generally speaking the sole limiting criterion was that the powers had to be exercised for the 'good government' of the English community abroad. This still rather indefinite criterion was replaced in 1505 by one which in some form or other would be consistently used in royal grants over the next two centuries.\textsuperscript{12} The letters patent issued to the Merchant Adventurers in Calais (1505) authorised the Governor and his assembled Assistants to "make, Ordeyne, and establish all such Statutes, Ordinances, and customes... for the better Governance good condition and Rule of our Said Merchants... [but that any which] shall be or may be contrary to us oure Crowne, Honour, Dignity Royall or

\textsuperscript{4} Id, 464.
\textsuperscript{5} Id, 511.
\textsuperscript{6} Indenture between England and Florence with subsequent letters patent, id, xii, 389-93.
\textsuperscript{7} Carr SC, xvi; Goebel Cases and Materials, 257-8; Madden "1066, 1766 and all that: the Relevance of English Medieval Experience of 'Empire' to later Imperial Constitutional Issues" in Flint and Williams, eds Perspectives of Empire, 9.
\textsuperscript{8} Text in Biggar, ed Precursors of J. Cartier, 7.
\textsuperscript{9} Id, 22.
\textsuperscript{10} Id, 41 at 50.
\textsuperscript{11} Id, 70.
\textsuperscript{12} This change was a response to the question of royal control over corporate ordinance power at issue during the reign of Henry VI. A statute (15 Hen 6 c 6) of 1504 forbade the enactment by guilds, fraternities or companies of ordinances diminishing royal prerogative and against the common profit. This statute was substantially re-enacted as 19 Hen 7 c 7 and provided the formula subsequently adopted in the charters for subjects abroad.
Prerogative or to the deminution of the Commonweale of oure Realme shall be of no force or effect.\textsuperscript{13} This provision for a system of internal regulation not repugnant to English law appeared in all the subsequent Tudor\textsuperscript{14} and Stuart\textsuperscript{15} authorisations for English activity abroad. The system of law encompassed by this invariable standard was not English law proper but a flexible one which used English law as a yardstick against which the internal one was assessed. Prior to Calvin's Case (1608) this feature can be seen as no more than an attempt to reconcile the regularity of English law with the flexibility required for the circumstances of English enterprise and communities in a strange environment.

The royal practice of granting internal rule to English communities beyond the realm had become so regular that Bacon in submissions in Calvin's Case spoke of the 'birthright' of Englishmen abroad to the benefit of English law in their dealings inter se.\textsuperscript{16} What the Crown considered a privilege in the royal gift was coming to be expressed in more absolute terms as a right which (potential) English communities abroad took with them. However the magnanimity, indeed eagerness, of the Tudor and Stuart monarchs in granting charters of settlement for the New World effectively postponed isolation of the origin of the right to internal regulation therein contained. Did the right derive solely from royal grant or was it a right inherent in the community of subjects? Corporate theory of the time might have assisted the latter view\textsuperscript{17} but the point was not to become pressing until after the Restoration when the Crown's settlements in the New World began to flourish. In the meantime, the intensity of English activity in the New World saw the Tudor and Stuart charters obtaining features of a delegated \textit{jure regalia}. The royal charters were taking the form of a grant of a palatinate or incorporation establishing extensive powers of government over a specified

\textsuperscript{13} SC, 249 at 251-2.

\textsuperscript{14} Notably: grant to merchants in Andalusia and Spain (1530), SC,1; first grant to Muscovy merchants (1555), PN, I,318; charter to the Merchant Adventurers (1564), BCC, 254 at 267-8; patent to Sir Humphrey Gilbert (1578), CRNC, I at 6; charter of the Eastland merchants (1579), Sellers, ed Acts and Ordinances of the Eastland Company, 142 at 145; grant to the Levant Company (1581), PN, III,64; patent to Sir Walter Raleigh (1584), CRNC, 13 at 18; patent to Barbary merchants (1585), PN, IV,268; fellowship for discovery of North West Passage (1585), id, V,276; patent for trade to Guinea, id, IV,291; charter to Levant merchants (1592), id, III,370; charter of Levant Company, SC, 30 at 34; charter of East India Company, Mukherji, ed Indian Constitutional Documents, I, 1 at 9.

\textsuperscript{15} For the New World charters see below note 20. Examples of Stuart charters for other regions included: grant to merchants trading to France, SC, 62 at 72; charter to Merchant Adventurers of the New Trade (1615), SC, 76 at 87; charter to "Gnymne and Bynne" Company (1618), SC, 99 at 102-3; charter to the East India Company (1661), E I Co Tracts, np; charter to the English East India Company (1698), id; charter of Royal Adventurers into Africa (1660 and 1662), SC, 172; charter of Royal African Company (1672), SC, 186; charter for St Helena (1673), E I Co Tracts, np.

\textsuperscript{16} In Spedding, Ellis and Heath, eds The Works of Francis Bacon, VII,637.

\textsuperscript{17} Davenant v Hurdis (1597), Moo (KB) 576 (resiants of a leet can make a by-law relative to common interest); The Chamberlain of London's Case (1590-91), 5 Co Rep 626, 77 ER 150 (KB) (inhabitants of a town and corporation can make by-laws for common good without a custom or charter) and, similarly, Norris v Staps (1617), Hobart 211, 80 ER 357. The English traders in Barbary were an example from the Elizabethan period of British subjects abroad assuming the power of internal regulation without incorporation from the Crown.
Such features were clearly more than a grant of a power of internal regulation (that is, legislative and judicial capacities) incidental to incorporation. Not only was the Crown claiming territorial as well as personal rights in its charters but it was erecting sophisticated systems of government.

B. **CALVIN’S CASE AND THE ACQUISITION OF COLONIES**

*Calvin’s Case* (1608), also known as *The Case of the Post-Nati*, presented the question whether a Robert Calvin born in Scotland after the accession of James I was an alien and hence unable to bring a real or personal action for lands in England. It was found that Calvin was not an alien and hence the comments in Coke’s report concerning the status of aliens and the acquisition of territory were made *obiter dicta*.

Although not directly concerned with the problem *Calvin’s Case* provided the earliest authoritative expression of the legal principles affecting territorial acquisition by the Crown. These principles were applied by the Crown to the New World.

At the beginning of the seventeenth century the common law conceived all territorial acquisition as derivative, that is in the sense of one sovereign acquiring territory from another. This derivative conception of territorial acquisition has been seen as manifest in the Tudor and Stuart charters for America. The report of *Calvin’s Case* confirmed the failure of the common law to recognise a distinct original means of territorial acquisition by limiting these means to conquest and descent. The rules affecting such territorial possessions were summarised thus:

And upon this ground there is a diversity between a conquest of a kingdom of a Christian King, and the conquest of a kingdom of an infidel; for if a King come to a Christian kingdom by conquest, seeing that he hath *vitae et necis potestatem*, he may at his pleasure alter and change the laws of that kingdom: but until he doth make an alteration of those laws the ancient laws of that kingdom remain. But if a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, there *ipso facto* the laws of the infidel are abrogated, for that they be not only against Christianity, but against the laws of God and of nature, contained in the decalogue; and in that case until certain laws be established amongst them, by the King himself, and such Judges as he shall appoint, shall judge them and their causes according to natural equity, in such sort as Kings in ancient time did with their kingdoms, before any certain municipal laws were given, as before hath been said. But if a King hath a title of descent, there seeing that by the laws of that kingdom he doth inherit the kingdom, he cannot change those laws of himself, without consent of Parliament. Also if a King hath a Christian kingdom by conquest, as King Henry the Second had Ireland, after King John had given unto them, being under his

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18 Three types of colony were established in North America during the seventeenth century, viz proprietary, royal (later Crown) and charter colonies: Burke *An Account of the European Settlements in America* (1757), 290-2; Blackstone *Commentaries* (1765), I, 108; Stokes *Constitution of the British Colonies in North America* (1783), 13-14; Chitty *Prerogatives of the Crown* (1820), 32; Clark, *Colonial Law* (1834), 16-18. Although the possibility of New Zealand becoming a charter colony was raised during the 1830s it eventually was acquired as a Crown colony. For present purposes nothing turns on the distinction.

19 (1608), 7 Co Rep 1a at 17b.
obedience and subjection, the laws of England for the government of that country, no succeeding King could alter the same without Parliament".

Coke's comments on the status of infidel laws and territory upon conquest will be considered in the subsequent chapter. At the moment the importance of the above lay in the recognition only of conquest and descent as valid forms of territorial acquisition at common law. In conquered colonies the Crown enjoyed extensive prerogative powers of legislation but where it had granted "the laws of England for the government of that country" these could not be altered without Parliament.

Two important consequences for the Crown's new colonies in the New World flowed from Coke's words. First, since the American settlements were hardly to be the Crown's by descent they would necessarily take the common law designation of conquered territory. Secondly, being conquered territory the American settlements held no right to English law other than by grant of the Crown and were amenable to prerogative legislation. The few charters for the New World prior to Calvin's Case had made no stipulation that English law was to govern the settlements planted there but had adopted the 1505 formula to grant a system of law not repugnant to English law. The doctrine in Calvin's Case gave this practice a most compelling *raison d'être* for the grant of English law to a settlement would have removed the Crown's prerogative legislative power. The grant of a system of internal regulation not repugnant to English law, however, ensured the preservation of the royal power whilst also facilitating some recognition of the 'birthright' of Englishmen abroad. The Stuart charters for North America issued after Calvin's Case maintained the practice of setting up the laws of England as a standard for compliance.20 As one commentator has observed, it was as if these charters had "been contrived with Coke's report of Calvin's Case at the royal elbow".21

The view taken by the early Stuarts was that where no grant of English law had been made for an overseas conquest Parliament held no legislative competence whatsoever. As the House of Commons debated whether the letters patent for New England (1620) were an infringement of the right of free fishery guaranteed English fishermen since Edward VI, Secretary Calvert, a notable participant in colonizing schemes of the period, informed the

20 Notably: second charter for Virginia (1609), TCVC, 27 at 52; charter for Newfoundland Company (1610), SC, 51; third charter for Virginia, TCVC, 76 at 86; charter for New England (1620), CC, III, 1827 at 1832; charter for Nova Scotia, text in Slafter *Sir William Alexander and American Colonization* (1873), 127 at 132-2; charter of Avalon (1623) in Prowse *A History of Newfoundland from the English, Colonial and Foreign Records* (1896), 131 at 132; charter for Carolina (1629), CRNC, 64 at 66; charter for Massachusetts Bay (1629), CC, III, 1846 at 1853; charter for Connecticut (1662), CC, 1529 at 533; charter for Rhode Island and Providence Plantations, CC, VI, 3211 at 3214; charter for Carolina (1663); Parker ed *North Carolina Charters and Constitutions*, 76 at 77; charter to Hudson Bay Company (1670), text in Martin *Hudson's Bay Company Land Tenures* (1893), 163 at 168; commission for New Hampshire (1680), CC, IV, 2446 at 2447; charter for Pennsylvania, *Minutes of the Provincial Council of Pennsylvania...*, 17 at 20; commission for New England (1688), CC, III, 1863 at 1864; charter for Georgia, CC, II, 765 at 771.

... if the Regall Prerogative have power in any thing it is in this. Newe Conquests are to be ordered by the Will of the Conqueror. Virginia is not annex'd to the Crowne of England and therefore not subject to the Lawes of this House".

In other words, since English law had not been granted to the Virginia plantation it was not under the legislative authority of Parliament. This view of the Crown's exclusive prerogative legislative power was weakened by the Commons during the 1620s and did not survive the Restoration. Thereafter the Crown had both a Parliamentary and prerogative legislative capacity for the American colonies. The latter began to fall into disuse during the second half of the seventeenth century although some commentators of the eighteenth century were to deny any prerogative legislative power had ever existed other than as an unlawful Stuart pretence. Still, whilst the Stuarts' claim to exclusive legislative power over North America did not survive infancy, Secretary Calvert's words represented an unmistakeable application of the principles in Calvin's Case to the Crown's new and growing colonies in the New World.

Throughout most of the seventeenth century the North American colonies were technically treated as conquests of the Crown in which the law of England held no currency other than as a yardstick against which local legislation might be tested and if found wanting disallowed by the Crown. Chalmers recounts the presentation by Attorney General Noy to the Privy Council (1633) of a "complete code for Newfoundland, which he advised the Crown to approve, because, said he, 'the king may make laws for such newly-acquired dominions". More significantly the case of Process into Wales (circa 1668-74) indicated that the Western Islands, Barbados, St. Christophers, Nevis and New England as well as Ireland and the islands of Guernsey and Jersey might be bound by Acts of Parliament or by laws made by the King's letters patent (that is, prerogative legislation). Similarly a legal opinion circa 1675 signed by eight eminent counsel advised in relation to America that "the Prince of that People who make the Discovery hath the Right of Soil and Government of that Place". Charles Molloy's De Jure Maritimo et Navali (1682), the first major English treatise on colonial jurisprudence, indicated that plantations, that is the Crown's American

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22 Notestein, Relf and Simpson, eds 1621 Debates, IV, 256. This view held at least to the Interregnum: Keith First British Empire, 3-6; Knollenberg Origin of the American Revolution 1759-1766 (1960), 157.
23 In Process into Wales (circa 1668), Vaughan 395, 124 ER 1072 (CP) it was affirmed Parliament as well as the Crown could legislate for the Crown's dominions. Also Knollenberg, op cit, 157.
25 Chalmers History of the Revolt of the American Colonies (circa 1782), I,68.
26 Vaughan 395, 124 ER 1072 (CP).
27 DHNY, XIII,486.
colonies, were ruled as conquests like Ireland. A private legal opinion (1683) by William Fitzhugh, a distinguished Virginia lawyer, also took the view that the North American colonies were classified as conquests. Sir Matthew Hale’s posthumously published *History of the Common Law* (1713) treated colonies, plantations and conquests as synonymous, a further indication of the seventeenth century position that whilst plantation might be a form of territorial acquisition distinct to conquest by arms it was nonetheless subject to the same rules at common law. In *Smith v Brown* (circa 1702-5) Holt CJ held that "the laws of England do not extend to Virginia, being a conquered country their law is what the King pleases".

C. THE COMMON LAW AS THE BIRTHRIGHT OF THE SUBJECT

The American colonists revealed their hostility towards designation as the inhabitants of conquered territory as early as 1651 when the colony of Virginia capitulated to the Commissioners of the Puritan government in England. The capitulation revealed the colonists considered themselves to have lost any status as 'conquests' given them years earlier by Secretary Calvert and their concern that capitulation to the Commonwealth would not revive such status. Not long after William Fitzhugh conceded the conquered status of the colony of Virginia (1683) but doubted its appropriateness. A more significant rejection of the North American colonies' status as conquests occurred during a debate (1684) between the Houses of Assembly in the Province of Maryland over the right of the Speaker to issue warrants for elections to vacancies. Arguing in favour of his own prerogative, the Proprietor stated that "the King had power to dispose of his conquests as he pleased". This incensed the Lower House which rejected the word 'conquest' as sinister and claimed, instead, that the rights of the members of the Assembly were based upon their full rights and privileges as Englishmen. These rights inhered in them as their birthright and, also, had been granted to them by the words of the charter to the Lord Proprietor.

These examples of the American settlers' unhappiness with the doctrine from *Calvin's Case* classifying their colonies as conquests preceded the Glorious Revolution and highlighted the emerging belief amongst the colonists that they enjoyed English law as of right. This right they located either in the terminology of their colonial charters capable,
with some strain, of interpretation as a gift of English law or, more usually and emphatically, in the simple argument that English law belonged to them as their birthright.

What, it may be asked, did the North American colonists mean by the 'English law' which they claimed as a birthright? It has been shown their early practice distinguished 'public' from 'private' law. In matters of private law, that is their affairs inter se, the seventeenth century colonists apparently considered themselves able to construct a legal system appropriate to their own circumstances. The common law was largely marginal to this activity. The rules legislated and applied by the courts amongst the colonists were usually a blend of the customary manorial and borough law experienced in England with Mosaic and scriptural influences. This was wholly consistent with the doctrine in Calvin's Case for it showed the colonists felt no obligation to apply the strict law of England. In questions of public law, however, the colonists insisted the common law governed their relations with the Crown. The common law was seen by them as the source of the rights and liberties of the subject against the monarch declared in Magna Carta. To the extent the seventeenth century colonists argued the common law crossed the Atlantic with them they thus limited it to the public sphere. An important example was the influential Declaration of the colony of Massachusetts (1646) which was accompanied by the "Parallels". The "Parallels" set out in one column "the fundamental and common lawes and customs of England, beginning with Magna carta", listing the laws and customs of the colony in the other. The intention was to show the laws of Massachusetts to be consistent with English law. Howe observes:

It should be noted that all of the provisions of English law summarized in the Declaration came from what may fairly be called the public, rather than private sector of that law. Whether the declarants were lifting provisions from Magna Carta or summarizing principles of the common and customary law of England their concern was, almost exclusively, with the English law's ordering of public affairs rather than its delineation of private relations. One would not be unfair in describing

35 This was evident, for example, in "The Lawes Divine, Morall, and Martiall for the Colony in Virginea Britania" (1612), Force's Tracts,III,#2 and "An Abstract of the Lawes of New-England as they are now established", id, #9. See Reinsch The English Common Law in the Early American Colonies (1899); Chafee Jr "Colonial Courts and the Common Law" in Flaherty, ed Essays on the History of Early American Law, 53-82; Sioussat English Statutes in Maryland, passim; Goebel Jr "King's Law and Local Custom in Seventeenth Century New England" and the essays on particular colonies in Flaherty, op cit, and Billias, ed Selected Essays. Law and Authority in Colonial America (1965).

36 On questions of private law, however, the common law was not without some influence: Woodbine "The Suffolk County Court, 1671-1680", (1936), 43 Yale Lf 1036; Haskins "A Problem in the Reception of the Common Law in the Colonial Period" (1949), U Penn L Rev 842; BH Smith "The Foundations of Law in Maryland: 1634-1715" in Billias ed, op cit, 92.

37 Text in Hutchinson Collection of Papers Relating to Massachusetts Bay (1769), 1,214.

the factor of selectivity as one directed towards the specification of constitutional principles... when the declarants endeavor to summarize those principles of the common law which they consider in force in the colony they limit the list of applicable principles to the broadest of constitutional generalities".

Thus Goebel comments:39

When we say the people desired the common law, however, we do not mean that they thought of it in the bald terms of an action in trespass, a plea in abatement, a special traverse, a writ of entry in the cui or any of the other constituents that went to make up the lawyer's idea of what this law was. It was to them a sanctuary which beckoned when there threatened some black evil from which they suffered, whether... a governor's ordinance, or a royal disallowance of a provincial act. Reduced to its lowest terms, we may say the colonists' desire was to enjoy the same privileges and rights with reference to the Crown that were enjoyed by the residents of England. That these rights and privileges seemed from the American colonies more delectable than they were in fact is comprehensible".

During the close of the seventeenth and into the early eighteenth century the common law came to exert an ever-increasing influence in the American colonies upon matters of private law. This process is usually associated with the growing professionalisation of the colonial bar and the increasingly pluralistic character of colonial society.40 Thus Richard West could advise in his well known opinion of 1720 that the "common law of England, is the common law of the plantations".41 By the period immediately before the American Revolution where Imperial or local statute was silent the English common law was taken as the subsidiary system of law42 subject to the important gloss that it was only applicable to the extent it met the circumstances of the colony.43 This congruence strengthened the argument of the colonists that the common law was their birthright and fostered the post-Revolutionary orthodoxy that the common law had always had thorough application in the American colonies.44 Nonetheless, by the beginning of the eighteenth century the American

41 Text in Chalmers Opinions, I, 194-5 (edited); II,200-215 (full text).
42 Opinion of Sir William Keith (1728), text in Goebel Cases and Materials, 278; Jury charge of James de Lancey, Chief Justice of New York (1733) cited in Smith "English Criminal Law", 45,n 25; Opinions of Smith and Murray (1734), text in Goebel, op cit, 272-7; Roberteau v Ros (1738), 1 Atk 543, 26 ER 343 (Ch); Sir William Keith The History of the British Plantations in North America (1738); Douglass A Summmary, Historical and Political... of the British Settlements in North America (1749), passim; W Smith, Jr The History of the Province of New York (1756, reprint ed 1972), I,259; Burke An Account of the European Settlements (1757), II,295-7.
43 Blackstone included this gloss in the second edition of his Commentaries (1766), 107 at the suggestion of Mansfield (Waterman, "Thomas Jefferson and Blackstone's Commentaries" (1933) 27 Ill Law Rev 629, n 120) who had referred to it in R v Vaughan (1769) 4 Burr 2494 (KB). The gloss appears to have become recognized during the 1750s: Smith Jr History of New York (1756), 1,259; Opinion of Henley A-G and Yorke S-G (1757), text in Chalmers Opinions, I, 197 at 198. cf Burke Account of the European Settlements (1757), II,295-7.
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colonists were insisting the common law was their birthright and hence source of constitutional right. The doctrine in *Calvin's Case*, starkly re-emphasized by Holt CJ in *Smith v Brown* (circa 1702-05), contradicted this argument.

D. **BLANKARD V GALDY (1693): THE COMMON LAW RECOGNISES 'SETTLED' COLONIES**

Although the Glorious Revolution was as much a colonial as English event the colonists were disappointed to learn afterwards that "they were dominions of the Crown to be dealt with as the King wished with no assurance of Englishmen's rights on a permanent basis".45 Their agitation for what they perceived to be the inherent constitutional rights of Englishmen grew throughout the eighteenth century and culminated in the American Revolution. One of the major constitutional issues in debate prior to the American Revolution was the colonists' claim to as full rights and liberties as those held by the subject within the realm. This benefit, which acted as a springboard to their arguments concerning taxation, representation and parliament's legislative authority, they claimed as their birthright under the common law. To make out the constitutionality of this claim the colonists' advocates had to confront the doctrine in *Calvin's Case* which characterised the American colonies as conquests wherein the inhabitants enjoyed no inherent right to the common law of England.46 In claiming the benefit of the common law the colonists were assisted by *Blankard v Galdy* (1693), a case barely five years after the Glorious Revolution.

In *Blankard v Galdy* (1693) Holt CJ held obiter that English laws were in force in the "case of an uninhabited country newly found out by English subjects". However, he proceeded, as Jamaica was a conquered colony the laws of England "did not take place there until declared by the conqueror or his successors".47 This decision was reinforced a few months later by *Dutton v Howell* where it was indicated that if subjects of the Crown went and possessed "uninhabited desert Country" with the Crown's consent the Common

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45 Lovejoy *Glorious Revolution in America*, 378. For contemporary accounts see Anon *A Brief Relation of the State of New England from the beginning of that Plantation to the Present Year*, 1689 (1689) in Force's Tracts, IV, #11; Byfield *An Account of the Late Revolution in New England* (1689), id, IV,#10 esp at 8; 'The Inhabitants of Boston and the Country Adjacent' *The Revolution in New England Justified and the People There Vindicated* (1691), id, IV,#9,esp 13-14; Dammer *A Defence of the New England Charters* (1721), 48-50; Otis *The Rights of the British Colonies Asserted and Proved* (1764), 24, 32.

46 The American colonists' repudiated this aspect of *Calvin's Case* ("the bastard child of the bastard mother", Wilson "Lectures" (1790-91) in *Works of James Wilson*, 1,582) but upon occasions invoked it in much the same way as Secretary Calvert in 1622 to argue Parliament lacked legislative power over the North American colonies: Otis *Rights of the British Colonies asserted and Proved* (1764), 43 et seq; I. Wilson *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament* (1774) in *Works*, II,729 at 739-44; J. Adams *Novanglus* (1774) in *The Works of John Adams* (1851), IV,11 at 131-50. McIlwain supported such argumentation *The American Revolution: A Constitutional Interpretation* (1923). The authority of *Calvin's Case* for this proposition has been thoroughly refuted: Schuyler *Parliament and the British Empire* (1929), passim; *HEL*, XI,122-4; Keith *First British Empire* 380-83; and see Mullet "Coke and the American Revolution" [1932] *Economica* 457. The aspect of *Calvin's Case* of present concern is the designation of the North American possessions as 'conquered' colonies.

47 (1693), Holt 341, 90 ER 1089; 2 Salk 411, 91 ER 356; 4 Mod 222, 87 ER 359; Comb 228, 90 ER 445 (KB).
Law must be supposed their Rule, as 'twas their Birthright'. The distinction between unoccupied territory settled by British subjects and that got by conquest or cession was strengthened by the publication in the reputable Peere Williams Reports of a Memorandum (1722) issued by the Privy Council. The Master of the Rolls stated in this Memorandum that the Lords had determined:

*1st* That if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so, wherever they go, they carry their laws with them, and therefore such new found country is to be governed by the laws of England... *2ndly*, Where the King of England conquers a country, it is a different consideration: for the conqueror, by saving the lives of the people conquered, gains a right and property in such people; in consequence of which he may impose upon them what laws he pleases...

By 1722, then, the common law recognised a type of colony which was to become known as 'settled'. The cases made a clear distinction between conquered and settled colonies, limiting the latter to desert and uninhabited country. The cases did not consider, however, the effects which flowed from the *ipso jure* introduction of English law to a settled colony. In particular they failed to clarify whether the Crown enjoyed a prerogative power to legislate for such colonies. Hindsight might tell one that the response to this question clearly lay in the negative however this response was not so apparent at the time. Shower had made this point in his detailed submissions in *Dutton v Howell* but whilst the House of Lords appreciated the distinction between the two forms of colony they were unable to take it to its logical conclusion. An opinion by law officers Yorke and Wearg (1724) was predicated on this basis, however, and the question appears to have been resolved conclusively by *Campbell v Hall* (1774).

Not surprisingly *Blankard v Galdy* was used by the American colonists anxious to establish a constitutional basis to their claims for the full measure of rights and liberties held by the subject within the realm. They grasped such comments as those in *Dutton v Howell*, "'tis the People, not the Soil, that is... said to be conquered", claiming that the Crown could hardly claim a conquest over its own subjects. Such sentiments, it was seen, had been expressed earlier but now they held some judicial backing despite Holt's clear opinion in *Blankard v Galdy* and strong inference from *Smith v Brown* that settled colonies were limited to 'desert, uncultivated lands'. Charles Davenant very early saw the debate and

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48 (1693), Shower PC 24, 1 ER 17 at 21. The case was argued after the decision in *Blankard v Galdy*: Slattery, "Land Rights of Indigenous Canadian Peoples", 40.
49 (1722), 2 P Wms 75, 24 ER 646 (PC).
50 (1693), 1 ER 17 at 18a.
51 Chalmers, *Opinions*, 1,222-3.
52 (1774), Lofft 655, 98 ER 848; 1 Cowp 204, 98 ER 1045; 20 St Tr 239. This point appears to have found general acceptance by the mid-eighteenth century: Douglass *A Summary, Historical and Political...* (1749), 491; Bland *The Colonel Dismounted* (1764),25.
53 (1693), 1 ER 17 at 22.

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ensuing confusion which Blankard v Galdy would assist and in 1701 recommended a declaratory statute stating that "Englishmen have right to all the laws of England, while they remain in countries subject to the dominion of this kingdom". The call went unheeded and as a result from the beginning of the eighteenth century the birthright theory of the reception of the common law was constantly invoked. One finds its presence, for example, in the dispute in Pennsylvania over the commissions of judges (1717-18). It was applied by Richard West in his well known opinion as counsel to the Board of Trade (1720).

The common law of England, is the common law of the plantations, and all statutes in affirmance of the common law, passed in England, antecedent to the settlement of a colony, are in force in that colony, unless there is some private act to the contrary, though no statutes made since those settlements, are there in force, unless the colonies are particularly mentioned. Let an Englishman go where he will, he carries as much of the law and liberty with him, as the nature of things will bear.

A more explicit application of Blankard v Galdy to the North American colonies arose in the dispute in Maryland (1722-32) over the extension of general English statutes to the Province. During the course of this debate the Lower House, arguing for the extension of all general statutes of England in affirmance of the common law (such as the Habeas Corpus Act 1679), drew up a list of Seven Resolutions (1722). The third, fourth and fifth of these drew direct inspiration from Blankard v Galdy insisting that Maryland had not the status of a conquered but, by unmistakeable implication, settled colony:

That the Province is not under the Circumstances of a Conquered Country; that if it were the present Christian Inhabitants thereof would be in the Circumstance, not of the Conquered, but of the Conquerors, it being a Colony of the English nation, encouraged by the Crown to transport themselves hither for the sake of improving and enlarging its dominions... And 'tis unanimously Resolved that whosoever shall advance That His Majesties Subjects by such their Endeavours and Success, have forfeited Any Part of their English Liberties are ill Wishers to the Country and mistake its happy Constitution... Resolved also, that if there be any Pretense of Conquest, it can only be supposed against the native Indian Infidels, which Supposition cannot be admitted, because the Christian Inhabitants purchased great part of the land they at first took up from the Indians, as well as from the Lord Proprietary...

The Proprietor's Manifesto (1725) attempted a sensitive response. On the one hand he disclaimed any intention to assert that Maryland was a conquered country yet, on the other, he sought to dismiss the applicability of Blankard v Galdy on the narrow ground that the court had found in that case that Jamaica was a conquered colony. The rejoinder of the

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54 Davenant "On the Plantation Trade" (1701) in Whiworth, ed The Political and Commercial Works of Charles Davenant (1771), III, 1 at 35-6.
55 State of Pennsylvania Minutes of the Provincial Council, III, 33. See the account in Sioussat English Statutes in Maryland, 26-7.
57 Sioussat English Statutes in Maryland, App 1, 73 at 73-74.
Committee of Laws for the Lower House made the colonists' position clear: Maryland had been established by occupation and settlement and not by conquest notional or otherwise. The Committee rebutted the Proprietor's dismissal of Blankard v Galdy. Salkeld's report indicated that the proposition had not been argued by counsel for one side as the Proprietor had claimed but had been accepted and resolved by the court. The Committee went on to suggest that a country inhabited by savages was like an uninhabited country with respect to the law of the newcomers. As a result they claimed Maryland was a settled colony of the variety recognised in Blankard v Galdy.58

During the course of the Maryland controversy Daniel Dulany Sr produced his tract The Right of the Inhabitants of Maryland to the Benefit of the English Laws (1728). For over thirty years this pamphlet remained the leading exposition of the colonists' claims to the common law as a birthright, being less conciliatory and more analytical than the well known anonymous pamphlet of 170159 and Dummer's celebrated Defence of the New England Charters (1721).60 Dulany rejected the equation of Maryland with conquered territory:61

I have heard it asserted, that Maryland is a Conquered Country; which, by the By, is false, and that the Conquered, must submit, to whatever Terms the Victor thinks fit to impose on him.; Were the case really so, the Indians, must be the vanquished, and the English the Victors; and consequently the Indians, would be liable to the Miseries, in which a Conquered People are involved: Otherwise, the Conquerors themselves, must be Losers by their Courage, and Success; which would be but a poor Reward of their Valour; However gross, and absurd, these Notions appear to be... they have been insisted on, with great Confidence, by Men, that have more Knowledge than Honesty.

Dulany also rejected the recognition in Calvin's Case of the continuity of the local law of conquered territory absent some act of suspension by the Crown. The application of this proposition to North America meant that in theory tribal law could govern the British communities. The possibility was, however, never more than notional and invariably deflected by the Crown's exercise of its constituent power for these communities. Still, even the theoretical applicability of tribal law to British subjects was too much to contemplate and reinforced the claim to the benefit of English law as the birthright of the subject.

On questions of private law the claim that the common law accompanied the American colonists from England had hardened into orthodoxy during the 1720s and '30s.62 Prior to the enactment of the Stamp Act (1765)63 the colonists' claims to the birthright of the

58 Id, 45-50.
59 Anon An Essay upon the Government of the English Plantations (1701).
60 Dummer A Defence of the New England Charters (1721). The constitutional argument of this tract was examined and explained by Otis Rights of the British Colonies Asserted and Proved (1764), 61-2.
61 Text in Sioussat English Statutes in Maryland, App 2, 98. Bailyn, Ideological Origins of the American Revolution (1967), 43 termed it "a prototypical American treatise in defence of English liberties overseas, a tract indistinguishable from any number of publications that would appear in the Revolutionary crisis fifty years later".
62 Supra n 42.
63 5 Geo 3 c 12.
common law as a source of constitutional protection and liberty had been directed largely towards the executive activities of the Crown through its various colonial representatives. Significant instances of such claims besides the Maryland controversy and those already mentioned included the debate in New York over the Crown’s right to erect courts of equity (1734)\(^{64}\) and the controversy over the tenure of colonial judges,\(^{65}\) writs of assistance\(^{66}\) and the criticism of the royal disallowance of colonial legislation.\(^{67}\) Such problems presented issues essentially concerned with the executive aspect of the Crown’s government and though sources of irritation were of themselves insufficient to bring the American colonists to rebellion.

The most important cause of the American Revolution lay in the colonies’ confrontation with the doctrine of the sovereignty of Parliament. Until the enactment of the Sugar Act (1764) and, more importantly, the Stamp Act (1765), the thitherto ineffectual Molasses Act (1733) excepted, Parliament had only lightly touched upon the colonists’ domestic affairs\(^{68}\) and then in a manner which had been accepted if at times begrudgingly.\(^{69}\) From 1764 onwards the colonists’ advocates attempted to pit the common law, or at least their interpretation of it, against the sovereignty of Parliament. In terms of the strict legal theory then obtaining this approach was ill-conceived from the start in that it sought to find a limitation on the legislative competence of Parliament in a common law which had come to recognise its supreme power.\(^{70}\) Nevertheless the belletrists of the American Revolution argued that the common law was the subject’s birthright and that it recognised certain rights and liberties which neither the Crown nor Parliament could violate. For instance, they maintained that the common law recognised a subject could not be taxed other than by his elected representatives and since the colonies had no representation at Westminster Parliament’s attempts to tax them were unlawful. The significance of such argumentation lay in its and violent repudiation of the suggestion emanating from Calvin’s Case that the

\(^{64}\) Opinion of Smith and Murray relating to courts of equity (1734) in Goebel Cases and Materials, 272-7.

\(^{65}\) Bailyn Pamphlets of the American Revolution 1750-1776 (1965), 249-55; Labaree Royal Government in America (1930), 388-401. A contemporary pamphlet was Galloway A Letter to the People of Pennsylavnia (1760) text in Bailyn Pamphlets, 257-72.

\(^{66}\) These were writs empowering customs officers accompanied by a local peace officer to enter premises during daylight hours, by force if necessary, to search upon mere suspicion for smuggled goods: Knollenberg Origins of the American Revolution, 67-8. Although referred to in the Act of Frauds 1662, 13 & 14 Car 2 c 11, Coke (3 Co Inst 162) 162 stated “And here is a secret in law, that upon any statute made for the common peace, or good of the realm, a writ may be devised for the better execution of the same, according to the force and effect of that Act”. Writs of assistance were treated, however, as a species of general warrant: for example, Otis Rights of the British Colonies Asserted and Proved (1764) and generally Mann “A Great Case Makes Law Not Revolution” in Hartog, ed Law in the American Revolution (1981) 3 at 6-7.

\(^{67}\) Knollenberg, supra, 44-64. The issue arose in the dispute (1758-63) over Virginia’s Twopenny Act and led to Bland’s pamphlet The Colonel Dismounted (1764).

\(^{68}\) Knollenberg, supra, 158-60 describes this legislation; also Christie Crisis of Empire, 13.

\(^{69}\) The colonists conceded Parliament had some power to legislate at least for colonial trade: Dickinson Letters of a Farmer in Pennsylvania in Ford, ed The Writings of John Dickinson (1895), I, 312; Adams Novanglus (1774) in Works, IV, 100 at 150; Hamilton The Farmer Refuted in Papers, I,122-5.

\(^{70}\) M Howard Jr A Letter from a Gentleman at Halifax (1765), text in Bailyn Pamphlets, 531 at 537 summarized the belletrists’ conundrum succinctly: “Can we claim the common law as a inheritance, and at the same time be at liberty to adopt one part of it and reject the other?”. 127
common law had not accompanied the colonists to the ‘conquered’ colonies of the New World.

Of these numerous pamphlets one might take Richard Bland’s The Colonel Dismounted (1764) as a typical and leading example. During the course of this tract occasioned by the Parson’s Cause of the early 1760s, Bland, a lawyer respected in colonial America for his knowledge of constitutional law, emphatically rejected any classification of the American colonies as conquests:

I do not suppose, Sir, that you look upon the present inhabitants of Virginia as a people conquered by the British arms. If indeed we are to be considered only as the savage ABORIGINES of this part of America, we cannot pretend to the rights of English subjects; but if we are the descendants of Englishmen, who by their own consent and at the expense of their own blood and treasure undertook to settle this new region for the benefit and aggrandizement of the parent kingdom, the native privileges our progenitors enjoyed must be derived to us from them, as they could not be forfeited by their migration to America.

After reference to Calvin’s Case and Smith v Brown Bland continued to insist the error of labelling the American colonies conquests:

It must be erroneous with respect to the original inhabitants because they were never fully conquered, but submitted to the English government upon terms of peace and friendship fixed and settled by treaties; and they now possess their native laws and customs, savage as they are, in as full an extent as they did before the English settled upon this continent. It must be erroneous with respect to the present inhabitants because upon a supposition that their ancestors were conquerors of this country, they could not lose their native privileges by their conquests. They were as much freemen, and had as good a right to the liberties of Englishmen after their conquest as they had before; if they had not, few of them, I believe, would have been induced by so inadequate a reward to endeavour an extension of the English dominions, and by making conquests to become slaves.

Another rejection of the technical position that the American colonies were conquests of the Crown was made by James Wilson, an important constitutionalist of the Revolutionary period, in his widely distributed pamphlet Considerations on the Nature and Extent of the Legislative Authority of the British Parliament (1774). Wilson located the source of the fiction of conquest in Calvin’s Case and proceeded to reject in forceful terms its

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71 In addition to the examples in the text see, notably, Galloway Letter to... Pennsylvania in Bailyn Pamphlets, 256 at 270-1; Otis Rights of the British Colonies Asserted and Proved (1764), 43-7 (this pamphlet was widely distributed being reprinted four times during the Stamp Act crisis and referred to by Lord Mansfield in the Lords: Bailyn Pamphlets, 409-11); “Substance of a Memorial Presented by the Assembly of Massachusetts” in Otis, op cit, App 2, 70 at 74; Dickinson Farmer’s Letters (1768) in Writings, I, 360; Adams Novanglus (1774) in Works, 125-6.

72 Bailyn Pamphlets, 293.

73 Bland The Colonel Dismounted (1764), 20-21.

74 Id, 21.

applicability to the American colonies: 76

In my Lord Coke’s Report, it is said, “that albeit Ireland is a distinct dominion, yet, the title thereto being conquest, the same, by judgment of law, may be, by express words, bound by the parliaments of England”. In this instance, the obligatory authority of the parliament is plainly referred to a title by conquest as its foundation and original. In the instances relating to the colonies, this authority seems to be referred to the same source: for any one who compares what is said of Ireland, and other conquered countries, in Calvin’s case, with what is said of America, in the adjudications concerning it, will find that the judges in determining the latter, have grounded their opinions in the resolutions given in the former... This is unreasonable, and injurious to the colonies, to extend that title to them. How came the colonies to be a conquered people? By whom was the conquest over them obtained?... The original colonists never suspected that their descendants would be treated as a conquered people; and therefore they never taught them the submission and abject behaviour suited to that character.

Those writers who took a position less sympathetic to the colonists for the most part felt unable to state that the common law enjoyed no status as such in the colonies. In his Letter From... Halifax (1765) Howard distinguished between the personal and political rights of the subjects, a distinction corresponding with that between private and public law. In matters of personal right the common law belonged to the subject by birthright, he found, but the political rights of the subject abroad were defined by the grant from the Crown in the exercise of its constituent power. Since the common law recognised this constituent power and also subjected the Crown to itself in Parliament it followed that Parliament held legislative authority over the American colonies. 77 Nonetheless the pamphlet had conceded some currency to the common law in the colonies as the birthright of the subject. Similarly Pownall’s widely read tract The Administration of the Colonies (3rd ed, 1766) declined to affirm the legal status of the American colonies as conquests. He conceded that this might be theoretically the case but stressed its incompatibility with the rights and liberties of the colonists as Englishmen. 78

Taken to its logical and fullest extent the argument that British colonists took English law with them as a birthright would have severely undermined the distinction between conquered or ceded and settled colonies. It would have created a class of persons in conquered or ceded colonies, the Crown’s natural-born subjects, who enjoyed privileges as against the Crown not held by the vanquished population. Could, for example, prerogative legislation apply to the English as well as non-English inhabitants of the territory?

It is not surprising, then, to find no less authorities than Blackstone and Lord Mansfield attempting to curb the inordinate extension of the birthright principle. These efforts were not

76 Text in Works of James Wilson, II, 739-40.
77 Text in Bailyn Pamphlets, 531 at 535-6. Otis replied that Howard had mixed Blackstone’s distinction between the rights of natural persons and bodies corporate: A Vindication of the British Colonies (1765) text in Bailyn Pamphlets, 553 at 559.
78 Pownall The Administration of the Colonies (3rd ed, 1766), 30-33.
to be wholly successful. Their thrust was an insistence upon the purity of the rules affecting settled and conquered or ceded colonies. Both Mansfield and Blackstone tried to keep birthright theory from the rules affecting the latter variety. Thus Blackstone after distinguishing between the two types of colony stated in his *Commentaries (1765):*79

Our American plantations are principally of this latter [ie conquered] sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present enquire) or by treaties. And therefore the common law of England, as such, has no allowance or authority; they being no part of the mother country, but distinct (though dependent) dominions.

These comments were approved by Stokes (1783),80 Chitty (1820)81 and in *Attorney-General v Stewart (1817)*82 but by the end of the eighteenth century this view of the legal status of the American colonies had become that of a minority. Mansfield concurred with the strict exclusion of the birthright principle from the rules affecting this variety of colony. In *Campbell v Hall (1774)* he provided a list of propositions concerning conquered or ceded territory which he found "too clear to be controverted". The fourth of these insisted:83

that the law and legislative government of every dominion affects all persons and property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives.

Though Mansfield’s opinion was clear it may be added that his classification of Jamaica as a settled colony (which contradicted its classification as a conquest in *Blankard v Galdy*) may have contributed unwittingly to the very confusion he was anxious to avoid. It should also be noted that Blackstone based his designation upon the circumstances of the indigenous tribes. By this time he must have felt unable to maintain the fiction derived from *Calvin’s Case* which equated the conquest with one over the Crown’s own subjects in the colony.

Blackstone and Mansfield’s efforts were not particularly successful. Even those writers of the post-Revolutionary period who disputed the constitutional claims the colonists had made against the sovereignty of Parliament, Stokes (1783) and Chitty (1820) who blindly followed Blackstone excepted, were unable to accept that the American colonies had the designation of conquests. Chalmers, to take a notable example, considered the early Stuarts claims to a prerogative legislative power in the American colonies, a claim directly supported by *Calvin’s Case*, to be an unlawful pretence. The American colonies, he stated, had been

79 Bla Comm (1765), I at 107.
81 Chitty Prerogatives of the Crown (1820), 29.
82 (1817), 2 Mer 143, 35 ER 895 (Ch).
83 (1774), 1 Cowp 204 at 208.
acquired by settlement:

No conquest was ever attempted over the aboriginal tribes of America: Their country was only considered as waste, because it was uncultivated, and therefore open to the occupancy and use of other nations. Upon principles which the enlightened communities of the world deemed wise and just, and satisfactory, England deemed a large part of America a desert territory of her empire, because she had first discovered and occupied it; and thence inferred, that she might there form settlements of her subjects, in the same manner as if the surrounding sea had delivered back the lands which had been formerly ravished from her coasts. Whether Virginia was planted, in order to gratify the ambition of a king, to satisfy the avidity of a commercial company, or to promote the national interests by the extension of trade, the emigrants departed with the consent of the whole, on condition that they should be considered as subjects, though they intended to settle in a distant dominion of the state. As Englishmen, they carried with them their former rights: As Englishmen, they owed obedience to their ancient legislature. For, it is a principle of universal equity that he who enjoys the benefit shall submit patiently to all its inconveniences”.

Chalmer’s views upon the original constitutional status of the American colonies were shared by the influential American writers of the post-Revolutionary period. These writers took the position that the common law had arrived in the American colonies as the birthright of the emigrating subject. This position soon became the established doctrine of the American courts so that the American colonies became viewed retrospectively as having had the original status of settled colonies.

The shift in thought over the legal status of the American colonies had a significant effect upon colonial law and practice. It indicated the extent to which the birthright theory had come to underlie colonial law in the century after Blankard v Galdy. Blackstone and Mansfield had tried to limit the birthright principle to desert, uncultivated lands (as had Holt in Blankard v Galdy and Smith v Brown) but once it became accepted that the American colonies had the status of settled colonies confusion was bound to eventuate. The constitutional status of a colony was now to be determined by reference not only to the physical state of the country but to the situation of the English colonists at the time of settlement. In the absence of a pre-existing civilized legal system to which they might properly be amenable, the colonists had the birthright to the benefit of the common law. In this way uncivilised as well as uninhabited territory became apt to classification as a settled colony of the Crown. This result had been forecast by Dulany Sr as early as 1728 when he stated that conquered or ceded colonies should be limited to territory in which there already

84 Chalmers Political Annals (1780), 28.
86 Van Ness v Packard (1829), 2 Pet 137 (USSC) at 144; Wheaton v Peters (1834), 8 Pet 591 (USSC) at 658. The Jeffersonian position appeared in some early post-Revolutionary cases (eg Fisch v Brainerd (1805), 2 Day (Conn) 163 (Conn SC) at 188; Town of Pawlet v Clark and others (1815), 9 Cranch 292 at 334, 3 Law Ed 735 at 750) but did not prevail.
... when it is considered, that those Countries, were inhabited, by civilized, sociable People, conversant with Art, Learning and Commerce; that had laws suited, and adapted to the Order, and Engagements of Society; by which, themselves and others that went to live among them, might be peaceably, and happily governed: That cause was wanting here, and so must the Effect be; for Maryland, before it was settled by the English, was to Law and Government in the same Condition, with an uninhabited Wilderness: And in Case of an Uninhabited Country newly found out, by the English Subjects: All Laws in Force in England, are in force there.

Prior to the colonists' application of Blankard v Galdy to the American colonies, as above, the earliest distinction between settled and conquered or ceded territory had simply been one distinguishing desert, uncultivated from inhabited land, an objective criterion unpolluted by the less objective distinction between civilised and uncivilised territory. If the basis of the distinction between the two types of colony recognised at common law was the amenability of British subjects to the lex loci, if any, what of those countries acquired from non-Christian polities whose sovereignty the Crown had formally recognised? Should the constitutional status of a colony at common law reflect the Crown's recognition of non-Christian sovereignty or should it focus exclusively upon the amenability of British subjects to the indigenous law? This question, it will be seen, was constantly to perplex British practice in the years after the American Revolution.

So far as colonial law was concerned an important result of the American Revolution was the enlargement of the range of territory apt to classification as a settled colony. Although taking account of the character of native society and law (that is, the impossibility of its application to natural-born subjects of the Crown), this trend was never a development aimed towards establishing a fiction against the American Indian. The colonists' invocation of Blankard v Galdy and its eventual acceptance was always tied to claims against the mother country. The American Indians were only marginally relevant to the claim of the colonists that the common law was their birthright in that any conquered status could only be explained (as Blackstone had done) by reference to the Indian tribes. In a moment the confusion in colonial practice eventuating from this complication will be seen. Before then it is necessary to consider the effect of Lord Mansfield's important judgment in Campbell v Hall (1774).

E. Campbell v Hall (1774)

This important case quickly became the leading statement of the Crown's powers in its colonies. Lord Mansfield's judgment was soon taken as clarifying the distinction between

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87 The Right of the Inhabitants of Maryland to the Benefit of England Laws (1728), 20.
conquered or ceded and settled colonies although his position regarding the latter was by no means explicit in the text.

The action in this famous case was brought by James Campbell against William Hall, a tax collector, for the return of duty paid upon goods exported from Grenada, a colony taken from the French by British forces and formally ceded to the Crown by the Treaty of Paris (1763). A Proclamation of 7 October 1763 and letters patent of 9 April 1764 had authorised the Governor to establish a representative legislature. Before the legislature came into being the King imposed a duty upon certain exports from the colony by letters patent of 26 July 1764. At issue was the Crown's prerogative power to impose a duty upon the colony subsequent to the grant of a representative assembly.

Mansfield agreed the Crown initially held a prerogative power of legislation in conquered or ceded colonies but found that the power to enact ordinary legislation disappeared upon the undertaking an assembly would be convened. Mansfield relied on two authorities. First, he referred to Coke's report of *Calvin's Case* in which it was stated that the King enjoyed no prerogative legislative power subsequent to the grant of English law to a colony. Mansfield clearly considered the grant of a representative assembly to put the Crown in the same constitutional position it would hold under English law. Secondly, Mansfield referred to a legal opinion of 1724 by law officers Yorke and Wearg in which they considered the power of the King to impose duties in Jamaica, the local assembly "being refractory". The existence of this power, they had advised, depended upon*

... whether Jamaica is now to be considered merely as a colony of English subjects, or as a conquered country; if, we apprehend, as a colony of English subjects, they cannot be taxed, but by the Parliament of Great Britain, or by and with the consent of some representative body of the people of the island, properly assembled, by the authority of the Crown; but, if it can now be considered, as a conquered country, in that case, we conceive, they may be taxed, by the authority of the Crown.

The opinion did not make it clear what was meant by the term a "colony of English subjects" although this presumably was a reference to the type recognized some years earlier in *Blankard v Galdy* (1693) and the Privy Council's *Memorandum* (1722). Although the opinion had been talking of settled colonies Mansfield still took it as authority for his ruling that once a conquered colony was promised a representative assembly the Crown's prerogative legislative power disappeared or, at least, was suspended.

*Campbell v Hall* was concerned with the ordinary legislative power of the Crown in its overseas possessions. Mansfield did not turn his attention directly to the consequences which flowed from the introduction of English law into a conquered or ceded colony other than indicate the consequential loss of the prerogative legislative power although he did cite these

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88 Text in Chalmers *Opinions*, I, 204 at 222-3.
propositions which he found "too clear to be controverted".

A country conquered by the British arms becomes a dominion of the King in the right of his Crown; and, therefore, necessarily subject to the legislature, the Parliament of Great Britain.

The 2d is, that the conquered inhabitants once received under the King's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens.

The 3d, that the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning.

The 4th, that the law and legislative government of every dominion affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations has no privilege distinct from the natives.

The 5th, that the laws of a conquered country continue in force, until they are altered by the conquerer: the absurd exception as to pagans in Calvin's Case shows the universality and antiquity of the maxim.

The 6th, and last proposition is, that if the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances that might be put.

These propositions recognized the continuity of the lex loci in a conquered or ceded colony but gave the Crown the power to alter these laws by prerogative legislation. The Crown's powers in its conquered or ceded colonies was recognised as plenary even with regard to any community of natural-born subjects who could not claim the birthright to English law as a "privilege distinct from the natives". In addition Mansfield apparently considered the terms of any treaty of capitulation binding on the Crown in the exercise of its prerogative legislative powers. This was the interpretation put upon his judgment in the East Indies during the late eighteenth to early nineteenth century. Where the Crown had granted English law to the conquered colony or promised a representative assembly under the Great Seal the ordinary legislative power was lost. Thereafter the Crown retained a prerogative constituent power but this could not be exercised inconsistent with the laws of England or the terms of a formal treaty of capitulation. Mansfield's recognition of the Crown's lack of an ordinary prerogative power of legislation in a conquered or ceded colony subsequent to its introduction of English law or formal promise of a representative assembly was taken as

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89 1 Cowp 204 at 208-9.
90 It appears the supposition was made that the Crown could not alter treaty rights without Parliament. For instance Amerchund Burdeechund v United East India Co (1826) 4 Ind Dec (OS) 547 at 554 per West CJ (reversed on other grounds on appeal 1 Knapp 316 (PC)); letter from the Judges of the Supreme Court (Bengal), September 1830, PP (1831), VI, Pt 5, #26, encl 4, 117 at paras 14 and 29; letter from Grey and Ryan JJ, 16 December 1830, id., #33, para 4.
having as its corollary the absence of an ordinary legislative power in settled colonies and the limitation of the constituent power to the convening of a representative assembly. This followed from Mansfield's approval of the 1724 opinion.

Unlike Blackstone, Mansfield expressed no clear view on the constitutional status of the American colonies but, it has been seen, he firmly rejected the attempt to implant the birthright principle into the rules affecting conquered or ceded territory. Although he was unequivocal on this point one aspect of his judgment together with that given some years earlier in *R v Vaughan* (1769) hinted some flexibility in the process by which a colony received its designation at common law. In *R v Vaughan* and *Campbell v Hall* Mansfield indicated the colonists in Jamaica might have received the full rights and liberties of Englishmen not in virtue of the grant of a representative assembly but by reasons of an original settled status. Jamaica had been taken from the indigenous Arawak Indians by the Spanish who, in turn, were expelled by the English in 1655. Mansfield found that all the Spaniards having left the island or been driven out, Jamaica was from its first settling as an English colony established by British subjects "who under the authority of the King planted a vacant island, belonging to him in right of his Crown". Although Mansfield treated Jamaica as uninhabited territory his finding hinted that the mode of acquisition given a colony at common law could take account not of the formalities of acquisition (conquest from Spain) but the actual position of the inhabitants. This position was expressed more strongly by Cockburn LCJ in *R v Eyre* (1867) when he described Jamaica as a settled colony for the reason that "the land was conquered, but the inhabitants by whom it was settled were not". Both judges clearly felt the notional subjection of the British population to Spanish law to be absurd. Although these opinions about the constitutional status of Jamaica were not to prevail they were symptomatic of the growing confusion over the identification of a colony's constitutional status.

F. THE BIRTHRIGHT PRINCIPLE AFTER THE AMERICAN REVOLUTION

The orthodoxy developed during the eighteenth century that the common law had accompanied the American colonists as their birthright confounded the earliest constitutional designation of the American colonies which had seen them as conquests in which the inhabitants held no inherent right to law other than that prescribed by the Crown. This development could be explained upon one of two theoretical grounds: Either the American colonies had always been of the settled variety despite the tardiness of the common law's

91 (1769) 4 Burr 2494 at 2500, 98 ER 308 at 311 (KB).
92 1 Cowp 204 at 211. In fact this was not totally correct. Some Spanish colonists had taken to the hills from where they waged guerilla warfare: Roberts-Wray *Commonwealth and Colonial Law*, 852.
93 (1867) quoted in Forsyth *Opinions*, 15.
94 *Jacquet v Edwards* (1867), Stephens SC 414 (Jam SC); *Phillips v Eyre* (1870), LR 6 QB 1 at 18; Roberts-Wray *Commonwealth and Colonial Law*, 46-7.
recognition of such colonies or, alternatively, the colonies kept the conquered or ceded status but the birthright principle extended to give the Crown’s subjects within the region certain inherent rights. The former explanation was the preferred one and its underlying corollary, that territory inhabited by tribal peoples could as well be settled territory as that desert and uncultivated, became incorporated into colonial law. The latter explanation, one expressly dismissed by Mansfield in *Campbell v Hall*, obtained partial recognition in the colonial law of the post-Revolutionary period.

1. Birthright principles in the rules affecting conquered or ceded territory

Although the assertion of the birthright principle was strongest and the most influential in North America it was not without its recognition elsewhere in the pre-Revolutionary period. The most notable example would be the three Presidency towns of the East India Company. In an opinion of 1757 of law officers advised that these towns could be treated as colonies to which English persons "carry with them your Majesty’s Law". Although these towns had been acquired by cession from the Mughal authorities or, in the case of Bombay, Portugal and were treated as having this constitutional status, the law officers found letters patent granting English law to the English inhabitants were not necessary. The opinion implicitly admitted that English law had accompanied the English subjects into the ceded colonies as a birthright independent of the grant from the Crown. It should be noted that the scope of this finding was limited to the affairs of the English population *inter se* and was not meant to facilitate the argument that the common law gave the subject constitutional privileges against the Crown. The only notable example from the East Indies during the mid-eighteenth of the use of the common law for a claim against the Crown located was the trial of James Creassy in Bombay for alleged assault and battery of two servants. During the course of his trial (1778) Creassy demanded civil trial by jury despite the non-provision for this in the royal charter of the Bombay Supreme Court granted pursuant to the Regulating Act. When, inevitably, judgment was given against him, a public committee was formed and a petition drawn up for presentation to the Supreme Court and, eventually, the authorities in England. Chief Justice Impey, who had counselled the petitioners otherwise, described this petition (1779) as a pretence by which the English inhabitants affected "to have learnt, from the Decisions in Creassy’s Cause, for the first time, that the Civil Causes of British Subjects were not triable by Jury; and they demanded such Trial ‘as the unalienable Right of British Subjects, residing in any Country where the Laws of Great Britain are in force, however far removed from their native land’". In a letter of the same day Impey scorned the English inhabitants of Bombay who "talk of their rights being indefeasible like the Americans and in

case of want of success to follow their example". 97

An illustration of the infiltration of birthright theory into the rules affecting conquered or ceded territory in the period after the American Revolution was given in Ruding v Smith (1821). In this case Lord Stowell had occasion to consider whether English or Dutch laws of marriage applied to an English couple married in the Cape Colony subsequent to the British acquisition by cession from the Dutch. If the principle of continuity was applied unqualifiedly Dutch law would have prevailed, however in the course of judgment the following observation was made:98

I am perfectly aware that it is laid down generally, in the authorities referred to, 'that the laws of a conquered country remain till altered by the new authority'. I have to observe, first, that the word 'remain' has, ex vi termini, a reference to its obligation upon those in whose usage it already existed, and not to those who are entire strangers to it.

Accordingly it was held the English law of marriage applied to the couple despite the absence of any positive act by the Crown introducing English law to the Cape. So far as the internal dealings of the English population of the Cape were concerned no such positive act was considered necessary as a matter of law.

During the nineteenth century some courts took an approach to the introduction of English law to conquered colonies similar to that in Ruding v Smith. 99 It should be stressed, however, that the ipso jure introduction of English law to a conquered or ceded colony recognised by these cases was always limited to the dealings of the English subjects inter se. The claim to English law was never to reach the extent it had in North America some years earlier where it was used to justify constitutional claims against the Crown. To this extent Lord Mansfield's fear in Campbell v Hall (1774) that the successful invocation of the birthright principle by the English population of a conquered or ceded colony would give them "privileges distinct from the natives" was not realized. But, equally, by the early nineteenth century the proposition was established that the English population of a conquered or ceded colony had the right to English law in their relations inter se independent of grant from the Crown.

2. settled colonies in uncivilised territory

97  Impy to Weymouth, 26 March 1779, text in "Reports on the Administration of Justice &c. in the East Indies", Reports from Committees of the House of Commons, 1st ser, V, Gen app 31, 182-3.

98 (1821), 2 Hag Con 371, 161 ER 774 at 778.

99 The Indian Chief (1800) 3 Rob Admir Rep 17 at 28; R v Brampton (1808), 10 East 283, 103 ER 782 (KB) at 784; Attorney-General v Stewart (1817) 2 Mer 143, 35 ER 895; Donegani v Donegani (1834), 3 Knapp 63 (PC); and, especially, Freeman v Fairlie (1828) 1 Moo Ind App 306, 18 ER 117 (Ch) at 128 and 130 and "Report of the Indian Law Commission on the Lex Locii" (1840) in "Special Reports of the Indian Law Commissioners" PP (1843), XXXVI, #7, 370 et seq, also extracts in Beramji v Roger (1867), 4 Bomb HCR 1 at 17 and Rankin Background to Indian Law, 22; and Advocate-General of Bengal v Ranee Surnomoye Dossee (1863) 9 Moo Ind App 427, 19 ER 786.

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After the American Revolution it became accepted that territory held by the Crown in which the native inhabitants were of an uncivilized nature could be properly designated a settled colony. This principle was well established by the time Britain annexed New Zealand in 1840. Several examples from British practice of the early nineteenth century illustrate the character of this development.

In 1819 law officers Shepherd and Gifford considered the prerogative right of the King to levy taxes in the colony of New South Wales. They found that such taxes could only be imposed by Parliament in the absence of a local representative assembly. Similarly an opinion of James Stephen (1822) confirmed that New South Wales had not been acquired by conquest or cession from the aboriginal population but had been appropriated by settlement. The basis of this was made explicit by Lord Watson for the Privy Council in Cooper v Stuart (1889): 102

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

Although the advice conceded the aboriginal presence their status was not at issue and the report proceeded on the basis that there was no law other than English which might have applied to the English inhabitants. On that basis New South Wales was considered a settled colony.

For much the same reason Newfoundland was identified as a settled colony in 1820. Although the exact date of British sovereignty over this colony is uncertain, it is clear that it had been established by the early to mid-eighteenth century. For the most part the region had been treated more as a fishery than a colony and on the supposition that the Crown enjoyed wide powers similar to those it had for conquered or ceded territory. This belief was shaken in Jennings v Hunt (1820) which decided that Newfoundland was a settled colony and so not subject to prerogative legislation. As with the Australian colonies this classification was not an abnegation of the aboriginal presence so much as a realization of the absence of a pre-existing legal system to which English people could be expected to conform. This realization had appeared much earlier as obiter dicta in Mostyn v Fabrigas

100 Text in O'Connell and Riordan, eds Opinions on Imperial Constitutional Law, 4.
101 Text in Harlow and Madden, eds British Colonial Developments 1774 - 1834 Select Documents, 161.
102 (1889) 14 App Cas 286, 291 (PC) (emphasis added). And, generally, Castles An Introduction to Australian Legal History, 1-25.
103 (1820), 1 Newf LR 220 (Newf SC) at 225. Also Yonge v Blaikie (1822), 1 Newf LR 277 (Newf SC); Keilley v Carson (1841-42), 4 Moo PC 63, 13 ER 225. This position had been first postulated by Reeves History of the Law of Shipping (1792), 125.

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(1774-75) where Lord Mansfield delivering judgment barely six weeks after Campbell v Hall, held English law to apply as amongst European persons along the Labrador coast. He observed that there were "no local Courts among the Esquimax Indians upon that part of the Labrador coast; and therefore whatever injury had been done there by the King's officers would have been altogether without redress" were English law held not to apply. As with New South Wales the original constitutional status of Newfoundland was being defined not by reference to the aboriginal population so much as the position of the English communities in uncivilised territory without a suitable lex loci.

The Crown's colonies in West Africa are other and probably more important examples of colonies with an aboriginal population which were treated as settlements at common law. During the late eighteenth to early nineteenth century the constitutional status of the British West African possessions was undetermined as they were initially limited to forts and factories controlled by chartered companies established under Act of Parliament. Hence one might explain Clark's reluctance in 1834 to clarify the constitutional status of these colonies. When the Crown resumed control of these forts and factories it was on the basis that these territorial possessions were settled colonies despite its consistent recognition of the sovereignty of the chiefs of the region. This position was taken in the British Settlements (West Africa and Falklands Islands) Act 1843 which recognised the British forts and factories along the coast of West Africa as settled colonies. The exception to this (although not one recognised in the Act) was the Gold Coast possessions which for reasons which remain unclear were considered by the Colonial Office to have been got by conquest or cession.

Further south the Boers of the Cape Colony had been establishing themselves during the 1820s in the territory of the Griqua tribes across the Orange River. The Griquas were not the aboriginal inhabitants of the region but relative newcomers. On 3 February 1848 Governor Smith of Cape Colony declared the Crown's sovereignty over the Orange River region. Subsequently the colonial Attorney-General Porter gave his opinion that the Orange River had been acquired in sovereignty by occupation of British subjects:

Is the Orange River Sovereignty a colony by conquest? At first sight it scarcely seems to be so. There are within it chiefs with whom we have entered into treaties, recognizing if not guaranteeing certain lands, and it seems absurd to say these lands

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104 (1774-75) Cowp 161, 98 ER 1021 at 1032. Mansfield did not advert to the constitutional status of the territory.
105 Clark Colonial Law (1834), 20.
106 Palmer v Stooke (1953) Sel Judg WACA 333; Buck v Attorney-General [1965] Ch 745 at 756 (Sierra Leone); Sabally v Attorney-General [1964] 3 WLR 732 at 737,741,745; Forsyth Opinions (1869), 27.
have been acquired by the occupancy of the very emigrants whom we laboured to exclude from them. All this is true. But it is also true that British subjects have settled down in a country where the feeble natives, so far from being in a position to maintain their vague, unsettled claims to vast tracts, could not defend their very kraals against those who have long ceased to view themselves as sojourners, and have for some time been the real masters of the land. As real powers the native chiefs exist no longer. Everything that could be tried was tried by the British Government to retain that theoretical supremacy. When, under such circumstances, and mainly for the protection of those who cannot protect themselves, sovereignty is asserted over those extended regions, it appears to me not to be unreasonable to call the colony so created a colony by occupancy. I avoid all attempt to define the sort of native occupation, which, when it exists, makes European intrusion, robbery, and when it does not exist, makes European intrusion rightful. But when, as a matter of fact, British subjects have got, in large numbers, amongst barbarous or semi-barbarous people, and brought about such a state of things, that if our support were once withdrawn, the natives would sink into serfs upon the face of the land, I regard the occupancy of the British subjects as being in the nature of almost every occupancy of which we have the history, and am disposed to view the colony created by the declaration of British sovereignty, as a colony by occupancy, instead of by conquest or by cession. If the Orange River Sovereignty be a colony of this description, provision for its future [i.e. any non-representative] government ought, it would seem, to be made by Parliament.

A treaty of cession from the Griqua chiefs had been out of the question, Porter noted.\(^{110}\)

Another Waitangi treaty would have been another mockery, and, even if it were otherwise, there was in fact no such treaty; nor had there been any such previous powers to make a treaty as existed, if I mistake not, in the instance of Waitangi.

Merivale of the Colonial Office disagreed thinking the Orange River shared the Cape Colony’s status of a conquered or ceded colony.\(^{111}\) He based this on what Roberts-Wray later called the ‘doctrine of absorption’\(^{112}\) rather than the previous recognition of the sovereignty of the Griquas. He explained that “when British subjects... proceeded from a Crown colony under Roman Dutch law, they carried with them no greater rights than they enjoyed in their former place of residence”.\(^{113}\) As the Boers had left the Cape Colony and not England for the Orange River their ‘birthright’ was limited to the constitutional privileges they had enjoyed at the Cape.

These African examples show the confusion that had crept into British practice during the early nineteenth century as to the appropriate constitutional status for a new colony: In some cases the position of the English inhabitants was treated as paramount, an emphasis which suggested the settled designation, but in other cases the formalities of territorial acquisition (treaty with an uncivilised ruler) could prevail. As Porter's opinion revealed, either emphasis could be preferred. No guidance to selection of the appropriate emphasis

\(^{110}\) *Id*, 13.

\(^{111}\) Merivale, minute, 5 June 1849 CO 879/1:1,27-30.

\(^{112}\) *Commonwealth and Colonial Law*, 110-112. Roberts-Wray does not refer to this example.

\(^{113}\) *Supra.*
was ever forthcoming. The most that can be said is that those colonies acquired from aboriginal tribes and treated as settlements must have presented occasions upon which the Crown felt the birthright argument to be particularly strong. Certainly by the mid-nineteenth century the public (as opposed to private) law aspect of the British subject’s birthright to English law was being characterised by Under-Secretaries Stephen\(^{114}\) and Merivale\(^{115}\) of the Colonial Office in terms of a right to representative government. This aspect was one immediately associable with the common law designation as a settled colony. It suggests that the designation was apt to arise for those colonies where a preponderantly British population would be the primary beneficiaries of the constitutional arrangements which the Crown in exercise of its constituent power would be called upon to provide. This explains why colonies in Africa and New Zealand acquired by the Crown by treaty with the tribal rulers whose sovereignty it had solemnly and consistently recognised were treated as settled colonies. This, however, was no guidance to selection of a colony’s constitutional status so much as an indication of the inherent uncertainty. Thus in 1834 Clark drew a list of thirty-two British possessions of which he found three (Newfoundland, New South Wales and Tasmania) were settled colonies.\(^{116}\) By 1869 the number of British possessions had grown to forty yet Forsyth found twenty-five to have been acquired by settlement.\(^{117}\)

3. the distinction between conquered or ceded and settled colonies during the nineteenth century

By the 1820s the distinction between the two forms of colony was beginning to break down in as much as it was recognised that the English communities in either had the inherent entitlement (birthright they called it) to English law in their relations \textit{inter se} independent of formal grant from the Crown. The sole function of the constitutional classification of a colony lay in its prescription of the legislative and constituent power of the Crown: According to the rules in \textit{Campbell v Hall} the Crown could grant a non-representative assembly and enact ordinary legislation for a conquered or ceded colony until such time as it granted either English law or a representative assembly. The Crown held no ordinary legislative power in a settled colony and its constituent power was limited to the establishment of a representative assembly.

In practical terms this meant the erection by the Crown of a non-representative assembly in a settled colony required Parliamentary permission. Thus one finds in respect of virtually all the Crown’s settled colonies of the late eighteenth to mid-nineteenth century special


\(^{115}\) Merivale \textit{Lectures on Colonization and Colonies} (1839-41), IV, 103-105.

\(^{116}\) Clark \textit{Colonial Law} (1834), 18-27.

\(^{117}\) Forsyth \textit{Opinions} (1869), 26-7.
legislation enlarging the Crown’s constituent power.\textsuperscript{118} This practice became so common that eventually general empowering legislation, the British Settlements Act 1887,\textsuperscript{119} gave the Crown as full constituent power in its settled colonies as that held in its conquered or ceded possessions. The practice of extending the Crown’s constituent power in settled colonies by statute was reviewed and explained by James Stephen in an important report to Cabinet on the Australian legislatures (1849). Although he fully admitted, indeed advocated, the ‘birthright’ of the English communities to the same constitutional privileges as those of the subject in England the "indispensable condition" to the grant of representative institutions was "we think, that the colonists should sustain the whole expense of their own civil government".\textsuperscript{120} Since special and in the end general empowering legislation assimilated the Crown’s constituent power in settled colonies to those it held in conquered or ceded territory by the end of the nineteenth century there was diminishing point to the old common law distinction between the two types.\textsuperscript{121} By the mid-nineteenth century a colony’s constitutional status had no bearing upon the common law’s recognition of the continuity of the \textit{lex loci}, nor did it disqualify (as once it had) the English community from the benefit of English law in their relations \textit{inter se}. We will discuss this last aspect more fully in the next chapter.

G. THE ORIGINAL CONSTITUTIONAL STATUS OF THE COLONY OF NEW ZEALAND

From as early as January 1839 the Colonial Office was treating the prospective colony of New Zealand as having the common law status of a settled colony. That month in a minute on policy for New Zealand James Stephen adverted to the need for the Parliamentary enlargement of the Crown’s constituent power in the prospective colony. He advised that since "the Royal prerogative of creating Legislative Bodies extends only to such Legislatures as are constituted on the Representative principle, application should be made to Parliament as in the case of Western Australia, to confer this power on a Governor + Council without an Assembly".\textsuperscript{122} This initial designation of New Zealand as a settled colony was never controverted by the Colonial Office and provided the basis for the constitutional arrangements thenceforth made for the country.

\textsuperscript{118} 4 Geo 4 c 96 (1823) and 9 Geo 4 c 83 (1829) (New South Wales); 10 Geo 4 c 22 (1830) (Western Australia); 4 & 5 Will 4 c 95 (South Australia); 5 & 6 Vict c 120 (Newfoundland); 6 & 7 Vict c 13 (1843) (West Africa and Falkland Islands); 5 & 4 Vict c 62 (1840) and 9 & 10 Vict c 103 (New Zealand); 29 & 30 Vict c 115 (Straits Settlements).

\textsuperscript{119} 50 & 51 Vict c 54 (1887) consolidating the 1843 (\textit{supra}) and 1860 (23 & 24 Vict c 121) Acts. The Act did not give the Crown any ordinary legislative but simply enlarged the constituent power.

\textsuperscript{120} “Report on Australian Legislatures”, 21 February 1849 CO 881/1:2,5.

\textsuperscript{121} It was still necessary to distinguish "settlements" under the British Settlements Act from the ‘settled’ colonies acquired before and hence not subject to the Acts: Roberts-Wray \textit{Commonwealth and Colonial Law}, 184.

\textsuperscript{122} Stephen, minute, 21 January 1839 CO 209/4:193,196.
A few days after writing the minute Stephen prepared the first draft instructions for Hobson. These draft instructions noted the prerogative constituent power in relation to any territory acquired in sovereignty in New Zealand was limited to the grant of a representative assembly but commented that "such a body would be wholly unsuited to the infancy of such a Settlement".\textsuperscript{123} The second draft instructions of early March 1839 made a similar point, as did the eventual instructions of August that year, terming a representative assembly "unripe" for the "particular exigencies of the Colony".\textsuperscript{124} A few days later Stephen reiterated his inability to conceive of any mode of colonizing New Zealand other than by the grant of a representative assembly. He found inescapable the designation of New Zealand as a prospective settled colony:\textsuperscript{125}

Notwithstanding all that is said of the dangers of that [i.e. representative] system of Colonial Polity, all my information compels me to think it is the best possible scheme for any Colonial Society of the Anglo-Saxon Race who are exempt from the disaste of caste. It is only because in New Zealand that calamity would prevail between the European and the Aboriginal Colonist that I should hesitate in at once convening an assembly, if I had any voice in such a decision.

Since the Maori population would have some formal representation in any assembly convened simply by means of the royal prerogative, Stephen felt that the Crown's constituent power would have to be enlarged under Parliamentary authority. He repeated this view a year later when he commented that without "the authority of Parliament the Crown can create no Legislature in New Zealand, except by establishing there a Representative Assembly which I suppose everyone would agree in pronouncing an absurdity".\textsuperscript{126}

To solve the problems emanating from the annexation of the 'settled' colony, the Colonial Office returned to the terms of the constitutional instruments for New South Wales giving the Governor and his Legislative Council authority over "adjacent" islands. The Continuance of New South Wales Act 183 had empowered the Crown to constitute a non-representative assembly for the colony.\textsuperscript{127} This meant that with the annexation of the "adjacent" islands of New Zealand as a dependency of New South Wales the Crown's legislative and constituent power over New Zealand would derive from statutory as opposed to prerogative right. In this way the limitations on its constituent and legislative power under the prerogative would be circumvented and the hazard of obtaining Parliamentary legislation for territory not then held in sovereignty by the Crown would be avoided.\textsuperscript{128} This

\textsuperscript{123} First draft (by Stephen) of consular instructions to Hobson, 24 January 1839 CO 209/4:203, 212-3.
\textsuperscript{124} Second draft (by Stephen) of consular instructions to Hobson, 8 March (\textit{circa}) 1839 CO 209/4:221,232.
\textsuperscript{125} Stephen to Labouchere, 15 March 1839, CO 209/4:326, 329.
\textsuperscript{126} Stephen to Vernon Smith, note, 21 July 1840, CO 209/7:40. Similar observations were made Stanley to Gray, 27 June 1845, \textit{PP} (1846), \#337,72,74.
\textsuperscript{127} 3 & 4 Vict c 62, section 2.
\textsuperscript{128} Stephen to Labouchere, 18 May 1839 CO 209/4:243, 245-6.
arrangement, one wholly predicated upon the presumption that New Zealand would be a settled colony at common law, received the blessing of the law officers. It became the formal means through which British government over New Zealand was first conducted. The instructions to Hobson (14 August 1839) as well as the charter of the colony, the first constitution by the Crown of a local legislative power and issued under the authority of the Imperial Act 3 & 4 Vic c 62 also proceeded on the basis that New Zealand was a settled colony at common law.

The Colonial Office did not treat the classification of New Zealand as a settled colony as an abnegation of Maori sovereignty. No link was ever made between the constitutional status taken by the colony at common law and the Crown’s recognition of Maori sovereignty. The internal memoranda of the Colonial Office as well as the instructions sent to Hobson emphatically recognised Maori consent as the basis of the Crown’s sovereignty as well as the islands’ constitutional status as a settled colony. To take an important example, Russell’s despatch accompanying the colony’s first charter, Hobson’s commission as Governor and formal Instructions, informed Hobson that the introduction of representative institutions had been postponed by the Crown with Parliamentary permission:

Proceeding upon the well-established principle of law, that Her Majesty’s subjects, settled in a country acquired as New Zealand has been acquired, carry with them as their birthright so much of the law of England as is applicable to their altered circumstances; that fundamental rule has been qualified in the infancy of the colony by constituting a legislature nominated by the Crown in New Zealand, as in other Australian colonies.

Elsewhere in this despatch Russell emphasized that the Maori tribes had "been formerly recognized by Great Britain as an independent state; and even in assuming the dominion of the country, this principle was acknowledged, for it is on the deliberate act and cession of the chiefs, on behalf of the people at large, that our title rests". These two features of British annexation, one the recognition of tribal sovereignty, the other the classification of New Zealand as a settled colony, were never regarded by the Colonial Office as irreconcilable or contradictory. Plainly the Colonial Office did not consider designation as a settled colony set up the legal fiction that New Zealand was 'desert, uncultivated territory'.

The Colonial Office regarded New Zealand as a settled colony in response to the position of the English settlers. In March 1839 Stephen had noted the two cardinal principles were, first, the protection of the Maori, and secondly, "the introduction among the Colonists of the

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129 Normanby to Law Officers, 30 May 1839 CO 209/5:76; Law Officers to Normanby, 4 June 1839 CO 881/1:25,7-8.
130 Text in CO 881/1:25,1-7.
131 Charter for erecting the Colony of New Zealand, 16 November 1840. Text in PP (1841), #311,31-33.
133 Id, 484.

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principle of self Government, to the utmost extent in which that principle can be reconciled with allegiance to the Crown, and with the Colony moving in the same political orbit with the parent state.\textsuperscript{134} If the recognition of Maori sovereignty was part of the first principle then the classification of New Zealand as a settled colony reflected the second. By the beginning of 1839 there were upwards of 2000 British subjects in New Zealand clamouring if not petitioning for the Crown to establish over them regular government based upon English law.\textsuperscript{135} This was precisely the situation in which the birthright principle was apt to flourish and one which counselled against the application to New Zealand of the pre-Revolutionary approach to the constitutional status of the North American colonies.

By 1840 the birthright principle had been asserted by English settlers in New Zealand on two important occasions. In May 1838 the English settlers at Kororareka in the Bay of Islands formed themselves into an Association and enacted a series of 'Resolutions' styled after English law and designed to protect their persons and property. For example, Rule 5 of the Resolutions provided that persons found guilty of robbery were to be presented to the British Resident and should he refuse to deal with the offender the Association reserved the right to punish the offender as it thought fit.\textsuperscript{136} On the other occasion, the settlers bound for New Zealand under the New Zealand Company had agreed to certain 'Articles of Agreement'\textsuperscript{137} by which they submitted themselves to the judicial and legislative authority of the Company in the prospective Port Nicholson settlement. A lawyer's opinion of late 1839 found the Articles were unlawful,\textsuperscript{138} a conclusion which the Colonial Office had reached even before sighting them.\textsuperscript{139} Stephen excoriated the Articles as "apparently... an infringement of the Rights of Her Majesty and a Foreign [i.e. Maori] State of which the Queen has recognised the independence".\textsuperscript{140} Under English law the exercise by any British subject of any judicial or coercive power over another must have the authority of law and since the constitution of judicial tribunals and legislative bodies lay solely within the royal grant, both the Kororareka Association and the Port Nicholson Articles\textsuperscript{141} were unlawful.

They were, however, important examples of the association of the Crown's exercise of its constituent power with the birthright of the subject. Although the subject took his birthright

\textsuperscript{134} Stephen to Labouchere, 15 March 1839 CO 209/4:326,327.
\textsuperscript{135} Stephen, minute, 21 January 1839 CO 209/4:193.
\textsuperscript{136} Foden \textit{New Zealand Legal History}, 53-61, esp at 56-7. Busby refused to countenance the measure.
\textsuperscript{137} "Articles of Agreement", early September 1839, copy in CO 209/4:621-8.
\textsuperscript{139} Stephen to Young, 19 September 1839 CO 209/4:573-6; Stephen, note, 28 September 1839, \textit{id}, 590; Vernon Smith to Young, 5 October 1839, \textit{id}, 591-2. The New Zealand Company relayed submission of a copy of the Articles to the Colonial Office, fearing legal proceedings might be commenced against the parties; Young to Russell, 7 November 1839, \textit{id}, 599-603.
\textsuperscript{140} Stephen, memorandum, 24 October 1839 CO 209/4:577-8.
\textsuperscript{141} The New Zealand Company obtained the consent of the local chiefs to the Articles (Foden \textit{New Zealand Legal History}, 64) and so could justify the form of government as a delegation from tribal sovereignty (as, for example, the East India Company's zemindary in the Calcutta region). It was the discovery of this form of Government which Hobson characterised as "reasonable" and led immediately to his proclamations of sovereignty on 21 May 1840.
to English law with him ultimately the lawfulness of its exercise depended upon constitution from the Crown. By the mid-nineteenth century colonial law was approaching the stage of recognizing some capacity in English settlers to exercise their own constituent power in default of the Crown, the British Honduras and Pitcairn Islands being the contemporary precedents. However the proposition was one inapplicable to New Zealand since any supposed inherent constituent power in the community presupposed British sovereignty over the territory. In 1839 the Crown expressly disavowed any sovereignty over New Zealand - a case of inability rather than refusal to exercise a constituent power for the settlers. In any event, the Kororareka Association and Port Nicholson Articles were in 1839 powerful reminders for the Crown of the constitutional claims the settlers might be expected to make and the link such claims had with the common law status of a colony. This link is apparent in the first indication of New Zealand's prospective constitutional status, a minute of James Stephen in January 1839, where he adverted to the colonists at Kororareka "living under a Conventional form of Government established by themselves". The link between the colony's status at common law and the constitutional relations between Crown and English subject were further underlined by the Address and Petition of the Port Nicholson settlers of November 1841. This petition quoted Pratt and Yorke's opinion (1757) and expressly invoked the birthright principle as the source of right to municipal institutions. Thus:

It was solemnly reported to one of Your Majesty's predecessors by two of the greatest luminaries of the law, then speaking officially, that 'English subjects carry with them Your Majesty's laws wherever they form colonies', and we pray only that effectual means may be provided for securing to us, on the spot, those sacred and inalienable rights... we pray only for the power of managing our own local affairs, by means of... municipal institutions.

142 Merivale Lectures on Colonization (1839-41), IV, 103-5; Ramsay, History of the American Revolution (1791), 17; Wilson "Lectures" in Works of James Wilson, I, 363-4; Roberdeau v Rous (1738) 1 Atk 543. Generally Roberts-Wray Commonwealth and Colonial Law, 153-7.
143 British settlers in the Honduras erected their own form of government, known as 'Burnaby's Laws' (1765) (text in Burdon, ed Archives of British Honduras, I, 100). The settlers constantly petitioned the Crown for a regularly-constituted form of government and the local magistrates appointed under Burnaby's Laws and visiting naval commanders frequently complained during during the late eighteenth to mid-nineteenth century of their lack of formal authority. A Law Officers' opinion of 27 July 1812 (abstracted CO 323/91a:96) held Burnaby's Laws illegal (local reaction was to petition, unsuccessfully, for the Crown's exercise of its constituent power: Petition of Baymen to the Prince Regent, 10 August 1818, Archives of British Honduras, II,209), however the Privy Council did not express a similar position in Attorney-General (British Honduras) v Bristowe (1880), 6 App Cas 143. This case found British sovereignty in the Honduras to date at least from 1817 notwithstanding formal annexation in 1842. Presumably their Lordships considered Burnaby's Laws to have had some legal effect until the Crown eventually exercised its constituent power.

144 Laws of Pitcairn's Island enacted with the assistance of Cmndr R Elliot (HMS Fly), November 1838. Text in Brodie Pitcairn's Island and the Islanders in 1850 (1851), 84-91. These laws were adapted throughout the nineteenth century (Roberts-Wray Commonwealth and Colonial Law, 907-8) until the Pacific Order in Council, 1893, article 6 put the local government on a sound constitutional footing.

145 Stephen, minute, 16 November 1839 CO 209/5:51; Roberts Wray Commonwealth and Colonial Law, 156.

147 The petitioner's had doubtless seen the abbreviated version of this opinion in Chalmers Opinions, I,195.
148 Enclosure in Hobson to Stanley, 13 November 1841 CO 209/10:158,

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This was a replay of the North American scenario albeit in a New Zealand and radically diluted format.

Given the needs of the New Zealand settlers and the post-Revolutionary development in the classification of a colony at common law, it was small wonder the Colonial Office thought New Zealand a settled colony. This designation was simply a response to the situation of the English settlers. The status of the Maori tribes was never central to the Colonial Office’s classification of New Zealand as a settled colony. The crucial ingredient was the relation of the Crown with the English settlers, or, more specifically, their birthright to English law not only upon matters *inter se* but in their constitutional relations with the Crown. The lesson of the American Revolution had been learnt.
CHAPTER FIVE
THE COMMON LAW STATUS OF MAORI CUSTOMARY LAW

A. INTRODUCTION

It has been seen that the rangatiratanga of the Maori chiefs was diminished if not lost upon the Crown's assumption of the territorial sovereignty of New Zealand to the extent the sole lawful source of imperium or government became the Crown. It was clear as a matter of British constitutional law that the tribal sovereignty had gone and with it any source of and right to self-government independent of formal royal permission but it did not follow that the customary laws affecting the civil and criminal relations of the Maori inter se or even with the Pakeha had also gone. The loss of tribal sovereignty might simply have indicated the transformation of the tribal code from a territorial to personal character, the exact reverse of the situation previously obtaining so far as the British settlers' right to English law had been concerned.

To what extent, then, did Maori customary law survive the British annexation? Were the disputes of the Maori inter se still regulated by the unwritten customary rules? On what basis, if at all, were these superceded de jure by English law?

B. BRITISH SOVEREIGNTY, ENGLISH LAW AND CUSTOMARY LAW

1. The common law presumption of continuity

By 1840 the common law principles relating to the effect of British sovereignty upon the pre-colonial legal system had been long established. The judicial identification of the relevant principles dated from the beginning of the seventeenth century. From this time and throughout the subsequent history of British imperial activity, the colonial and British courts consistently recognised a presumption of continuity.¹ That is to say, the common law presumed that British sovereignty of itself did not disrupt the pre-existing legal system of the newly-acquired territory. This presumption, it will be seen, was subject to a number of qualifications as well as modification by the Crown. It was certainly settled by the time Britain acquired the sovereignty of New Zealand in 1840.

¹ Blankard v Galdy (1693) 4 Mod 222; Memorandum (1722) 2 Wms 75 (PC); Campbell v Hall (1774) 1 Cowp 204 (KB); Forbes v Cochane (1824) 2 B & C 448, 463 per Holroyd J; Mayor of Lyons v East India Company (1836-37) 1 Moo PC Ind App 175; Hirabae v Sonabae (1847) 4 Ind Dec (OS) 100, 113 (Bomb SC); Fewson v Phayre (1848) 2 Ind Dec (OS) 242 (Beng SC); Advocate-General (Bengal) v Ranee Surnomaye Dossee (1863) 9 Moo PC Ind App 387, 426 per Lord Kingsdown.
The presumption of continuity embodied a fundamental theme of the British imperial experience, both as victim and protagonist, which had arisen long before the first authoritative judicial recognition in the first decade of the seventeenth century. Sir Matthew Hale had stressed the Roman policy of leaving conquered peoples with their own laws the better to ensure their voluntary submission to Roman government.2 The Romans had applied this policy in Britain. Similarly Coke and Hale went to lengths to prove the Norman Conquest was in law no conquest but that William I had assumed the English throne in accordance with English law.3 The common law’s own experience therefore had been one of continuity and it was a principle which it extended to the legal systems of the Crown’s medieval possessions. The Isle of Man, which after some dispute between England and Scotland came to the former by cession from the King of Norway (1266), retained its customary laws dating from the days of Scandinavian domination.4 The same was also true of Wales which lost its customary law not by the fact of English conquest but the Statute of Rutland.5 A similar pattern of continuity prevailed in the Channel Islands6 and, as The Case of Tanistry indicated, Ireland.7 The medieval precedents were expressly adopted by the courts in their consideration of the principles governing the Crown’s acquisition of territory in the New World and India, a notable example being Lord Mansfield’s judgment in Campbell v Hall (1774).8

An inherent distinction between the Crown’s acquisition of the territorial sovereignty and the introduction of English law was fundamental to the common law’s presumption of the continuity of the pre-colonial legal system. Whilst it was clear that English law was introduced ipso jure to a new colony to the extent it defined the character of the Crown’s sovereignty, it did not follow from this that the whole of English law was also introduced. It was recognised that certain rules of English law were inevitably introduced as incidents of the Crown’s sovereignty,9 necessarily supplanting contrary local law. During the early nineteenth century it was held that the English law defining a person’s status as alien or subject of the Crown was introduced into a colony as part of the sovereignty of the Crown but the consequences flowing from alien status, such as the capacity to maintain an action

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2 History of the Common Law (posthumous pub 1713), 40; similar observations were made in The Case of Tanistry (1608) Davies 28, 41 (KB).
3 3 Co Inst iii; Hale History of the Common Law, cap 5 and Prerogatives of the King, cap II.1.
5 The Case of Tanistry (1608) Davies 28, 41 (KB).
7 (1608) Davies 28 (KB). In submissions during Calvin’s Case Bacon stated that “the reason why Ireland is subject to the laws of England is not ipso jure upon conquest, but grew by a charter of King John”, Works, VII, 660. Also Blankard v Galdy (1693) 2 Salk 411 per Holt CJ; Campbell v Hall (1774) Lo Ft 655, 742 per Mansfield LJ (KB).
8 Supra. Another important example was Blankard v Galdy, supra.
9 Ruding v Smith (1821) 2 Hag Con 371, 382 (Con Ct); Advocate-General (Bengal) v Ranee Surnomoye Dossee (1863) 9 Moo PC, Ind App 387, 392 at 405 per Peacock CJ (Beng SC); Union Government (Minister of Lands) v Estate of Whitaker [1916] AD 194, 203 per Innes CJ (SCSA); Madzimbamuto v Lardner Burke [1968] AC 721 (PC); Kodeeswaran v Attorney-General (Ceylon) [1970] AC, 1118 (PC).
for real property, were to be determined according to the *lex loci*.\textsuperscript{10}

It should be added that the Crown’s formal acquisition of the territorial sovereignty immediately gave the local inhabitants the status of British subjects.\textsuperscript{11} As with the simple fact of British sovereignty, the mere status of British subject did not entail the comprehensive applicability of English law to all inhabitants of the territory. The status of British subject protected the original inhabitants from an 'act of state' by the Crown\textsuperscript{12} but did not affect the presumption of continuity. This point is of some importance since the third article of the Treaty of Waitangi gave the Maori tribes "all the rights and privileges of British subjects". The tribes' acceptance of British subjecthood, status which regardless of the Treaty was obtained at common law with the formal annexation of the country in 1840, did not have as any corollary the acceptance of English law as the new basis for all their relations both as amongst themselves and with the settlers. Any such interpretation was contradicted by the protection of *rangatiratanga* in the Maori text of the Treaty of Waitangi. The common law rules regarding the acquisition of territory also negated any such intention: Were the status of British subject to have brought the *ipso jure* amenability of the native inhabitants to English law in all relations the common law presumption of the continuity of pre-colonial law could never have been made. When the Maori people became British subjects in 1840 they did not in consequence become amenable to the whole or any part of English law other than those rules incidental to the sovereignty of the Crown.

2. Qualifications upon the presumption of continuity

a) *The Case of Tanistry* (1608)

*The Case of Tanistry* provided the earliest authoritative guide to the status of aboriginal laws subsequent to British sovereignty. During the course of judgment the Court drew a distinction between a conquest "Monarchy Royall" and "Monarchy Seignoriall, ou tyranny".\textsuperscript{13} With the former, the local inhabitants "ont property en lour biens & frantement & inheritance en lour terres".\textsuperscript{14} This was contrasted with a conquest "Monarchy Seignoriall" whereby all the local inhabitants "son touts come villeins ou esclaves, and proprieters de rein ... come en Turkey & Muscovie ...".\textsuperscript{15} The Court commented that the English Crown’s

\begin{itemize}
    \item \textsuperscript{10} Donegani \textit{v} Donegani (1835) 3 Knapp 63 (PC); \textit{In re Henry Adam} (1837-38) 1 Moo PC 460.
    \item \textsuperscript{11} Opinion of Solicitor-General Yorke, 13 August 1759, Chalmers \textit{Opinions}, II, 359, 360; \textit{Campbell v Hall} (1774) 1 Cowp 204, 208 (KB); \textit{Mayor of Lyons v East India Company} (1836-7) 1 Moo PC, Ind App 175, 286-7 (PC); Forsyth, \textit{Opinions} (1869), 334-5.
    \item \textsuperscript{12} \textit{Entick v Carrington} (1765) 19 St Tr 1029; \textit{Campbell v Hall} (1774) 1 Cowp 204, 208-10; \textit{Walker v Baird} (1892) AC 491, 496-7 (PC); \textit{Johnstone v Pedlar} (1921) 2 AC 202, 272 per Viscount Finlay (HL); \textit{Attorney-General v Nissan} (1970) AC 179, 207 and 203 per Reid LJ. Also Moore \textit{Act of State} (1875), 75-83; Stephen \textit{History of Criminal Law} (1883), II, 65.
    \item \textsuperscript{13} (1608) Davies 28, 40 (KB).
    \item \textsuperscript{14} \textit{Id}.
    \item \textsuperscript{15} \textit{Id}.
\end{itemize}
conquests were inevitably made "Monarchy Royall" and proceeded to clarify the principles governing such a conquest.

The Case of Tanistry concerned the custom known as tanistry. Long part of the indigenous law of Ireland, this custom provided for the descent of land upon the eldest and worthiest male relative of the blood and name of the deceased. The criterion of "worth" was particularly significant since it often required and resulted in potential male heirs establishing their worth in a forceful and bloody manner. The Court found that the custom of tanistry was void and abolished when the common law was established in Ireland. The introduction of the common law was characterised as a gradual process rather than a pronounced act of the Crown but by the time the Court came to consider the custom of tanistry it found the introduction of English law into Ireland had been complete. The Court proceeded, however, to give judgment on the basis that the general introduction of English law had spared certain parts of brehon law affecting real property.16

The Court found customary law should have four "unseperable propertys".17 It should be reasonable, unambiguous, have continued without interruption from a time beyond the memory of the court and, finally, it ought not lift itself above or challenge but submit to the Crown's prerogative. The Court found that the inherent characteristics of tanistry challenged at least three of these criteria and, further, even were that not so, it had not been continuously applied in respect of the land in question whereover English rules of descent had frequently been adopted. The Court indicated that the custom's requirement of proof of worth was the "veray cause del barbarisme & desolation".18 It was a law of force and the cause of great bloodletting and other associated mischiefs. This made it both unreasonable and disruptive of the royal peace or, in other words, "prejudicall al profit & del Roy".19 Tanistry was also void for uncertainty since by its nature the identity of the person who as heir was to succeed to an estate was uncertain.20

The Case of Tanistry recognised the continued enjoyment by the native inhabitants of Ireland of their own customary laws subsequent to British sovereignty and the general introduction of English law, at least on the questions of land tenure and succession with which the case was directly concerned. The pre-colonial laws of the country survived the Crown's sovereignty provided they met the requirements of reasonableness, certainty, immemorial usage and compatibility with the prerogative (that is, sovereignty) of the Crown. That part of the aboriginal brehon law known as tanistry failed to meet these requirements.

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17 Davies 28, 80 ER 516.
18 Id, 520.
19 Id, 522-4.
20 Id, 523-4.
We will return to *The Case of Tanistry* at the close of this chapter. In the meantime it can stand as an early and important authority on two matters. First, it recognised that certain customary laws, those relating to title to property, survived a general introduction of English law. Secondly, where some continuity of the local law was acknowledged, it gave the criteria for the assessment of particular laws. The criteria adopted were substantially the same as those applied in English courts to questions of customary right.

b) *Calvin's Case* (1608) and the status of infidel laws

Even before *The Case of Tanistry* had provided the general test of the continuity of the pre-colonial law, Coke had limited the presumption in *Calvin's Case*.

It has been seen that *Calvin's Case* (1608) recognised two forms of territorial acquisition at common law, namely title by conquest and descent. Coke distinguished the conquest of the territory of a Christian king from that of an infidel finding that the ancient laws of the Christian kingdom were presumed to survive English conquest absent any act of suspension by the Crown. Coke indicated this presumption could not apply to the laws of an infidel power. Upon conquest these laws were abrogated *ipso jure* for "they be not only against Christianity, but against the laws of God and of nature contained in the decalogue".21 The newly-acquired territory was to be ruled by natural equity until provision was made for new laws. In addition, Coke distinguished between the different forms of aliens stating that an alien friend would be a subject of Christian sovereigns in league with the Crown. Other aliens were enemies of the Crown. This was a category into which Coke placed all infidels as "in law perpetui inimici, perpetual enemies (for the law presumes not that they will be converted, that being remota potentia, a remote possibility) for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual hostility, and can be no peace."22 Unlike alien enemies, the common law permitted alien friends to acquire and maintain actions for personal goods within the realm although it did not allow them to bring real actions or acquire real property other than for habitation.

There were a number of immediate difficulties with Coke's dicta in *Calvin's Case*. First, Slattery has described the authorities Coke used for his rule that infidels were perpetual enemies as "surprisingly weak".23 The scriptural passage Coke cited was a reference to spiritual rather than temporal discord between Christian and infidel. His excerpt from the Register stemmed from a writ of protection granted to the hospital of Saint John at Jerusalem. In reality the writ simply stated that the hospital was founded for the defence of the Church against enemies, hardly an affirmation, Slattery observes, that infidels were

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21 (1608) 7 Co Rep 1a, 17b.
22 Id.
perpetual enemies. Coke's third source was an opinion of Justice Brooke (1520) during which it was commented that if a lord beat his villein or a man his wife, an outlaw, traitor, or pagan, the victim would have no action in trespass being unable to sue.\textsuperscript{24} The opinion did not address the status of pagans and the reference to them, Slattery comments, was incidental and cursory.\textsuperscript{25} A second difficulty with Coke's dicta was that he contradicted elsewhere the position he had taken in\textit{Calvin's Case} on infidel status.\textsuperscript{26} In his\textit{Institutes} he affirmed that a Christian prince could conclude treaties of peace, consolation and commerce with infidel rulers. He also found that alien Christians and infidels occupied the same position so far as their ability to acquire real property within the realm was concerned.\textsuperscript{27} Coke confirmed the treaty-making capacity between Christian prince and infidel ruler in\textit{Michelborne v Michelborne} (1609)\textsuperscript{28} soon after\textit{Calvin's Case}. Thirdly and most fatally, Coke's views were challenged by the established practice of the time. By the beginning of the seventeenth century the Crown had been conducting formal relations by treaty with non-Christian societies for some decades. By Coke's time the most outstanding example would have been the Capitulations of the Porte (1580) with the Ottoman Empire whereby consular jurisdiction was obtained over English merchants in the Turkish territory. These capitulations, as indeed other treaties with non-Christian societies, were considered a thoroughly sound basis for the extra-territorial exercise of English law amongst the English merchants of the region. To have obtained overwhelming evidence of the contemporary assumption that the Crown was able to enter into treaty relations with infidel as well as Christian rulers Coke need only have perused the immensely popular editions of Hakluyt's\textit{Principall Navigations} wherein numerous instances of engagements between the Crown and non-Christian rulers would have been found. If infidels were perpetual enemies the Crown's prerogative power to enter into such treaty relations would have been limited to Christian princes - the proposition was inconceivable. It may be added that although the question of the status of infidel laws upon British conquest was a question distinct to that of the Crown's prerogative power to enter into treaties with non-Christian powers both related to the\textit{perpetui inimici} status Coke had given these societies.

Coke's dicta found some support during the seventeenth century. His views were reported by Callis in\textit{Reading ... Upon the Statute ... of Sewers} (1622).\textsuperscript{29} The point was made again before a Parliamentary Committee in 1647\textsuperscript{30} and\textit{Wingfield's Maxims} (1658).\textsuperscript{31} Coke's

\textsuperscript{24} (1520) \textit{YB}, Trinity Term, 12 Henry 8, fol. iii at iii.
\textsuperscript{25} \textit{Supra}, 14.
\textsuperscript{26} For a fuller analysis see Slattery, \textit{supra}, 15.
\textsuperscript{27} \textit{A Institutes} 155.
\textsuperscript{28} (1609) 2 Brownl & Golds 296 (CB).
\textsuperscript{29} Callis \textit{The Reading of That Famous and Learned Gentleman ... Upon the Statute of 23 H 8. Cap. 5 of Sewers} (1622), 23.
\textsuperscript{30} Referred to by Slattery "Land Rights of Indigenous Canadian Peoples", 16.
\textsuperscript{31} Cited in Goebel \textit{The Struggle for the Falkland Islands}, 104.
view was also manifest in the polemic surrounding Bacon's Rebellion in Virginia (1675), Fitzhugh's opinion (1683), the submissions by counsel in East India Company v Sandys (1683 - 85) and implicit in the opinion of Francis Fane in 1730 as counsel to the Board of Trade.

It is clear Coke's views on infidel status did not become the common law orthodoxy. The distinction between Christian and non-Christian systems of law received not even a passing mention in The Case of Tanistry, the nearest allusion being the reference to 'Conquest Seignorialis' and the barbaric aspect of the custom of tanistry. Barbaric law, it seems, was not considered as limited to the heathen. In an Anonymous case (1640) Littleton disapproved Coke's dicta as based upon a groundless opinion of Justice Brooke and as contrary to Christian principle. Infidels, he said, "are creatures of God, and of the same kind as we are, and it would be a sin in us to hurt their persons". In Blankard v Galdy (1693) Holt CJ commented that "in the case of an infidel country, their laws by conquest do not entirely cease, but only such as are against the law of God; and that in such cases where the laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity". This position was reiterated in the Privy Council Memorandum (1722). In Omichund v Barker (1744) Coke's dicta was derided by Willes CJ as contrary to scripture as well as common sense and humanity. Even the devils, he added colourfully, whose subjects Coke had said the heathen were, could not have worse principles. Lord Mansfield provided an authoritative dismissal of Coke's view in Campbell v Hall (1774) where he rejected the "strange, extrajudicial opinion" as the product of some residual crusading zeal. It was, he said, an "absurd exception" better left unmentioned for the honour of Coke.

The application of Calvin's Case to the New World settlements and the constitutional argumentation this produced during the eighteenth century was shown in the previous chapter. One problem with the removal of Coke's exception of the infidel laws from the presumption of continuity was that it rendered the British settlers in the New World notionally subject to Indian customary law. This, however, was nothing more than a theoretical result for the Crown had invariably pre-empted any such possibility by the grant of a charter to the English settlements. Nonetheless the very statement of it was enough to

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32 See the account in Washburn Red Man's Land/White Man's Law (1971), 43.
33 Epitomized in Smith, "English Criminal Law in Early America", 9-11. Fitzhugh was an eminent Virginia lawyer.
34 (1683-85) 10 St Tr 371 (KB). Jeffries CJ agreed (at 546) but inferred the Crown could remove this status by entering into relations with the tribes.
35 Referred to in Slattery "Land Rights of Indigenous Canadian Peoples", 18.
36 (1640), 1 Salk 46 (CP).
37 (1693), 2 Salk 411, 412.
38 (1722), 2 P Wms 75.
39 (1744) Willes 538, 542 (Ch). A like position was taken by Parker, CB reported in 1 Atk 21, 42.
40 (1774) Lo Ft 655, 744 (KB).
41 Id.
arouse the indignation of the American colonists and so assist their argument that English law had accompanied them across the Atlantic as their birthright. The criticism of the presumption of continuity as it applied to tribal law was, therefore, tendentious in that it encouraged the designation of the colonies as settled rather than conquered or ceded colonies. A forthright and early statement of the inherent exception of the British subject from non-Christian law was made by Daniel Dulany Sr (1728). He insisted the medieval precedents which recognised the continuity of the laws of conquered peoples could not apply without qualification in North America. These precedents involved territory inhabited "by civilised, sociable People, conversant with Arts, Learning and Commerce; that had Laws suited, and adapted to the Order, and Engagements of Society; by which, themselves, and others that went to live among them might be peaceably, and happily governed". He sarcastically dismissed the applicability of Indian law to the English settlers:

The native Indians, were rude, savage, and ignorant; destitute of Letters, Arts, or Commerce; and almost, of the common Notions of Right, and Wrong: A People, thus qualified, must make excellent Preceptors, for Englishmen! and shew (without doubt,) worthy Examples, for their Imitation!

The American belletrists' arguments found acceptance after the American Revolution, it has been seen, to the extent the designation as a settled colony became applicable to colonies with a non-Christian indigenous population as well as those originally desert and uncultivated. Equally, however, it became accepted that British colonists in conquered or ceded colonies held a birthright to the benefit of English law in their dealings inter se, the recognition of which did not require the charter of the Crown. In short, the common law recognised that English law applied to the British inhabitants of the Crown's colonies in their internal relations irrespective of the original constitutional status. The test was the suitability with which the pre-colonial law might be applied to the natural-born subjects and European population of the newly-acquired territory. Where its application was unsuitable the English law applied amongst the Christian population automatically and regardless of the constitutional status of the colony. Thus Stephen, Master in Chancery and the father of James Stephen, commented in Freeman v Fairlie (1828) that so far as the status of the pre-colonial law and the position of the non-indigenous inhabitants were concerned:

I apprehend the true general distinction to be, in effect, between Countries in which there are not, and Countries in which there are, at the time of their acquisition, any existing civil institutions and laws, it being, in the first of those cases, matter of

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42 William Fitzhugh had argued similarly in 1683, opinion epitomized by Smith, "English Criminal Law in Early America", 9-11.
43 "The Right of the Inhabitants of Maryland" (1728) reprinted in Sioussat The English Statutes in Maryland, App II, 82, 95-96.
44 Id.
45 (1828) 1 Moo PC, Ind App 306, 324-25 (Ch).
necessity that the British settlers should use their native laws, as having no others to resort to; whereas, in the other case there is an established *lex loci* which it might be highly inconvenient all at once to abrogate; and, therefore, it remains till changed by the deliberate wisdom of the new legislative power. In the former case, also, there are not, but in the latter case there are, new subjects to be governed, ignorant of the English laws, and unprepared, perhaps, in civil and political character, to receive them. The reason why the rules are laid in Books of authority, with the reference to the distinction between newly-discovered Countries, on the one hand, and ceded or Conquered Countries, on the other, may be found, I conceive, in the fact, that this distinction always, or almost always, practically corresponded with that, between the absence and the existence of a *lex loci*, by which the British settlers might, without inconvenience for a time be governed; for the powers from whom we had wrested Colonies by conquest, or had obtained them by Treaties of cession, had ordinarily, if not always, been civilised and Christian States, whose institutions, therefore, were not wholly dissimilar to our own. But, in the Settlements formed by the East India Company in Bengal, the case was very different, and one to which neither of the rules [regarding the law applicable in settled and conquered or ceded colonies] could possibly have entire application. The acquired territory was not newly discovered or uninhabited, but well peopled, and by a civilised race, governed by long-established laws, to which they were much attached, and which it would have been highly inconvenient and dangerous immediately to change. On the other hand, those laws were so interwoven with, and dependent on, their religious institutions, as Mahommedans or Pagans, that a great part of them could not possibly be applied to the Government of a Christian people.

The Law Commissioners of India came to a similar finding in their *Lex Loci Report* (1840) when they found English law had come to the Crown’s possessions in India as the birthright of the English subjects establishing permanent communities in non-Christian territory. The Commissioners adverted to Coke’s *dicta* on infidel status in *Calvin’s Case* and its outright dismissal by Lord Mansfield in *Campbell v Hall*. They indicated, however, that the principle of unqualified continuity of the native law recognised by Mansfield could hardly apply in the case of the Christian inhabitants of non-Christian territory. To that extent, therefore, they restored Coke’s *dicta* shorn of its more extreme aspect: The infidel laws enjoyed the common law presumption of continuity but the extent of their applicability was limited to the indigenous community. This meant the non-Christian pre-colonial law had acquired a personal character, the *lex loci* of the newly-acquired territory becoming English law. Although the non-indigenous inhabitants of the Mofussil such as the Armenians, Parsis, Christian Indians and Jews became subject to English law the indigenous people had their own laws to their dealings amongst themselves.

A recent Australian case *Milirrpum v Nabalco Property Ltd* has found that the application of the common law presumption of the continuity of the pre-colonial law

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46 Extracted in *Bera’mji v Rogers* (1867) 4 Bomb HCR 1 (Bomb HC), and see the response to this report, item 3, "Copies of the Special Reports of the Indian Law Commissioners" *PP* (1847), XLIII, 1, 607 et seq.

47 Similarly: *Fewson v Phayre* (1848) 2 Ind Dec (OS) 242, 246 per Peel CJ (Beng SC); *Maclean v Cristall* (1849) 4 Ind Dec (OS) 69, 77 per Perry CJ (Bom SC); *R v Willans* (1858) 3 Ky (MC) 16, 19 per Maxwell R (Ct Jud Pen); Minute of Sir E. Perry on the draft Act for a *Lex Loci*, 27 March 1845 (1847) *PP*, 3, 655; *Secretary of State v Administrator-General for Bengal* (1868) 1 BLR 87 (Beng HC).
depended upon the constitutional status of a colony. Blackburn J held that if a colony was settled rather than conquered or ceded it was to be equated with desert uncultivated land in which the sole law was English. The same reason underpinned the New Zealand judgments which held the Maori lacked sovereignty at the time they signed the Treaty of Waitangi, a conclusion already challenged. Since the Maori lacked the sovereignty to make a valid treaty of cession, the reasoning held, the colony was acquired by settlement and hence the only law which governed all inhabitants in their relations inter se was English. Maori customary law may have survived the Crown's sovereignty de facto but the reasoning concluded that it had not continued de jure. A recent commentator on New Zealand's constitutional history has accepted this view.

This position is misconceived on two counts. First, it overlooks the true basis for the application of the 'settled' classification to non-Christian territory. This practice was reviewed in the previous chapter. Secondly, it is clear that the presumption that non-Christian law would continue to govern the relations of the indigenous population inter se was applied without any reference to the constitutional status of the colony. Stephen intimated in Freeman v Fairlie that the same result would have eventuated were the territory technically treated as a settled colony: the native population would have had their own law, the non-indigenous inhabitants would have had English law. In Attorney-General (British Columbia) v Calder Hall J found that Mansfield's propositions in Campbell v Hall, particularly those recognising the continuity of the pre-colonial laws and property rights, had applied a fortiori in settled colonies. Were this not the case an indigenous population which had not exerted any forcible resistance to British colonisation would have been placed in a less advantageous position than those populations which had.

In summary, English persons inhabiting non-Christian territory held the birthright to English law in their relations inter se independent of the grant of the Crown (which was essential nonetheless for the formal constitution of the courts wherein the birthright could be exercised). This did not displace the common law presumption of the continuity of the pre-colonial law so much as limit its applicability to the indigenous population. This result was not a function of the constitutional status of the colony but a response to the non-Christian character of the pre-colonial law. The exemption of the non-indigenous population from the aboriginal law (that is, the transformation of the customary code from a territorial to personal character) was, therefore, a qualification upon the common law presumption of the

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48 (1971) 17 FLR 141 (Aust NTSC)
50 Williams "The Use of Law in the Process of Colonization", ch 2.
51 (1828) 2 Moo PC, Ind App 306; 18 ER 117 at 130.
52 (1973) 34 DLR (3d) 145 (SCC) at 199.
continuity of the pre-colonial law.

3. the introduction of English law

The common law presumed the continuity of the tribal law but also acknowledged that the indigenous inhabitants could have lost the customary code de jure in either of two ways: First, the tribal law might have been suspended by an act of state during the process of acquisition of the sovereignty. Secondly, and presupposing no such disruption, the tribal law might have been superceded subsequent to the Crown’s sovereignty by a general introduction of English law.

a) the introduction of English law by an ‘act of state’

The act of state doctrine recognises the plenary power of the Crown in the conduct of the foreign affairs of the nation to perform certain actions unreviewable in her courts.\(^53\) In particular, the courts have refused to locate any source of right in an act of state made by the Crown.\(^54\) For example, special promises made in a treaty could not be enforced\(^55\) nor could the arbitrary seizure of an alien’s property outside the Crown’s dominions be challenged.\(^56\) Under this recognised power the Crown could announce the introduction of English law to territory then being acquired and the courts would be bound to give any such stipulation unquestioned effect.

The Crown made no act of state as it acquired the sovereignty over New Zealand by which it indicated an intention to make the Maori tribes amenable to English law. Indeed the recognition of rangatiratanga in the Maori text of the Treaty of Waitangi was an express stipulation otherwise. Maori customary law was not suspended by an act of state of the Crown during its acquisition of the sovereignty.

b) the introduction of English law by charter of the Crown

\(^{53}\) An 'act of state' has been defined as an "act of the executive as a matter of policy performed in the course of its relations with another state, including its relations with the subjects of that state, unless they are temporarily within the allegiance of the Crown": Wade "Act of State in English Law: Its Relations with International Law" (1934) 15 BYIL 98, 103.

\(^{54}\) Secretary of State in Council of India v Kamachee Boye Sahaba (1859) 13 Moo PC, Ind App 22; Nabob of Arcot v East India Company (1793) 2 Ves 56; Gibson v East India Company (1839) 5 Bing N C 262; Doss v Secretary of State for India in Council (1875) LR 19 Eq 509; Rustomjee v R (1876) 2 QB 69 (CA); Rajah of Coorg v East India Company (1860) 29 Beav 300; Sirdar Bhagwan Singh v Secretary of State for India (1874) LR 2 Ind App 38; Cook v Sprigg (1899) AC 572 (PC); West Rand Central Gold Mining Co v R (1905) 2 KB 391, 408-10; Salaman v Secretary of State for India (1906) 1 KB 613; Oyekan v Adele (1957) 2 All ER 785 (PC).

\(^{55}\) Nabob of Arcot v East India Company (1793) 2 Ves Jun 56 (Ch); Vajesingji Joravasingji v Secretary of State for India in Council (1924) LR 51 Ind App 357, 360 (PC); Hoani Te Heu Heu Tukino v Aotea District Maori Land Board [1941] AC 308 (PC).

\(^{56}\) Buron v Denman (1848) 2 Exch 167; Johnstone v Pedlar [1921] 2 AC 262, 271 per Lord Finlay (HL).
The common law recognised the prerogative power of the Crown to introduce English law to her colonies. In conquered or ceded colonies this introduction could be completed by prerogative legislation or the exercise of the constituent power whilst in settled colonies any general introduction of English law was normally performed through the exercise of the prerogative constituent power to erect courts of judicature for the colony. The most important guide to the introduction of English law, therefore, was usually the charter of the Crown. Since the Crown invariably exercised a constituent power for its overseas possessions, the British Honduras and Pitcairn Island were the exceptions which proved the rule, the common law presumption of the continuity of the pre-colonial law needed to be read in tandem with the charter of the colony.

It was an established rule by the early nineteenth century that where the Crown established courts with a territorial jurisdiction, that is jurisdiction over all the inhabitants of its territory, these courts were to dispense English law. The establishment of courts with a territorial jurisdiction therefore amounted to a general introduction of English law. In consequence, the applicability of English law extended to the indigenous inhabitants unless they could establish some exemption from its application. The subsequent restoration of native law by statute aside, some such exemption could be expressly recognised in the Crown’s constituent instruments or implied by the courts from the circumstances of the colony. The exemption from English law could be partial or it could be virtually complete in that it left the indigenous tribunals and legal institutions, in particular their system of criminal justice, substantially intact notwithstanding the general application of English law to the non-indigenous population.

Prior to the annexation of New Zealand in the mid-nineteenth century there were two important examples of non-Christian legal systems which had survived the Crown’s sovereignty and exercise of its constituent power. The legal system of the American Indian and the Mughal machinery of justice in the Mofussil both enjoyed de jure status. What, it may be asked, was the basis of this status? The short answer is that it may have originated from the presumption of the continuity of the indigenous law but was more closely tied to the terms of the Crown’s exercise of its constituent power over its territory. This position is confirmed by a brief analysis of the basis upon which the American Indian and Mughal systems of justice remained substantially intact.

57 eg: Blankard v Galdy (1693) 2 Salk 411; Memorandum (1722) 2 P Wins 75; Campbell v Hall (1774) 1 Cowp 204; Jephson v Riera (1835) 3 Knapp 130 (PC); (1836-37) Mayor of Lyons v East India Company 1 Moo PC, Ind App 175; Perozeboye v Ardaseer Cursetjee (1843) 2 Mor Dig 336, 4 Ind Dec (OS) 614 (Born SC); Fewson v Phayre (1848) 2 Ind Dec (OS) 242 (Beng SC); Secretary of State v Administrator-General for Bengal (1868) 1 BLR 87 (Beng HC).

58 The English inhabitants already had English law, of course, as their birthright. The Crown’s exercise of the constituent power, unless provision was or had been made elsewhere (as by legislation), was usually taken as providing the date from which the reception of English law was timed.

59 Attorney-General (ex parte Magistrates of Banff) v Stewart (1817) 2 Mer 143 (Ch); Mayor of Lyons v East India Company (1836-37) 1 Moo PC, Ind App 175; R v Williams (1858) 3 Ky (MC) 16 (Ct Jud Pen); Advocate-General (Bengal) v Ranee Surnomoye Dossee (1863) 9 Moo PC, Ind App 387.
i) the legal status of the American Indian legal system

The Stuart charters for the New World were issued at a time when the orthodox doctrine of territorial sovereignty had yet to emerge. These charters combined claims to a territorial title as well as personal jurisdiction, a feature which led to Marshall CJ's early nineteenth century formulation of tribal status. Typically, the charters constituted a government and judicial institutions enforcing the English-styled law over the white settlers of the colony. The unmistakable negative inference of this was the non-disruption *de jure* (for it could hardly have been accomplished *de facto* by sweep of the royal pen) of the Indian *lex loci* amongst themselves. To take an example, the New England charter (1620) granted the Plymouth Company...

...full and absolute Power and Authority to correct, punish, pardon, govern, and rule all such the Subjects of Us ... as shall from time to time adventure themselves in any Voyage thither, or that shall at any Time hereafter inhabit in the Precincts of Territories of the said Collony, as aforesaid, according to such laws, Ordinances, Directions, and Instructions as by the said Council aforesaid be established.

The charter limited the exercise of the legislative and judicial power to English settlers and those living within the precincts of the settlements notwithstanding its claims elsewhere to the sovereign title of vast areas of territory much of which was inhabited by Indian tribes. Colonial practice, both legislative and judicial, generally conformed with this personal limitation. When Marshall CJ came to assess the status of the Indian tribes he could speak of the 'domestic, dependent nations' who retained their laws and self-government within their own lands. He found the Indian tribes were not subjects of the Crown or its successor the United States government until they had been subdued or voluntarily submitted by treaty. The continuity of the Indian law, in particular their system of criminal justice, was thus associated with their residual sovereignty acknowledged and observed by the Crown and United States government. As a result, during the early nineteenth century most tribes retained the power to deal with offenders on Indian land and intra-Indian matters regardless of location. Later treaties required the Indians to surrender non-Indians who committed crimes on Indian land to federal authorities at the reservation border. No tribes surrendered the power to deal with Indians committing serious crimes against one another, their

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60 CC, III, 1827, 1833.
61 The Canadian courts also observed the personal limitation of the courts' jurisdiction under royal charter, Connolly *v* Woolrich (1867), 11 LCF 197, 213-4 (Que SC). The charter of the Hudson's Bay Company (1670) introduced English law "but did not, at the same time, make it applicable generally or indiscriminately - it did not abrogate the Indian laws and usage" per Monk J, approved on appeal sub nom Johnstone *v* Connolly (1869), 1 RLOS 253, 270-2 per Loranger J (dissenting), 355-8 per Bagley J, 376-7 per Mackay J, 396 per Caron and Duval, JJ.
62 The Marshall cases are discussed above, chapter 2. Also United States *v* Wheeler (1978), 435 US 313, 55 L Ed 2d 303, esp 312-3 (SC) for a full, recent analysis.
64 Mason "Canadian and United States Approaches to Indian Sovereignty" (1983), 21 Osg HLJ 421, 454.
retention of this power being confirmed by the Supreme Court in *ex parte Crow Dog* (1883). Some years earlier, however, the Supreme Court had qualified its recognition of Indian sovereignty by holding that Congressional legislation could diminish incidents of this sovereignty. This important judgment recognised for the first time the tribes' subordination to the legislative authority of the United States. Previously the Marshall doctrine had recognised them as wholly independent nations subject to the United States only in that it was the exclusive government with which the tribes could have 'foreign' relations. Congress' response to the *Crow Dog* decision, therefore, was to assert ultimate sovereignty by giving federal courts jurisdiction over serious crimes on reservations. The judicial reduction of the jurisdiction of the tribal authorities on criminal matters was underlined by the holding that relations between tribal members and non-members were without the tribal jurisdiction.

Despite this reduction of Indian sovereignty by judicial and Congressional inroad, it is clear that unlike the tribal criminal jurisdiction the continuity of the Indian customary law on most civil matters was not linked to any residual sovereignty. The American courts constantly recognised the validity of Indian marriages, laws of descent and property ownership without characterising these customs as an emanation from their residual sovereignty.

ii) the status of the Mughal legal system in the Mofussil

The Crown's first exercise of a constituent power for the Mofussil subsequent to the victory at Plassey (1757) and subsequent grant of *diwani* (1765) were letters patent establishing a Supreme Court for the Bengal (1773) which, like the Regulating Act, limited the Court's jurisdiction to British subjects and servants of the East India Company. The intention of the Act and letters patent was to except the indigenous Hindu and Muslim communities from the Court's jurisdiction and hence amenability to English law. The indigenous population were to be left to the jurisdiction of the courts of the *diwan* administered by the East India Company. The problem with this approach was that the

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65 (1883), 109 US 556 (SC).
66 Cherokee Tobacco *v* United States (1871) 78 US 619 (SC); also United States *v* Kagana (1886) 118 US 375 (SC); The doctrine of Congressional legislative supremacy found its fullest expression in *Lone Wolf* *v* Hitchcock (1903) 187 US 553 (SC) and has become known as "The Lone Wolf Doctrine".
67 The same year Congress passed an important law (3 March 1871, 16 Stat 566) stipulating the Indians were no longer treated as independent nations, and compacts with them were styled "agreements" instead of "treaties". This year was, therefore, significant for its impairment of tribal sovereignty.
68 *Oliphant* *v* Suquamish Indian Tribe (1978), 435 US 191; *United States* *v* Wheeler (1978) 435 US 313; *UNC Resources, Inc* *v* Benally (1981) 514 F Supp 358 (DNM)
70 13 Geo 3 c 63.
71 Text in "Reports on the Administration of Justice, & c, in the East Indies" (1781), Gen App 1, in *Reports from Committees of the House of Commons* (1st ser), V.
preamble of the Regulating Act spoke of the "Territorial Acquisitions" of the Crown. If the Mofussil had been acquired in sovereignty by the Crown then all the inhabitants, Hindu, Muslim or otherwise, were subjects of the Crown and hence under the jurisdiction of the Supreme Court erected in 1774. The contrary explanation, and it was one initially preferred, was that the Crown had no sovereignty over the Muslim inhabitants but merely the status of diwan under and subject to the Mughal law. In this sense the East India Company was no more than an agent of the Mughal dispensing his justice to the Hindu and Muslim population of the Mofussil. Thus Hastings' Regulations (1772), issued the year before the Crown constituted any legislative authority in the region, were based on their lawfulness under Mughal rather than English law. By the end of the eighteenth century, however, it was impossible to maintain the fiction of Mughal sovereignty. Once this became apparent the exercise of a legislative power over the indigenous inhabitants of the Mofussil by the East India Company derived validity from English rather than Mughal law. The Mughal system of criminal justice survived subject to rather than independently of the Crown's sovereignty, its continued viability resulting from the personal jurisdiction given the Supreme Court for the Bengal.

North America and the Mofussil provided important examples of the legal survival of the indigenous, non-Christian system of criminal justice amongst the native inhabitants subsequent to the Crown's sovereignty. It is significant, however, that in both cases the continuity of these systems was linked to the perceived absence of British sovereignty over these people. In the United States the tribes were termed 'domestic, dependent nations' whilst the East India Company initially styled itself as diwan under Mughal authority rather than the full sovereign of the Mofussil. The exclusion of the Indian tribes and Hindu and Muslim communities from the English criminal law was thus associated with their lack of the status of British subject. When it became clear that the Crown had sovereignty over these people the continuity of the native tribunals and system of criminal justice became incorporated into the domestic law and resulted not from any independent sovereignty, as before, but the sufferance of the Crown or, in the case of the American.

72 The problem with the interpretation of the phrase "British subjects" was discussed in the letter of the Judges of the Supreme Court, September 1830, App in "Report on the affairs of the East India Company" (1831) PP, VI, Pt 5; Stephen Nuncomar and Impey, II, 126-7; Archbold Outlines of Indian Constitutional History, 63-78. The phraseology was continued in the Settlement Act, 1781, 21 Geo 3 c 65. In Bombay, however, 'British subject' was interpreted to include Hindus and Muslims because the town had been acquired by cession from Portugal, there being no native courts: Perozeboye v Ardaseer Cursetjee (1843) 4 Ind Dec (OS) 614 (Bomb SC).

73 This was Warren Hastings' position: Archbold Outlines of Indian Constitutional History, 53-59; also Cowell History and Constitution, 19; Firminger Fifth Report, vii - xiii.

74 13 Geo 3 c 63, section 7.

75 Ilbert Government of India, 43-44; Firminger Fifth Report, xii; R v Shaik Boodin (1846) 4 Ind Dec (OS) 397, 423 (Bomb SC).

76 13 Geo 3 c 63, section 7 and 21 Geo 3 c 65, section 23. Numerous regulations for the administration of justice amongst the natives of the Mofussil were enacted under this power, eg Regulations of 11 April, 1780 (Archbold Outlines of Indian Constitutional History, 76-78) and the Cornwallis Regulations (1793). See Secretary of State v Administrator-General for Bengal (1868) 1 BLR 87 (Beng HC).
Indian, United States. The allowance of the indigenous system of criminal justice was indicated by the personal jurisdiction the Crown had given its courts of the territory.

The principles which underlay the continuity of the American Indian and Mughal (Mofussil) criminal justice systems were further illustrated by the early to mid-nineteenth century inquiries into the applicability of English law to the Australian Aborigine. During the first half of the nineteenth century English persons had committed various atrocities against native individuals. The colonial authorities insisted that the Aborigines as subjects of the Crown were under the full protection of British law, a position confirmed by the Select Committee on Aborigines (1837). This meant not only protection by but also Aboriginal amenability to English law, a result explained on two bases: First, the common law presumption of the continuity of the pre-colonial law was held inapplicable to the Aborigines who to the British eye were far and away the most primitive, scarcely human some influential commentators of the time felt, aboriginal race they had encountered. Secondly, even were the presumption of continuity to have applied, the Crown had introduced English law to Australia not only by statute but in its constituent instruments for the colony and continent. On either basis, the Australian Aborigines were amenable to English law. Speaking for Govenor Gipps, the Colonial Secretary put it this way (1842):

... even if the Aborigines be looked upon as a conquered people, and it be even further admitted that a conquered People are entitled to preserve their own Laws until a different law be proclaimed by the Conqueror, still no argument in favor of a separate Code of Laws for the Aborigines of New South Wales can be drawn therefrom, first, because the Aborigines never have been in possession of any Code of Laws intelligible to a Civilized People, and secondly, because their Conquerors (if the Sovereigns of Great Britain are so to be considered) have declared that British Law shall prevail throughout the whole Territory of New South Wales.

Gipps recommended, however, the adoption of a policy which forebore the rigorous application of English law to the Aborigines. He realised their technical amenability but advised a policy of lenient enforcement. In South Australia, however, George Grey, later Governor of New Zealand, was recommending the immediate and strict rather than gradual application of English law to the criminal relations of the Aborigines both with one another and the colonists. He felt any other policy would frustrate their assimilation into white

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77 Hunter to Portland, 2 January 1800 HRA, 1st ser, II: 401-2; Atkins to King, 8 July 1805 HRNSW, 653-4 (but observing that bringing an Aboriginal before a Criminal Court "would be a mockery of judicial proceedings, and a solecism in law"); Glenelg to Bourke, HRA, 1st ser, XIX: 48-9; Gipps to Glenelg, 19 December 1838, id, 700-4 (reporting execution of whites tried for the 'Myall Creek massacre' of Aboriginal women and children); R v Congo Murrell (1836) 1 Legge 72 (NSWSC); Gipps to Stanley, 24 January 1842 HRA, 1st ser., XXI: 653-4 (enclosing views of Willis J, controverted in Stanley to Gipps, 2 July 1842, id, XXII: 133).
78 PP (1837), 7, #425, 80-84.
80 Similarly, Select Committee on Aborigines Report, supra, 80, 84; Dowling J. to Gipps, 8 January 1842 HRA, 1st ser, XXI: 656 (reporting courts have Jurisdiction over Aboriginal crimes inter se but noting the policy of lenient enforcement and "great infrequency of such cases").
society.  

It must be stressed that the position taken in North America, the Mofussil and Australia all related to the applicability or otherwise of the English criminal law to the native population. The relevant documentary evidence often did not make this clear speaking in terms which divorced from the context might suggest the aboriginal amenability to the English law included the whole of its aspects civil as well criminal. The circumstances of each colony, however, made it clear that in either exempting or subjecting the aboriginal population from the jurisdiction of its courts, the Crown was stating its position on the amenability of the indigenous communities to the English criminal law. So far as the civil aspect of English law was concerned there is no evidence of an attempt to apply or even a belief that it did so apply to the aboriginal population except, perhaps, in civil disputes with non-indigenous persons. We will see shortly the basis up on which the continuity of the native ‘civil’ law rested notwithstanding the general introduction of English law to the colony.

c) qualifications upon the general introduction of English law

The general introduction of English law by charter of the Crown did not import the total suspension de jure of the pre-colonial law. Neither the Crown and its representatives nor the judiciary were so inflexible as to dissociate the situation de jure from that obtaining de facto. It would have been an impossible result were the general introduction of English law to have supplanted completely all the customary laws of the indigenous inhabitants. In Doe dem Silveira v Texeira (1845) Anstruther R thought "such a proposition to have been, in the very statement of it, sufficient to carry its own refutation." Although the general introduction of English law might have ousted the customary laws of criminal justice the courts still recognised some viability of the customary law in the ‘civil’ relations of the indigenous inhabitants. The basis of this was the important qualification upon the introduction of English law to a colony that it was only imported to the extent it suited local circumstances. This rule was enforced by the courts irrespective of the way in which English law had come to the colony whether by ‘birthright’ (in which case its application was limited to the British inhabitants) or charter of the Crown. The rule was used by the courts, particularly in the East Indies’ Presidency towns, to recognise the continuity of native laws, especially those concerning title to property.

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81 Grey to Russell, 4 June 1840 CO 201/304: 245-63 (report enclosed).
82 At least initially, in the late nineteenth century it was held the Aboriginal law on civil matters inter se (marriage, adoption, etc) was not cognisable: R v Neddy Monkey (1861) 1 W & W (L) 40 at 41 (per Barry, J) (customary marriage an evidentiary matter); R v Cobby (1883) 4 LR (NSW) 355 at 356 (per Martin CJ) (Aborigines "have no laws of which we can take cognisance"). Also Law Reform Commission Recognition of Aboriginal Customary Law (1986), paras 39-48, 237, 899-900.
83 (1845), 4 Ind Dec (OS) 529 (Bomb R Ct).
This qualification upon the introduction of English law had developed during the early eighteenth century as the applicability of particular aspects of the English common and statute law to the American colonies was assessed. In 1724 the law officers advised that the colony of Jamaica was bound by "such acts of parliament as have been made in England, to bind the plantations in general, or Jamaica in particular, and also such parts of the common, or statute law or England, as have, by long usage, and general acquiescence, been received, and acted under, there, though without any particular law of the country for that purpose". In 1757 the law officers considered the applicability to Nova Scotia of English statutes prohibiting the counterfeiting of coins. They advised that "the proposition adopted by the judges there, that the inhabitants of the colonies carry with them the statute law of this realm, is not true, as a general proposition, but depends upon circumstances, the effect of their charter, usage, and acts of their legislature; and it would be both inconvenient, and dangerous, to take it in so large an extent". Blackstone omitted the rule from the first edition of the Commentaries but corrected this, evidently at the suggestion of Mansfield, in the second edition. Mansfield himself recognised the rule in \textit{R v Vaughan} (1769) and \textit{Campbell v Hall} (1774). The rule was certainly well-established by the last quarter of the eighteenth century and by the middle of the nineteenth was being invoked by the colonial bench as a matter of course. For instance, the rule was used to assess the introduction of the feudal doctrine of tenures into the colonies - an example to which we will return in the next Part, the usury laws of England and the Statute of Mortmain.

The qualification upon the introduction of English law to a colony left the "insoluble difficulty" of deciding the extent to which the various aspects of English law were introduced. Judicial determination as well as local legislation resolved the uncertainty and to that extent the former amounted to quasi- if not legislative activity. Nonetheless in reaching

\begin{footnotes}
\footnote{84 eg Anon \textit{Government of the English Plantations} (1701), 23; Smith Jr \textit{History of the Province of New York} (1756), 259; Burke \textit{European Settlements in America} (1757), II, 295-7.} \footnote{85 Chalmers \textit{Opinions}, I, 203, 220.} \footnote{86 Id, 198.} \footnote{87 Wilson \textit{Works}, ed Andrews, 1895, I, 19, nn 1 and 2.} \footnote{88 \textit{Bla Comm} (2nd ed), 107.} \footnote{89 4 Burr 2494 98 ER 308, 311.} \footnote{90 1 Cowp 204.} \footnote{91 \textit{R v Steel} (1834) 1 Legge 65, 68 (NSWSC); \textit{Attorney-General v Brown} (1847) 1 Legge 312 (NSWSC); \textit{Doe dem de Silveira v Texeira} (1845) 4 Ind Dec (OS) 529 (Bom SC); \textit{Bera'mji v Rogers} (1867) 4 Bomb HCR 1 (HC Bom).} \footnote{92 \textit{Macdonald v Levy} (1833) 1 Legge 39 (NSWSC).} \footnote{93 \textit{Attorney-General (ex parte Magistrates of Banff) v Stewart} (1817) 2 Mer 143 (Ch); \textit{Mayor of Lyons v East India Company} (1836-37) 1 Moo PC, Ind App 175, 276; \textit{Doe d. Anderson v Todd} (1846) 2 UCQB 82 (QB Upper Can).} \footnote{94 Keith \textit{First British Empire}, 186. As early as 1701, Anon \textit{Government of the English Plantations}, had spoken of "the Crooked Cord of a Judge's Discretion" (at p 23) on the extent to which English law applied in a colony. Sir J. Grant, minute to Governor-General of India in Council, 17 April 1845, "Special Reports of Indian Law Commissioners" \textit{PP} (1847), vol 43, 664, 675 termed the courts' power "quasi-legislative". Stephen, minute, 29 September 1842 CO 209/14: 360, 362 noted the rule required the "arbitrament of a Judge - often a prejudicial, and I should say, invariably an ignorant or ill-informed Arbiter in such Matters". The task was better suited, he felt, to Legislators.}
this determination the judges took account of the practice within the colony, variously
described as "usage" and "general acquiescence". This meant that the general indeed any
introduction of English law to a colony was qualified by the way in which the inhabitants
had subsequently ordered their affairs. Where a local practice was inconsistent with the
application of a particular English rule judges would decline to enforce it unless it could be
proven the rule had been specially introduced.

This was the basis upon which the courts of the Presidency Towns of the East Indies
exempted the indigenous inhabitants from the rules of English law governing such matters
as title to property, succession, marriage and even the inessential rules of the criminal law.
The application of these rules of English law to the Hindu and Muslim population was
inconsistent both with the means by which the Crown had acquired the sovereignty of the
towns as well as local practice subsequent to the acquisition of the sovereignty and
introduction of English law. A leading account of the relevant principles was given by the
Privy Council in Mayor of Lyons v East India Company (1836-37). Having found no special
introduction of the English law incapacitating aliens from holding real property, Lord
Brougham proceeded to discuss the extent to which the general introduction of English law
into Calcutta (by the charters of 1726 and 1753) had brought with it this particular law.

... it might have been said that the general application of the English laws implied
that of the portion in question. But the acts of the power which alone could introduce
this portion, and which alone introduced the English laws generally, show that it was
introduced not in all its branches, but with the exception of this portion at least. This
must be admitted, unless it can be maintained that there is no possibility of
introducing the English laws at all, without introducing every part of them, which
clearly cannot be asserted; for notwithstanding the extent to which these laws have
been introduced, it is allowed on all hands that many parts of them are still unknown
in our Indian dominions.

In other words, though the general applicability of English law in Calcutta was admitted, the
extent to which a particular rule or branch would apply depended upon the proof of its
actual adoption. Where some other rule was proven to have been applied to the affairs of
the indigenous inhabitants by "usage" the applicability of English law would be qualified to
that extent. In Advocate-General (Bengal) v Ranee Surnomoye Dossee (1869) the Privy
Council held that although English law had been generally introduced to Calcutta by the
charter of the Crown, the application of the rule of English law of *felo de se* with
consequent forfeiture did not apply to the Hindu community. Lord Kingsdown noted that
"the application of the criminal law of England to natives not Christian, to Mahomedans and
Hindoos, has been treated as subject to qualifications without which the execution of the law

95 (1836-37) 1 Moo PC, Ind App 175, 274.
96 *Id*, 284. This method was followed Advocate-General v Ranee Surnomoye Dossee (1863), 9 Moo PC, Ind App
392 (Ben SC); Sarkies v Prosonomoyee Dossee (1881) 6 ILR (Cal) 794, 796 (Cal HC).
would have been attended with intolerable injustice and cruelty". Certain rules of the English criminal law associated with what might be termed 'victimless crimes' were thus held not to have been wholly introduced into Calcutta on the grounds of the unsuitability of their application to the circumstances of the natives. A caveat was made in *R v Willans* (1858) when Maxwell R warned that the rule that English law was only introduced to the extent suitable to local circumstances could not be used as a basis for the complete exception of the non-European population from English law. He stressed the primary test was the situation obtaining *de facto*, the actual usage of the colony, rather than the mere non-Christian status of those inhabitants seeking the exemption from a particular rule of English law. Since Penang had a variety of inhabitants, European, Malay, Hindu and Chinese, none of whom were aboriginal, he found that the rule could only be narrowly invoked otherwise these people "would all be living on the same soil, each according to their own law."

The continuity of the indigenous 'civil' law on the basis that the application of English law was unsuitable to their circumstances was implicitly a transitional arrangement. Once the natives had adopted the English practice in matters such as marriage, descent and suchlike, the English law would apply to their civil relations *inter se* as fully as it did their criminal. This premise was not one applied by the judicial assessment of the state of 'civilisation' attained by the native community at large, so much as a function of the situation of the indigenous litigants before the court. In *Re Noah Estate* (1961) Sissons J considered the applicability of Inuit customary law to the deceased Noah's estate:

Noah had left his father's house and community and Eskimo society and had become part of another society and economy where different laws and customs prevailed. He accepted those laws and customs. He trained for a job, and he worked for wages and saved a fair part of his wages and deposited this money in a bank to his credit for the use of himself and his own family. He did not make this money available to his father and the Eskimo community at Broughton Island.

Accordingly, English rather than customary law applied to Noah's estate.

Far from taking an inflexible approach to the interpretation of the introduction of English law by the Crown the common law conceded an approach which was flexible and pragmatic. It recognised that any importation of English law into a colony as regarded both the British and indigenous inhabitants could not result in the unqualified application of the

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97 (1863) 9 Moo PC, Ind App 387, 427.
98 (1858) 3 Ky (MC) 16 (Ct Jud Pen); similar warning was made by Sir J Grant, minute to Governor-General of India in Council, 17 April 1845, *supra*, 667.
99 *Id*, 28.
100 (1961) 32 DLR (2d) 184, 206 (NWITC).
101 Similarly: *The Case of Tanistry* (1608) Davies 28 (English rules of descent had been used for the particular land); *Adebola v Folaranmi and others* (1921) 3 Nig LR 81 (FC) (natives had converted to Christianity and given up customary laws).
rules of English law. This meant, however, that the status of a particular rule of English law was subject to the accident of litigation or clarification by local legislation. Until then, the "usage" of the colony could affect the applicability given it by the colonial courts. The relations of the indigenous community *inter se* and with the British inhabitants were a prime example of this process. The "usage" adopted in a colony where there had been a general introduction of English law did not undermine the general applicability of English law so much as amplify the extent to which the Crown intended it should govern a particular aspect of colonial life.

Apart from the review given above it is difficult to produce a sophisticated summary of the common law principles governing the relation of native law to English law subsequent to the Crown's general introduction of the latter. There was not a great deal of reported litigation other than from the East Indies. The cases from that region as well as several North American cases recognised the continuity of native customary laws of succession, adoption, marriage, and, importantly, land tenure, subsequent to the Crown's sovereignty and the general introduction of English law. Even the early Australian position which held the Aborigine subject to the English criminal law in their criminal relations *inter se* did not go so far as to hold all Aboriginal law suspended with the general introduction of English law, a position taken, however, towards the end of the nineteenth century. It is clear that the common law cushioned the application of English law to non-Christian societies at least to the extent of their civil relations. Although this was a position upon which the common law developed but the most general of principles it nonetheless highlighted the deep-seated character of the presumption of the continuity of the pre-colonial laws. The common law was not so insensible as to act as though the general introduction of English law should be comprehensive and take little account of the peculiarities of the community which in the application it was meant to serve. The common law recognised that the indigenous population was to be weaned onto English law as much as that was consistent with the terms of the Crown's charter and other formal conduct. Usage exempting the indigenous community from English law could become a matter of judicial cognisance, and, in turn, the natives could by their conduct adopt rules of English law from which their circumstances had previously excepted them.

C. THE STATUS OF MAORI CUSTOMARY LAW

The application of the relevant principles to the status of Maori customary law upon British annexation is straightforward: Maori customary law survived the Crown's sovereignty over New Zealand. English law superceded the tribal code on matters incidental to the sovereignty of the Crown and where the latter included customs repugnant to 'fundamental principles' of English law. The tribe members' acquisition of the status of British subjects
occurred with the annexation and did not affect this continuity. No act of state was performed by the Crown as it acquired the territorial sovereignty disrupting this continuity. Indeed, the Maori text of the Treaty of Waitangi recognised the *rangatiratanga* of the chiefs and so was probably an express saving of the customary code. Moreover, the English text of the Treaty provided for the Maori to have the "undisturbed" enjoyment of their property including their forests and fisheries. This provision presupposed the continued viability of customary law at least in its definition of the traditional (real and personal) property rights. Nonetheless English law was introduced with the Crown's sovereignty as the law governing the relations of the settlers *inter se*. This law might have arrived in New Zealand earlier by virtue of the 'birthright' of the British settlers but, even were this the case, its formal establishment required the Crown's exercise of a constituent power (which it would not undertake until the Maori had signified their formal consent). English law could only have become applicable to the Maori tribes by formal extension of the Crown.

The major determinant of the status of Maori customary law subsequent to British sovereignty therefore was the manner in which the Crown had exercised its constituent power for the colony. The first constituent instruments for New Zealand were drafted towards the end of 1840 once the Colonial Office had been informed of Hobson's formal annexation of the country. Strictly speaking, the first constituent instruments for New Zealand were the charters and commissions for the colony of New South Wales to which it had been initially annexed.¹⁰² This, however, was never more than an interim measure calculated to give the Crown the breathing space in which to draft and promulgate proper and particular constitutional instruments for the colony. These documents rather than the constituent instruments for New South Wales represented the Crown's formal position on the status of Maori customary law.

The first charter for the colony was issued under the authority of the New South Wales Continuance Act 1840.¹⁰³ The charter authorised the establishment of local courts and the appointment of the requisite personnel:¹⁰⁴

And we do hereby authorize and empower the governor of our said colony of New Zealand for the time being, to constitute and appoint judges, and in cases requisite, commissioners of oyer and terminer, justices of the peace, and other necessary officers and ministers in our said colony, for the due and impartial administration of justice, and for putting the laws into execution, and to administer or cause to be administered unto them such oath or oaths as are usually given for the due execution and performance of these offices and places, and for the clearing of truth in judicial

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¹⁰² Stephen to Labouchere, 18 May 1839 CO 209/4: 243; Stephen to Normanby, 7 June 1839 CO 209/5: 78. Act declaring the laws of New South Wales extend to Her Majesty's Dominions in New Zealand (NSW), 16 June 1840, 3 Vict No 28 "so far as the same can be applied in the administration of justice therein" (section 1). These laws were never applicable in New Zealand, it becoming a separate colony before the Act took effect: opinion of Fisher, 11 May 1841 CO 209/9: 190, so the colonial assembly passed an Ordinance similar to the NSW Act: Ordinance No 1, 1841, 4 Vict sess 1.

¹⁰³ 3 & 4 Vict c 62, section 2.

¹⁰⁴ *PP* (1841), #311; 32.
The charter did not stipulate that English law was to govern the relations of the tribes however the judicial officers were to be given a territorial jurisdiction from which the Maori were not excepted. The charter represented the general introduction of English law to New Zealand. The status, if any, of Maori customary law during early colonial history turned, therefore, upon the rules governing the effect of such a general introduction of English law. In making such an inquiry it is necessary to distinguish the 'civil' from the 'criminal' aspects of English and tribal law.

1. the criminal relations of the Maori

It is clear that in signing the Treaty of Waitangi the Maori chiefs were under the impression they would retain their traditional authority over the tribe. They felt that the resolution of internal disputes and the regulation of tribal life would still follow the customary pattern. They were to be mistaken in this belief at least as a matter of law. The general introduction of English law by charter of the Crown without modification for Maori customary law meant that legally speaking the customary criminal code no longer obtained. Of course, it would be absurd to conceive this as a de facto result - the promulgation of the Crown's charter and erection of courts thereunder, mere legal ceremony, could hardly of itself be supposed to have produced the Maoris' abandonment overnight of the customary means of social control. Nor did the general introduction of English law mean that whenever the Maori inhabitants transgressed the penal law of England, even where their activity had been in harmony with their own customs, prosecution in Her Majesty's courts would inevitably eventuate. It was one thing to have made the Maori technically amenable to the English criminal law, another actually to enforce that amenability rigorously.

From the start the Colonial Office advocated the same policy of moderation and leniency in dealing with Maori offences against English law as had been applied in the case of the Australian Aborigine. Lord Russell's despatch of late 1840 accompanying the first charter and other constituent instruments for the colony advised Hobson to interpose a 'Protector' between aboriginal and white society. As, again, in the case of the Australian Aborigine, the Protector was essentially a means to wean the indigenous inhabitants onto the English criminal law in preference to the sudden imposition of an alien code of social control.

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105 Glenelg to Gipps, instructions for an Aboriginal Protectorate, 31 January 1838 HRA, 1st ser, XIX, 252-5. The Protectorates were not a success: Gipps to Russell, 3 February 1841, id, XXI, 8-11; Gipps to Stanley, 16 May 1842, id, XXII, 54-5; "Report from the New South Wales Committee on the Aborigines and Protectorate" New South Wales Legislative Council Votes and Proceedings (1849), 1-2.

106 The idea derived from the recommendations of the Select Committee on Aborigines (British Settlements), PP (1837), 7, 83-4. Note especially the recommendation that Protectors be commissioned as magistrates to act on the natives' behalf both in prosecuting their crime inter se and superintending their defence in criminal actions by or against settlers.
Russell advised Hobson:¹⁰⁷

The general duty of the protector would be to watch over the execution of the laws, in whatever concerned immediately the rights and interests of the natives; and, to reduce this general principle into a definite form and practical usefulness, it would be necessary that laws should be framed, investing the principal protector and his officers with every power of prompt and decisive interference which it may be found convenient and practicable to confer. In such a case, the analogies of the law of England, as administered amongst Englishmen, whether at home or abroad, will, in many respects, be found to fail. A magisterial authority, more prompt than that of our justices of the peace, and less fettered with technical forms and strict legal responsibilities, will probably be indispensable. I should also anticipate the necessity of providing some method by which the protector might, under proper legal advice, have at all times immediate access to a court of criminal justice, the duty of which should be to give immediate attention to all prosecutions instituted under his orders. In the protector should also be vested a summary jurisdiction, for arbitrating on all questions controverted between the European and the native settlers, with, perhaps, a right of appeal in the more weighty cases to the ordinary tribunals of the colony. In the same way, questions disputed among the natives themselves should fall under the cognisance of the protector, - so far as this might be compatible with a due regard to any native customs, not in themselves immoral, or unworthy of being respected.

Having advised the appointment of a Protector and the constitution of his office by colonial legislation, Russell then clarified his reference to the native customs to which the Protector would pay ‘due regard’:¹⁰⁸

Amongst the native customs there are some which it will be the duty of the Government not to respect. Of these, the chief are cannibalism, human sacrifice and infanticide. With such violations of the external and universal laws of morality no compromise can be made, under whatever pretext of religious or superstitious opinion they may have grown up. On the other hand, there are customs, which, however pernicious in themselves, should rather be gradually overcome by the benignant influence of example, instruction, and encouragement than by legal penalties. And, finally, there are customs which, being rather absurd and impolitic, than directly injurious, may be borne with, until they shall be voluntarily laid aside by a more enlightened generation. It is important to advert distinctly to this topic, because, without some positive declaratory law, authorizing the executive to tolerate such customs, the law of England would prevail over them, and subject the natives to much distress, and many unprofitable hardships.

The Colonial Office appreciated that the Maori had been rendered amenable to the English criminal law and certain parts of the civil in their disputes with the settlers but sought a means of enforcement which cushioned the tribes from the sudden and strict enforcement of the Pakeha code. The beneficient interposition of a Protector with an office constituted under local legislation permitting his departure from the strict rule and procedure of English law was that means.

¹⁰⁷ Russell to Hobson, informal instructions accompanying charter commission and formal instructions erecting separate colony of New Zealand, 9 December 1840 CO 209/8: 460, 487.
¹⁰⁸ Id.
Under this policy, Protectors were appointed and commissioned as Justices of the Peace with jurisdiction in Maori cases from which the settlers' Justices had been excluded. The commissions of the Protectors and Sub-Protectors instructed in your magisterial capacity, where natives are concerned, there are many minor offences or disputes which you may compromise or adjust in accordance with their custom, which, if brought before a court of justice, and judged according to the strict and rigid interpretation of the law, might subject them to grievous punishments.

This, however, did not give the Protectors any legal basis upon which they could resolve criminal matters and other disputes between Maori and settler in a manner sensitive to Maori custom because there was no colonial legislation authorising their application of the customary law. The charter of 1840 had suspended this law in virtue of its general introduction of English law and so the partial re-establishment of the customary law de jure required legislation. George Clarke, the Chief Protector, referred to the instructions in his commission and complained of his "loss to conceive how such a principle can be carried out until native customs have been legalized, or an enactment made to meet the case." An attempt to put Maori customary law on a legal footing was made in 1844. The Native Exemption Ordinance of that year aimed at the "gradual" rather than "immediate and indiscriminate enforcement" of the English criminal law among the Maori. Prosecutions for crimes committed by the Maori inter se were not to be initiated without an information being laid by "two principal chiefs of the tribe to which the injured party" might belong. Any warrants laid as a result of such an information were to be directed for execution to two principal chiefs of the offenders' tribes with no further proceedings to be taken unless the alleged offender was delivered up by the two chiefs. Mixed offences required an information to be directed to two principal chiefs of the offender's tribe (where he was without the town limits).

The Ordinance had been passed at the initiative of Governor Fitzroy who had taken office determined to take account of the Maori position. The settlers were not sympathetic with this goal, except where it suited their own purposes. From the start, whilst its confirmation by London was awaited, the Ordinance proved difficult to enforce. The Protector George Clarke reported that when the Ordinance was passed "it was so ill received, and so opposed to the prejudices of the unthinking community, that even the magistrates in some instances wanted the moral courage to put it into effect."

109 Wards A Show of Justice, 46.
110 Campbell v Hall (1774) 1 Cowp 204; Damodhar Gordhan v Deoram Kanji (1876) LR 1 App Cas 332 (PC).
111 Clarke to Colonial Secretary, 31 July 1843, PP (1844), 556, App, 349.
112 Native Exemption Ordinance 1844, 8 Vict Sess 3, No 18, sections 1-3.
113 Wards, A Show of Justice, 66-8.
114 Clarke to Colonial Secretary, final report as Protector of Aborigines, 30 March 1846, encl in Grey to Stanley, 12 June 1846, PP (1847), 837, 13, 17.
One might have expected Lord Stanley to react favourably to this law. Two months before its arrival in the Colonial Office for allowance, he had instructed George Grey as the latter set off on his New Zealand appointment to show "every possible respect ... both in the structure of the law and in the administration of it" for Maori customs "of which they may be possessed and from which they cannot be rudely or abruptly divorced." Upon looking at the Native Exemption Ordinance soon after, however, Stanley characterized it as "too unequal in favor of the weaker party". He termed the Ordinance "an experiment of a difficult and doubtful nature":

To the general principle of exempting the natives, in their relations with each other, from the operation of a code of laws utterly unintelligible to them and wholly unsuited to their condition, I fully assent; but in carrying that principle into effect, several rules have been framed of which may give birth to well-founded complaints on the part of their fellow subjects of the European race ... I fear that the zeal, however laudable, for the welfare of the aborigines, which has dictated these enactments, has rather outrun discretion, and that laws so unequal in favor of the weaker party, will, by the sure operation of familiar causes, defeat their own end.

In making these comments Stanley had in mind the recent recommendations of the Select Committee on New Zealand (1844) which had expressly adopted the policy taken by the same George Grey in his report on the Australian Aborigine: The lenient enforcement of the English criminal law amongst the Maori population was thought to hinder rather than encourage their assimilation into white society. Although James Stephen did not agree with this view the fate of the Native Exemption Ordinance showed that any attempt to put the customary law on a legal footing in matters of criminal law was bound to encounter difficulty and resistance from the British settlers. Stanley instructed Grey to revise the Ordinance.

Whilst these attempts were being made to establish a legally-based equilibrium between Maori customary law and the English penal code, the suggestion was put that certain portions of the Maori population were not amenable to the jurisdiction of the colonial courts. In making this proposition in late 1842 and again early in 1843 Attorney-General Swainson was implicitly drawing upon the precepts by which the indigenous legal systems of the North American Indian and Mofussil were initially treated as separate codes independent of English law. Swainson argued that the Crown lacked sovereignty over the

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115 Stanley to Grey, notification of appointment, 13 June 1845, PP (1847), #337: 68, 70.
116 Stanley to Grey, 13 August 1845, id, 83, 84.
117 Id, 84-5.
118 Report from the Select Committee on New Zealand (1844), PP (1844), #556: x-xi.
120 Swainson to Shortland, 27 December 1842, CO 209/16: 487-94. George Clarke and Shortland took the contrary view, Shortland to Stanley, 31 December 1842, id, 446-455.
tribes which had not signed the Treaty of Waitangi or had but in the imperfect knowledge of the consequences. This was the same equation of British subjecthood with amenability to the jurisdiction of the Crown's courts that had obtained in North America and the Mofussil. Swainson's fatal error, however, was to go behind the solemn assertion of the sovereignty of the Crown over New Zealand. His opinion was repudiated on this basis. James Stephen also queried Swainson's belief that the sovereignty of the Crown and formal establishments of courts with jurisdiction over all inhabitants had completely superceded the tribal law.

But the assumption [of Swainson] is itself confounded. All this legal pedantry (for it is nothing better) about arson, & warrants, & the Queen's book, & so on, in our intercourse with savages is just as needless as it is unmeaning. I know of no reason why in all matters purely inter se - their marriages, inheritances, contracts, & so on, & even in the definition and punishment of crimes - they should not live under their own law or customs: such customs only excepted, as are abhorrent from the universal laws of God; As for example infanticide & cannibalism. And even in questions, between the State & the Natives, I know not why they should not be governed by their own laws & customs to the utmost possible extent: gradually of course superceding them by our own law, as the natives may learn to understand & appreciate it. At this moment this is the case in Ceylon in many respects. It is the custom throughout the whole of British India. Even in Canada, the Indian is at once subject to the British Crown, & exempt from subjection to very much of the laws of the province. Establish this distinction, & the Queen's sovereignty would in no exercisable manner injure the native chiefs or their people. But, to be sure, if these black men are, in respect of their own allegiance, to be brought under the yoke of Blackstone's commentaries, it would be as good a reductio ad absurdum, as could be proposed.

Stephen had stressed that any introduction of English law to New Zealand only reached as far "as circumstances will allow", and indicated that the application of the strict rule of English law was to be qualified by the circumstances of the Maori. Certainly the above passage indicated his belief this was the position with the Maoris' civil relations inter se and he even seemed to take the position, identical to that soon afterwards recognised by the Privy Council, that the same rule governed the applicability of the English criminal law to Maori relations inter se. Nonetheless Stephen's subscription to the position that the Maori customary law had not been extinguished by the formal constitution of the colony underlined rather than obviated the need for a legislative determination of the formal status of Maori customary law, at least as far as it might affect Maori - Pakeha relations in the

122 Stephen to Hope, 19 May 1843, CO 209/16: 454r:455; Stanley to Shortland, id, 456-9; Stephen to Hope, 28 December 1843, CO 209/22: 247-54, Hope to Stanley, 30 December 1843, id 254; Stanley, note, 31 December, id; Hope, note, 15 December 1843, id, 246r.


124 Id, 247 (the emphasis belongs to Stephen: "In our relations with such people it is necessary to be circumspect, and just, & to keep as close to the law as circumstances will allow. A complete observance of it is out of the question"). Also Stephen to Vernon Smith, 21 July 1840 CO 209/7: 40r (saying it "is almost the universal error to regard as illegal all deviations from the rules of law in force in England, however plainly the difference of circumstances may point out the inapplicability of such rules") and minute 29 September 1842 CO 209/14: 360-7 (the introduction of every detail of English law would produce "utter confusion").

125 Advocate-General (Bengal) v Ranee Surnomoye Dossee (1863), 1 Moo PC, Ind App 387, esp. at 427.
Since the colonial legislature's efforts were unsatisfactory the Colonial Office took the matter in hand and gave a positive lead. The Instructions for the colony issued in 1846 under the authority of the New Zealand Constitution Act (UK) 1846 made provision which in retrospect the first charter ought to have done six years previously. The Instructions followed the parent statute and provided for the setting aside by proclamation of "Aboriginal Districts" within which the "laws, customs, and usages of the aboriginal inhabitants so far as they are not repugnant to the general principles of humanity, shall for the present be maintained." Within the districts "such native chiefs or others as shall be appointed or approved by the Governor-General for that purpose, shall interpret and carry into execution such laws, customs, and usages as aforesaid, in all cases in which the aboriginal inhabitants themselves are exclusively concerned". White persons in such districts were to observe the native law and any violations by them were to be tried by the magistrate of the province wherein the district was situated. This provision for Aboriginal Districts was modelled almost exactly on the American principles by which the whole of the customary law took effect within the Indian territory (save where legislation intervened otherwise). As his report on the Australian Aborigine had indicated, the new Governor, George Grey, was not sympathetic with what essentially was a laissez faire policy toward the indigenous laws and so the provision for Aboriginal Districts was neglected. Nonetheless the Instructions, like the parent Act, contained an important provision which took effect irrespective of Grey's proclamation, or rather non-proclamation, of Aboriginal Districts:

In cases arising between the aboriginal inhabitants of New Zealand alone, beyond the limits of the said aboriginal districts, and in whatever relates to the relations to and the dealings of such aboriginal inhabitants with each other beyond the same limits, the courts and magistrates of the entire province ... shall enforce such native laws, customs, and usages as aforesaid.

This was a restoration de jure to the Maori of their customary law on those matters inter se where previously English law was technically applicable. The crucial aspect, however, was the replacement of the traditional jurisdiction of the chief and elders with the jurisdiction of Pakeha courts. This was no laissez faire system but an incorporation of the customary law into the ordinary judicial system of the colony. Grey gave this stipulation more detailed

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126 9 & 10 Vict c 103, section 1. Those parts of the Act dealing with the Maori were unaffected by the New Zealand Constitution Act 1848, 11 Vict c 5, section 1.
127 id, section 10.
128 Text in PP (1847), #763, 76-87, chap xiv, 82.
129 id, 83.
130 id, 6. Earl Grey did not share this interpretation: Earl Grey to Grey, 8 June 1847, PP (1847), #837, 87 but deferred to Grey's opinion. Cf Rira Peti v Ngaraahi te Paku (1888) 7 NZLR 235 (SC).
131 Grey to Gladstone, 14 November 1846, PP (1847), #837, 79-81.
expression in his Resident Magistrates’ Courts Ordinance 1846 which continued and adapted, although he protested otherwise, elements of the Native Exemption Ordinance he had been instructed to revise.

It is beyond the scope of the present inquiry to chart the status of Maori customary law in New Zealand beyond its restoration de jure in 1846. The Resident Magistrates were empowered to take stock of Maori customary law both on criminal and civil matters as it affected Maori relations inter se and with the Pakeha. The Maori may have been rendered amenable to the English criminal law by virtue of the general introduction of English law in 1840 however this was ameliorated informally by the policy of lenient enforcement and corrected formally in 1846.

2. the civil relations of the Maori.

Although the general introduction of English law with the first charter of the colony made the Maori liable to the English criminal law, the same did not hold for their civil relations. Whilst civil disputes with the Pakeha fell to be decided by English law should such matters end in the colonial Court of Requests established in 1841, important parts of the customary law were unaffected by the general introduction of English law. At the Colonial Office Stephen and Russell considered the civil relations of the Maori inter se to remain ordered by the customary code. When Russell advised Hobson to enact a law recognising the customary law he was referring to its status in the Maoris’ civil disputes with the settlers as well as their criminal relations at large. Stephen made exactly the same point when he characterised any attempt to treat the Maori as technically amenable to the yoke of Blackstone’s Commentaries as "as good a reduction ad absurdum as could be proposed".

The relations between the Maori and colonial authorities on questions relating to land were based on the supposition that the Maoris title to their land was defined according to their own law. The 1840 charter had contained the proviso that

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132 Resident Magistrates’ Courts Ordinance, 10 Vict sess 7, No 16. Pt III dealt with treatment of natives in criminal cases, Pt IV with civil cases between Maori and European, Pt V established Arbitration Courts for Maori civil disputes inter se with tribal assessors "men of the greatest authority and best repute in their respective tribes" (section 20).

133 Ward A Show of Justice, 73-91. describes and assesses the Resident Magistrate scheme and its incorporation of aspects of the Native Exemption Ordinance which Governor Grey had pilloried. The Governor stressed the early success of his scheme: Governor Grey to Grey, 25 January 1847, PP (1847), #837, 86-7; Grey to Grey, 2 February 1847, id, 90-1; Grey to Grey, 4 February 1847, id, 92-4.

134 Grey disbanded the Protectorate, Wards supra, 73 when he repealed the Native Exemption Ordinance, Grey to Gladstone, 27 November 1846, PP (1847), #837, 85 and Police Magistrates’ and Native Exemption Ordinances Repeal Ordinance, 1846, 10 Vict sess 7, No 15.

135 Russell to Hobson, 9 December 1840 CO 209/8:460,487.


137 Text in PP (1841),#311,31,33.
... nothing in these our letters patent contained shall affect or be construed to affect the rights of any aboriginal natives... to... any lands in the said colony now actually occupied or enjoyed by such natives.

Since the title of the Maori to their land derived from their customary rules it followed from the charter that at least this aspect of the customary law survived. Similarly Stephen considered the enforcement of criminal charges against Maori chiefs whom he noted were acting in defence of their own property, and hence not in technical breach of the criminal law.138 A further example concerned the question of the trespass by European-owned cattle onto Maori cultivations. Encouraged by the English concept of rights of common, white farmers depastured their stock to let them roam. Unlike the European, and similar to the North American Indian, the Maori did not fence their cultivations and kept their stock tethered. The Maori like their North American brethren did not regard wandering cattle happily. The Cattle Trespass Ordinance 1844139 protected unfenced cultivations from roaming stock and in a test case some years later judgment was given for Maori landowners whose crops had been damaged by Pakeha-owned beasts.140 During the 1840s Maoris were also bringing actions in trespass before local courts founded on their aboriginal title.141 These are examples wherein a supposition of the existence de jure of a body of customary law regarding title to land was made, for how else could the title recognised as held by the tribal owners be defined if not by reference to that customary law?

The precise extent to which the colonial courts recognised other aspects of the Maori customary law in their civil relations is an inquiry the writer has eschewed. Such an investigation would require access to the records of the colonial courts which remain in an archival state (unlike those of colonial America which have mostly been put into published form). The only important secondary account of the post-annexation status of Maori customary law mainly dwells upon the criminal relations of the Maori and questions of land rights.142 In the absence of such a study into the behaviour of the colonial courts, there is no precise indication of the extent to and regularity with which the colonial courts were called upon to recognise, say, the customary laws of marriage, descent or title to personal property. In large part such silence was doubtless a function of the very continuity of the customary law and consequential absence of litigation in Pakeha courts.

The judgment of Prendergast CJ in Rira Peti v Ngaraihi te Paku (1888) is the leading reported assessment by local courts of the status of Maori customary law subsequent to

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139 Cattle Trespass Ordinance, 1844, 7 Vict sess 3, No 14.
140 Ward, A Show of Justice, 134. As to the problem see, generally Ward, id, 50; Adams Fatal Necessity, 222-3.
141 Ward, supra, 51. George Clarke observed, however, the frequent Maori inability to bring civil actions in defence of their land (as by actions in trespass) because, unlike the European, "the native is ignorant of even the first steps to be taken", Clarke to Hobson, 18 June 1842, CO 209/16: 109-18. Similarly Clarke to Grey, 30 March 1846, PP (1847), #837, 13.
142 Ward, supra, passim.
British annexation. In this case Prendergast had to consider the legal status of a customary marriage. He noted that the Marriage Ordinances of 1842 and 1843 implicitly declared marriages in the colony were to be governed by the common law. These Ordinances had been passed to clarify doubts within the colony over the status of marriages solemnised by someone other than a minister episcopally ordained. The Ordinances declared local marriages were valid only if solemnised by an ordained minister. It is clear the doubts prompting the Ordinance had attached only to marriages amongst the European segment of the colony yet Prendergast inferred from the Ordinances that the common law rules regarding solemnisation applied to all marriages, Maori as well as European.\textsuperscript{143} In addition, the Marriage Ordinance 1847 (section 44) as well as subsequent legislation\textsuperscript{144} had expressly excepted native marriages, he noted, but all that could do was leave the Maori under the \textit{status quo ante}. Since by that they were "British subjects, [whose] relations to each other [were] governed by the laws of the land, and not by their usages", the Maori were subject to the common law rules of marriage. The premise behind this position was acceptance of a general suspension of Maori customary law upon the Crown's assumption of territorial sovereignty.\textsuperscript{145} This reasoning made the crucial and important error of blending two distinct processes, namely the Crown's assumption of the sovereignty and the general introduction of English law to the colony. Mistaken both as to the scope of the Marriage Ordinances and the rules in \textit{Campbell v Hall}, Prendergast proceeded to consider the extent, if at all, to which the Crown had restored the Maori customary law \textit{de jure}. His attention focused upon the New Zealand Government Act of 1846 (UK) and the Royal Instructions issued thereunder. Whereas it was concluded earlier that this Imperial Act and the constituent instruments under its authority made a limited but significant restoration \textit{de jure} of Maori customary law, Prendergast held any such restoration only was to occur in Native Districts set aside under the relevant provisions of the Act. These "Aboriginal Districts", he noted, "were never appointed".\textsuperscript{146} This ruling ignored the provisions of both the Act and Instructions indicating Maori customary law was intended to have some cognisability in the courts irrespective of the establishment of Native Districts. The ruling was doubtless drawn by way of inference from the local Marriage Act 1880 which exempted Maori partners from the formalities therein specified where they were living in Districts set aside by proclamation under authority of the imperial Acts.\textsuperscript{147} Being imperial legislation the 1846 Act and the instruments under its authority should have been given priority over the narrow, local statute. Instead Prendergast read both the imperial and local legislation as taking an identical position towards the status of Maori customary law when plainly they had not. Prendergast's

\textsuperscript{143} (1888) 7 NZLR 235, 238 (SC).
\textsuperscript{144} Smith \textit{Maori Land Law}, 35-9.
\textsuperscript{145} \textit{Id}, 239.
\textsuperscript{146} \textit{Id}.
\textsuperscript{147} The Marriage Act 1880, No 21, section 2.
ruling against any *de jure* status for Maori customary law was completed by reference to the English Laws Act 1858 (NZ). This local statute declared that "the laws of England as existing on the 14th day of January, 1840, shall so far as applicable to the circumstances of the colony, be deemed and taken to have been in force therein as, and after that day, and shall continue to be therein applied in the administration of justice accordingly."\(^{148}\) This Act, he observed, was "without any exception with regard to natives."\(^{149}\) He thus failed to use the 'circumstances of the colony' exception to the general introduction of English law in order to spare, even if but partially, Maori customary law. This unwillingness might be contrasted with the approach then already taken in relation to Hindu and Muslim law in the Presidency towns of the East Indies. Prendergast's approach was followed in *R v Wairemu Kingi* (1909),\(^{150}\) *Rangi Kerehoma v Public Trustee* (1918)\(^{151}\) and *In re Wi Tamahau Mahupuku* (deceased), *Thompson and another v Mahupuku* (1932).\(^{152}\)

As will become seen as the usual pattern, Prendergast's position on the effect of British sovereignty upon traditional Maori rights might be contrasted with that of the Privy Council. In *Hineita Rirerire Arani v Public Trustee* (1919) the Board considered the status of the Maori customary law of adoption. The case concerned Maori couples' capacity to adopt a European child. For their Lordships Lord Phillimore found that prior to the Native Land Act 1909 which abolished customary adoption,\(^{153}\) Maori persons had the choice of adoption by customary or statutory means. Although no reference was made to supporting authority, none apparently being felt necessary, Phillimore treated Maori customary law as enjoying legal status in the absence of legislative provision otherwise. He observed how this customary law had adjusted in post-contact years so as to permit adoption of non-Maori children. Approving the Maori Appellate Court's "sound" judgment in the *Blake-Wellwood* case\(^{154}\) he accepted such change in the customary law as admissible and part of the general evidence of the particular custom. This dynamic character set aboriginal customary law apart from the customary local laws acknowledged within England. It might well be, he said, that the Maori as a race may have some internal power of self-government enabling the tribe or tribes by common consent to modify their customs, and that the custom of such a race is not to be put on a level with the custom of an English borough or other local area "which must stand as it always stood, seeing that there is no quasi-legislative internal authority which can modify it".\(^{155}\)

\(^{148}\) *English Laws Act 1858, No. 2, section 2.*
\(^{149}\) (1888) 7 NZLR 235, 240.
\(^{150}\) (1909) 12 GLR 175 SC.
\(^{151}\) [1918] GLR 483, 485 (SC).
\(^{152}\) [1932] NZLR 1397 (SC).
\(^{153}\) [1840-1932] (1919) NZPCC 1,6.
\(^{154}\) "Decisions of Native Land Court and Native Appellate Court..." *AJHR* (1907), G5.
\(^{155}\) *Id.*
One wonders the intrinsic difference between the customary law of marriage and adoption, making the latter subject to a common law presumption of continuity not given the other. The real difference in approach doubtless lay in the attitudes of the Privy Council and colonial judiciary. By the early twentieth century the Board was routinely dealing with aboriginal laws of the East Indies, Africa and New Zealand. Unlike the New Zealand bench their Lordships were thoroughly versed in the legal principles underpinning British colonial activity.

Generally, however, the local courts located any continuity of Maori customary law in resuscitative legislation rather than common law principles regarding the introduction of English law to a new colony. Given the present state of Maori society - its adoption and adaptation of European rules of personal succession, marriage and suchlike, any residual vigour of Maori customary law as a matter of common law must be open to some doubt. Nonetheless the writer would wish to reserve his position on this question since progression onto this inquiry would be another study in itself. It will become clear in the next Part, however, that at least where an aboriginal title to or over land is proven the character of this property right will be defined by reference to the customary law.

D. IDENTIFICATION OF MAORI CUSTOMARY LAW

If on any given occasion a local court is called to adjudicate upon a matter involving an issue of customary law the first task will be to assess the cognisability of that custom. In theory, it has been seen there may have been some continuity of the pre-colonial law notwithstanding a general introduction of English law. To establish any basis for such recognition in a particular field of native affairs will require an assessment both of the practice within the country and the effect of the relevant statutes. Even if the continuity of the customary law in a particular field is shown, it must still be found to have governed the relations of those Maori seeking its recognition by the court. This is a necessary consequence of the personal character of the continuity of customary law. The following Part shows, however, it is clear Maori customary law retains some cognisability at least on questions of aboriginal title (that is, traditional property rights over land). Whether this cognisability extends to other aspects of contemporary Maori life is a study which unfortunately the present work cannot make.

One recent case where Maori customary law has been recognised as retaining some status is Te Weehi v Regional Fisheries Officer (1986).\(^{156}\) In this case it was held that a claim to the exercise of a traditional right of fishery will only be enforced in defence to a prosecution under the Fisheries Act 1983 where it can be shown the right was exercised in accordance with Maori customary law. On the strength of this case it must be supposed that

\(^{156}\) Unreported, High Court of New Zealand, Christchurch Registry, 19 August 1986.
in the future New Zealand courts will increasingly be required to consider matters requiring proof of Maori customary law. It may be noted that section 50 Maori Affairs Act 1953 provides some means for the ascertainment of that law through submission of a case stated from the High Court to the Maori Appellate Court on matters concerning "any questions of fact or of Maori custom or usage relating to the interests of Maoris in any land or in any personal property." The Maori Appellate Court is composed of judicial personnel with the experience in such matters.

Given that on a particular occasion a New Zealand court has satisfied itself on the issue of cognisability of Maori customary law, it must then turn its attention to the content of that law. In considering these questions there is considerable caselaw from the colonial British East Indies and Africa.

1. proof of the customary law

The Privy Council has stressed on several occasions that proof of the customary law is a matter of evidence, a position which section 50 Maori Affairs Act 1953 would seem to confirm. In 1866 the High Court of Madras stated: 157

...what the law requires before an alleged custom can receive the recognition of the Court and so acquire legal force, is satisfactory proof of usage so long and invariable acted upon in practice as to show that it has, by common consent, been submitted to as the established rule of the particular family, class, or district of country; and the course of practice, upon which the custom rests, must not be left in doubt but be proved with certainty. Applying that rule of law here, we are of opinion that the evidence wholly fails to support the custom set up.

On appeal the Privy Council agreed: 158

Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular Districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable: and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.

Similarly on appeal from the Supreme Court of the Gold Coast in Kobina Angu v Cudjoe Attah (1916) the Board ruled that as "is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof in the Courts, become so notorious that the

157 Sivanananja Persuma’l Se’thura’yar v Muttu Ra’malinga Se’thura’yar (1866) 3 Mad HC 75, 77.
158 Appeal nom Ramalakshmi Ammal v Sivanatha Perumal Sethurayar (1872) 14 Moo Ind App 570, 585 per Sir Montague Smith.
Courts take judicial notice of them." The Privy Council affirmed this position on proof of African customary law on numerous other occasions, indicating its unwillingness to disrupt a finding at first instance as to the existence of a particular custom. The same position was applied by the Board in relation to New Zealand in *Nireaha Tamaki v Baker* (1902) when Lord Davey commented that the reference in the various local statutes to the Maori title to their traditional lands "plainly" assumed "the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them in evidence." In practice, the proof of the customary law will require both native testimony and expert anthropological evidence. In the aboriginal context *Calder v Attorney-General of British Columbia* (1973) and *Millirrpum v Nabalco Property Ltd* (1971) provide notable and relatively recent examples of a court looking at both types of evidence. In *Te Weehi v Regional Fisheries Officer* (1986) Williamson J considered the evidence of academic specialists and the testimony of the elders (kaumatua) of the Ngaitahu tribe before finding that the defendant had been exercising a fishing right in accordance with Maori customary law.

2. The characteristics of the customary law

*The Case of Tanistry* (1608) recognised four criteria by which the courts were to be guided in identifying a valid customary law. These were reasonableness, certainty, immemorial usage and compatibility with the sovereignty of the Crown, the last characteristic being later taken to mean compatibility with statute. These attributes of custom are similar to those governing customary rights in England although clearly the rules applied in English courts could not be used in the colonial context without modification. In general terms the colonial tribunals required proof of a consistent, long-standing practice not "repugnant to justice and morality." The latter aspect was evidently interpreted in a much wider sense in British India than Africa, resulting in the judicial exclusion of a greater

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161 (1901), [1840-1932] NZPCC 371, 382.
162 (1973), 34 DLR (3d) 145 (SCC); also, Kruger and Manuel v The Queen [1978] 1 SCR 104, 108; Baker Lake v Minister of Indian Affairs and Northern Development [1980] 1 FC 518 (TD).
163 (1971) 17 FLR 141.
164 See Appendix.

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proportion of customary law.¹⁶⁷

It is clear the particular custom need not have existed since the beginning of legal memory (that is, 1189, being the commencement of the reign of Richard II) nor is it restricted to its pre-colonial format. In Eleko v Officer Administering the Government of Nigeria (1931) the Privy Council acknowledged that customs may change over a period of time under "the influence of civilisation ... without losing their essential character of custom."¹⁶⁸ Native custom is not, in other words, a museum-piece frozen in its pre-colonial state. A Canadian example is the recognition that methods of exercising hunting and fishing rights can take account of technological progress unthought of in pre-contact times.¹⁶⁹ Rules are intrinsically dynamic, no less in the aboriginal than European context, and this position does no more than acknowledge this feature.

It is also plain that certain pre-colonial laws and customs may be unrecognisable on grounds of repugnancy. This rule has been traced back to Romano-canonical origins in judgments ex aequo et bono.¹⁷⁰ In Picton's Case (1807-08), to give an example, the Spanish laws condoning torture and the immolation of Protestant proselytes were held to have been suspended immediately upon British sovereignty as repugnant to the fundamental principles of English law.¹⁷¹ Similarly the Hindu custom of suttee (the burning of widows) did not survive British sovereignty in the Mofussil although legislation successively authorised then declared the custom illegal.¹⁷² Other Hindu and Muslim customs contrary to English law but essentially victimless in character, polygamy, sexual relations with ten year old girls and suicide were given as examples by Lord Kingsdown in Advocate-General (Bengal) v Ranee Surnomoyee Dossee (1863) did not fall within the scope of the test of repugnancy.¹⁷³ In Khama v Ratshosa (1931)¹⁷⁴ the Privy Council found the native custom allowing West African chiefs to raze an offender's property was not one which an English court could condone. Similarly in the Eleko case the Board indicated its inability to give effect to a 'barbarous' custom until its harsher aspects had been ameliorated by exposure to 'civilisation'.¹⁷⁵ The test of repugnancy did not distinguish Christian from non-Christian law. The approach taken by the Privy Council to the indigenous laws of British East India and Africa show the custom of tanistry would as readily have been held void for repugnancy

¹⁶⁷ Id.
¹⁶⁸ [1931] AC 662; similarly, Sakariyowo Oshodi v Brimah Balogun (1936) 4 WACA 1 (PC). The position is directly comparable with the consequences in municipal law of a change in customary international law: Trendtex Trading Co v Central Bank of Nigeria [1977] QB 529 (CA) per Denning MR.
¹⁶⁹ Notably Prince and Myron v The Queen [1964] SCR 81 (SCC) approving judgment of Court of Appeal (Manitoba), (1962) 40 WWR 234 (at 242-3).
¹⁷⁰ Allott New Essays in African Law, 44; Derrett "The Role of Roman Law and Continental Law in India" in Essays, II, 166.
¹⁷¹ (1807-08) 30 How St Tr 539.
¹⁷² Forsyth Opinions, 14.
¹⁷³ (1863) 9 Moo Ind App 427, 19 ER 786 (PC).
¹⁷⁴ [1931] AC 784 (PC).
¹⁷⁵ Id, 662.
and incompatibility in the nineteenth or twentieth as early seventeenth century.

E. CONCLUSIONS

The common law recognised the continuity of the pre-colonial law subsequent to the Crown's assumption of the territorial sovereignty of new lands. This presumption applied to the Maori customary law no less than the other pre-existing legal systems, Christian and non-Christian, in other British colonies. The Crown enjoyed the constituent power for a colony, however, and under this power could make a general introduction of English law as by establishing courts of judicature with a jurisdiction over all inhabitants. This put the indigenous inhabitants under the English law in all their criminal relations and their civil disputes with the settlers but left them with their own law at least in their civil relations inter se on matters such as marriage, adoption, succession and, most crucially, title to land and other property. English law was only introduced to the extent it was suitable to the local circumstances. It could hardly have been applied suitably to the family matters and ownership rights of the Maori. Even if there had been a suspension de jure of all the customary law as a result of the 1840 charter, it was restored by the Imperial Act and Instructions of 1846 which required Pakeha courts to take stock of the customary law in disputes among the Maori and between Maori and Pakeha. In any event, it will become clear the customary law governing the title of the Maori to their land and other property continued notwithstanding the general introduction of English law.

These conclusions regarding the status of Maori customary law upon and in the period immediately after the Crown's assumption of the territorial sovereignty of New Zealand have brought us back to the distinction constantly made between imperium and dominium. The Maori chiefs evidently believed that in signing the Treaty they were to retain the right of government within and over their own tribe. They felt they would be retaining what might be termed a limited or qualified imperium, a belief confirmed by the reservation in the Maori text of the Treaty of Waitangi of their rangatiratanga. It has already been seen that the cession of sovereignty took away the chiefs' sovereign authority over their own people. In ceding their sovereignty English constitutional theory held that the chiefs thereby recognised the Crown thenceforth as the sole source of legislative and judicial authority in the islands. That this position was inconsistent with the Maori text of the Treaty was of no moment: Once formally declared, the Crown's sovereignty was constitutionally incontrovertible. The Crown's charter of 1840 reflected the complete character of its imperium, establishing courts with a jurisdiction over all inhabitants. This was a general introduction of English law for there had been no express saving of the customary laws of the Maori. This meant that those aspects of the law which might be said to have touched upon the imperium over the tribes, the native criminal justice system being the most
important, were superceded by English law. In contrast those parts of the customary code essentially related to *dominium* (title to property) or which at least did not go to the issue of *imperium* (such as the family laws of the Maori), enjoyed the common law presumption of the continuity of the pre-colonial law. The difficulty with this approach was that it had equated the Crown’s complete *imperium* as territorial sovereign and the Maoris’ status as British subjects with amenability to the English laws in those spheres of Maori life touching upon *imperium*. The equation was not intentional, quite the opposite in fact, for Russell had instructed Hobson to seek colonial legislation restoring most of the customary law to the Maori in their criminal relations *inter se* and making it cognisable in the resolution of their criminal relations and civil disputes with the settlers. When such legislation eventuated as the Native Exemption Ordinance 1844 it was so poorly conceived in the Colonial Office’s eyes that Westminster did the task in 1846, which, in retrospect, the first charter of 1840 should have performed. The restoration of Maori customary law *de jure* in 1846 simply made it cognisable in the colonial courts, in particular the Resident Magistrates’ Courts established by Grey. The 1846 Act did not give the chiefs any authority *de jure* capable of description as a delegated *imperium* for the Aboriginal Districts for which it had provided were never established. The customary law was thus restored *de jure* but in a manner which completely dissociated it from an *imperium* in any body other than the Crown. The New Zealand courts did not recognize Maori customary law as enjoying any legal status *ex proprio vigore*. This refusal was predicated upon an inaccurate interpretation of the Imperial statute and constituent instruments of 1846 and, more fundamentally, unfamiliarity with established legal principle underlying British colonization since at least *The Case of Tanistry* (1608). It was no surprise, then, that the Privy Council’s position differed from that taken by Prendergast CJ in *Rira Peti v Ngaraihi te Paku* (1888). In the absence of resuscitatory legislation local courts denied Maori customary law any continuity.
PART III

ENGLISH LAW AND MAORI PROPERTY RIGHTS
CHAPTER SIX

THE COMMON LAW STATUS OF TRIBAL PROPERTY RIGHTS

A. INTRODUCTION

This Part considers the extent to which the common law recognised the property rights of the New Zealand Maori to their ancestral lands, forests and fisheries upon the British assumption of sovereignty over the country in 1840. These rights were expressly guaranteed by the Treaty of Waitangi which added the rider that they were to be inalienable save to the Crown. The present chapter looks at the general principles of the common law regarding the status of tribal property rights upon the assumption of British sovereignty. Although this body of rules has only lately acquired designation as the ‘doctrine of aboriginal title’, it is founded on ancient principles and suppositions which have underlaid British colonial activity since at least medieval times. The following chapter will discuss the particular application of this doctrine to the aboriginal claims of the Maori.

B. THE COMMON LAW PRESUMPTION OF CONTINUITY

1. the medieval doctrine of infidel dominium

The distinction between the sovereign title to territory and private title to land was fundamental to British colonial practice by the beginning of the nineteenth century. This distinction was epitomised by the Roman law concepts of imperium or government and dominium or ownership. During the medieval period, however, these two notions of imperium and dominium were blended in the work of the influential canonist lawyers who treated the authority of a ruler over his people as a combination of the government and ownership of the territory. This combination was termed, unhelpfully, dominium. Thus, as the medieval canonists debated the existence and character of infidel dominium they were addressing at once what post-medieval lawyers would characterise as separate questions, these being, first, the right of Christian princes to supplant a non-Christian ruler and, secondly, the right of a Christian prince to dispossess infidel peoples of their land and property.

By the time the Spanish writers came to their celebrated theorizing of the sixteenth century the medieval arguments over the existence of infidel dominium had taken two distinct lines. Those, such as Hostiensis and Wyclif, who argued in favour of a Christian

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2 Muldoon Popes, Lawyers and Infidels, passim, esp 12-13, 109-14, 125-29, 144-47; "John Wyclif and the Rights of The Infidels;" (1979) 36 The Americas 301; Pagden The fall of natural man, passim.
prince's right to wage war and dispossess the infidel, took the Aristotelian argument that some men were slaves by nature.\(^3\) Bereft of the ability to reason and being as brutes this reasoning saw the heathen as incapable of possessing *dominium*\(^4\). Secondly, it was maintained that *dominium* was dependent upon the enjoyment of a state of Christian grace. Since the infidel were in a state of mortal sin it followed that they held no *dominium*.

These arguments were in the eclipse long before the Age of Discovery began at the end of the fifteenth century. The Council of Constance (1414-18) had condemned Wyclif's views and it was mostly felt that Innocent IV had got the better of Hostiensis. Generally the view that infidel societies were capable of *dominium* held sway in medieval Europe.

The Salamanca Divines generally recognised the *dominium* of the Indian societies of the New World in the medieval sense of the term.\(^5\) These writers, however, were also beginning to separate the question of government of the Indians from that of their right to the ownership of their land. Vitoria, to take probably the most influential example, considered the right of the Indians to own land. He rejected the Aristotelian argument equating the heathen\(^6\) with natural slaves.\(^7\)

The Indian aborigines are not barred on this ground from the exercise of true dominion. This is proved from the fact that the true state of the case is that they are not of unsound mind, but have, according to their kind, the use of reason. This is clear, because there is a certain method in their affairs, for they have polities which are orderly arranged and they have definite marriage and magistrates, overlords, laws, and workshops, and a system of exchange, all of which call for the use of reason; they also have a kind of religion.

Similarly Vitoria adopted the Thomist position\(^8\) that non-belief did not disqualify an infidel from true ownership and concluded that the Indians and barbarians could not "be barred from being true owners, alike in public and private law, by reason of the sin of unbelief or any other mortal sin, nor [did] such sin entitle Christians to seize their goods and lands."\(^9\) Las Casas, as most other Spanish writers of the period, took a similar position.\(^10\)

Having recognised infidel *dominium*, however, the Salamanca Divines proceeded to explain the grounds upon which it might be taken by a Christian prince. Generally, it was held that any conquest and dispossession of the heathen was just where they had refused to let Christians exercise their lawful right of trade and commerce or, more crucially, displayed hostility to the word of God. Although it was insisted any such conquest should proceed

\(^3\) *Politics*, I, 5.
\(^4\) The debate is described in Hanke *Aristotle and the American Indian*, passim.
\(^5\) Pagden *The fall of natural man*, provides a comprehensive account of their position, also Scott *The Spanish Origin of International Law* and Hanke *The Spanish Struggle for Justice*.
\(^6\) By which Aristotle had meant all non-Greeks, said Gentili: *De Jure Belli Libri Tres* (1589), 54.
\(^7\) *De Indis*, I, 127.
\(^8\) Id, 123.
\(^9\) Id, 125.
\(^10\) *Brevissma Relacion* (1583, Eng trl), R I v.

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with moderation, judged by the result, the virtual annihilation of the Indian population of Meso-America, the true legality of Spanish conduct in the Indies was seriously in doubt. This point did not escape the English pamphleteers and compilers, notably the Hakluys and Purchas, of the late sixteenth and early seventeenth centuries. These writers did not hesitate to recount both the Spanish theorising over the character of Indian rights and accounts of the atrocities in the Americas. The flurry of publication in this period aimed to encourage British colonisation of the New World yet, significantly, in deprecating the Spanish behaviour the strong implication was that the English relations with the Indians would proceed on if not higher then certainly more punctiliously regarded principles. In 1610 the Virginia Company published a pamphlet which included a condemnation of Spanish behaviour in the Indies: "Let the divines of Salamanca, discusse that question", the pamphlet sanctimoniously stated, "how the possessor of the west Indies, first destroied and then instructed."

2. the presumption of continuity in colonial British North America

By the beginning of the seventeenth century the medieval notion of infidel *dominium* was being replaced by a modern distinction between *imperium* (right of government) and *dominium* as understood in its Roman law sense of private ownership. The disengagement of the right of government from the ownership of the territory was, however, incomplete, or at least less apparent than later was to be the case, at the time the Crown granted its charters for the New World. These charters displayed the classic hallmarks of the medieval notion of *dominium*: The Crown described its power over territory in the New World as both a government over its own subjects (an *imperium*) and as ownership of the land.

On the face of it these charters appeared inconsistent with the *dominium* (understood in its medieval sense) which European thought and practice had ascribed to infidel societies over previous centuries. The Crown's exercise of an *imperium* over the Indian tribes under these charters has already been discussed and it has been shown that no government was assumed over these people unrelated to their actual submission to British rule. The other aspect of the medieval *dominium* was the question of the title of the Indians to their land, that is their *dominium* in the Roman law meaning of the word. Were the Crown's courts to treat the royal grant of thousands of square miles of the Americas as a suspension of the

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11 eg Eden *A treatyse of the newe India* (1553) and *The Decades of the newe worlde* (1555) in Aber, ed *The First Three English Books on America*, 1511-55 (1885); Keymis (attrib) *The Discoverie of the Large, Rich and Bewtiful Empyre of Guiana* (1596).
12 "Discourse of Western Planting" (1584) in Taylor, ed *The original writings... of the two Richard Hakluys* (1935), 258-61; "Discovery and Conquest of Terra Florida" (1611)
13 *Purchas His Pilgrims* (1625, rep ed 1905-7), XVIII, 80.
14 See the account in Porter *The Inconstant Savage*, passim, esp Parts I and II.
15 *A True Declaration of the Estate of the Colonie in Virginia* (1610) 5.
16 Especially, Grotius *De Jure Belli ac Pacis* (1646 ed), lib 2, cap 3, para 3.
Indian title?

As with the question of imperium the terms of the charters when inspected a little more closely frequently revealed that they were never intended as a royal suspension of the Indian title to their lands.\textsuperscript{17} Several of the charters were issued with the express stipulation that the grant was only as "full as that which wee by oure lettres patent maie or cann graunte".\textsuperscript{18} This, apparently, was a saving prompted by doubts over Indian rights.\textsuperscript{19} Other royal instruments expressly recognised that the land under grant had been purchased from the Indian owners.\textsuperscript{20} 

It is significant that the practice of the colonial authorities under these charters generally conformed with the recognition of Indian title. The Indian title was usually quieted by purchase from the tribes, a practice to which we will return, or, much less frequently, confiscation after war.\textsuperscript{21} The early legislation of the American colonies was replete with instances founded upon a recognition of the legal character of the aboriginal title.\textsuperscript{22} Colonial records show that by the end of the seventeenth century 'plantation' Indians were bringing actions in trespass in the colonial courts, often seeking to protect their cultivations from wandering European-owned stock.\textsuperscript{23} Clearly the royal charters were not considered to have disrupted the Indian title, a conclusion confirmed by the Royal Proclamation of 1763 which declared strongly the proprietary rights of the Indian tribes within and without the boundaries of the territory encompassed by the Crown's colonial charters.\textsuperscript{24} This presumption of continuity received an important and influential confirmation by the Supreme Court of the United States in 

Johnson \textit{v} M'Intosh (1823).\textsuperscript{25}

3. Judicial recognition of the presumption of the continuity of local property rights

The presumption of the continuity of the tribal title recognised in colonial America to have survived the Crown's assertion of sovereignty was in many respects but an aspect of the

\textsuperscript{17} Slattery "Land Rights of Indigenous Canadian Peoples", 108-112; Springer "American Indians and the Law of Real Property", 32
\textsuperscript{18} Second Virginia Charter (1609), TCVC, 43; Third Virginia Charter (1612), TCVC, 78; Newfoundland Charter (1610), SC, 53; Charter of Georgia (1732), CC, II, 811.
\textsuperscript{19} Juricek "English Territorial Claims in North America", 18.
\textsuperscript{20} Royal patent for the Providence Plantations (1643), CC, VI, 3210; Charter for Connecticut (1662), id, I, 529; Charter for Rhode Island and Providence Plantations (1663), CC, VI, 3212 These post-Restoration charters were the first royal grants to the respective colonies.
\textsuperscript{22} Examples are given below but see a thorough account of this legislation in Thomas "Introduction" to Royce "Indian Lands Cession", \textit{supra}.
\textsuperscript{23} Shurtleff, ed Records of... the Massachusetts Bay, I: 259; III: 233; IV, pt 1: 52, 209-10; IV, pt 2: 153; Trumbull and Hoadly, eds Public Records of the Colony of Connecticut, I: 251; Records of the Particular Court of Connecticut, 1639-1663, 208; Pulsifer, ed Records of the Colony of New Plymouth, XI: 137-8, 213; Noble and Cronin, eds. Records of the Court of Assistants of the Colony of Massachusetts Bay, 1630-1692, II: 26; McIlwaine, ed Minutes of the Council and General Court of Colonial Virginia [1670-1675], 365, 369, 370, 518.
\textsuperscript{24} Text in Brigham, ed British Royal Proclamations Relating to America; 212-8.
\textsuperscript{25} (1823) 8 Wheat 543 (SC).
common law’s general presumption of the continuity of the pre-colonial law. Nonetheless
the common law also recognised that the land rights of the indigenous inhabitants stood on
special ground entitling them to particular protection. 26 This position was evident as early as
*The Case of Tanistry* (1608) where it was indicated that whilst there had been a general
introduction of English law into Ireland the *brehon* law affecting title to land would still
survive providing it complied with certain criteria. After observing that the Crown’s
acquisition of new territory was invariably made “Monarchy Royall” the court made this
important observation: 27

Et p ceo, quant tiele Monarch Royall, que voet governor ses sujects per un just &
Positive ley, ad fait novell conquest de un realme, coment que ipso facto il ad le
seigniory paramount de touts les terres deins tiel realme ... & il ad le possession de
touts les terres queux il voet actualment sieser & retainer en ses proper maines, pur
son profit ou pleasure, & poct auxy per se grants distributer tiels portions que luy
plerra a ses serviteurs & gens de guerre, ou al fiels colonies queux il veut planter
immediatement sur le Conquest ... but que si tiei Conqueror receive ascun de natives
ou antient enhabitants en son protection, & avou eux pur ses subjects, & permit eux
de continuer lour possessions, & demourir en son peace & allegiance, p lours heirs
serront adjudge eins per bon title, sans grant ou confirmation del Conqueror, &
joyeront lour terres solonque les rules de la ley que le Conqueror as allow au
establish ...

This passage recognised that where the Crown had taken the local inhabitants into its
protection and by its conduct permitted them to continue in the enjoyment of their
possessions they and their heirs would be adjudged the rightful possessors of their ancestors’
property without the necessity of formal grant or confirmation by the Crown. The right to
their ancient property was qualified by the Crown’s power to seize their lands during the
conquest (as reward for its servants and soldiers or to plant colonies) and by the rules and
laws subsequently established by the conqueror. Nonetheless conquest of itself produced no
*ipso jure* suspension of the local property rights.

The presumption of the continuity of tribal rights subsequent to British sovereignty was
recognised regularly by the Privy Council in appeals from the Canadian, African and, it will
be seen later, New Zealand courts. In *Saint Catherine’s Milling and Lumber Company v The
Queen* (1888) Lord Watson indicated the Indian title survived British sovereignty and
subsisted until such time as it "was surrendered or otherwise extinguished". 28 The Privy
Council reaffirmed the continuity of Indian title in Canada on several other occasions. 29

The Board applied the same presumption to the property of the African tribes under the
sovereignty of the Crown. The Crown’s relations with these tribes had been founded upon a

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27 (1608) Davies 28, 40-1.
28 (1888) LR 14 App Cas 46.
29 *Attorney-General (Quebec) v Attorney-General (Canada)* [1921] 1 AC 401, 408; *Ontario Mining Company v Seybold* [1903] AC 73, 79; *Dominion of Canada v Province of Ontario* [1910] AC 637. See also *R v Wesley* (1932) 58 CCR 269, 280-1 per McGillivray JA (Alta CA).
strict distinction between *imperium* and *dominium*. Several treaties of the early to mid nineteenth century were reminiscent of the Treaty of Waitangi in their cession of sovereignty and express reservation of tribal property rights. Other treaties purposefully contained a cession both of sovereignty and title to the land, a typical example being the Convention for the cession of Banco, Tasco and Tombo (1824) which granted "the full, entire, free, and unlimited right, possession, and sovereignty" of the specified land. This method's deliberate combination of the acquisition of the sovereignty and title to land was advocated by the Madden Report on the Sierra Leone (1841) which criticised the acquisition of sovereignty *simpliciter* as ineffective and nothing more than the purchase of the right to exclude other European nations.

The second question goes to the consideration of the meaning that is attached to the term "sovereignty" of the country for that is what Colonel Doherty proposes to purchase, and it seems to me that the bare privilege of preventing other powers from purchasing the soil or establishing themselves upon it, would be an unprofitable right without acquiring any property in the land, but, on the contrary, having the necessity of purchasing the latter whenever we thought fit to plant a settlement in the country after we had already paid for the worthless privilege of a veto on the question of sale or transfer to any other European power.

As in the case of the North American colonies, this practice was thoroughly consistent with the recognition of tribal property rights after British sovereignty, a finding which the Privy Council did not hesitate to reach on several occasions. In *Re Southern Rhodesia*, to give an important example of one such occasion, Lord Sumner indicated that the continuity of the tribal title as a matter of law depended largely upon whether it "belonged to the category of rights of private property, such that upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and foreborne to diminish or modify them". He then made a comment which seemed to indicate the presumption of continuity depended upon the degree of 'civilisation' of the indigenous society. However he modified this position by indicating that where the tribal law defined the title with sufficient precision the court would give it the appropriate recognition:
The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organisation that their usages and conceptions of right and duties are not to be reconciled with the institutions or legal ideas of civilised society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them ... On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law.

Not long after, Lord Haldane observed for the Board that any gradation approach to aboriginal title had to "be held closely in check". He affirmed that the tribal title to their land "must be presumed to have continued to exist unless the contrary is established by the context or circumstances."36

Two cases have been cited as authority37 for the proposition that the Privy Council did not recognise a general presumption of the continuity of the tribal title subsequent to British annexation.

In *Cook v Sprigg* (1899) the Board advised that the appellants as grantees of concessions made by the paramount ruler of Pondoland could not enforce these rights against the Crown after British annexation. During the course of its unanimous opinion the Committee, upon which Lord Watson was sitting, made the rather wide observation that "according to the well-understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal had authority to enforce such an obligation."38 The property rights alleged in this case were, however, not to land but contractual and personal in character. In consequence and despite the wide *dicta* the case was soon seen as no more than an application of the rule that tribunals in a British possession have no jurisdiction in respect of contractual claims against the Crown based upon its succession to the territory of another state against whom such claims would have lain.39

The advice of the Privy Council in *Vajesingji Joravasingji v Secretary of State for India* (1924) contained the following passage:40

> When a territory is acquired by a Sovereign State for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following upon a treaty, or it may be occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitants can only make good in the municipal courts such rights as that sovereign has through his officers recognised. Such rights as he had under the rule of

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36 [1921] 2 AC 399, 403.
37 *Calder v Attorney-General (British Columbia)* (1971), 13 DLR (3d) 64 (BCCA), 71-2 per Tysoe JA, 103-4 per Maclean JA. This position was reversed on appeal: (1973) 34 DLR (3d) 145 (SCC). *Milirrpum v Nabalco Pty Ltd* (1971), 17 PLR 141 (Aust NTSC), 266-7 per Blackburn J.
38 [1899] AC 572, 578.
39 Moore *Act of State in English Law* (1906), 80-1.
40 (1924) LR 51 Ind App 357.

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his predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce those stipulations in the municipal courts. The right to enforce remains only with the high contracting parties.

These comments were not inconsistent with the common law presumption of the continuity of local (and particularly tribal) property rights. Indeed, the Board's advice was wholly consistent with a presumption it had recognised elsewhere. In acquiring the sovereignty of the Panch Mahals during the 1860s the Crown had stipulated that certain property rights, or pattas as they were known, would be the subject of later confirmation. This amounted to a valid suspension of the property rights pending later confirmation. The appellants' attempt to obtain the recognition of their pattas was, therefore, an attempt to enforce not a presumption of continuity but the terms of a treaty which had left the property rights subject to eventual royal confirmation. This was a case of the valid suspension of the presumption of continuity by act of state during the acquisition of the sovereignty.

The Privy Council's advice in Vajesingji Joravasingji was given amidst a series of appeals to the Board concerning tribal title to land in the Colony of Southern Nigeria. These appeals resulted in an emphatic affirmation of the common law presumption of the continuity of local property rights. The particular importance of these cases to the New Zealand context lies in their recognition of the continuity of the tribal title and view of the status of a treaty of cession (the Cession of Lagos (1861)) expressly saving the property rights of the indigenous tribal population.

On 6 August 1861 the eleko (king) of Lagos ceded the island and port of the same name to the Crown. The Treaty stipulated that "I, Docemo, do, with the consent and advice of my Council, give, transfer, and by these presents grant and confirm unto the Queen of Great Britain ... the Port and Island of Lagos, with all the rights, profits, territories, "and appurtenances whatsoever thereunto belonging, and as well the profits and revenue as the direct, full, and absolute dominion and sovereignty of the said port, island and premises, with all the royalties thereof, freely, fully, entirely, and absolutely." The same article provided for the inhabitants of the "said islands and territories, as the Queen's subjects, and under her sovereignty, Crown, jurisdiction and government, being still suffered to live there." The second article permitted the King to retain his royal style and authority to decide disputes between native inhabitants according to the native law. The native community considered the Treaty to have ceded the government of Lagos but with the saving of tribal property rights, a belief confirmed by a series of cases during the 1920s and

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41 There was some indication these were personal rather than property rights however the case proceeded on the footing the pattas were of the latter variety.
42 Article 3, Treaty for the cession by Scindia of Gwalior, 12 December 1860, 123 CTS 181.
43 Treaty with the King of Lagos, 6 August 1861 MAT 1st, 409 and 123 CTS 234, 256.
This series of cases began with the judgment at first instance of Osborne CJ in Attorney-General v John Holt and Co (1910). This case concerned the claim to certain rights over the foreshore as part inter alia of the property rights saved by the Treaty of Cession. Osborne found that according to native law a riparian owner had the right known as etisha to use the foreshore for access to water to land, embark, moor and otherwise use his canoe. Although some form of property interest the right of etisha did not give any exclusive ownership of the foreshore according to native custom. Hence the cession of the sovereignty to the Crown also passed the title to the foreshore but subject to the property rights (etisha) of the riparian owners under native customary law. In reaching this conclusion Osborne stressed it "to be quite clear that the Treaty of 1861 was a cession of territory, which at the same time respected pre-existing rights of private ownership." This continuity would be recognised and enforced by the courts of the Colony. Sitting on the Full Court (1911) Osborne maintained this position upon appeal. Winkfield J took a similar approach resting the continuity of the local property rights upon both the Treaty of Cession and subsequent practice embodied in local ordinances. Significantly he appeared to treat each as separate grounds for the continuity of the tribal property rights. With regard to the Treaty he noted:

At the time of the cession the natives were aware that the land of the island was being ceded. The white-capped chiefs complained that the cession involved the abrogation of all private rights of property and they protested that the King could not give away their lands. They were assured that the Treaty did not deprive them of their private property.

Winkfield also indicated these property rights remained defined and regulated according to native customary law. On appeal the Privy Council did not disagree with these findings, indicating that the Treaty gave up the sovereignty "subject to the condition that all rights of property existing in the inhabitants under grant or otherwise from King Docemo and his predecessors, were to be respected." The Board left it open, however, whether the recognition of these property rights required "confirmation by subsequent procedure, prescribed by way of ordinance or otherwise" (that is, formal grant of the Crown).

Two years previous to the Board's advice in the John Holt case the Full Court of Southern Nigeria had given judgment in Oduntan Onisiwo v Attorney-General (1912). Osborne’s judgment was particularly important, not only for its affirmation of his approach in the John Holt case but for its later emphatic approval by the Privy Council. This case required the Court to consider both the status of property rights subsequent to British

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44 (1910) 2 Nig LR 1, 10-11.
45 Id, 27.
46 Id, 41 and 41-2.
47 Id, 43.
48 [1915] AC 599.
annexation and the extent of territory ceded by the Treaty of 1861. Relying on *Cook v Sprigg* (1899) the Attorney-General alleged both matters were at the sole determination of the Crown but the Court could not agree. So far as the second point was concerned Osborne found *Cook v Sprigg* was no authority for the proposition that a court could not look to the terms of a treaty of cession to ascertain the extent of territory ceded. Considering the first point, the Chief Justice distinguished *Cook v Sprigg* on the basis that there the Crown had not undertaken to respect private property rights after the change of sovereignty whereas it had done so under the cession of Lagos. Although he apparently felt the Treaty was enough recognition of itself he noted that the Crown had issued Royal Instructions to Freeman, the first Governor of Lagos, and allowed legislation both of which contained a recognition of tribal property rights. He did not doubt the accuracy of *Cook v Sprigg* for the proposition that private property rights were at the disposal of the Crown during the assumption of sovereignty but no such act of suspension had been made, quite the opposite in fact, and by the Treaty it "was the intention of the Crown to accord to the inhabitants of the ceded territories the status and privileges of British subjects." Winkfield, however, seemed to have had second thoughts since the *John Holt* case. Relying on *Cook v Sprigg* he found *obiter* that the recognition of local property rights required either a grant or legislative declaration by the Crown. Stoker J took the middle ground between Osborne and Winkfield finding that the administrative as well as legislative practice in Lagos over the past fifty years clearly showed "that the Crown had long since generally recognised rights of private ownership."

The Privy Council finally confronted the question it had sidestepped in the *John Holt* case, this being the source of the continuity of tribal property rights in Lagos, in *Amodu Tijani v The Secretary, Southern Provinces* (1921). This case concerned the rights of the White Cap chiefs of Lagos who had been granted lands by the *eleko* prior to the cession. By these grants the White Caps held the right to control the use and management of the land, most notably the power to evict miscreant tenants. In the years prior to the cession they had also come to exercise the right to allot the lands for the purposes of cultivation in return for a nominal rent. Land was taken from the plaintiff White Cap under the Public Lands Ordinance 1903 so presenting the question of the character and hence compensability of the White Caps' ownership under pre-cession grants from the *eleko*. The Divisional and Full Courts of the Colony held that the plaintiff was entitled to compensation on the basis of the nominal rent received. The Privy Council overruled these decisions advising that the plaintiff was entitled to compensation as the absolute owner of the land. It was found at all stages, although not without some contradiction in the lower courts, that the White Caps'
annexation and the extent of territory ceded by the Treaty of 1861. Relying on *Cook v Sprigg* (1899) the Attorney-General alleged both matters were at the sole determination of the Crown but the Court could not agree. So far as the second point was concerned Osborne found *Cook v Sprigg* was no authority for the proposition that a court could not look to the terms of a treaty of cession to ascertain the extent of territory ceded. Considering the first point, the Chief Justice distinguished *Cook v Sprigg* on the basis that there the Crown had not undertaken to respect private property rights after the change of sovereignty whereas it had done so under the cession of Lagos. Although he apparently felt the Treaty was enough recognition of itself he noted that the Crown had issued Royal Instructions to Freeman, the first Governor of Lagos, and allowed legislation both of which contained a recognition of tribal property rights. He did not doubt the accuracy of *Cook v Sprigg* for the proposition that private property rights were at the disposal of the Crown during the assumption of sovereignty but no such act of suspension had been made, quite the opposite in fact, and by the Treaty it "was the intention of the Crown to accord to the inhabitants of the ceded territories the status and privileges of British subjects." 49 Winkfield, however, seemed to have second thoughts since the *John Holt* case. Relying on *Cook v Sprigg* he found *obiter* that the recognition of local property rights required either a grant or legislative declaration by the Crown. 50 Stoker J took the middle ground between Osborne and Winkfield finding that the administrative as well as legislative practice in Lagos over the past fifty years clearly showed "that the Crown had long since generally recognised rights of private ownership." 51

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rights over their land were proprietary in character and had survived British annexation. The Board simply disagreed with the lower courts' interpretation of the character of those property rights.

At first instance Speed CJ indicated the reasoning of the Full Court in the Onisiwo case as unimpeachable on the question of the effect of the cession and continuity of local property rights. The eleko had made a complete and valid cession of the sovereignty but with the saving of the property rights of the White Caps. He found this view confirmed by a despatch from Freeman, first Governor of the Colony, of 8 March 1862. This despatch and others to and from the Colonial Office were frequently referred to in the colonial courts as indicative of the non-disruption of property rights by the cession. Interestingly Speed also cited as authority for this continuity both Onisiwo and Cook v Sprigg. On appeal to the Full Court Speed maintained his position. Ross J held that although private rights survived the cession in 1861 in virtue of local legislation, the rights claimed in this case (unlike Onisiwo) were not for the use and occupation of land but its control and management. Accordingly they were 'public' rights and part of the sovereignty acquired by the Crown with the cession. Somewhat contradictorily, however, he held that these rights although 'public' were compensable as if private rights and on the basis of the nominal rent. Webber J found the cession and royal exercise of the constituent power for Lagos - that is, the process of annexation, had "left entirely unimpaired the ownership rights of private property." This position was confirmed by the British government's assurances to the White Caps after the cession and was also "recognised, alluded to and implied in subsequent legislation allowed by the Crown." He also indicated the nature of these property rights was to be determined according to the native law. Pennington J took an approach similar to Webber. He agreed private rights were not affected by the cession but insisted the character of this continuity had to be interpreted in the light both of the (developing) customary law and Ordinances passed after the cession. These sources showed the White Caps were not the absolute owners of the land and hence not entitled to compensation on that basis.

It would be fair to say that the Southern Nigeria judges had not taken a uniform approach to the source of the continuity of tribal property rights subsequent to the cession of Lagos. Some had located this continuity in the common law treating the events of 1861 as essentially non-disruptive. Osborne was the most notable adherent to this position. Others took the lead from Cook v Sprigg and looked either to local legislation or formal Crown grant. The Privy Council's avoidance of this question in the John Holt case had not helped

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52 (1915) 3 Nig LR 21, 25-7.
53 Id, 31.
54 Id, 32-4.
55 Id, 39.
56 Id.
57 Id, 44-8.
although its response was unequivocal when *Amodu Tijani* reached London. For the Board Viscount Haldane approved Osborne's judgment in *Onisiwo* insisting that a "mere change in sovereignty is not to be presumed as meant to disturb rights of private owners."58 Although by cession the Crown obtained "along with the Sovereignty, ... the radical or ultimate title to the land, in the new Colony", this title was acquired "on the footing that the rights of property of the inhabitants were to be fully respected."59 This principle was a "usual one under British policy *and law* when such occupations"60 took place. The Crown's title was burdened by the customary property rights of the tribal inhabitants - a result which obtained in West Africa so much as the East Indies and Canada.61 In confirming this position the Board referred to an 1862 debate in the Commons62 as well as contemporary despatches and other documentary evidence. This material indicated, as did the terms of the cession itself, that British annexation was not intended to disrupt the tribal property rights. Thus Haldane found that the "original native right" to their lands "must be presumed to have continued to exist unless the contrary [was] established by the context or circumstances."63 Given this continuity the actual character of the tribal property rights was to be assessed according to the rules of native tenure. Haldane commented that it was on this point that Speed CJ had erred. Speed had "virtually" excluded "the legal reality of the community usufruct" under native custom and so "failed to recognise the real character of the title to land occupied by a native community."64 That title was "*prima facie* based, not on such individual ownership as English law has made familiar, but on a communal usufructuary occupation, which [might] be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference."65 In other words, Speed CJ had tried to transliterate the native customary title into an English law equivalent distinguishing "public" from "private" rights. By native custom the White Caps retained title to land granted by them to members of their community for "usufructuary occupation" and on that basis were entitled to compensation as full owners of the land upon its compulsory acquisition.

The Privy Council's advice in *Amodu Tijani* recognised the continuity of tribal property rights as a matter of common law in the absence of some act of extinguishment by the Crown during the assumption of sovereignty. These property rights were to be determined according to the customary law. The Board also found that the interposition of a system of Crown grants for land subject to a tribal title did not necessarily affect that title where it was introduced "mainly, if not exclusively, for conveyancing purposes, and not with a view to

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58 [1921] 2 AC 399.
59 *Id.*
60 *Id.* Emphasis added.
61 *Id.*
63 [1921] 2 AC 399, 410.
64 *Id.*
65 *Id.*
to altering substantive title already existing.”66

The Board affirmed this position on the tribal title to land in Lagos on at least six subsequent occasions.67 In Sonomu v Disu Raphael (1927) the Board confirmed its obiter dicta in Amodu Tijani, ruling that a Crown grant of land subject to a native title was to be presumed as vesting the land in the grantee subject to the tribal right.68 The Crown grant did not extinguish the native title but was taken subject to it. This position was reiterated in Sakariyawo Oshodi v Moriamo Dakolo (1930) although it was noted Crown grants were “in their form inconsistent with the whole idea of native rights.”69 This was a result requiring legislative rather than judicial correction. It was also one highlighting the extent of the Board’s commitment to the recognition of the continuity of local property rights: In principle a Crown grant of land was taken subject to any unextinguished tribal title, a proposition re-affirmed by the Board in Idowu Inasa v Chief Sakariyawo Oshodi (1934)70 and Sakariyawo Oshodi (deceased) v Brimah Balogun (1936).71 The same position also underlay the advice in Akajaiye v Lieutenant-Governor Southern Provinces (1929) when it was alleged that an Ordinance requiring transformation of the native title into one based on a Crown grant was confiscatory in character in relation to those native owners who did not present themselves for Crown grant within the statutorily set period. The Board held otherwise, noting that the Ordinance provided the machinery for the transformation of the titular ownership from a Crown-recognised to Crown-derived basis.72

Some years after these cases an important reconsideration and re-affirmation of the principles in Amodu Tijani was given by the Board in Oyekan v Adele (1957). The well known passage from Vajesingji Joravasingji was repeated and reconciled with the common law presumption of the continuity of local property rights. Lord Denning acknowledged that subsequent to British annexation local property rights could not be based for municipal law purposes solely upon the terms of a treaty of cession. In order to ascertain what rights passed to the Crown and what were retained by the inhabitants "the courts of law look, not to the treaty, but to the conduct of the British Crown." Such inquiry, he indicated was governed by "one guiding principle": "The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected."73 This position confirmed that in the absence of any act of state during the process of acquisition the recognition of local property rights would depend not solely upon the terms of a treaty affecting those rights (as in Vajesingji Joravasingji) but a general presumption arising

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66 Id, at 404.
67 Below cases, also Eshugbayi Eleko v Officer Administering the Government of Nigeria [1931] AC 662, 672.
69 (1930) 9 Nig LR 25 (PC).
70 [1934] AC 99.
71 (1936) 4 WACA 1 (PC).
72 (1929) 9 Nig LR 1, esp 5-6 (PC).
73 [1957] 2 All ER 785, 788 (PC).
independently though capable of modification by the terms of a treaty concluded during the acquisition of the sovereignty.

The Canadian courts have applied the presumption of the continuity of tribal property rights on numerous occasions. Of these the most influential have been the judgments of the Supreme Court of Canada in Attorney-General (British Columbia) v Calder (1973). In giving judgment the Court recognised the tribal title of the Nishga Indians over their traditional territory but parted company on the question of extinguishment. More recently the Court has restated the presumption in the strongest of terms. In other parts of Canada the aboriginal title can be based upon the terms of the Royal Proclamation 1763 rather than a common law presumption of continuity. Significantly, however, most courts have interpreted the Proclamation as no more than declaratory of the common law title.

It should be stressed that the presumption of continuity of local property rights recognised in the courts and applied to the aboriginal title was never characterised as the retrospective application of latter day legal principle. In the application of the presumption the courts have constantly stressed its basis in the historical record. The presumption of continuity was no more than a guide to the interpretation of the conduct of the Crown during and upon the assumption of the territorial sovereignty. The judicial emphasis upon the conduct of the Crown was described by the Privy Council in this way.

The only legal enforceable rights which the original inhabitants could have as against their new sovereign were those, and only those, which the new sovereign, by agreement express or implied, or by legislation, chose to confer upon them. Of course this implied agreement might be proved by circumstantial evidence such as the mode of dealing with them which the new sovereign adopted, his recognition of their old rights, and express or implied election to respect them and be bound by them.

The judicial application of the presumption of continuity to the title of the indigenous inhabitants of North America, Africa and the East Indies was thoroughly consistent with the historical record of the Crown's relations with these societies upon the assumption of sovereignty over their territory.

74 eg R v Wesley [1938] 58 CCR 269, 276 per McGillivray JA (Alta CA); R v White and Bob (1964) 52 WWR 193, 232 per Norris JA (BCCA); Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development (1979), [1980] 1 FC 518 (NWTID).
75 (1973) 34 DLR (3d) 145 (SCC).
76 For a full analysis of this decision see Lysyk "The Indian Title Question in Canada: an appraisal in the light of Calder" (1973) 51 Can Bar Rev 450.
77 Guerin v The Queen [1984] 2 SCR 335.
78 The territory subject to the Proclamation is discussed by Slattery, "Land Rights of Indigenous Canadian Peoples", 244-60;
79 eg Doe dem Burk v Cormier (1890), 30 NBR 142, 148 per Allen CJ (NBCA); R v Koonungnak (1963) 45 WWR 282, 302 per Sissons JC (NWTTC); R v White and Bob (1964) 52 WWR 193, 221 per Norris JA (BCCA); Guerin v The Queen [1984] 2 SCR 335, 379 per Dickson CJ (SCC);
80 Secretary of State for India in Council v Bai Rajbai (1915) LR 42 Ind App 229, 237 per Lord Atkinson (PC), aff'd Vajesingji Joravasingji v Secretary of State for India in Council (1924) LR 51 Ind App 357, 360 per Lord Dunedin (PC).
In coming later to assess the application of the common law presumption of the continuity of the tribal title of the Maori the primary focus, therefore, must be upon the actual conduct of the Crown during and upon the assumption of territorial sovereignty. The goal of such an inquiry must be identification of the extent to which the Crown suspended or modified this presumption during its acquisition of the sovereignty.

4. the doctrine of 'modified continuity' in the North American colonies

The encounter on the North American continent between tribal societies with a customary code of tenure and English settlers anxious to colonise their land saw the recognition of certain principles which subsequently were applied to Maori-settler relations. The principles developed in North America concerning the status of Indian title over their lands upon the Crown’s assumption of the territorial sovereignty were founded upon the adaptation of the presumption of the continuity of local property rights. As with the presumption of the continuity of the pre-colonial law, however, it was understood implicitly that this presumption could not have been applied unqualifiedly to the Indian title. Were that the case in theory the acquisition and transmission of title to land would have been regulated by the customary code. Again, this problem was never more than notional being averted by the introduction and application of English rules of feudal tenure to the title of land held by the non-indigenous population of the territory: These settlers acquired their title to the land through the formal grant of the Crown (or its agents). The settlers required what might be termed a ‘Crown-derived’ title whilst the indigenous inhabitants held a ‘Crown-recognised’ title. This, in effect, created a dual system of tenure within the colony, one aboriginal governed by the customary code, the other feudal and subject to the appropriate rules of English law. Where the Crown had established this dual system of tenure, North America and, later, New Zealand being the notable examples, the accommodation of the two systems was facilitated by the Crown’s exercise of an exclusive faculty to silence the tribal title. The Crown, or those it had authorised, usually silenced this title by purchase. Where the purchase had preceded the Crown grant, the grantees took free of the extinguished aboriginal title but where the grant was made without such extinguishment they took subject to the aboriginal title, the Crown grant giving on the grantees the faculty to silence it by purchase. The essence of the rule was a recognition of the continuity of the tribal title but with a limitation upon its alienability. In this sense one might speak of a presumption of the ‘modified continuity’ of the Indian title.

The restriction of the alienability of the tribal title was an early and invariable theme of Indian - settler relations in colonial North America. As early as 1609 the instructions of the Virginia Council required Sir Thomas Gates to keep close supervision of all trade with the

81 The phrase belongs to Slattery Ancestral Lands, Alien Laws (1983), passim.
Indians, land transactions included, through the appointment of two "truncmasters" for each fort. With their appointment he was "by proclamacon or edict publiquely affixed [to] prohibite and forbidd vppon paine of punishement ... all other psons to trade or exchange for anythinge"\textsuperscript{82} with the Indians. A system of land purchase appears to have been adopted by the colonial authorities in Virginia there being numerous instances of purchase by 'treaty' during the first decades of settlement.\textsuperscript{83} By 1655 the colony had grown to an extent that the local assembly enacted a law stipulating the land of the plantation Indians should "not be alienable by them the Indians to any man de futuro" but that "for the future no such alienations or bargaines [between settler and tribe would] be valied without the assent of Assembly."\textsuperscript{84} A few years later Act 51 of the Colony (1657-358) reminded the settlers that "where the land of any Indian or Indians bee found to be included in any pattent alreadie granted for land ... such pattentee shall either purchase the said land of the Indians or relinquish the same ..."\textsuperscript{85} Act 72 of the same Assembly stipulated "no Indians to sell their lands but at quarter courts"\textsuperscript{86} where it could be entered upon the court records. Private purchases of Indian land persisted, however, the settlers usually insisting afterwards that the colonial authorities confirm their purchase by patent. A further Act was passed by the Colony in 1660 and settled the colony's position conclusively:\textsuperscript{87}

Act 138. Whereas the mutuall discontents, complaints, jealousies and ffeares of English and Indians proceed chiefly from the violent intrusions of diverse English made into their lands, The governor ... councell and burgesses ... enact, ordaine, and confirme that for the future noe Indian king or other shall upon any pretence alien and sell, nor noe English for any cause or consideration whatsoever purchase or buy any tract or parcell of land now justly claymed or actually possest by an Indian or Indians whatsoever; all such bargaines and sales hereafter made or pretended to be made being hereby declared to be invalid, voyd and null any acknowledgement, surrender, law or custome formerly used to the contrary notwithstanding.

In the New England colonies of Massachusetts Bay, Plymouth, Rhode Island, Connecticut, New Hampshire, and New Haven (which merged with Connecticut in 1665) a similar pattern prevailed. The "First General Letter" (1629) of the Governor of the New England Company to its authorities at Massachusetts Bay contained an express recognition of Indian title and acknowledgement that the colony's charter had been taken subject to their rights.\textsuperscript{88}

If any of the salvages ptend right of inheritance to all or any pt of the lands graunted in oure pattent, we pray yoU endeavoř to pçhase their tytle, that wee may avoid

\textsuperscript{82} Kingsbury,\textit{Records of the Virginia Company}, III, 12 at 20.
\textsuperscript{83} Thomas "Introduction" to Royce \textit{"Indian Land Cessions"}, 563-5.
\textsuperscript{84} Hening, ed \textit{Laws of Virginia}, I, 396.
\textsuperscript{85} \textit{Id}, 456-7.
\textsuperscript{86} \textit{Id}, 467.
\textsuperscript{87} \textit{Id}, II, 34.
\textsuperscript{88} Shurtleff, ed \textit{Records ... of the Massachusetts Bay in New England}, I, 386. Also "Second General Letter" (May, 1629), \textit{id}.
the least scruple of intrusion.

The year after enacting a law affirming the Indian title to land within the jurisdiction of the colony (1633), the General Court of Massachusetts Bay prohibited the purchase of land from the Indians without its permission, adding the requirement in 1639 that all authorised purchases were to be entered into court records. This law was re-enacted in 1648 and enforced by the Court on a number of occasions. During the mid-seventeenth century similar legislation was passed in Plymouth, Rhode Island, New Hampshire, New Haven and Connecticut. Likewise the colonial authorities of the other British colonies, New York, Maryland, New Jersey, Pennsylvania, North and South Carolina, and Georgia reserved the exclusive power to extinguish the tribal title. By the middle of the eighteenth century the practice had become a settled basis of colonial relations with the Indian tribes. In the detail these laws naturally varied but they were variations upon the same theme of modified continuity. The Royal Proclamation of 1763 which applied to the Crown's extant colonies as well as its newly acquired territory in Canada and the Floridas, gave the principle uniformity throughout British North America.

And whereas great Frauds and Abuses have been committed in the purchasing lands

89 In Thomas "Introduction" to Royce "Indian Land Cessions", 602-3.
90 Shurtleff, ed Records ... of the Massachusetts Bay, I, 112.
91 Id, 276. The "Generall Court" appointed a Committee (4 November 1646) to purchase Indian lands for the needs of the colony, id, II, 166.
92 Laws and Liberties of Massachusetts (reprint 1929) 28.
96 Slattery "Land Rights of Indigenous Canadian Peoples", 114 (1641) includes a reference to subsequent legislation (1686 and 1718).
97 Hoadly, ed Records of the Colony ... of New Haven, I: 27 (1639); subsequent legislation, id, 200 (1644-45); New Haven's Settling in New-England, 49 (1656).
98 Trumbull and Hoadly, eds Public Records of the Colony of Connecticut, I: 402 (1663); subsequent legislation, id, III: 422-3 (1687); V: 4 (1706), 30 (1717).
99 O'Callaghan, ed Documents Relative to the Colonial History of the State of New York, I: 44 (Dutch charter 1630); II: 96-10 (1629), 119 (1640). Early authorisations for English settlers to purchase (1664), id, XIII: 395 et seq. No law was enacted declaring the pre-emptive right but it was understood as law in the colony: Lords of Trade to Justice De Lancey, 19 March 1756, id, VII: 78.
100 Bozman, History of Maryland, II: 112-113 (1638). Subsequent general legislation, id, 584-5 (1649 and in force until the Revolution).
101 Thomas "Introduction" to Royce "Indian Land Cessions", 588 (1672), 589 (1703).
102 Id, 594-7 (Penn's exercise of his pre-emptive right), 597-8 (laws of 1700, 1729 and 1768).
103 Saunders, ed Colonial Records of North Carolina I:51 (instructions to Berkeley, 1663); CRNC, I: 165 ("Fundamental Constitutions" 1669 art.12); Thomas "Introduction", 628-9 (1715 and 1748).
104 Thomas "Introduction", 630-4.
105 Law of circa late 1757-early 1758, Digest of the Laws of the State of Georgia from 1755 to 1799, 51.
106 Brigham, ed British Royal Proclamations Relating to America, 212, 216-7.
of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; in order therefore to prevent such Irregularities for the future, and to the End that the Indians may be convinced of Our Justice, and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of Our Privy Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those Parts of Our Colonies where We have thought proper to allow Settlement; but that if, at any Time, any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose by the Governor or Commander in Chief of Our Colonies respectively, within which they shall lie ...

Several comments directly relevant it will be seen, to the aboriginal title of the Maori can be made in relation to the North American practice regarding the Indian title.

First, and perhaps obviously, the various laws of the colonies were predicated upon a recognition of the Indian title. The colonial authorities proceeded on the basis that their charter from the Crown left them with a title subject to the proprietary rights of the Indians. Their assertion of an exclusive right to silence the tribal title was in many respects an acknowledgment of their duty to quiet that title before allowing white settlers to plant the land under a colonial 'Pattent' (ie Crown grant). In those cases, however, where grants or patents were made for land over which some unextinguished tribal right subsisted, the colonial authorities as later did the American courts\(^\text{107}\) recognised that as in the case of their own charters these patents were issued subject to the Indian right. The colonial records are full of examples where settlers' patents were recognised as being encumbered by any unextinguished aboriginal title.\(^\text{108}\) Where this was the case, the grant operated as an assignment of the right to silence the title by purchase or agreement with the tribal owners.

A New England example of the declaration of this principle in colonial legislation may be given:\(^\text{109}\)

It is also ordered that for all lands whatsoever granted by this Court to particular towns or persons within this colony wherein any Indian have right and interest, the grantee shall agree\(^\text{110}\) with the native proprietors respecting their rights to prevent further inconveniences that might insue or arise through neglect hereof, and this court doth judge requisite to be attended in all former grants, although it hath not been imposed or incerted in the said graunt.

Secondly, and briefly relating back to the topic of the British imperium over the tribes

\(^{107}\) Fletcher v Peck (1810) 6 Cranch 87 (USSC) (grantee cannot eject the tribal owners); Johnson v McIntosh (1823) 8 Wheat 543, 574 (USSC) (grantee takes subject to Indian title); Clark v Smith (1839) 13 Pet 195 (grantee assumes unencumbered title upon Indian relinquishment); Beecher v Wetherby (1877) 95 US 517; Cramer v United States (1923) 261 US 219

\(^{108}\) eg Pulsifer ed Records of the Colony of New Plymouth, II: 130-1, 164; III: 104; Shurtleff, ed Records ... of the Massachusetts Bay, II: 159-60; III: 189; IV, pt 1: 303; Hoadly, ed Records of the Colony of ... New Haven, I: 5, 45; McIlwaine, ed Minutes of the Council and General Court of Colonial Virginia [1670-1675], 227, 369, 381.


\(^{110}\) Interpreted as including the right to purchase their title; Springer, supra.
discussed in the second chapter, the colonial practice regarding the Indian title concerned both the independent but, more usually, ‘plantation’ Indians who lived as tribes within the vicinity of the settlements in alliance if not express submission to the nearby colony. In contemporary terms, the plantation Indians might be described as Indians under the sovereignty of the Crown, a status often betokened by the frequent reference in the colonial records to the ‘Indians of the colony’. This observation is made simply to emphasize the separation of the question of Indian title from that of the character of the British *imperium* over the tribe. The recognition of the Indian title was never linked with tribal non-submission to a colony or, in other words, their status as ‘domestic, dependent nations’.

Finally, the modification upon the continuity of the Indian title represented by the restriction on its alienability was undoubtedly connected with the control of the settlement of the colony and maintenance of peaceful relations with the tribes. From the start the unfailing and frequently frustrated efforts of the Crown’s officials to restrict the purchase of Indian lands by private individuals was a constant source of friction within the colonies. The colonists, eager to acquire Indian land, had no objection to, indeed advocated, the recognition of the Indian title however they objected to the colonies’ insistence upon its exclusive faculty to silence that title. Many purchased land directly from the Indians and founded their claim to a good title on the Indian title and grant. Their complaint lay not in the doctrine of the continuity of the Indian title but in the modification of it signified by the restriction on its alienation. A pamphlet published by ‘The Inhabitants of Boston’ (1691) justifying their own ‘Glorious Revolution’ against the Governor of New England, Sir Edmund Andros, provided a typical account of the position taken by those who had purchased land directly from the Indians. The pamphleteers accused Andros of having acted arbitrarily in violation of their ‘birthright’ to the privileges of English law. This birthright, beside the privileges relating to taxation by elected representatives, habeas corpus and jury trial, also included the right to the undisturbed enjoyment of property. Andros, the ‘Inhabitants’ complained, had refused to recognise their title to land other than where evidenced by formal grant under the colonial seal. The title of those who had occupied land without such grant rested on two grounds they argued:

1. By a right of just occupation from the grand charter in Genesis 1st and 9th chapters, whereby God gave the earth to the sons of *Adam* and *Noah*, to be subdued and replenished. 2. By a right of purchase from the Indians, who were native inhabitants, and had possession of the land before the English came, and that having lived here sixty years, I did certainly know that from the beginning of these plantations our fathers entered upon the land, partly as a wilderness of *Vacuum Domicilium*, and partly by the consent of the Indians, and therefore care was taken to treat with them, and to gain their consent, giving them such a valuable consideration as was to their satisfaction ... and therefore did I believe that the lands of *New England* were the subject’s properties, and not the king’s lands.

This passage contains the two grounds typically advanced by colonists wishing to establish a legal title to land for which they had no Crown grant. The first, one which Vattel gave secular form in the mid-eighteenth century, will be discussed presently. The second was founded upon the unqualified continuity of the tribal title: Since the Indians were recognised as the lawful owners of their land the same status must vest in any person who had purchased from them. Such argumentation was to reappear in almost exactly the same form one and a half centuries later in the dispute between the Colonial Office and the New Zealand Company over the status of the latter's purchases from the Maori tribes. It can be noted too that by the end of the seventeenth century the colonists were styling the Crown’s exclusive power to extinguish the aboriginal title as its 'pre-emptive right',¹¹² the same term which later was to be used in the second article of the English text of the Treaty of Waitangi.

This 'pre-emptive right' had become a recognised principle of colonial law as early as 1675. That year, eight eminent English counsel¹¹³ advised that in the plantations "no people have been Suffered to take up Land but by ye Consent and Lycence of ye Gov r or proprietors under ye princes title whose people made ye First Discovery". In consequence a planter could not obtain a "Sufficient" title by purchase from the Indians without "a Grant from ye King or his Assignes."¹¹⁴

The principles which the colonial practice exemplified were analysed authoritatively by Marshall CJ in Johnson v M'Intosh (1823). This case soon became the leading account of the principles governing the Indian title over their lands. This case concerned the title to large tracts of land once within the colony of Virginia and later ceded to the United States as part of the Northwest Territories. In 1773 and 1775 the Illinois and Piankeshaw tribes sold land directly to a group of land speculators. Subsequently the tribes ceded these lands by treaty to the United States which granted the title to a portion of the land to a William M'Intosh. An action of ejection was brought against M'Intosh by the devisees of the speculators’ company who sought to establish title to the lands by right of the earlier sale of the Indians. At issue, then, was the nature of Indian title and the capacity of the Indians to pass a title which could be sustained at law.

Marshall opened his judgment with an indication that the relevant principles lay "not singly [in] those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature Man, and which are admitted to regulate, in a great degree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles also which our government has adopted in the particular case, and given us as the rule for

¹¹² 'Inhabitants of Boston', Revolution in New-England Justified, supra, used the term. Also Byfield, supra.
¹¹³ John Holt, later Chief Justice, was one.
our decision."\textsuperscript{115} Whilst the court might have recourse to the principles of the \textit{Jus gentium}, Marshall clearly felt the primary determinant to be the conduct of the government. The presumption made was that the government had based its conduct on legal principle and so the relevant principles were to be found in this conduct. Having established the source of the law, Marshall proceeded to show how that his formulation of Indian title was based on a doctrine of 'discovery'. The "great nations of Europe" had been "eager to appropriate to themselves" so much of North America "as they could respectively acquire":\textsuperscript{116}

But, as they were nearly all in pursuit of the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments which title might be consummated by possession.

The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere.

Nonetheless, Marshall continued:\textsuperscript{117}

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees subject only to the Indian right of occupancy.

Marshall confirmed this position by reviewing British practice in North America and its adoption by the United States. He observed that it had "never been doubted, that either the United States, or the several states, had a clear title to all the lands ... subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right was vested in that government which might constitutionally exercise it".\textsuperscript{118} He gave the Virginia law of 1779 applicable to the case at bar as an example of the principle.

\textsuperscript{115} (1823) 8 Wheat 543, 572.
\textsuperscript{116} Id, 572-3.
\textsuperscript{117} Id, 573-4.
\textsuperscript{118} Id, 584-5.
Having noted the continuity of the aboriginal title and the government's exclusive right to silence it, Marshall went on to explain the origins of the restriction on the alienability of the tribal title. He observed that once the Crown conquered or acquired new territory it normally adopted the rule that "the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections, and united by force to strangers."\textsuperscript{119} This echo of Lord Mansfield's propositions in \textit{Campbell v Hall} (1774) could not, however, be applied to the case of the "fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest."\textsuperscript{120} Marshall indicated that that "law which regulates, and ought to regulate in general, the relations between the conqueror and conquered, was incapable of application to a people under such circumstances."\textsuperscript{121} The limitation upon the alienability of the Indian title was the result of the necessary "resort to some new and different rule."\textsuperscript{122} The tribal owners were "deemed incapable of transferring the absolute title to others." This rule was one which the courts were bound to enforce:\textsuperscript{123}

However this restriction may be opposed to natural right, and to the usages of civilised nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.

Having reached his central conclusion that the court could not recognise any private title to land in a settler not derived from a Crown or government grant, Marshall turned his attention to the effect of a direct purchase by a settler from the tribal owners:\textsuperscript{124}

The title of the crown, whatever it might be, could be acquired only by a conveyance from the crown. If an individual might extinguish the crown title for his own benefit, or, in other words, might purchase it, still he could acquire only that title. Admitting their power to change their law or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from their will; and, if they choose to resume it, and make a different disposition of the land, the courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding.

\textsuperscript{119} Id, 589.
\textsuperscript{120} Id, 590.
\textsuperscript{121} Id, 591.
\textsuperscript{122} Id.
\textsuperscript{123} Id, 591-2.
\textsuperscript{124} Id, 591-2.
Marshall's judgment in *Johnson v M'Intosh* together with an important New Zealand case *R v Symonds* (1847) were, and remain, the fullest accounts of the legal character of aboriginal title. Marshall recognised the continuity of the Indian title and its regulation amongst the tribal owners by the traditional rules of tenure. The enforcement of the customary code lay solely in the hands of the tribal authorities. The 'uncivilised' character of this tenure, however, necessitated a modification of the normal presumption of the continuity of local property rights upon the Crown's assumption of the territorial sovereignty. The modification was the recognition of the Crown's exclusive or 'pre-emptive' right to silence the Indian title by fair purchase or, it may be added, legislation. The Indian title was recognisable in the colonial courts which would not hesitate to protect it but no settler could bring an action for land without a Crown grant.

The Canadian courts have recognised a doctrine of modified continuity similar if not identical to Marshall's approach in *Johnson v M'Intosh* (1823). In *Saint Catherine's Milling and Lumber Company v R* (1887) the Supreme Court of Canada considered the title of the Province of Ontario to Indian lands surrendered by Treaty No 3 (1873). During the course of separate judgments the court, which had had the American authorities cited at length in argument, made several observations on the character and extinguishment of the Indian title. Ritchie CJ adopted the American principles holding that the Crown held the legal title to all land in Ontario "subject to the Indian right of occupancy in cases in which the same has not been lawfully extinguished absolutely to the Crown". Upon the extinguishment of this title the land passed to the Crown in right of the Province by reason of the British North America Act 1867. Strong and Gwynne JJ dissented on the ground that this Imperial Act simply gave the Province title to those lands which it held at the enactment of the statute. Since land subject to an unextinguished aboriginal title was not vested in the Province at the time of confederation its subsequent extinguishment could not vest title in the Province. Strong took a similar position as Ritchie on the question of Indian title, however, and expressly applied the Marshall doctrine. After referring to the American cases and their summary in Kent's *Commentaries*, he stated:

It thus appears, that in the United States a traditional policy, derived from colonial times, relative to the Indians and their lands has ripened into well established rules of law, and that the result is that the lands in the possession of the Indians are, until surrendered, treated as their rightful though inalienable property, so far as the

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125 (1847), [1840-1932] NZPCC 387 (SC).
126 The cases are analysed thoroughly by Slattery *Ancestral Lands, Alien Laws*.
127 (1887) 13 SCR 577, 587-8, 592-3, 596, 598-9.
128 *Id*, 599.
129 *Id*, 605.
130 *Id*, 612-3. Other important occasions where Canadian judges have expressly adopted the Marshall doctrine include *R v White and Bob* (1964), 50 DLR (2d) 613, 646-7 (BCCA); *Warman v Francis* (1958), 20 DLR (2D) 627, 630 (NBSC); *Calder v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145, 190-6 (SCC); *Guerin v The Queen* (1985), 13 DLR (4th) 322, 335-8 (SCC).
possession and enjoyment are concerned; in other words, that the *dominium utile* is recognised as belonging to or reserved for the Indians, though the *dominium directum* is considered to be in the United States. Then, if this is so as regards Indian lands in the United States, which have been preserved to the Indians by the constant observance of a particular rule of policy acknowledged by the United States courts to have been originally enforced by the Crown of Great Britain, how is it possible to suppose that the law can, or rather could have been, at the date of confederation, in a state any less favourable to the Indians whose lands were situated within the dominion of the British Crown, the original author of this beneficent doctrine so carefully adhered to in the United States from the days of the colonial government? Therefore, when we consider that with reference to Canada the uniform practice has always been to recognise the Indian title as one which could only be dealt with by surrender to the Crown, I maintain that if there had been an entire absence of any written legislative act ordaining this rule as an express positive law, we ought, just as the United States courts have done, to hold that it nevertheless existed as a rule of the unwritten common law, which the courts were bound to enforce as such...

Upon appeal the Privy Council did not dwell upon the question of Indian title. Lord Watson indicated approval of the approach taken by the majority of the Supreme Court. He found it "sufficient" to state the Indian title was a "personal and usufructuary right" and that the Crown had a "substantial and paramount estate" underlying the Indian title which "became a plenum dominium whenever that title was surrendered or otherwise extinguished." The Board reaffirmed their position in the *Star Chrome* case (1920) interpreting the 'personal' aspect of the Indian title as simply an indication of its inalienability other than to the Crown. In *R v Smith* (1983) the Supreme Court indicated that the aboriginal title was 'personal' in the sense that it was a personal right which by law must disappear upon surrender by the person holding it; such an ephemeral right cannot be transferred to a grantee, be it the Crown or an individual. The right disappears in the process of the release, and a release couched in terms inferring a transfer cannot operate effectively in law on the personal right any more than an express transfer could. In either process the right disappears.

In *Guerin v The Queen* (1985) Dickson CJ held that the inalienability of the Indian title save to the Crown coupled with the Crown's status as holder of the legal title to its ungranted lands placed the Crown in a fiduciary position vis-à-vis the tribal owners. This duty particularly arose in those cases where the Crown was obtaining the tribal relinquishment or, in Canadian terminology, surrender of their aboriginal title.

Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a

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131 (1888), 14 App Cas 46, 55. The point was reiterated later when he stated the Crown "has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden" (at p 58).

132 [1921] 1 AC 401, 410-1.

133 (1983) 147 DLR (3d) 237.

personal right. It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true ... that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to facilitate the Crown's ability to represent the Indians in dealings with third parties. The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both misleading and unnecessary.

The land subject to an unextinguished aboriginal title in *Guerin* was vested in the Crown so the case did not consider the effect of a Crown grant of land subject to an unextinguished aboriginal title. The colonial practice and *Johnson v M'Intosh* (1823) indicate such grants were treated as encumbered by any subsisting aboriginal title. The precise extent to which a Crown grantee assumed the fiduciary duties of the Crown by reason of the mere grant awaits judicial determination although the West African cases give some indication that a tribal grantee at least holds subject to the customary rights. Despite some uncertainty over the relationship of the Crown grantee to the aboriginal owners on the question of extinguishment it is at least clear that such grants were encumbered by the aboriginal title.

It may be said by way of closing comment that the doctrine of modified continuity recognised as part of the common law of North America was essentially a means of recognising yet accommodating and limiting the tribal tenure. The Indians' title to their land and its regulation by the customary law was acknowledged in the colonial courts yet limiting the alienation of it to the Crown or its grantees ensured the application of English law to the title of the settlers. The settlers who had purchased direct from the Indians tried to accomplish the incorporation of their title into some English-like system by dressing their purchases in deeds with the tribes and other formalities of conveyance (even livery of seisin)138 practiced in England. But in the end, the introduction and application of the feudal rules of English law to the settlers' titles meant that if any were to be recognised and enforced in the colonial courts a Crown grant was necessary.

5. the introduction of feudal principles of land tenure to a British colony

According to the principles of English law the Crown's sovereignty over its territory is defined in terms reminiscent of the medieval notion of *dominium*. The Crown is constitutionally recognised as the ultimate, indeed only, sovereign authority in its territory. It

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has, in other words, whether in its legislative or executive capacity, the *imperium* (government) over its territory. The Crown is also considered the ultimate landowner of its territory, the term *dominium eminens* describing this 'prerogative' of sovereignty.136

The feudal rules of land tenure developed from Norman times have their basis in the Crown's ultimate ownership of its territory. There is 'nulle terre sans seigneur', no land without a lord, and so all title to land in England was located ultimately in the grant of the Crown. The feudal doctrine of tenures was simplified over the years, in preventing subinfeudation the statute *Quia Emptores* (1290)137 established a more direct link between lord and tenant whilst the forms of tenure were progressively reduced over the years. Nonetheless the doctrine of tenures was the notional basis of all title to land in England and still underlies English land law, as in the case of escheat.138 Sitting at the apex of the feudal pyramid the Crown had the *dominium directum* of its land in England, that is the power to make a grant to a subject who thereby acquired the *dominium utile* or use of the land as a tenant. *Plenum dominium*, the term used by Lord Watson in the *Saint Catherine's Milling* case, was a combination of both.139

The feudal code of land tenure must be carefully distinguished from the Crown's constitutional position as the ultimate owner of its territory. Although the feudal doctrine developed from this constitutional premise it did not follow that the Crown's assumption of the sovereignty and hence underlying ownership of its newly-acquired territory brought with it the feudal rules of title to land in the territory. The many cases recognising the continuity of the local non-English laws of land tenure (Christian and otherwise) subsequent to the Crown's assumption of the territorial sovereignty were founded upon the implicit separation of feudal doctrine from the Crown's sovereignty.140 Were that not so the presumption of the continuity of local property rights could not have been made by the common law. Instead all titles to land would have required the grant of the Crown. In short, the feudal rules governing title to land were not imported into a colony as that part of English law incidental to the sovereignty of the Crown: The Crown held the *dominium eminens* in virtue of its sovereignty but the existence of any *dominium directum* depended upon the extent to which feudal rules were introduced, if at all, into a colony. In *Attorney-General v Brown* (1847) Stephen CJ observed for the Supreme Court of New South Wales that the fiction of English law supposing title to all land to be in the Crown was a proposition "depending for its

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136 The term belonged to Grotius (*De Jure Belli ac Pacis*, trsl ed, 218-9,385,796-7,807) who considered eminent domain an attribute of sovereignty. Bynkershoek *Quaestiones Juris Publici* (1737) indicated *imperium eminens* more accurately described the sovereign's right (lib 2,ch XV,p 218). Also Vattel *Le droit de gens* (1758), lib 7, para 244.
137 18 Edw 1 cc 1, 2.
140 The distinction was stressed in *Johnson v M'Intosh* (1823) 8 Wheat 543, 595-6.
support on no feudal notions or principle.”

A lengthy and important assessment of the introduction of the feudal rules of land title to the Crown’s colonies was made in *doe dem Silveira v Texeira* (1845). This case concerned the applicability of the feudal rule of escheat to land in Bombay. Bombay, it may be recalled, was acquired by the English by cession from Portugal in 1661. The Crown granted the island to the East India Company in 1668, the general introduction of English law being dated from a Proclamation under authority of the 1668 letters patent. In *Silveira* the defendants claimed that the English (feudal) rules of succession had never applied in Bombay but that the old Portuguese laws which made no distinction between succession to land and personal property had been followed. After opening with a reference to the presumption of the continuity of the local property rights, Anstruther R continued:

The subjects of each estate, in planting new colonies, must be supposed to carry with them the law of the mother country, so far as it applies to their situation as colonists; for human society cannot exist without some definite rule as to the rights to property: and where no other is prescribed, the former law of the people must be supposed to continue. The law which English colonists carry with them, if not otherwise fixed, and if left to this natural inference, is therefore, in its very nature, the law which follows the persons of Englishmen. But the law of descent of land belongs to, and remains with, the land of England to which it is attached. It has nothing to do with the persons and cannot follow them. It is a fruit of feudal tenures, and was introduced for the purpose of preserving to the lord of each fief the entire service for his vassal, and the whole fruits of the vassalage.

Anstruther developed this theme after stating that the King might introduce feudal tenure during the acquisition or subsequently by legislation:

...as the whole principle of tenure of land is a mere creature of the feudal system, as applicable to the particular soil in which that law is established, I do not think that the lands of a new colony can be the subject of tenure at all, unless it were divided into manors, or honours, or other feudal divisions, as the land may be divided for feudal purposes, into parishes, if the Crown thought proper so to do ... but unless such direct act of legislation appeared, or unless it could be presumed from the uniform practice of the place, I do not see any reason for thinking that the principle of the feudal, or of the ecclesiastical polity, or of tenure, or of titles, as derived from either of those principles, are at all a necessary part of the law of England, when the persons are removed from the soil to which the laws of tenure and of title apply. Here the existing practice not only does not warrant the presumption of any such legal enactment of feudal principles, but is wholly inconsistent with it, and negatives its existence.

This conclusion would apply, Anstruther indicated, even were Bombay "a new plantation

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141 (1847), 1 Legge 312, 318.
142 Perozeboy v Ardassee Cursetjee (1843) 4 Ind Dec (OS) 614 (Bomb HC); Bera'mji v Rogers (1867) 4 Bomb HCR 1; Keith "Bombay and English Constitutional Law" (1935), XI Ind HQ 57.
143 (1845) 4 Ind Dec (OS) 529: 538 (Bomb Rec Ct).
144 Id, 543-4.
and colony of Englishmen." The fact, however, that there were indigenous Hindu and Muslim who enjoyed title to their land according to their own laws strengthened his finding that the English rules had not been introduced to Bombay.  

I can see no reason to overturn the course of succession which has obtained here; we can only do so by supposing the King of England to have at once annihilated all the preceding rights of the whole native landholders of Bombay, and of every English settlement in India. We must suppose, that, either by the mere fact of English conquest or acquisition, or by the subsequent act of establishing Courts of Judicature upon the principles of English law, all former titles to land were at an end; that the land of British India immediately, ipso facto, became the property of the King; and that all rights now existing in lands in British India are emanations from the universal property of the Sovereign. I should have supposed such a proposition to have been, in the very statement of it, sufficient to carry its own refutation ... We must not in our zeal for the principles of the English law, forget that land may in nature be a subject of property in individuals, independently of any grant from the Crown. This seems to me to be the state of landed property in India; that not being a subject of tenure at all, it ought not to follow the law of descent of the subjects of tenure.

These words are significant if only as a direct antithesis to the approach which the New Zealand courts were later to take to the customary Maori land tenure subsequent to British sovereignty. More precisely, Anstruther found that although there had been a general introduction of English law to Bombay it had only been introduced to the extent it was suited to the circumstances of the colony. The practice adopted in the colony indicated the application of English rules of tenure to be unsuitable to the circumstances of the indigenous Hindu and Muslim inhabitants as well as the European. The former had title to their land regulated by the customary code whilst the European population applied the old Portuguese rules. There existed no special act of the Crown introducing the feudal rules and making them applicable to the title of all the inhabitants.

By the middle of the nineteenth century investigation into the applicability of the feudal rules of English land law to British colonies was regular judicial activity. In Mayor of Lyons v East India Company (1836-37) the Privy Council found that the law forbidding aliens from holding and devising real property was based upon feudal notions of allegiance and fealty. This rule had not accompanied the general introduction of English law to Calcutta. In Freeman v Fairlie (1828) it was found that the English law of succession applied to the title of European landowners in Calcutta but did not extend to the natives as a rule unsuitable to their circumstances. In Attorney-General v Brown (1847) the feudal rule of escheat was applied to settlers' land titles in the colony of New South Wales. The court indicated that the title of the Crown to the waste lands of the colony not only as an aspect

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145 Id, 544-5.
146 (1836) 1 Moo PC (Ind App) 175 (PC).
147 (1828) 1 Moo PC (Ind App) 305 (Ch).
of its sovereignty but also in the feudal sense was integral to the foundation of the colony. The applicability of the feudal rules (including primogeniture) was confirmed by the public colonial records as well as Imperial statutes affecting the colony.\(^{148}\)

Such cases illustrate the proposition that the introduction to the Crown's colonies of feudal principles of English land law required some express act of the Crown. Even then the presumption was that any such introduction would be qualified by the circumstances of the colony, in particular with regard to the land tenure of the indigenous inhabitants: Bombay had been granted to the East India company in "free and common socage" as of the manor of East Greenwich yet this notwithstanding the Silveira case found that the local practice was proof against any comprehensive introduction of feudal rules of land tenure. The Crown's charters for North America generally took either of two forms, one being modelled on the joint stock company in England with its socage tenure and lands held as of the manor of East Greenwich,\(^{149}\) the other following the seignorial grants found in Ireland with tenure provision that the land be held of the Crown \textit{in capite}.\(^{150}\) These features\(^{151}\) coupled with the early assertion of the Crown's pre-emptive right to silence the aboriginal title settled the question in North America: The feudal rules of title were generally applicable to the title of the settlers\(^{152}\) but the Indian title was spared. This was the ratio of \textit{Johnson v M'Intosh}. The feudal doctrine requiring title to land to emanate from the grant of the Crown was certainly not a rule of English law incidental to the sovereignty of the Crown nor did it come into a colony on the coat-tails of a general introduction of English law.

6. the extent of the aboriginal title

One important issue presented by the British colonisation of North America from the seventeenth century concerned the extent of the Indian title over their land. It was agreed on all hands that the Indian had title to the land in their actual occupation, that is cultivations, village sites,, pastures and suchlike. Their title over the forests and rivers, the apparent wild lands wherein they foraged, hunted and fished, was, however, less clear. The Indians for their part considered their hunting and fishing grounds as included in their territory. The

\(^{148}\) (1847), 1 Legge 312.

\(^{149}\) eg first charter to Virginia Company (1606), \textit{TCVC}, 1,10; third charter to Virginia Company (1612), \textit{TCVC}, 76,79; charter to the Plymouth Company (1620), \textit{CC}, III: 1827, 1834; charter of Connecticut (1662), \textit{CC}, I: 529, 535; charter of Hudson's Bay Company (1670) in Martin \textit{Hudson's Bay Company's Land Tenures}, 163 at 167.

\(^{150}\) eg charter of Avalon (1623) in Prowse \textit{History of Newfoundland} 131 at 132; charter of Carolina (1629), \textit{CRNC}, I: 64, 65; grant of Nova Scotia (1621) in Slafter \textit{Sir William Alexander and American Colonisation}, 127;


\(^{152}\) Thus the rule of escheat was applied to settlers' titles: opinion of A-G. Somers and S-G Trevor (\textit{circa} 1692), \textit{Chalmers Opinions}, I, 121-2; opinion of Northey, 19 October 1703, \textit{id}, 123-4.
colonial authorities generally recognised the Indian title over such land however the New England colonies did not display complete willingness.

During the mid-seventeenth century the New England colonies had enacted laws declaring that the "Indians in this Jurisdiction have an undoubted right to such lands as they have possessed and improved by subduing the same, and may not be disposessed thereof without their consent and licence of the General Court". The authority for this law was given as the Old Testament's injunction to 'subdue' and 'replenish' the earth. In 1664 special royal commissioners had been appointed *inter alia* to consider the complaints of the "Nanyaganset Indians" who complained of ill-treatment since their submission to the New England government. The General Court protested that it had been "conscientiously careful" to observe the Indians' rights however the commissioners were unable to reconcile that with the limitation of the Indian lands to those in their actual occupation. The Biblical authority for this limitation was found wanting:

... for it seems as if they were disposessed of their land by Scripture, which is both against the honor of God & the justice of the king; yet in Gen 1st, 28, 'subdue the earth' is but equivalent to 'have dominion over the fish of the sea'; in Gen 9, 1 'replenish' relates to generation, not husbandry; in Psa 115, 16, 'children of men' comprehends Indians as well as English; & no doubt the country is theirs till they give it or sell it, though it be not improoued.

In practice, however, the New England authorities had not generally interpreted 'possessions' and 'improvement' in a narrow sense limited to the Indian villages, cultivations and nearby pastures. The Indian deeds of the late seventeenth and eighteenth century indicated that the Indian title was interpreted to include hunting grounds, fishing stations and the reserves of secondary forest used for shifting agriculture. The title over colonial land by right of Biblical injunction was in practice treated as supplementary to rather than independent of Indian grant. Ultimately this was a position dictated by common sense for were the recognition of the Indian title limited to their villages and immediate vicinity conflict between the tribes and colonies would have been inevitable.

Nonetheless the theoretical position that Indian title was limited to the land in their actual occupation did not die with the decline of Puritan control over New England during the early eighteenth century. Although English lawyers of the seventeenth century had taken the position that within England all rights to land were ultimately located in the Crown as

153 Thomas "Introduction", 549-562. The Royal Proclamation of 1763 was based upon recognition of Indian title over their hunting grounds: Egremont to the Lords of Trade, 5 May 1763, noting the Indians "are entitled to [be] most cautiously guarded against any Invasion or Occupation of their hunting Lands", O'Callaghan ed *Documents Relative to the Colonial History of New York*, VII: 478-9.
155 Id, IV(2): 190.
156 Id, 198.
157 Id, 213.
its *dominium directum*, they conceded quite readily that in non-feudal systems occupation of land *simpliciter* furnished legal title.\(^{159}\) Indeed the English themselves took the civil law rule of *occupatio* and applied it to the title they claimed in the New World as against the other European nations.\(^{160}\) Were one to search for the theoretical justification for the seventeenth century recognition of the Indian title, then, one would locate it in the simple fact of the Indian use and occupation of their territory. By the end of the seventeenth century, however, property rights were being characterised as an emanation from the owner’s labour rather than his occupation of the land. Zouche found that property was "gained by industry".\(^{161}\) Locke’s influential *Second Treatise of Government* (1689) stated that as "much Land as a Man tills, Plants, Improves, Cultivates, and can use the Product of, so much is his Property."\(^{162}\) This was a secularisation of the Biblical injunction to subdue the earth and was employed by those who would have limited the Indians’ title to land which they had actually occupied and cultivated.\(^{163}\)

This position received further influential support from Vattel’s *Le droit de gens* (1758) where it was found that a nation could not appropriate to itself "more land than they had need of or can inhabit and cultivate."\(^{164}\) Vattel commented that "if each Nation had desired from the beginning to appropriate to itself an extent of territory great enough for it to live merely by hunting, fishing, and gathering wild fruits, the earth would not suffice for a tenth part of the people who now inhabit it."\(^{165}\) Hence he would have restricted the territory over which the Indian tribes of North America could claim both ownership and sovereignty to those lands in their actual occupation. He praised, however, the "moderation" of the English and their respect for the Indian title over land which upon the strict application of his *dictum* they might have justifiably treated as *res nullius*.\(^{166}\) In expressing his admiration Vattel might have been conceding the impracticability of a position which if adopted would have led to most unhappy if not ruinous European - Indian relations on the colonial frontier. Certainly he acknowledged that the English had followed a more generous rule. This rule may have been more generous than that which the ‘labour’ theorists of property rights would have chosen but it was adopted and existed such theorising notwithstanding.

\(^{159}\) Digges, "Arguments provinge ... the Corone just and lawfull owners of all lands" (circa 1568-9) in Moore *History of the Foreshore* (1888), 185,193; Cowell *Institutes of the Lawes of England* (trl ed 1651), cap 12, fol 57; Callis *Reading ... Upon the Statue ... of Sewers* (1622), fol 22; Selden *Of the Dominion, or, Ownership of the Sea* (1652), fol 21. Grotius took a similar position *De Jure Belli ac Pacis*, 191-2.

\(^{160}\) Goebel *Struggle for the Falklands Islands*, 99-119.

\(^{161}\) *Cases and Questions Resolved in the Civil-Law* (1652), 21.

\(^{162}\) Cap V, para 32.

\(^{163}\) Bulkley "An Inquiry into the Right of the Aboriginal Natives to the Lands in America, and the Titles derived from them" (1724) in *Coll Mass Hist Soc* (1st ser), (1810), 159 used Gen 1: 28 and Locke to support the limitation of Indian title to the land they have improved.

\(^{164}\) *Le droit de gens* (1758), lib 1, cap xviii, para 208.

\(^{165}\) Id, para 209.

\(^{166}\) Id.
The North American courts followed the lead of the colonial authorities and recognised the Indian title over lands beyond those in their actual use and occupation. Baldwin J's comments in *Mitchel v United States* (18) were representative of the United States position: 167

Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals.

The Canadian courts have also supposed that the exercise of customary hunting and fishing rights may be evidence and part of a subsisting aboriginal title. 168 The cause of action in the *Baker Lake* case, for example, was the disruption of the traditional hunting grounds by mineral exploration. 169 In short, the common law aboriginal title extended not only to lands in actual use and occupation but to the 'unimproved' forest land used for foraging, hunting and fishing. The courts founded the common law aboriginal title in the simple fact of tribal use and occupation of their territory.

7. the extinguishment of aboriginal title

In those cases where a court has considered the question of the extinguishment of an aboriginal title it invariably faced a *de facto* state of affairs, the continued exercise of the traditional incidents of the aboriginal tenure such as hunting or fishing rights, in search of recognition *de jure*. This continues to be the case with claims based on a common law aboriginal title.

The position in the United States is typified by the opinion of Davis J in *Lipan Apache Tribe v United States* (1967) that an aboriginal title subsists in "the absence of a 'clear and plain indication' in the public records that the sovereign intended to extinguish all of the claimants' rights" to their land. 170 A similar approach had been taken in *Choate v Trapp* (1912) when it was stated "the rule of construction recognised without exception for over a century has been that 'doubtful expression' instead of being resolved in favour of the United States, are to be resolved in favour of a weak and defenceless people, who are wards of the nation, and dependent wholly upon its protection and good faith." 171 This approach

167 (1835) 9 Pet 711, 746 (USSC).
168 eg *R v Wesley* [1932] 58 CCR 269, 276 per McGillivray JA (Alta CA); *R v White and Bob* (1964) 52 WWR 193 (BCCA), esp judgment of Norris JA; *R v Koonungnak* (1965) 45 WWR 282, 306 (NWTT); *Daniels v White and Reginam* (1968) 64 WWR 385, 402-03 (SCC); *Kruger and Manuel v The Queen* [1978] 1 SCR.
169 (1979), 107 DLR (3d) 513 (PCT); see Bickenbach "The Baker Lake Case: A Partial Recognition of Inuit Aboriginal Title" (1980), 38 U Tor Fac L Rev 232.
170 (1967), 180 Ct CI 487, 492.
originated, in turn, from *Johnson v M'Intosh* (1823) where Marshall CJ had said Indian treaties "must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians." The American courts have applied this canon of interpretation to statutes as well as treaties and other engagements affecting aboriginal title.

The Canadian position is less settled. In *Calder v Attorney-General (British Columbia)* (1973) Hall J held that aboriginal title being a legal right of property "could not therefore be extinguished except by surrender to the Crown or by competent legislative authority, and them only by specific legislation." He based this position upon the *Lipan Apache* case. By contrast Judson J found that an aboriginal title might be extinguished by implication of legislation. In *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* (1979) Mahoney J attempted a compromise test of 'necessary' implication:

To say that the necessary result of legislation is adverse to any right of aboriginal occupancy is tantamount to saying that the legislator has expressed a clear and plain indication to extinguish that right of occupancy.

The standing of this test must be in considerable doubt since the judgments of the Supreme Court in *Guerin v The Queen* (1985). In this case, it will be recalled, it was held that the aboriginal title was a unique property right placing the Crown as holder of the legal title in a fiduciary position vis à vis the traditional owners. Given this, it is hard to see why or how an aboriginal title should be on any different footing to other rights of property the expropriation of which requires express legislation. The provincial courts of first instance have resisted this interpretation of *Guerin* strenuously and have taken the 'implied extinguishment' position of Judson in *Calder*. These cases concern important and large areas of provincial land and are presently upon appeal. The writer feels that ultimately Hall's test of express extinguishment will prevail as it is consistent with the American position as well as that recently adopted in New Zealand.

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172 (1823), 8 Wheat 543. Similarly *Nowegijick v R* [1983] 1 SCR 29, 144 DLR (3d) 193 (SCC) and *Simon v R* [1985] 2 SCR 387 (SCC) at 402 per Dickson CJ.
173 (1973), 34 DLR (3d) 145, 208.
174 Id, 156-160.
175 (1979) 107 DLR (3d) 513, 552 (FCTD).
177 *Attorney-General (Ontario) v Bear Island Foundation* (1984) 15 DLR (4th) 321 (Ont HC); *MacMillan Bloedel v Mullin* [1985] 2 WWR 1 (BCSC). This position is shared with the federal government which has considered claims "based on aboriginal title to be superseded by law in instances in which... general legislation... and third party alienations [are] inconsistent with continued aboriginal use and occupancy" (Canada. Department of Indian Affairs and Northern Development *Living Treaties. Lasting Agreements* (1985) at 44). This subscription to the Judson approach in *Calder* has been challenged by the Task Force report, *op cit*, and must be in doubt given the Supreme Court's judgments in *Guerin* and *Simon v R* [1985] 2 SCR 387.
178 *Te Weehi v Regional Fisheries Officer*, unreported, 19 August 1986, expressly adopting the approach in *Lipan Apache Tribe v United States*, supra.

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If aboriginal title can be extinguished only by express legislation, as would appear to be the case, it follows that in the absence of stipulation otherwise the common law will presume a right of compensation. In *United States v Creek Nation* (1935) the Supreme Court of the United States ruled that the federal government’s exercise of its sovereign powers "did not enable the United States to give the tribal lands to others, or to appropriate them for its own purposes, without rendering, or assuming an obligation to render just compensation for them; for that ‘would not be an exercise of guardianship, but an act of confiscation’." Similarly Hall J indicated in *Calder* that the common law rule that only express words to that effect would authorise a legislative taking without compensation applied to aboriginal title. Lord Denning stated in *Oyekan v Adele* that where expropriatory legislation had been passed "the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law."

It is possible, however, that legislation affecting an aboriginal title may be regulatory rather than confiscatory in character and hence not subject to a right of compensation. In *France Fenwick and Co v The King* (1927) Wright J stated:

> I think that the rule of compensation can only apply ... to a case where property is actually taken possession of, or used by, the Government, or where, by the order of a competent authority, it is placed at the disposal of the Government. A mere negative prohibition, though it involves interference with an owner’s enjoyment of property, does not, I think, merely because it is obeyed, carry with it at common law any right to compensation. A subject cannot at common law claim compensation merely because he obeys a lawful order of the state.

In *Kruger and Manuel v R* (1978) the Supreme Court of Canada considered the argument that the provincial Wildlife Act had extinguished the claimants aboriginal hunting rights but left intact the right to compensation. In the end the British Columbia Court of Appeal and Supreme Court skirted the issue ruling that the federal Indian Act made provincial laws of general application applicable to the Indians in the case at bar. The Supreme Court did however venture the following *obiter dicta*:

> It has been argued that absence of compensation supports the proposition that there has been no loss or regulation of rights. That does not follow. Most legislation imposing negative prohibitions affects previously enjoyed rights in a ways not deemed compensatory. The Wildlife Act illustrates the point. It is aimed at wild life management and to that end it regulates the time, place, and manner of hunting game. It is not directed towards the acquisition of property.

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179 (1935) 295 US 103, 109-110 (USSC); also *Minnesota v Hitchcock* (1901) 185 US 373 (USSC).  
180 (1973) 34 DLR (3d) 145, 153.  
182 [1927] 1 KB 458, 467.  
Whilst this dicta might assist the interpretation of legislation affecting aboriginal title one must be mindful that in certain cases (as where the sole incident of the claimed aboriginal title is the right to hunt or fish) 'regulation' may amount to confiscation. This appears to have been at the back of the mind of the Supreme Court in *Kruger and Manuel* for the opening paragraph of the judgment noted that the Indians could have "readily" obtained and had previously obtained the necessary permits required by the provincial statute. In other words the Wildlife Act was a regulation rather than confiscation of the aboriginal title for it simply added a bureaucratic aspect (the acquisition of permits) to the exercise of the traditional hunting right. One wonders, though, what would have been the case had the Wildlife Act produced a serious interference with the Indian lifestyle which in many regions of Canada is heavily reliant on subsistence hunting and fishing.

8. Conclusion

The important ingredients of the common law doctrine of aboriginal title might be summarised accordingly:

1) The common law presumed the continuity of pre-existing tribal property rights upon the Crown's assumption of the territorial sovereignty of new territory in the absence of an act of state during the process of acquisition suspending those property rights.

2) The presumption of continuity had been modified in North America by a restriction of the alienability of the tribal title making it alienable only to the Crown or its grantees. This modification ensured that the settlers' titles to their lands were based upon the feudal principle of Crown-derived tenure. The Indian title stood apart from this as a Crown-recognised title.

3) The Crown's status as the ultimate owner of its territory (*dominium eminens*) was an incidental aspect of its sovereignty distinct to its position as feudal overlord (*dominium directum*). Even where feudal tenure had been introduced into a colony its applicability was qualified by the circumstances of the colony, in particular the land tenure of the indigenous inhabitants which was excepted from feudal rules. Therefore two systems of tenure could arise in a colony, one Crown-recognised and based upon the presumption of continuity (modified or not), the other Crown-derived and based upon the introduction and application of feudal principles of title to a certain class (invariably non-indigenous) of inhabitants.

4) A subsisting aboriginal title extends over all the traditional lands of the customary owners and includes all aspects of the tribal exploitation, including hunting, fishing and foraging rights.

5) Apart from voluntary relinquishment (by sale or cession) to the Crown or its grantees or abandonment by the traditional owners, an aboriginal title can be extinguished only by express legislation.
CHAPTER SEVEN

THE ABORIGINAL TITLE OF THE NEW ZEALAND MAORI

A. INTRODUCTION

The remaining chapters in this Part are concerned with the extent to which the general principles reviewed in the previous chapter applied to the land rights of the Maori subsequent to the Crown's assumption of the territorial sovereignty of New Zealand. This inquiry is conducted at two important stages: First, we consider the manner in which the doctrine of modified continuity was recognised during the late 1830s and early days of the colony. It is clear that during this period a certain position was adopted regarding the Maori aboriginal title and this underlay the early land policy of the colony. Secondly, we will look at the treatment given this aboriginal title by the New Zealand courts. It will be seen that from the last quarter of the nineteenth century the courts adopted a position on aboriginal title at odds with the early history of the colony. Having clarified the basis of this position and isolating what the writer considers to be its important and crucial flaws, we pass on to consider briefly the residual vigour of the doctrine of aboriginal title. It is clear that the doctrine still has some effect upon the land and other related claims of the Maori.

B. THE RECOGNITION OF MAORI PROPERTY RIGHTS BY THE CROWN

1. Early British position on Maori land rights.

The British did not treat the character of the Maori title over their land as an issue until the late 1830s when settlement of the country began in earnest. Until then, the British assumed the Maori had a full title to their land. The missionaries had purchased mission sites and small areas of farmland from the Maori, an indication of the prevalent belief, taken to an extreme by de Thierry, that the Maori could confer a valid title to land in the islands. Since the Crown recognised the sovereignty of the tribes their title to their property and capacity to alienate it appeared incontrovertible.

By 1838 land purchases from the Maori were a regular feature of the New Zealand frontier. These purchases were described in detail by numerous witnesses before the Lords

1 eg Macquarie to Bathurst, 24 June 1815 RSCNZ (1840), App 2,137; Bathurst to Macquarie, 9 April 1816, HRNZ 1,407; Stephens, note, 25 May 1830, CO 201/215:696; Busby A Brief Memoir (1831), in CO 209/1:183,197.
2 Adams Fatal Necessity, 175.
3 De Thierry claimed the right of sovereignty over New Zealand in virtue of his purchase of land through Thomas Kendall: "Address to the New Zealander settlers", 14 September 1835 CO 209/2:87, 89-90. This blended imperium and dominium - Busby attacked de Thierry's claims to both: Busby to de Thierry, 30 October 1835 CO 209/2:99; Busby to Bourke, 31 October 1835 CO 209/2:95.
Committee on New Zealand (1838). The Maori tenure these witnesses often described as feudal in that the land was vested in a paramount chief from whom the lesser chiefs held as tenants, but they noted, too, that a chief would not claim a greater right over the land itself than that of an ordinary tribe member. Generally they noted that any sale required tribal permission. A purchaser would deal with the local chiefs in the first instance but the transaction was subject to the veto of the superior chief and the approval of the tribe at large. This was usually signified by some formal meeting at which tribal approval and the payment of the consideration would be made, a process not unlike the common law form of livery of seisin. The European purchaser usually presented a deed to which the chief(s) making the sale would inscribe his (their) mark(s). Frequently the purchaser and native vendors would walk around the boundaries of the land being alienated. It would seem that during the 1830s and possibly into the 1840s the Maori had a limited comprehension of the absolute character of a sale of land: To them the transaction signified the grant of permission to a European to come and live upon their land. In other words, a sale was the grant of a licence to use and occupy the land, a usufructuary interest rather than an abandonment of the tribal title. If the European purchaser did not come upon the land within a reasonable period some chiefs felt themselves able to 'sell' the land again.  

Until the beginning of 1839 the Colonial Office had not seriously considered the question of the Maori title to their lands for the problem of the New Zealand frontier had until recently been one of lawlessness amongst the English traders and escaped convicts resorting to the islands. Landjobbing was only becoming an issue in early 1837 when Busby reported disputes arising from European purchases. By the middle of that year he was describing not only the effects upon Maori society of European lawlessness, liquor and disease but the "distressing evils" of "the Consequences of the sale of their lands to British Subjects". Busby's accounts were underlined by Hobson's report received in London early in 1838, the evidence before the Lords Committee in the middle of that year, and, most crucially, the rejuvenation in mid-1837 of the colonial reform movement with its plans to undertake the large scale systematic colonisation of New Zealand. The extreme hostility of the missionary societies to the settlement of New Zealand further emphasised the problems which the continued and unregulated purchase of land in New Zealand would bring.

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4 Lords Committee (1838), Watkins: 16-18, 24-26, 28; Flatt: 34, 37-44, 48-50; Montefiore: 37, 61-3; Polack: 80-83, 87; Wilkinson: 96, 99-101; Hinds: 134-5, 138; Baring: 148-151; Fitzroy: 165, 171-172, 174, 176. Similarly: Mackay, report, 17 March 1890, OVANT, 1-2; Martin The Taranaki Question (1860); Board of Inquiry, Report to Governor Browne, 1856, OVANT, 5; Clarke to Fitzroy, 29 July 1844, Id, 8-9; Hadfield, August 1860, id, 9-10; Wilson, id, 13-14; McDonnell, "The Power of the old New Zealand Chiefs; or, Maori Law", Evening Post, 12 May 1888, id, 16-17; Maning, "The Nature of Title according to Maori Custom", 26 November 1877, id, 17-21.  

5 Busby to Bourke, 30 January 1837 CO 209/2: 301, 304-5; Busby to Bourke, 28 March 1837 CO 209/2: 313, 314-6.  

6 Busby to Bourke, 16 June 1837 CO 209/2: 333, 338.  

7 Hobson to Bourke, 8 August 1837, CO209/2: 30, 35 reporting "fast accumulating" purchases by British subjects.  

8 eg Lords Committee (1838), evidence: Coates (CMS), 180-275; Garratt (CMS), 277-285; Beecham (WMS), 286-315.
The Colonial Office’s position on these land purchases started from the fundamental distinction “so familiar to ourselves” between the sovereignty of the islands (imperium) and ownership of the land (dominium). This distinction was, of course, embodied in the Treaty of Waitangi by which the Maori ceded their sovereignty whilst retaining and being guaranteed their land rights. The distinction was expressly applied to the New Zealand islands as early as 1830 when James Stephen spoke of the Maori “owners & Sovereigns” of the country. His draft instructions to Hobson (1839) emphasised the distinction although this part of the instructions were subsequently deleted on other grounds. Hobson was to have been instructed to “exert all your power to explain to the Chiefs, and to convince them that the security of their proprietary rights will not be impaired but greatly strengthened by their abdication of their Sovereign Authority” to the Crown. Some years earlier Busby had made a similar point when he advised that the Maori “if protected in the enjoyment of their landed property, and their personal rights... would, I am sure gladly become the subjects of the King, and yield up the Government of their country to those who are more fitted to conduct it.” The same distinction between sovereignty and property rights was made by Lord Glenelg as he reacted to the New Zealand Association’s overtures. He stressed that any British colony in New Zealand would not be permitted to proceed in “abrogation” of the Maoris’ rights “whether of Sovereignty or of Property”. The distinction between the acquisition of sovereignty and the title of the Maori to their land was treated as a fundamental premise of British relations with the Maori tribes.

Anxiety over the land purchasing activity of British subjects in the New Zealand islands heightened by the prospect of large scale settlement (were the Colonial Reform movement successfully to bend the ear of his political overlords), led James Stephen early in 1839 to consider that it might “be necessary to declare the invalidity of any title to Land, not acquired through the Crown - a declaration which may be safely made when the preponderating numerical interest is in favour of it but not afterwards”. Stephen wanted the Crown to step in and control land purchasing from the Maori before it was too late for as “large tracts of the most valuable lands are obtained from the Chiefs, and in proportion as the erection of a regular Government shall be delayed, the possibility of any well regulated Land system being introduced, will be diminished”. The exclusive control of land purchases by one body which Stephen had suggested in January 1839 was hardly novel in relation to the New Zealand frontier for the New Zealand Association had planned upon assuming the monopoly of land purchases from the Maori and subsequent disposal to the

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9 Stephen, draft instructions to Hobson, circa 13-14 August 1839, CO 209/4:260.
11 Supra.
12 Busby to Bourke, 26 January 1836 CO 209/2:152,156.
15 Id.
English settlers. Stephen had based his position, however, not only on the desirability of an orderly system of land titles for the settlers but also "the protection of the Aborigines".

The first draft instructions to Hobson (24 January 1839) showed that within days Stephen's suggestion that the Crown should be the sole source of title to land for any English settlers had become Colonial Office orthodoxy. The second draft instructions of March that year contained a further recognition of the principle, stating that Parliament would be approached to make a "Declaration that no title to land in New Zealand" would have "any validity unless it be founded upon or derived from a Grant from Her Majesty". In the meantime, "immediately upon the foundation of the Colony", Hobson was to issue a Royal Proclamation "giving notice to all persons that Her Majesty would not recognise any title to Land in any part of New Zealand which should be subsequently acquired from the Natives, or afford any protection to such acquisitions even if they should at any future time be brought within the limits of the British Sovereignty". The New Zealand Company was immediately opposed to this position, advising its agent in the islands that "all the world is free to purchase lands in New Zealand". By mid-1839, however, the Colonial Office was responding to inquiries from those who had purchased land in New Zealand through the Company or from the tribes with a refusal to guarantee any such title should the islands become British. This refusal was consistently repeated over the following months.

The final instructions to Hobson were dated 14 August 1839. He was told not only to obtain "the mere recognition of the sovereign authority of the Queen" from the chiefs but also to induce them "to contract with you, as representing Her Majesty, that henceforward no lands shall be ceded, either gratuitously or otherwise, except to the Crown of Great Britain". The instructions set out fully the grounds for this stipulation:

Contemplating the future growth and extension of a British colony in New Zealand, it is an object of the first importance that the alienation of the unsettled lands within its limits should be conducted, from its commencement, upon that system of sale of which experience has proved the wisdom, and the disregard of which has been so fatal to the prosperity of other British settlements. With a view to those interests, it is obviously the same thing whether large tracts be acquired by the mere gift of the Government, or by purchases effected on nominal considerations from the

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17 Stephen to Labouchere, 15 March 1839 CO 209/4:326,327.
18 First draft instructions to Hobson, 24 January 1839 CO 209/4:203,214-5.
19 Second draft instructions to Hobson, circa 8 March 1839 CO 209/4:221,235-6.
20 Id.
21 "Instructions to the New Zealand Company's Governor in New Zealand", enclosure in Hutt to Normanby, 29 April 1839 CO 209/4:535.
22 eg Normanby to Green, 20 July 1839 CO 209/5:227; Russell to Greenwood, 4 September 1839 CO 209/5:233; Vernon Smith to Beilby, 18 January 1840 CO 209/7:270-1; Vernon Smith to Woollcombe, 4 March 1840 CO 209/8:399-400; Gairdner to Webster, 7 July 1840 CO 209/7:500-1; Gairdner to Rooke, 29 June 1840 CO 209/7:480; Vernon Smith to Blackburn 30 June 1840 CO 209/7:284.
23 Normanby to Hobson, 14 August 1839 CO 881/1:#25,1,2.
24 Id.
Aborigines... Indeed, in the comparison of the two methods of acquiring land gratuitously, that of grants from the Crown, mischievous as it is, would be the less inconvenient, as such grants must be made with a least some kind of a system, with some degree of responsibility, subject to some conditions and recorded for general information. But in the case of purchases from the natives, even these securities against abuse must be omitted; and none could be substituted for them. You will, therefore, immediately on your arrival, announce, by a proclamation addressed to all the Queen’s subjects in New Zealand, that Her Majesty will not acknowledge as valid any title to land which either has been or shall hereafter be acquired, in that country which is not either derived from, or confirmed by, a grant to be made in Her Majesty’s name, and on her behalf.

These instructions recognised two grounds for the rule that all title to land other than that held by the tribes under their aboriginal title was to derive from the Crown. These were, first, the protection of the tribes from landjobbing and, secondly, the establishment of an orderly system of tenure for the colonists. Normanby stressed to Hobson that the bona fide European purchasers need not be concerned because the New South Wales Legislative Council would enact legislation appointing Commissioners to investigate and recommend the confirmation of those purchases "acquired on equitable conditions".25

The Crown’s intention to reserve the exclusive right to accept the relinquishment of the tribal title and to act as the sole source of title to land for the non-indigenous inhabitants was well known in London by the end of 1839.26 The New Zealand Company had certainly been apprised of the Crown’s position as had the various individuals, amongst whom the Archbishop of Canterbury27 and descendants of James Cook,28 who had made inquiry of the Colonial Office.

By January 1840 Hobson was in Sydney. Before Hobson left for New Zealand, Governor Gipps issued the Proclamation29 to all Her Majesty’s subjects in New Zealand, that Her Majesty will not acknowledge as valid any title to land which either has been or shall be hereafter acquired in that country, which is not either derived from or confirmed by a grant to be made in Her Majesty’s name and on Her behalf...

The Proclamation went on to state that any purchases from the Maori landowners after that date would be treated as "absolutely null and void". The Proclamation had a salutary effect in Sydney, Gipps reported to Russell, speculation in New Zealand land ceasing almost immediately.30

25 Id.3.
26 Normanby’s instructions to Hobson (14 August 1839) plus other documents on the subject had been published by order of the House of Commons (see, for example, Vernon Smith to Blackburn, 30 June 1840 CO 209/7:284).
27 Russell to Archbishop of Canterbury, 6 July 1840 CO 209/7:302-4.
28 Vernon Smith to Cook, 27 April 1840 CO 209/7:298-9.
29 Proclamation, 14 January 1840 CO 209/6:11.

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Upon arrival in New Zealand at the end of January and having formally announced his office as (prospective) Lieutenant-Governor, Hobson issued a Proclamation to the British subjects in the islands:

... Her Majesty does not deem it expedient to recognize any titles to land in New Zealand which are not derived from or confirmed by Her Majesty... And... that all purchases of land in any part of New Zealand, which may be made from any of the chiefs or native tribes thereof, after the date of these presents, will be considered as absolutely null and void, and will not be confirmed or in any way recognised by Her Majesty.

The speculators and settlers were not slow to controvert the legality of Gipps’ and Hobson’s Proclamations, villifying them as legislation by Proclamation similar to that attempted by the early Stuarts. Gipps defended the Proclamations sternly and convincingly, insisting they were no more than a statement of the Crown’s intentions with regard to the land titles within the territory over which it planned to acquire the sovereignty. He might have underlined this by referring to Campbell v Hall (1774) where although finding the Crown had lost its prerogative legislative power for Grenada by grant of a representative assembly in 1763, Mansfield treated as valid a subsequent Proclamation dealing with the disposal of lands in the colony. Similarly Marshall CJ found in Johnson v M’Intosh (1823) that the Royal Proclamation of 1763 prohibiting the purchase of lands from the Indians was valid being an indication by the Crown of the conditions upon which it would dispose its lands in North America. The power to make such pronouncements was a necessary result of the Crown’s position as the feudal owner of all undisposed lands in North America (which technically the tribal lands were albeit subject to the burden of the aboriginal title). Both of these cases were known to Gipps and although not cited reinforced the legality of his and Hobson’s Proclamations prohibiting direct land purchases from the Maori.

By the beginning of 1840 and before the process of the acquisition of the sovereignty had commenced, the Crown had fixed its position in relation to the land titles within the prospective colony of New Zealand. So far as the Maori title was concerned the same principle of modified continuity recognised in North America was to apply. The Maori were treated as the proprietors of their land but the tribal title was to be alienable to none but the Crown. As with the Royal Proclamation of 1763 for the North American continent, the aim

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32 A category which at the time excluded, of course, the Maori inhabitants.
33 Proclamation regarding British subjects’ land titles, 30 January 1840 CO 209/6:14.
34 Wentworth, debate in the New South Wales Legislative Council, 9 July 1840, in Gipps Speech... on the Second Reading of the Bill for appointing Commissioners to enquire into claims to grants of land in New Zealand (1860), 4-5.
35 Id.
36 (1774) Lofft 655, 661-2 and 747.
37 (1823), 8 Wheat 543, 595-6.
38 He referred to both in his Speech... on the Second Reading, 5-6, 7-10.
of this rule was both to protect the aboriginal owners (or at least prevent land disputes between settler and native) and to establish an orderly system of land tenure for the colonists. The Crown's formal adoption of this principle of modified continuity also signified an express but limited introduction of the feudal doctrine of tenures to New Zealand. As Gipps' and Hobson's Proclamations made clear, the feudal Crown-derived system of tenure was to be restricted to the land titles of the settlers.

2. The Treaty of Waitangi

The principles which would govern land titles in New Zealand once it became British had been determined by the Crown before the Treaty of Waitangi and were known to the settlers before the first Maori signatures in February 1840. In that sense the recognition in article 2 of the Treaty of the principle of modified continuity was no more than declaratory of rules which would have applied in any event: The title of the Maori to their lands, forests and fisheries was guaranteed but its alienability was limited to the Crown.

It has been said by one influential writer that in agreeing to the Crown's 'pre-emptive right' in the second article of the Treaty, the Maori chiefs thought they were giving the Crown no more than a right of first refusal. Ross supports this view by claiming, incorrectly, that in legal usage the word 'pre-emption' meant the right of first refusal, further ammunition for her general conclusion that the Treaty was "ambiguous and contradictory in content". She suggests that Hobson and his helpers at Waitangi lacking legal experience and advice could have had no idea of the proper and legal meaning of the term.

Whilst it may be true that Hobson, the missionaries and Busby failed to communicate to the Maori the exact meaning of the term 'pre-emption' as used by them, it is apparent that in chosing this term at least Hobson and Busby had in mind the North American practice in relation to Indian land. The term had been frequently used in North American legislation affecting Indian lands, it had appeared occasionally in the report of Johnson v M'Intosh (1823) and had obtained a clear meaning in relation to aboriginal title. In 1858 Busby explained that the word in the English version of the Treaty, is used in the technical sense, in which it has always been used in dealing with the American Indians (and, as far as I am aware, the use of the word is peculiar to such transactions), - that is, as an exclusive right to deal with them for their lands. The etymological sense of the word 'pre-emption' may be different, but it assuredly was never understood by the Natives that the Queen was only to have the first offer of the land; which would have been a mere mockery. The relinquishment of the right to sell land to any one but agents

40 She herself had relied on the advice of the late Dr Warwick McKeen (letter 22 March 1972, in which she admitted neglecting inquiry into the American Indian analogy), who in conversation with the writer before his untimely death agreed revision of his position in line with that herein taken.
41 Southern Cross, 15 June 1858, supplement.
appointed by the Queen was as absolute in the Maori version of the Treaty as one of the best Maori scholars could make it.

Hobson, for his part, had been briefed exhaustively in London during 1839 and his instructions alluded to the problems caused in other colonies (meaning North America) by direct purchases of lands from the tribal owners. Indeed the same problem had lately reappeared in Upper Canada where the Six Nations had been selling land to settlers without going, as required, through the colonial authorities. Whilst in Sydney Hobson had discussed his New Zealand mission with Gipps who was definitely aware of the principle of 'pre-emption' applied in British North America and, most recently, his own colony New South Wales. Given that the term 'pre-emption' had been frequently used in North America as describing the Crown's exclusive right to silence the aboriginal title, its appearance in the Treaty of Waitangi could hardly have been a matter of surprise much less evidence of ambiguity. The term might have had two meanings at law but in the context of the Treaty of Waitangi it plainly had one legal meaning. The colonial inhabitants who soon afterwards attacked the choice of the term were usually those who would want to or had at some time purchased land directly from the Maori. There may have been an unfortunate failure to communicate precisely the meaning of the term to the Maori signatories but Hobson and, of those who assisted him, at least Busby knew exactly what the term meant. Their view was legally correct as Chapman J indicated in R v Symonds (1847):

... the Court must look at the legal import of the word, not at its etymology. The word used in the Treaty is not now used for the first time... the framers of the Treaty found the word in use with a peculiar and technical meaning, and, as a short expression of what would otherwise have required a many-worded explanation, they were justified by very general practice in adopting it.

3. the constituent instruments for the colony of New Zealand

The charter separating the colony of New Zealand from New South Wales and letters patent commissioning Hobson as Governor passed the Great Seal of the United Kingdom on 16 and 24 November 1840 respectively. The charter gave the Governor power to make grants of the colony's "waste lands". The charter added the important proviso, however, "that nothing in these our letters patent shall affect or be construed to affect the rights of any aboriginal natives... to the actual occupation or enjoyment in their own persons... of any

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42 Commission on Indian Affairs (Upper Canada), Appendix 10, in CO 42/516:118 et seq. For example, memorandum regarding Wilkes' claim to Indian tract near Brantford by direct purchase from Indian owners, September 1840, by Jarvis, Chief-Superintendent Indian Affairs, id, 194-201; Jarvis to Harrison (Provincial Secretary), 12 September 1840, id, 202 reporting the "illicit traffic with the Indians for the sale or occupation of their lands which for many years past has been carried on into an extent almost incredible and in defiance of the repeated proclamations". Generally, Palmer Patterson, The Canadian Indian (1972) 83.

43 Below, text accompanying notes 63-91.

44 (1847), NZPCC 387 (SC), 390-91, also 397 per Martin CJ.
lands... now actually occupied or enjoyed by such natives".45 The same proviso appeared in paragraph 37 of Hobson's formal Instructions (5 December 1840) under the royal sign manual. Hobson's power to make grants of the unappropriated or waste lands was conferred with the rider that nothing in the charter was to "affect the rights of any aboriginal inhabitants... [to] any lands... then actually occupied or enjoyed" by them.46

These constituent instruments were accompanied by informal instructions to Hobson in a despatch from Russell of 9 December 1840. This despatch referred back with approval to Normanby's instructions of the previous year regarding the native title to their lands and settlers' claims under purported purchase and conveyance from the tribes. Russell noted that the New South Wales Legislative Council had been impressed into passing legislation on this matter which Hobson would soon supercede with that of his own Council.47

The constituent instruments separating New Zealand from New South Wales therefore continued the same principles which had been recognised in 1839 and maintained through early 1840 in the form of Gipps' then Hobson's Proclamations and the Treaty of Waitangi: The native title was recognised as a burden on the Crown's title to the unappropriated lands of the colony but its alienability was restricted to the Crown. The settlers' title to land would have to derive from the grant of the Crown.

On Christmas Eve 1840, soon after sighting a copy of the constituent instruments for New Zealand and learning of the Colonial Office's recent agreement with the New Zealand Company regarding its claims under alleged land purchases from the tribes and expenditure on colonization,48 the Aborigines Protection Society petitioned the Crown fearing its intention to grant lands while yet in the possession of the native owners.49 Stephen wrote a lengthy minute in response, referring to the charter and instructions very recently forwarded to Hobson.50

"It seems to me scarcely possible that any Governor, or Commissioner appointed [under the land claims legislation], should so far mistake the meaning of those instructions, as to suppose they authorize the dispossession of the Natives from so much as an Acre of Land, unless they first freely sold it to the Governor, or unless, antecedently to the proclamation of British Sovereignty, they had sold it for an equivalent price, and according to their Native customs. I do not see how this injunction could be rendered more clear by any additional words".

Stephen progressed to consider the character of the agreements reached by the Crown with the tribes in purchasing their aboriginal title:51

45 PP (1841),#311:31,32.
46 Id, para 37.
47 Russell to Hobson, 9 December 1840 CO 209/8:460-504.
48 Vernon Smith to Somes, 8 November 1840 CO 881/1:#29, encl 32,60-2.
50 Stephen to Vernon Smith, minute, 28 December 1840 CO 209/8:443.
51 Id, 445-6.
... I would take care that the mere forms and phrasology of the Contracts should embody and recognize the great cardinal principle, that the Lands are not only ours, but theirs - that we have no title to them except such as we derive from purchase - and that their future Claims on us in respect of such lands, are the claims not of Paupers for Alms, but of Vendors for the fulfillment of a binding Contract.

A note by Russell on New Years Eve confirmed Stephen's position. In January 1841 Russell wrote to Hobson reminding him that

1. Her Majesty, in the royal instructions under the sign manual, has already established the general principle, that the territorial rights of the natives must be respected, and that no purchases hereafter to be made from them shall be valid, unless such purchases be effected by the governor of the colony, on Her Majesty's behalf.

The title of those who had purchased previous to the Crown's sovereignty were to be determined according to the procedure of the colonial land claims legislation.

The Colonial Office took the position that the constituent instruments separating New Zealand from New South Wales recognized the aboriginal title of the Maori. Although these lands were part of the unappropriated or waste lands of the colony the Maori were not to be dispossessed in their enjoyment of their property rights. Apparently the view was that the Governor should not make a grant of the undisposed lands while there remained an outstanding aboriginal title however this position was not plain from the terms of the constituent instruments. Even were the Governor to have made such a grant, however, it was clear that any grantee would take subject to the unextinguished aboriginal title. The aboriginal title was considered a property right inalienable other than to the Crown and hence capable of being the subject matter of a contract in which the Crown was under the utmost requirement of probity and good faith.

4. colonial legislation recognising the principle of modified continuity

Once Governor Gipps had been advised of Hobson’s formal annexation of New Zealand as a dependency of New South Wales in May 1840, he presented a Bill to his Legislative Council for the appointment of Commissioners to investigate settlers’ claims to title to land in New Zealand by purchase from the Maori owners. The Bill recited the Crown's
Instructions to Hobson of 14 August 1839 stipulating that "all titles to land in New Zealand which are not, or may hereafter be allowed by Her Majesty, are, and shall be, absolutely null and void". It may be added that the "titles" to land to which the Bill referred were not those of the Maori but those claimed by non-indigenous persons "by virtue of purchases or pretended purchases, gifts or pretended gifts, conveyances or pretended conveyances, or other titles, either mediately or immediately from the chiefs or other individuals of the aboriginal tribes". The Bill was passed and in September Gipps issued commissions to two officers, Godfrey and Richmond, to inquire into the land titles claimed by right of purchase.

This Act was eventually disallowed because by late 1840 it had been overtaken by events: New Zealand was about to be separated from New South Wales with a Legislative Council of its own and an accommodation of sorts had been reached with the New Zealand Company regarding the claims arising from their land purchasing activity amongst the Maori tribes. By the time news of the disallowance would have reached the southern hemisphere Hobson would have enacted through his Council legislation similar but in the detail more up to play than the New South Wales Act. Nonetheless the Colonial Office thoroughly endorsed the principles embodied in the New South Wales Act and Gipps' strict obedience to the Crown's Instructions.

In June 1841 the Legislative Council of New Zealand passed the Land Claims Ordinance. This important Ordinance, the second statute passed in the fledgling colony, repealed and replaced the New South Wales Act of the previous year, making similar provision for the appointment of Land Commissioners to investigate land titles founded upon purchases from the Maori. The second section of the Ordinance made this significant provision:

And whereas it is expedient to remove certain doubts which have arisen in respect of titles of land in New Zealand, be it 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... and that all titles to land in the said colony of New Zealand, which are held or claimed by virtue of purchases or pretended purchases, gifts or pretended gifts, conveyances or pretended conveyances, leases or pretended leases, agreements, or other titles, either mediately or immediately from the chiefs, or other individual or individuals of

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57 New Zealand Land Bill (NSW) 1840, clause 1.
58 Id, preamble.
59 The charter of 16 November 1840 provided for the separation of New Zealand from New South Wales under the authority of 3 & 4 Vict c 62, section 2. The separation was proclaimed and published on 3 May 1841, Hobson to Russell, 29 May 1841 CO 209/9:60, enclosing Proclamations (ff 61-63).
60 Vernon Smith to Somes, 18 November 1840 CO 881/1:#29, encl 32,60-2.
61 Russell to Gipps, 21 November 1840 CO 209/8:250-1; Stephen to Vernon Smith, note, 12 March 1840 CO 209/13:367; Gipps to Russell, 28 March 1841 CO 209/9:12-13; Russell to Gipps, 16 April 1841, PP (1841),#311,60 (commending his "able and zealous exertions").
62 Land Claims Ordinance, 9 June 1841, No 2, section 2.
the aboriginal tribes inhabiting the said colony, and which are not, or may not hereafter be allowed by Her Majesty... are and the same shall be absolutely null and void.

This was a clearer recognition of the principle of modified continuity than had been the case with the New South Wales Act. The Ordinance recognised the introduction of the feudal rule of title to land in New Zealand: The Crown was to have the legal title to "all unappropriated lands" within New Zealand but that title was "subject to the rightful and necessary occupation and use thereof by the aboriginal inhabitants". The Maori title was to be inalienable other than to the Crown and the settlers' title to their land required a grant from the Crown. The Ordinance, like its New South Wales predecessor and the Treaty of Waitangi, was a declaration par excellence of the doctrine of aboriginal title.

5. the constitutional premises

The constitutional premises underlying the recognition of aboriginal title in the earliest colonial land claims legislation as well as Hobson's instructions, the Treaty of Waitangi and the colony's constituent instruments were made explicit in a speech in July 1840 by Governor Gipps to his Legislative Council during the Second Reading of the New South Wales Bill. This speech was reprinted privately in Sydney and in widespread circulation within Australasia during the 1840s. The speech, which Russell approved, provided the earliest, authoritative exposition of the constitutional sources of the rules affecting title to land in the newly acquired colony of New Zealand.

Gipps first dismissed arguments against the Bill based on the illegality of his and Hobson's Proclamations of January that year declaring the Crown's position on land titles within New Zealand. He discounted the alleged expropriatory effect of the Bill. The real questions which the Bill presented were two, said Gipps:

They are, first, whether uncivilized tribes, not having any settled form of government, and not having any individual property in the land, can confer valid titles to land, on individuals not of their own tribes, and secondly, whether the right of extinguishing the native title or the right of pre-emption, as it is technically called, does, or does not, exclusively exist in the government of the nation which may form a settlement in the country occupied by such uncivilized tribes.

These principles were incorporated into American law, Gipps indicated, and "if it can be proved to be the English law, the preamble of the Bill will be vindicated, and all the enactments of it be conformable to justice".

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63 Russell to Gipps, 16 January 1841, PP (1841), #311,78-9.
64 Speech on the Second Reading, 9 July 1840, 7.
65 Id.
Before progressing onto a review of the American law Gipps stressed the origin of the relevant principles in the practice of the Crown.66

We know, in fact, that there is no such thing as a Code of the Law of Nations. Nations have never met together by their representatives, and passed Acts of parliament, neither have they established any international court to judge of their disputes. The Law of Nations is to be deduced only from the practice of nations, as the unwritten or common law of England is deduced from the practice of England; - with this difference, however, that for the want of an international court, and of international judges, there are no decisions to refer to in contested cases, binding upon all nations. Each nation will, however, be found to contend that its own practice is agreeable to the Law of Nations. No government will admit that it breaks the Law of Nations; its own practice is for it, - the Law of Nations, - and hence I deduce, that the practice of England is, for Englishmen at least, the Law of Nations. This I consider important to my argument, namely, that in cases wherein the Law of Nations is appealed to, that law is, as far as Englishmen are concerned, to be deduced from the practice of England.

Gipps saw the practice of the Crown as being founded upon and hence reflective of legal principle. These legal principles derived from that part of the Law of Nations which by the practice of the Crown had been incorporated into English law.

Having established the origins of the relevant legal principles Gipps proceeded "to show that the right of pre-emption by the government was the law of England, and the law also of the colonizing Powers of Europe, before it was the law of the United States; and that the Americans themselves profess to derive it from the English".67 He then quoted lengthy extracts from Story68 and Kent69 summarizing Marshall's judgment in *Johnson v M'Intosh* (1823). These passages indicated, Gipps said, "that in the opinion of the Americans themselves, their law on this subject was derived from the English law; or, in other words, that the law which prohibited individuals from purchasing land from the natives was English law before it was American law".70

Gipps then insisted that these principles which had become incorporated into American law were "English law still", citing the opinions of three of "the most eminent of living lawyers".71 These opinions had come to his possession as a result of the purchase of land in Port Phillip (New South Wales) by several persons styling themselves the Port Philip Association from the Aboriginal occupants. This purchase of 100,000 acres had been performed by deed under the sponsorship of one John Batman from whom the transaction took the name 'Batman's Treaty'. It had been immediately disallowed by Governor Bourke. The disgruntled Association sought legal advice in London to justify their purchases from

66 Id, 8.
67 Id.
68 Story *Constitution of the United States... a brief commentary* (1840), chap 1,5-6.
69 Kent *Commentaries on American Law* (1832), 57.
70 *Speech... on the Second Reading*, 9 July 1840, 12.
71 Id.
the Aborigines. These opinions were not favourable and so were used by Gipps as declaratory of the relevant principles of English law and hence support for his Bill.

The opinion of William Burge,72 an eminent colonial lawyer, was concurred in by Thomas Pemberton and William Follett.73 Burge’s opinion (1836) was that it had been a principle "adopted by Great Britain as well as by the other European states, in relation to their settlements on the continent of America" that they held "ultimate dominion in and sovereignty over the soil, even whilst it continued in the possession of the Aborigines".74 However, Burge proceeded,75

this principle was reconciled with humanity and justice towards the Aborigines, because the dominion was qualified by allowing them to retain, not only the rights of occupancy, but also a restricted power of alienating those parts of the territory which they occupied. It was essential that the power of alienation should be restricted... The restriction imposed on their power of alienation consisted in the right of pre-emption of these lands by that state, and in not permitting its own subjects or foreigners to acquire a title by purchase from them without its consent. Therein consists the sovereignty of a dominion or right to the soil asserted and exercised by the European Government against the Aborigines...

Burge amplified his opinion making reference to the North American charters by which the Crown granted title to extensive reaches of territory. These grants were taken subject to the Indian title and understood to have given the grantees the sole right to extinguish the aboriginal title. Burge also referred to Johnson v M’Intosh in which it was held, he said, "that the Indian title was subordinate to the absolute ultimate title of the Government, and that the purchase made otherwise than with the authority of the Government, was not valid".76 Accordingly, Burge concluded, the Association’s purchases from the Aborigines at Port Philip were not valid.

Having tabled Burge’s opinion Gipps presented another, this by Doctor Lushington and also concerning the Association’s purchases but given in the mistaken belief that Port Philip was not within the Crown’s dominions, an "erroneous impression" which made "his opinion far more valuable" in considering the land purchases of British subjects from the Maori prior to the annexation of New Zealand.77 In a brief opinion Lushington found that the "grants obtained by the Association were not valid without the consent of the Crown".78 He advised that any title to land ostensibly claimed by acquisition from the tribal owners required "confirmation or grant from the Crown".79 To hold otherwise would condone the

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72 The whole opinion is given id, 14-16. Burge had written a text on colonial law in 1838.
73 Id, 16.
74 Id, 14.
75 Id.
76 Id, 15.
77 Id, 17 (reproduced in whole).
78 Id.
79 Id.
"planting of a new colony" in contravention of the established prerogative of the Crown. Gipps amplified this last point by discussing the unlawful attempts of the New Zealand Company to form their own colony under a government derived from voluntary compact amongst the settlers rather than the formal grant of the Crown.

Gipps then turned to the argument that the pre-annexation purchases from the Maori were valid because the Crown had previously treated with the tribes as the full sovereigns of the islands. If they were admitted as the full sovereigns of their territory could not they convey a full and valid title to their lands? Gipps answered in the negative. He conceded that Normanby had rather overstated the recognition of Maori sovereignty but, more importantly:

... it is not Independence which confers on any people the right of so disposing of the soil they occupy, as to give individuals not of their own tribes a property in it; it is civilization which does this, and the establishment of a Government capable at once of protecting the rights of individuals, and of entering into relations with Foreign Powers; above all, it is the establishment of law, of which property is justly said to be the creature. Independence without civilization could no more give to the New Zealanders the right to dispose of their soil to strangers, than it could take the tattoo marks off their faces, or give them garments wherewith to cover their nakedness.

Although Gipps disparaged the Declaration of Independence ("a paper pellet fired off at the Baron De Thierry"), his real point was that the Maori lacked a system of law equipped to deal with the transmission of land title to civilized persons. What law the Maori tribes possessed fell far below the standards of protection which purchasers of land in a civilized legal system would rightly expect. Gipps supported this position by a reference to Robertson's *History of America* in which the writer related the lack of a civilized if, indeed, any legal system amongst the American Indian. Given the uncivilized system of law amongst the Maori it was inconceivable that a European purchaser would be able to claim a title under their law. This essentially was the same justification for the modification of the tribal title (ie by its inalienability) as Marshall had given in *Johnson v M'Intosh* (1823).

Speaking of the Bill itself, Gipps turned to other justifications for the Crown's position on land titles in New Zealand. He noted that the Select Committee on Aborigines (1837) had recommended that the acquisition of aboriginal land by "Her Majesty's Subjects, upon any title of purchase, grant, or otherwise, from their present proprietors should be declared illegal and void". Gipps then stressed the positive aspects of the Bill, namely the
appointment of Commissioners to investigate _bona fide_ purchases from the Maori and to recommend their confirmation by the Crown. It was "not a bill to take away any man's _tenementum_, but to give him a _tenementum_, provided he can show that he has a fair and equitable claim to it". The other positive aspect of the Bill was the protection of the Maori who were, in many respects, "as minors, or wards of Chancery" entitled to the guardianship of the Crown. The Bill was as much intended to prevent the settlers "despoiling these poor savages of their lands" as to establish an orderly system of tenure for the non-indigenous inhabitants of the new colony.

In England at the same time, the Select Committee on New Zealand (1840) was also pondering the status of land titles in New Zealand and citing the same authorities as Gipps. The Committee recommended the enforcement of the rule by which the Crown was recognised as the sole source of title in a colony, a principle which they noted had been "adopted by the United States" and "solemnly declared by the Supreme Court of Judicature in the United States to be a principle of international law". Edward Gibbon Wakefield informed the Committee that the Crown's repudiation of the doctrine of discovery in relation to its sovereignty over New Zealand precluded the application of the rule of Crown pre-emption to land titles in the colony acquired previous to the annexation (then pending). He linked the principle of Crown pre-emption to the diminished sovereignty of the American tribes in virtue of the application of the doctrine of discovery. The Committee appeared to take the point.

The acknowledgement of the independent nationality of the natives has given a sanction to the acquirement of lands by individual purchasers, because, when the right of the natives to sell to all the world was admitted by the British Government, it followed that all persons, whether British subjects or others, had a right to buy without its sanction. Hence the Crown, which, by pursuing a different line of policy from the time of discovery, might have prevented the acquirement of land by private purchasers at all, appears to be now precluded from applying the proper remedy to the evil.

Aside from its misconception over the basis of the American caselaw, the fundamental flaw in this approach was the confusion of _imperium_ and _dominium_. Nonetheless it expressed the basic theme of the argument soon afterwards taken by those who had purchased land prior to annexation and objected to their titles being declared and treated as invalid.

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86 _Second Reading... on the Bill_, 9 July 1840, 27.
87 _Id_, 28.
88 _Id_, 29.
89 "Report of the Select Committee on New Zealand", (3 August 1840), _PP_ (1842),#582,iii,citing _Johnson v Macintosh_ (sic) and Kent's _Commentaries_, III,376, also p 48 where Committee refers in questioning to _Cherokee Nation v Georgia_ (1831) 5 Peters 1 (USSC).
90 _Id_, 48-9.
91 _Id_, iii.
6. the constitutional premises debated

Gipps had made an erudite and convincing defence of the application to the colony of New Zealand of the principle of modified continuity. He had not based his position on some decision by the Crown to introduce a new policy regarding title to land in the colony, that is to say mere political grounds. Gipps had located the origins and applicability of the rules regarding the status of land titles in New Zealand in the constitutional principles governing the Crown's acquisition of territory inhabited by a tribal society. It is not surprising, then, that the settlers' upset with this position chose to attack it on constitutional grounds.

These objections were raised by the purchasers who had acquired land from the Maori tribes prior to the annexation of New Zealand. Although those who sought to acquire land directly from the Maori after the annexation heavily criticized the Crown's pre-emptive right they did not do so on constitutional grounds for in that respect there was no gainsaying the power of the Crown. The unhappiness with the position insisted by the Crown arose most vociferously amongst those who saw it as a retroactive rule undermining their land titles acquired by purchase from the natives before New Zealand became a British colony. This group, comprised in the main of the New Zealand Company and those styling themselves the 'old settlers', did not dispute the recognition of the Maori's title to their traditional lands. Indeed the whole of their argument against the Crown was based upon its full recognition. It was the modification of the tribal title which had rendered it inalienable to any other than the Crown to which they objected on grounds, inter alia, of constitutional principle.

The constitutional grounds upon which this objection was placed were identified in an opinion of December 1840 by one Garratt, a lawyer and committee member of the Church Missionary Society. The Society was worried the Land Claims (New Zealand) Act passed in New South Wales would upset the title of the missionaries and their families to lands purchased from the Maori as mission sites and small farms for their upkeep. Garratt argued that the missionaries had acquired their land whilst New Zealand was under the sovereignty of the Maori chiefs and therefore had taken a valid title according to Maori law. This applied especially in the case of the title of a person born in New Zealand of British parents who was, by his reckoning, "quoad hoc' not a British subject, but a New Zealander". The argument here was the same as that of the Select Committee on New Zealand (1840) - the Crown had recognised the sovereignty of the New Zealand chiefs and hence must acknowledge any titles to land acquired under that sovereignty and according to Maori

92 It also comprised a few companies which had purchased lands, particularly in the Waitemata district, as well as French and American settlers and the missionaries, all of whom had purchased from the Maori.
93 Coates to Russell, 12 December 1840 CO 209/8:201-4.
94 Garratt to Coates, 8 December 1840, id, 205,206.
custom. Stephen was sympathetic to the Society's claim and recommended a confirmation of their claim. He also agreed with Garratt's argument regarding the title of the purchasers born in New Zealand of British parentage. He stated that these persons "were born in allegiance to the New Zealand Chiefs, and are as well entitled as if they belonged to the Native Race to the benefit of all the Native Customs, and that benefit is claimed for them only in cases where their purchases were made without fraud or undue influence". Vernon-Smith made short work of Stephen's position on the status of New Zealand-born children of British parentage as "new and doubtful". "Can the Chiefs eat them?" he asked with a rhetorical flourish. The proposition "would sound absurd - but earlier they claim protection as British subjects against the rule of the New Zealanders and only count themselves their subjects for the sake of the advantage". The argument went no further, the Society being told the Commissioner would assess their claims "in a spirit of justice and fairness".

Nonetheless the association of the validity of their pre-annexation purchases with the Crown's previous recognition of the sovereignty of the Chiefs became the fundamental theme of the old settlers' argument.

Early in March 1842 a Petition against the land claims legislation was presented to Hobson by a group of old settlers who objected to the proposed investigation of their purchases by the commissioners appointed under the Ordinance. They insisted the Crown should not investigate but could only confirm their title derived from the Maori vendors prior to the annexation. The Petition was reprinted in The Bay of Islands Observer together with an unattributed article most probably written either by Busby, the former British Resident, or Earp, a fractious and subsequently expelled member of Hobson's Legislative Council who had fiercely opposed the investigation of the old settlers' titles. The article exhorted its readers:

95 Stephen, note, 14 December 1840, id, 208 recto.
96 Vernon Smith, note, 15 December 1840, id.
97 Russell, note, nd; Vernon Smith to Coates, 28 December 1840, id, 209.
98 The Bay of Islands Observer, 3 March 1842, Vol 1 No 2, front page. Copy in CO 209/19:139. Also Petition of 'Old Settlers', 10 February 1842, in Hobson to Stanley, 29 March 1842 CO 209/14:310,324-5; Petition of Land Claimants, nd (probably that reproduced in The Observer, op cit), id, 328-30; Petition of old settlers, 22 April 1842, encl in Willis to Stanley, 9 August 1842 CO 209/19:359,361; Petition of old settlers, 16 May 1842 CO 209/15:124-7. Hobson conceded some basis to the old settlers' argument, Hobson to Stanley, no 2, 29 March 1842 CO 209/14:334. The Colonial Office took the position that the old settlers could be accommodated within the existing arrangements provided their claims were proven before the Commissioners: Stephen to Hope, minute, 20 August 1842, id, 336-7; Hope to Stanley, 29 August 1842, id, 337 recto.
99 Busby had purchased land from the Maori the day before Hobson's Proclamation of 30 January 1840 prohibiting direct purchases by British subjects from the tribes. Busby, who probably knew the Proclamation was imminent but may have been unaware of Gipps' similar Proclamation a fortnight earlier (14 January 1840), therefore had a vested interest in defending the old settlers' claims. He refused to submit his purchases to investigation by the Land Claims Commissioners: Hobson to Stanley, 18 June 1842 CO 209/15:255-7,260-71 (enclosures, Busby's correspondence and Commissioner's reports). Busby had appeared before the New South Wales Legislative Council in July 1840, defending his land claims (50,000 acres): Gipps to Russell, No 2, 16 August 1840, PP (1841), #311,62.
100 Hobson to Stanley, 20 March 1842 CO 209/14:161-6,167-78 (encl) reporting Earp's unruliness in the local press and Council ("a shameless tissue of malignity, treachery, and egotism") in defence of the old settlers' claims.
101 The Bay of Islands Observer, 3 March 1842, in CO 209/19:1349 recto.
... not to be frightened out of their property. We maintain, and will maintain that the best of all land titles in this country are those derived directly from Native sovereigns. The titles given by the Crown are only secondary. We will not agitate the question whether a "sovereign" alone can give title to lands, or whether that doctrine be... a mere obsolete fiction of the feudal ages. We wish only at present to observe, that, admitting the truth of the dogma, it is an ample guarantee for the claimants, on the ground of direct purchase from the aborigines in their state of sovereignty. If the doctrine be true, what right, we ask, has Governor Hobson to suspend the prosperity of New Zealand for years together by calling such titles in question? We totally, in the name of law, common sense, and human nature, refuse to concede such a right to any mortal power. Say it belongs to sovereignty to give titles to property, and to law to create property, who will allow that the law and sovereignty meant are those of Great Britain alone? If the assertion be true at all, it is true in relation to the laws and sovereignty of every state under the sun, and then the sovereign chiefs of New Zealand and their customs, standing in the place of statutory enactment, had a power to grant titles which the law of England can only confirm. Sovereignty is the same thing, although transferred to other hands, and it is to sovereignty, and act of the hands that hold it, the supposed prerogative belongs.

A fortnight later The Observer carried another article developing this argument. This article confronted those, such as Gipps, who were "very fond of appealing to the law authorities of America" in defence of "the right of the Crown to the preemption of ALL the lands of this country". The writer had taken "some little pains to examine the nature of the parallelism between the case contemplated by the American authorities, and that of this country". As applied in America the rule of pre-emption derived from the doctrine of discovery, the writer insisted, according to which the Crown had claimed the sovereignty of North America "as against all foreign nations". Admitting "the 'right of discovery' principle as correct in itself, and as originally applicable to New Zealand", the writer noted, quoting Edward Gibbon Wakefield in support, the Crown had foregone that "paramount right" which discovery would have given it. This "threw the sovereignty entirely into the hands of the natives" and sovereignty was sovereignty "whether in the hands of Great Britain, the United States, or the New Zealand Chiefs". Hence the article drew the parallelism to which it had referred thus:

<table>
<thead>
<tr>
<th>Original Sovereign of United States and territories contiguous by discovery GREAT BRITAIN</th>
<th>Original Sovereign of New Zealand by the repudiation of the only other claimant - THE NATIVE CHIEFS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Derivative Sovereign of above territories, holding &amp;</td>
<td>Derivative Sovereign of above country, holding and inheriting</td>
</tr>
</tbody>
</table>

102 The Bay of Islands Observer, 17 March 1842, Vol 1, No 4, in CO 209/19:105-6.
103 Id.
104 Id.
105 EG Wakefield, evidence, 13 July 1840, Select Committee on New Zealand (1840), PP (1840),#582, in reply qn 11,p 5; qns 280-7, pp 48-9.
106 Observer, supra.
107 Id.
inheriting from Great Britain
the original sovereign by
treaty - THE UNITED STATES

from Native Chiefs, the original
sovereigns by treaty - GREAT
BRITAIN

Given this, "if it be a prerogative peculiar to sovereignty to alienate lands, and the American authorities to which we appeal maintain this, we are bound to carry out the conclusion... that the power to alienate lands is the same in hands of Great Britain and the United States on the one side, and in those of the Native Chiefs of New Zealand and Great Britain of the other, before and after the respective treaties, by which sovereignty was transferred".108

Busby, who had taken upon himself the advocacy of the old settlers' claims and may have been responsible for the above article, took an identical position in a letter to Hobson two months later accompanying a Petition of the old settlers:109

The right to the Sovereignty and the soil being thus in the most solemn manner recognized as vesting in the Natives, up to the date when the sovereignty and right of preemption were ceded to Her Majesty by the Confederated Tribes, and the chiefs, not members of the Confederation, it is certain that this case is not parallel to that of the British Settlements in America, however strongly the precedents cited from that country have been relied on as invalidating the purchases of land in New Zealand from the native proprietors. For in no case was the right of the natives of America to the sovereignty or the demesne of their country admitted by the Crown. Both were considered to have been discovered by right of discovery or conquest, and both were granted to individuals or to corporations with as little reference to the Aboriginal inhabitants, as if they had no existence.

The Colonial Office did not respond to these refutations of the American principles regarding title to land in territory occupied by tribal societies. There were, however, important shortcomings in the argumentation which should not go unnoticed. Most fundamentally, the old settlers' advocates mistakenly equated dominium (the ownership of land) with imperium (the sovereignty or government over the territory). The doctrine of discovery articulated in the American courts under Marshall CJ did not recognise the Crown as the absolute sovereign of North America. Certainly they found it was sovereign as against other European powers but they also held that the Indian tribes had been left with a diminished and limited sovereignty. Marshall never linked this residual sovereignty with the character of Indian title. He distinguished imperium from dominium by locating the restrictions upon the alienability of the Indian title not in the doctrine of discovery, as the likes of Busby incorrectly supposed, but in the uncivilized character of their laws and hence unsuitability of the application of such law to the title of white purchasers. Gipps had done exactly the same. Although he showed some impatience with the over-emphasis Normanby had placed upon the recognition of Maori sovereignty, he seperated this recognition from the question of the character of the Maori title to their land. The uncivilized character of the

108 Id.
Maori customary law meant they could not pass on a valid title to land under that law to white settlers which subsequently the Crown’s courts would recognise and enforce. The aboriginal title to their lands derived not from their supposed sovereignty but independently and in virtue of the simple fact of their use and occupation of land.

Although it tended to fudge the matter by associating the Maori imperium (original sovereignty) with their dominium wherever it suited their argument, on at least one important occasion the New Zealand Company acknowledged the real origin of the modification of the tribal title and so provided an unwitting rebuttal of the old settlers' fundamental premise.\(^\text{110}\)

However unjust may have been some of the practices of early colonists, when unchecked by authority or public opinion, the principles on which the law of England has professed to deal with the rights of the native population of our foreign possessions are perfectly consonant with justice and humanity. The sweeping right of conquest has nowhere been asserted to the extent of dispossessing the peaceable owners of the soil. Wherever we have acquired a territory, occupied by a people whose degree of civilisation had established rights of property in land, we have respected those rights to the fullest extent in which they existed, according to the notions of the country. If we acquired a portion of the French, or Spanish, or Dutch possessions, we have invariably recognised all proprietary rights which we found in existence. Whatever degree of power over property the refinement of the civil law, or the peculiar institutions of feudalism might give, however complicated and intangible the rights which the various laws of inheritance, mortgage, bequest, trust or tenancy might have created, we have always respected and enforced them. The same practice has been extended to Turkey, to India, and even to countries enjoying less of regular government and civilization, provided that the laws in force had reached such a degree of perfection as to give individuals a property in land. The Crown never thought of asserting a prerogative over the lands, either in Canada or in Oude, which it found in the possession of individuals, whether natives of the country or Englishmen, who had previously purchased under the laws of the country. But an obvious difference of circumstances necessarily led to a different practice with respect to those vast regions, which the early discoverers found occupied by scanty tribes of savages. These people it was immediately seen, had no idea of property in land according to our notions. Particular tribes claimed a right to exclude others from making use of lands in their neighbourhood; and may be said to have possessed such right, as long as force or fraud gave them the power of checking intrusion. But of any individual rights in the soil - tenures whereby different degrees of advantage accrued to different persons from the same portion of land - of laws regulating peaceful sale or transmission - these people had no notion. The law of England rightly held that they could be treated as possessing rights, of which they had not even formed a conception to themselves. What rights they enjoyed and used, the law acknowledged; for it respected their actual occupation... and on the same principle, the Crown refused to recognise the validity of purchases effected from the natives; for it would have been inconsistent to have treated the native as having a power of transferring rights which he did not possess, did not even understand.

The ‘native leases’ were a practical expression of the settlers’ attempts to circumvent the modification of the continuity of the tribal title. The European settlers of the Thames and

\(^{110}\) Somes to Stanley, 24 January 1843 CO 209/26:35,74-7. Immediately after this passage Somes returned to the usual mischaracterisation of dominium as an emanation from imperium.
Wairarapa districts had obtained land on lease from the tribes, defending their transactions on the grounds that a leasehold tenure was not a 'title' but, according to English law, a contractual or personal right. Hobson felt "it must be obvious to every reasonable man, that all titles must include leasehold". The Attorney-General of New South Wales gave a vague response, so Hobson asked Gipps how the problem might be handled. The lessees holding the lands, he wrote, "not laying claim to them in fee, do not deem it necessary to prefer any claim to the Commissioners, but continue to occupy and cultivate them as tenants under the chief". The appropriate response recommended by Gipps was the purchase of the tribal title so that it bore the character of waste land at the Crown's disposal "and it it be rightly understood that leases from the natives will not be admitted as valid by the Crown after the lands may have been purchased, the practice of taking land on lease will, I apprehend, speedily fall into disuse". Failing that, he suggested a legislative enactment prohibiting such leases might be necessary:

Such an enactment must be based upon the principle that uncivilised tribes, not having an individual right of property in the soil, but only a right analogous to that of commonage, cannot, either by a sale or lease, impart to others an individual interest in it, or, in other words, that they cannot give to others that which they do not themselves possess.

Gipps thus reaffirmed the position that the modification of the tribal title derived solely from its uncivilized and communal character. The Colonial Office approved his position.

The 'native leases' were a fitful and abortive effort by the settlers to use the legal character of the native title as a basis for a derivative right cognisable in the colonial courts. These attempts recognised the continuity of the tribal title but sought to get about its modification. The failure of this device only aggravated the settlers' unhappiness with the modification, that is the inalienability, of the native title. This unhappiness must have grown considerably after the Supreme Court's judgment in 1847 stressing the legal character of the principle of modified continuity. The settlers' scheming and constitutional argumentation had come to naught.

7. R (on the prosecution of C.H. McIntosh) v Symonds (1847)

This case presented virtually the identical issue as that before the Supreme Court of the United States in Johnson v M'Intosh (1823). McIntosh had purchased land directly from a tribe under a certificate issued by Governor Fitzroy waiving the Crown's right of pre-

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111 Hobson to Gipps, 25 October 1840 CO 209/9:90.
112 Plunkett, A-G (NSW) to Gipps, id, 91.
113 Hobson to Gipps, 17 February 1841, id.
114 Gipps to Hobson, 6 March 1841, id.
115 Id.
emption. Fitzroy's successor subsequently issued a Crown grant for the land to another person, Symonds. The waiver issued by Fitzroy had been granted under the purported authority of an unlawful Proclamation suspending the Crown's pre-emptive right to purchase native land.\(^{116}\) The Supreme Court therefore faced two competing claims to the land, one based on the direct purchase from the native owners, the other evidenced by Crown grant. Both judges held that the person with the Crown grant held the only title of which the Court could take cognizance. In so ruling both judges, particularly Chapman J, made important observations on the character of the Maori title to their traditional lands upon the Crown's assumption of the territorial sovereignty of New Zealand.

a) Chapman J's position

Chapman opened his judgment by noting that the question before the court involved "principles of universal application to the respective territorial rights of the Crown, the aboriginal Natives, and the European subjects of the Crown". He then amplified this location of the relevant law in what he had called 'principles of universal application':\(^{117}\)

The intercourse of civilized nations, and especially of Great Britain, with the aboriginal Natives of America and other countries, during the last two centuries, has gradually led to the adoption and affirmation by the Colonial Courts of certain established principles of law applicable to such intercourse. Although these principles may at times have been lost sight of, yet animated by the humane spirit of modern times, our Colonial courts, and the Courts of such of the United States of American as have adopted the common law of England have invariably supported and affirmed them; so that at this day, a line of judicial decision, the current of legal opinion, and above all, the settled practice of the colonial Governments, have concurrèd to clothe with certainty and precision what would otherwise have remained vague and unsettled. These principles are not the new creation or invention of the colonial Courts. They flow not from what an American writer has called 'the vice of judicial legislation'. They are in fact to be found amongst the earliest settled principles of our law; and they are in part deduced from those higher principles, from charters made in conformity with them, acquiesced in even down to the charter of our own Colony; and from the letter of treaties with Native tribes, wherein those principles have been asserted and acted upon.

This repeated what by then was the familiar location of the relevant principles in the actual conduct of the Crown which was assumed to follow and hence reflect legal principle. Chapman then turned to clarify the character of those 'settled principles' of the common

\(^{116}\) Proclamations of 26 March 1844 and 10 October 1844, published in *New Zealand Gazette* on respective dates. Also Fitzroy to Stanley, 15 April 1844, *PP* (1845),#131, 18-25; Fitzroy to Stanley, 14 October 1844, *PP* (1845),#369, 20-27 explaining that the natives wished to sell their land as they pleased and complaining "that the words of the English treaty 'exclusive right of pre-emption' were not translated correctly, and have a meaning not generally understood by the natives, who would never have agreed to debar themselves from selling to private persons..." Earl Grey to Governor Grey, 10 February 1847, *PP* (1847),#837,34, stating these Proclamations were "plainly" unlawful being in excess of Fitzroy's authority in the colony's charter, his commission and instructions "which created and limited his powers".

\(^{117}\) (1847) [1840-1932] NZPCC 387 (SC), 388.
He commenced by observing that it was "a fundamental maxim of our laws, springing no doubt from the feudal origin and nature of our tenures, that the King was the original proprietor of all lands in the kingdom, and consequently the only legal source of private title". This principle, he proceeded, "has been imported with the mass of the common law, into all the colonies settled by Great Britain; it pervades and animates the whole of our jurisprudence in relation to land".\textsuperscript{118} Strictly speaking this was not so. The introduction of the feudal doctrine of tenures into a colony, it has been seen, required some special act of the Crown. Nonetheless it was clear in relation both to New Zealand and North America that some such act of the Crown existed and Chapman's judgment proceeded on that basis:\textsuperscript{119}

As a necessary corollary from the doctrine, "that the Queen is the exclusive source of private title", the colonial Courts have invariably held... that they cannot give effect to any title not derived from the Crown (or from the representative of the Crown, duly authorized to make grants), verified by letters patent. This mode of verification is nothing more than a full adoption and affirmation by the colonial Courts of the rule of English law; "that (as well for the protection of the Crown, as for the security of the subjects, and on account of the high consideration entertained by the law towards Her Majesty) no freehold, interest, franchise, or liberty can be transferred by the Crown, but by matter of record..." that is to say, by letters patent under the great seal in England, or (what is equivalent thereto in the Colony) under the public colonial seal.

The case before him might end there, Chapman noted, since Symonds unlike McIntosh had a title by Crown grant.\textsuperscript{120} However he felt it necessary to proceed with an investigation into the character of the Maori title to their ancestral lands.

He opened this inquiry with a recognition of the Crown's exclusive right to silence the aboriginal title.\textsuperscript{121}

It seems to flow from the very terms in which the principle, "that the Queen is the only source of title", is expressed, that no subject can for himself acquire new lands by any means whatsoever. Any acquisition of territory by a subject, by conquest, discovery, occupation, or purchase from Native tribes (however it may entitle the subject, conqueror, discoverer, or purchaser, to gracious consideration from the Crown) can confer no right on the subject. Territories therefore, acquired by the subject in any way vest at once in the Crown. To state the Crown's right in the broadest way: it enjoys the exclusive right of acquiring newly-found or conquered territory, and of extinguishing the title of any aboriginal inhabitants to be found thereon.

He then noted the inalienability of the tribal title subsequent to the Crown's sovereignty, referring to North American examples as well as the Port Phillip incident in New South

\begin{footnotes}
\footnote{118} Id. \\
\footnote{119} Id, 388-9. \\
\footnote{120} Id, 389. \\
\footnote{121} Id.
\end{footnotes}
These were given as illustrative of the failure of direct purchases by settlers from the natives to confer a valid title until confirmed by formal Crown grant. Having thus noted the general inalienability of the aboriginal title before and after the sovereignty of the Crown, Chapman considered its extinguishment by the Crown stressing that this was usually performed with the consent of the tribal owners: 123

The practice of extinguishing Native titles by fair purchases is certainly more than two centuries old. It has long been adopted by the Government in our American colonies, and by that of the United States. It is now part of the law of the land, and although the Courts of the United States, in suits between their own subjects, will not allow a grant to be impeached under pretext that the Native title has not been extinguished, yet they would certainly not hesitate to do so in a suit by one of the Native Indians.

Chapman then cited with approval the position taken by the Supreme Court of the United States under Marshall CJ as showing "the principles of the common law as applied and adopted from the earliest times by the colonial laws". 124 He thus stated: 125

Whatever may be the opinion of jurists as to the strength or weakness of the Native title, whatsoever may have been the past vague notions of the Natives of this country, whatever may be their present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish it.

These general principles showed the Treaty of Waitangi was no more than declaratory of common law rules which would have applied in any event: 126

It follows from what has been said, that in solemnly guaranteeing the Native title, and in securing what is called the Queen's pre-emptive right, the Treaty of Waitangi, confirmed by the Charter of the Colony, does not assert either in doctrine or in practice anything new and unsettled.

Chapman then explained that the "legal doctrine as to the exclusive right of the Queen to extinguish the native title" did not affect the tribal law of tenure. They remained able to "deal among themselves, as freely as before the commencement of our intercourse with them". 127 This recognised two systems of tenure within the country, one Crown-derived and governed by feudal principle, the other limited to the tribal inhabitants and regulated by

122 Id., 390.
123 Id.
124 Id.
125 Id.
126 Id.
127 Id., 391.
their customary law. This accommodation of the tribal system was accomplished by the severe restriction upon its alienability which made it "technically... inferior to what we call an estate in fee":\textsuperscript{128}

But this necessarily arises out of our peculiar relations with the Native race, and out of our obvious duty of protecting them to as great an extent as possible, from the evil consequences of the intercourse to which we have introduced them, or have imposed upon them. To let in all purchasers, and to protect and enforce every private purchase, would be virtually to confiscate the lands of the Natives in a very short time. The rule laid down is, in the actual circumstances, the only one calculated to give equal security to both races... The existing rule contemplates the Native race as under a species of guardianship. Technically it contemplates the Native dominion over the soil as inferior to what we call an estate in fee; practically, it secures to them all the enjoyments from the land which they had before our intercourse, and as much more as the opportunity of selling portions, useless to themselves, affords. From the protective character of the rule, then, it is entitled to respect on moral grounds, no less than to judicial support on strictly legal grounds.

Finally Chapman harmonised this title with the Crown's position as ultimate owner of its territory:\textsuperscript{129}

Anciently, it seems to have been assumed, that notwithstanding the rights of the Native race, and of course subject to such rights, the Crown as against its own subjects, had the full and absolute dominion over the soil, as a necessary consequence of territorial jurisdiction. Strictly speaking, this is perhaps deducible from the principle of our law. The assertion of the Queen's pre-emptive right supposes only a modified dominion as residing in the Natives. But it is also a principle of our law that the freehold can never be in abeyance; hence the full recognition of the modified title of the Natives, and its most careful protection, is not theoretically inconsistent with the Queen's seisin in fee as against her European subjects. This technical seisin against all the world except the natives is the strongest ground whereon the due protection of their qualified dominion can be based.

He then alluded to \textit{Fletcher v Peck} (1810)\textsuperscript{130} as authority for the proposition that the Crown's ownership of the unappropriated, that is ungranted, lands of its colonies was subject to the unextinguished aboriginal title. The Crown had formally granted land in North America to British settlers and groups whilst that land remained subject to an unextinguished aboriginal title. The grantees took subject to that title, he found, and were bound to extinguish the aboriginal title by fair purchase. Fortunately, this "ancient" practice had been abandoned "for more than a century certainly":\textsuperscript{131}

To part with the Crown's interest during the existence of the Native title, leaving it

\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} (1810) 6 Cranch 87 (USSC), 142-3 where it was said that the "majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisin in fee on the part of the state".
\textsuperscript{131} NZPCC 387,392.
to the grantee to acquire that title, is obviously fraught with evil to both races, and with great inconvenience and perplexity to the colonial Governments.

In summary it may be said that Chapman's judgment provided a clear and authoritative guide both to the origins and character of the Maoris' aboriginal title. He insisted that the common law recognised the continuity of tribal ownership of their land and the traditional laws governing it. This title was, however, inalienable other than to the Crown and to that extent he spoke of the 'modified dominion' of the natives. He obviously considered the recognition of Maori sovereignty by the Crown not to have affected the pre-annexation inalienability of their land. Both before and after the Crown's sovereignty this title was inalienable other than to the Crown. The corollary was the introduction of the feudal doctrine of title so far as the land titles of all inhabitants other than the aboriginal owners were concerned. The Crown thus held the legal title to the ungranted land (in consequence of its sovereignty as well as the introduction of feudal doctrine) but subject to any subsisting aboriginal title. This legal ownership coupled with the pre-emptive right enabled both the protection of the Maori from land-jobbing and the introduction for the other inhabitants of an orderly system of tenure based on English law. Legislative extinguishment (unmentioned by Chapman) and confiscation after rebellion aside, this title could only be extinguished with the free consent of the owners. Not only the title of the Crown to the ungranted lands but that of any grantee was taken subject to the unextinguished aboriginal title. Although these principles were embodied in the constituent instruments and legislation of the colony, as well, most dramatically, as the Treaty of Waitangi, they originated from the common law.

b) Martin CJ's position

The judgment of Martin CJ paid much less attention to the question of aboriginal title than that of Chapman, focussing more upon the power of the Crown to dispose of its waste lands.132 Martin opened with a statement of the general principles regarding settlers' titles to lands in a colony previously uninhabited or occupied by tribal societies:133

Now the general law of England, or rather of the British colonial empire, in respect of the acquisition of lands, such as those which are comprised within the claimant's purchase and the defendant's grant, has from very early time stood as follows: Wherever, in any country to which (as between England and the other European nations) England had acquired a prior title by discovery or otherwise, there were found lying waste and unoccupied, and the same came to be occupied and appropriated by subjects of the British Crown it was helden that such subjects did not and could not thereby acquire any legal right to the soil as against the Crown.

132 Even before leaving England for New Zealand to take up his appointment, Martin had offered suggestions for the guidance of the land claims Commissioners: Martin to Howard, 10 March 1841 CO 209/13:185-8; Stephen, note, 12 March 1841, id, 367; (noting Martin was probably not aware of the legislation which had been passed); Vernon Smith to Martin, 24 March 1841, id, 189-90.

133 NZPCC 387, 393.
And this rule was understood to apply equally, whether the country was partially peopled or wholly unpeopled and whether the settlers entered and obtained possession with or without the consent of the original inhabitants. Accordingly, colonial titles have uniformly rested upon grants from the Crown. This was the case in the oldest British colonies in America; and it is notorious that the same rule has been acted upon without deviation or exception in the more recent colonization of Australia.

This passage did not deny the existence of an aboriginal title - elsewhere in his judgment Martin recognised this title quite explicitly, so much as indicate its general irrelevance to the title of the settlers: Whether the settlers' alleged title derived from purchase or usurpation of the natives was meaningless for the only title they could set up successfully in the Crown's courts were those by grant of the Crown.

Martin then referred with approval to Chapman's judgment and the American authorities recognising the native title and the Crown's exclusive right to silence it. Noting that the Treaty of Waitangi and Lands Claims Ordinance 1841 had asserted similarly, he summarised the basis of the rule restricting the alienability of the aboriginal title:

This rule then does in substance and effect assert that, whenever the original Native right is ceded in respect of any portion of the soil of these islands, the right which succeeds thereto is not the right of any individual subject of the Crown, not even of the person by whom the cession was procured, but the right of the Crown on behalf of the whole nation, on behalf of the whole body of subjects of the Crown; that the land becomes from the moment of cession not the private property of one man, but the heritage of the whole people, that accordingly no private right shall be recognised as interfering with the public and national right; that no single member of the nation shall have any power to impede in any way the progress and working of the plan ordained by the Supreme Authority of the nation for the nation's benefit.

Although this rule might have had its origins in either the Crown's sovereignty itself or the introduction and application of feudal doctrine vesting "the supreme dominion and ultimate ownership of all land personally in the Sovereign", Martin preferred to locate its modern basis in the desirability of the Crown's supervision of the settlement of its newly-acquired colony. The rule that so "soon as the Native title is withdrawn the soil vests entirely in the Crown for the bechof of the nation" permitted "the Sovereign right of control, without which no uniform or central system" of land ownership for the settlers would be possible.

The remainder of Martin's judgment dealt with the legality of Fitzroy's Proclamations dispensing with the Crown's pre-emptive right. Martin found the Proclamation had been unlawful and that no person who had purchased directly from the tribal owners in reliance upon it could claim a Crown-derived title.

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134 Id, 393-4.
135 Id, 396.
136 Id, 395.
137 Id.
In many ways Martin's judgment complemented Chapman's for the latter had concentrated upon the protective aspect of the doctrine of aboriginal title whereas Martin emphasized its provision of a means for the orderly settlement of the colony under the Crown's supervision. In consequence, Chapman's judgment was a more detailed examination of the character of the Maoris' aboriginal title. Nonetheless Martin had explicitly recognized the basic thrust of the doctrine and referred with approval to Chapman's approach. He accepted that the aboriginal title was a burden upon the Crown's ownership of the ungranted lands of the colony. Any extinguishment of this title by purchase of the settlers vested the land absolutely in the Crown freed of the aboriginal burden. These basic postulates were sufficient basis for the emphasis which he had given his judgment.

Martin's position in Symonds on the native title is best read in tandem with his extra-judicial statements in the pamphlet *The Taranaki Question* (1860). This pamphlet was occasioned by the Waitara dispute in the Taranaki. This dispute arose from the attempt by the colonial authorities in 1859 to exclude the superior chief's power of veto over a sale by its primary aboriginal owners (the sub-tribe) unless he could establish a hereditary primary right to the land in common with the ordinary owners (ie membership of the sub-tribe). A minor chief of the Puketapu, Teira, had sold the Waitara block to the Government despite the objection of the acknowledged leader, Wiremu Kingi. Governor Browne justified this modification of the previous recognition of the veto right of the paramount chief "because had I admitted the right of a chief to interfere between me and the lawful proprietors of the soil, I should soon have found further acquisition of territory impossible in any part of New Zealand". Kingi's men interfered with the surveys of the block and Browne determined to enforce the 'purchase' by military means. Martin's pamphlet was written amidst the dispute and questioned the constitutionality of the Government's action.

Martin noted an opinion of December 1859 by the law officers upon the entitlement of the Maori to the electoral franchise in which the following passage had appeared:

Could he (one Native) bring an action of Ejectment or Trespass in the Queen's Court in New Zealand? Does the Queen's Court ever exercise any jurisdiction over real property in a Native District? We presume, these questions must be answered in the negative.

If this opinion was correct - and he indicated his feeling that it was not, it followed, said Martin, that Kingi had "no legal and peaceable means of redress".

This, however, put the proverbial shoe on the wrong foot: It was up to the Government to show the lawfulness of their action:

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138 Quoted by Ward *A Show of Justice*, 114.
139 Quoted in *The Taranaki Question* (1860), 74.
140 *Id*.
141 *Id*, 75.
This is the point which was forgotten throughout, that the Governor, in his capacity of land buyer, is as much bound by law as other land buyers. The rights of William King [Wiremu Kingi] and his people, in respect of that piece of land, were not altered by the fact of the Governor being the purchaser. They were the same as if Teira had sold to a private person. The Governor has no more right to seize land upon the decision of his own agent than any other land buyer would have. He has no right to take possession, except where a private buyer would have such a right: no more right in the case where he is buying land from a Maori, than where he is buying from a Pakeha... As there was no legal decision upon the Native rights, so there was no legal warrant for the Government to take the land".

Kingi and his men should not be condemned, Martin proceeded, because they knew but little, if any, of "Constitutional rights or English law". They had "a sufficient natural sense of fairness to know that they had not been fairly treated". Their failure to appeal to the courts or even the Queen herself was hardly surprising. "They met force by force". Martin clearly felt the Maori were able to bring an action in the Crown's courts for the protection of their property rights. He emphasized the Maoris' status as British subjects and the recognition of their right to their land from which followed unmistakeably, the protection of their land rights by the law. The tribal title was "clearly a right of property", being "expressly recognised and protected by the Treaty of Waitangi".

It must be added that the law officers' opinion of 1859 was not so much a negation of the Maori right to bring actions in the colonial courts to defend their aboriginal title so much as an indication of the infrequency of such steps. The law officers' were illustrating the failure of the Maori to have attained civilized and individualized notions of property as to justify the grant of the franchise. They referred to the right of "one Native", that is an individual tribe member, to sue in trespass or ejectment. This was an unlikelihood given the communal character of the tribal title. Since the franchise required an individual to own a certain amount of property the subsumption of the tribe member's interest into the communal title disqualified him from the franchise. Similarly the law officers' comment upon the failure of the Queen's courts to exercise jurisdiction over real property in a Native District was a reference to the Districts specifically set aside under statutory authority and wherein the courts' jurisdiction was excluded by statute. In this context, the law officers' opinion of 1859, three bare sentences touching upon native land ownership, was hardly a negation of any aboriginal title.

8. other early recognition of the Maori's aboriginal title

142 Id, 76.
143 Id.
144 Id, 9.
145 Prendergast A-G, opinion as to the legal status of rebellious Maoris, 30 June 1869, in Turton, ed Epitome of Official Documents (1883), 191,192-3 opined this opinion was incorrect in the "inferential... impression... that the Queen's Courts would not redress personal wrongs when suffered by Maoris". His opinion on violations of Maori property rights was not the same.
The judicial, legislative and administrative activity during the period of Crown colony government presupposed the legal existence of a communal native title to their traditional land. Besides the formal recognition already noted one might instance other activity from the same period. Ward, for example, reports the occasional suit in trespass by a tribe under its aboriginal title. Colonial legislation such as the Cattle Trespass Ordinance 1841, framed partially with a view to the protection of Maori cultivations from roaming European stock, presupposed some property right in the aboriginal owners. Another example would be the Proclamation of Acting-Governor Shortland (12 July 1843) by which he "publicly" warned...

... all persons claiming land in the Colony, in all cases where the claim is denied or disputed by the original Native owners, from exercising acts of ownership thereon, or otherwise prejudicing the question of title to the same, until the question of ownership shall have been heard and determined by one of Her Majesty's Commissioners appointed to investigate Claims to Land in New Zealand.

Imperial legislation, as well as the constituent instruments drafted in London, presupposed the existence of an aboriginal title. The New Zealand Constitution Act 1852 gave the colonial General Assembly jurisdiction over the disposal of waste lands "wherein the Title of Natives shall be extinguished as hereinafter mentioned". Legislative jurisdiction over native title was however withheld from the Assembly. The Act committed the colonial authorities to the continued observance of the Maori aboriginal title:

It shall not be lawful for any Person other than Her Majesty, Her Heirs or Successors, to purchase or in anywise acquire or accept from the aboriginal Natives Land of or belonging to or used or occupied by them in common as Tribes or Communities, or to accept any Release or Extinguishment of the Rights of such aboriginal Natives in any such Land as aforesaid; and no Conveyance or Transfer, or Agreement for the Conveyance or Transfer of any such Land, either in perpetuity or for any Term or Period, either absolutely or conditionally, and either in Property or by way of Lease or Occupancy, and no such Release or Extinguishment as aforesaid, shall be of any Validity or Effect unless the same be made to, or entered into with, and accepted by Her Majesty...

It is submitted that there is overwhelming evidence from the first two decades of New Zealand's colonial history establishing the recognition of the aboriginal title of the Maori. This body of judicial, legislative and administrative practice was actuated by much more

146 A Show of Justice, 50-55. cf Adams Fatal Necessity, 222-3. This topic, requiring access to court archives in New Zealand, would be a fertile area of inquiry for a legal historian.
149 15 & 16 Vict c 72, section 73.
150 The Crown law officers' reported that the colonial General Assembly, which had been given legislative jurisdiction over "waste lands", lacked the same power over "lands of the natives belonging to them 'in common as tribes or communities'" as not being part of the colony's waste lands: Crown law officers to Rogers, 4 July 1862 CO 885/10:#121,1-2.
151 New Zealand Constitution (UK) Act 1852, section 73.
than a simple belief that the aboriginal title of the Maori was merely some moral imperative. The Crown, its colonial representatives and the settlers, their acquisitive eyes set on the Maoris' land, took the position that the tribes had a legal as well as moral title over their ancestral lands. This conclusion is submitted as inescapable.

9. the extent of the Maori aboriginal title

The British colonial authorities as well as the settlers recognised the aboriginal title of the Maori tribes. Faced with the difficulty of extinguishing this title the proposition was put during the period 1842 - 1847 that this title was limited to the lands in the actual occupation of the tribes. Had it been adopted this proposition would have meant the tribal title was limited to their cultivations, pa (villages) and burial sites. The restriction the aboriginal title was eventually rejected not least on the ground that its enforcement would have provoked extreme Maori reaction. The argument was uncannily reminiscent of the efforts in previous centuries to contain the Indian title and its eventual repudiation also gave it an identical fate.

It was clear to the British even before the annexation of New Zealand that the tribes laid claim to the whole of the country. As early as 1835 Busby had informed Bourke that as "far as can be ascertained, every acre of Sand in this Country is appropriated amongst the different Tribes, and every Individual in the Tribe has a distinct interest in the property although his possession may not always be separately defined". Witnesses before the Lords Committee on New Zealand (1838) similarly described the tribes' title as comprehending all the islands. Captain Fitzroy, later Governor of New Zealand, reported his belief "that every Acre of land in those Islands is the Property of one or another Tribe". Although Wakefield was subsequently to change his mind, his position in the period before and during the Crown's assumption of the sovereignty indicated subscription to a similar view of the native title. The missionary societies certainly held the view that the tribal title encompassed the fishing, hunting and foraging grounds as well as the cultivations, pa and burial grounds.

The Crown's behaviour during the acquisition of the sovereignty showed it accepted the tribes' title over most of the islands, their uncultivated lands included. Normanby's despatch accompanying the first constituent instruments for the colony instructed Hobson "to obtain, by fair and equal contracts with the natives, the cession to the Crown of such waste lands as may be progressively required for the occupation of settlers resorting to New Zealand". The English text of the Treaty of Waitangi guaranteed the chiefs and tribes "the full, exclusive, and undisturbed possession of their lands and estates, forests, fisheries, and other properties which they may collectively or individually possess, so long as it is their wish.

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152 Busby to Bourke, 31 October 1835 CO 209/2:95,98.
153 Lords Committee (1838), Nicholas: 11; Fitzroy:168.
154 Supra.
155 Normanby to Hobson, 14 August 1839 CO 881/1:25,1,3 (emphasis added).
and desire to retain the same in their possession”.

Once New Zealand had been annexed the comprehensive character of the tribal title was acknowledged by a number of important and local authorities, some in response to the controversy sparked by the New Zealand Company’s attempts to limit the extent of the aboriginal title. Sir William Martin, Chief Justice and a year before his judgment in *R v Symonds* (1847) commented:

> So far as yet appears the whole surface of these islands, or as much of it as is of any value to man, had been appropriated by the Natives, and, with the exception of the part which they have sold, is held by them as property. Nowhere was any piece of land discovered or heard of... which was not owned by some person or set of persons... There might be several conflicting claimants of the same land; but, however the Natives might be divided amongst themselves as to the validity of any one of the several claims, still no man doubted that there was in every case a right of property subsisting in some one of the claimants. In this Northern Island, at least, it may now be regarded as absolutely certain that, with the exception of lands already purchased from the Natives, there is not an acre of land available for purposes of colonisation but has an owner amongst the Natives according to their own customs...

Martin reiterated this position in *The Taranaki Question* (1860). The first Attorney-General of the colony, William Swainson, took an identical view:

> Their territorial claims are not confined to the land they may have brought into cultivation: they claim and exercise ownership over the whole surface of the country, and there is no part of it, however lonely, of which they do not know the owners. Forests in the wildest parts of the country have their claimants. Land apparently waste is highly valued by them. Forests are preserved for birds, swamps and streams for eel-weirs and fisheries. Trees, rocks, and stones are used to define the well-known boundaries. Land is held by them either by the whole tribe or by some family of it, or sometimes by an individual member of a tribe. Over the uncultivated portions of territory held by a tribe in common every individual member has the right of fishing and shooting.

Over the following years numerous local authorities on Maori tenure, legal and otherwise, confirmed that the Maori had appropriated the whole of the country and that a tribe’s title embraced its hunting, fishing and foraging grounds as much as the tribal cultivations, pa and burial sites.

The extent of the Maori aboriginal title became an issue towards the end of 1842. Until then, the colonial authorities in London, New South Wales and New Zealand had assumed the aboriginal title included the uncultivated lands used by the tribe. Adams has argued that

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156 Treaty of Waitangi, article two.
157 *OVANT*, 3.
158 *The Taranaki Question* (1860),1-3.
159 *OVANT*, 10.
160 Many of these were collated in *OVANT* (1890). See also those cited in Smith *Maori Land Law*, 88-94.
at least Russell and Gipps took a more limited view of Maori title however his interpretation of their position is marred by a confusion of Maori original sovereignty (which they were inclined to but demurred from taking a limited view) with their rights of land ownership. In addition when Gipps and Russell spoke of the aboriginal "right of occupancy" they were referring not to the limitation of the tribal title to those lands in their actual occupation and cultivation so much as the Marshall limitation of the alienability of the tribal title. Adams thus infers an intention to limit the extent of the aboriginal title from Gipps' and Russell's position on the separate question of its modification. For their part, Hobson and Fitzroy certainly recognised the aboriginal title to uncultivated as well as cultivated land.

In November 1840 the Crown had reached an agreement with the New Zealand Company by which the Government undertook to give the Company four acres of land for every pound it had spent on land purchases from the Maori, emigration, surveys and suchlike. In return the Company waived its claim to the millions of acres allegedly purchased from the tribes. The Lands Claims Commissioner, William Spain, had begun investigating these purchases and found that the Company had occupied and sold land to settlers in Port Nicholson and along the west coast of the lower North Island in circumstances which called these purchases into extreme doubt. In other words, the aboriginal title over these lands was unextinguished and in order to clear the settlers' land titles some body would have to purchase or at least compensate properly the tribal right. The Company claimed this duty was incumbent upon the Government. The Crown for its part held that the agreement with the Company had been made on the supposition that the Company's purchases from the Maori had been genuine (if by the rule of pre-emption invalid). James Stephen noted

For the purpose of the agreement, his Lordship took the title of the Company for granted, as against the Natives. If that assumption was erroneous in point of fact, the Company's concession was of no value. They give; and by such a Cession, they acquired no claim to anything from the Govt.

The debate through the period 1842 - 48 over the extent of the aboriginal title related to the compensation to be paid the Maori for lands over which their aboriginal title had been at best but partially extinguished. If the aboriginal title was limited to the land in their actual occupation the amount would be comparatively meagre. Since the Crown was determined

161 Fatal Necessity, 179-80.
162 Id, 181,185-6.
163 Vernon Smith to Somes, 18 November 1840 CO 881/1:429, encl 32, 60-2; Somes to Russell 19 November 1840 CO 209/8:257-8; Vernon Smith to Somes, 2 December 1840 CO 209/8:259-62.
164 Stephen, note, 14 November 1842 CO 209/18:324 recto. Stephen had signalled this position as early as 10 March 1841 when learning of the Maori chiefs disputing the Company's purchases at Port Nicholson: "If as against the chiefs they [the Company] have no valid title the Crown cannot of course dispossess the Chiefs in their favor": CO 209/7:185,187. Vernon Smith indicated agreement, id.
this duty lay with the New Zealand Company the argument divided into two camps, the
sympathisers and members of the Company who tried to restrict the title and those whose
sympathies lay more with the Maori. In the end the attempt to limit the extent of the Maori
aboriginal title was an issue of pound and pence.\(^{165}\)

In advocating the restriction of the aboriginal title the Company’s sympathisers
deprecated both Normanby’s despatch of August 1839 to Hobson and the Treaty of
Waitangi. They pointed to the incompatibility of the comprehensive recognition of the Maori
title with ‘general principle’. In December 1842 Somes protested to Stanley\(^{166}\)

... if the aborigines are to be regarded as being, with the exception of such small
portions as they may have legally sold, proprietors of the whole surface of New
Zealand, ninety-nine hundredths of which are probably covered with the primeval
forest, then, doubtless, the claims of the natives would be co-extensive with those of
the Company, an inquiry into them would put their title to their whole property again
at issue, and the agreement and award would be mere nullities. But the only interest
in land which our law has ever recognized as possessed by savages is that of “actual
occupation or enjoyment”; and this would obviously be a peculiarly fitting measure
for the rights of an agricultural population like that of New Zealand, requiring no
extent of territory for hunting or pasture, but confining itself to the small area which
it could cultivate... If the claims of the natives be limited to such lands in their actual
occupation, as they may now assert that they did not alienate to the Company, the
question can, at the utmost, be one only of a few patches of potato-ground and the
rude dwelling-places, and can involve no matter of greater moment than some few
hundreds of acres.

Hope replied for Stanley that some lands claimed by the Company not actually occupied by
the Maori might indeed by "waste", that is not subject to a native title, but that would
require a local investigation of the native title over the land in question.\(^{167}\) This was exactly
what the Company was seeking to avoid. Stanley was, in short, not prepared to concede the
principle restricting the Maori’s aboriginal title to lands in their actual occupation.

The New Zealand Company continued to vilify Normanby’s despatch and the Treaty of
Waitangi “as reconcilable neither with sound reason nor with the acknowledged principles of
our law”.\(^{168}\) Stanley’s reply grew firmer. He was "not prepared, as Her Majesty’s Secretary
of State, to join with the Company in setting aside the Treaty of Waitangi, after obtaining
the advantages guaranteed by it, even though it might be made ‘with naked savages’, or
though it might ‘be treated by lawyers as a praiseworthy device for amusing and pacifying

\(^{165}\) Adams describes the manouvering on this aspect, Fatal Necessity, App 4, 256-7 concluding that “it was not so
much the principle of paying compensation to which the company objected, but the possibility that a much larger
amount of money than was first thought would be needed for the purpose”.

\(^{166}\) Somes to Stanley, 21 December 1842 CO 209/18:376-87. Similarly “Memorandum left at Colonial Office by the
New Zealand Company”, circa 11 November 1842, id, 325-34.

\(^{167}\) Hope to Somes, 10 January 1843, id, 388-400.

\(^{168}\) Somes to Stanley, 24 January 1843 CO 209/26:35-92.
this duty lay with the New Zealand Company the argument divided into two camps, the sympathisers and members of the Company who tried to restrict the title and those whose sympathies lay more with the Maori. In the end the attempt to limit the extent of the Maori aboriginal title was an issue of pound and pence.\footnote{Adams describes the manoeuvring on this aspect, \textit{Fatal Necessity}, App 4, 256-7 concluding that "it was not so much the principle of paying compensation to which the company objected, but the possibility that a much larger amount of money than was first thought would be needed for the purpose".}

In advocating the restriction of the aboriginal title the Company's sympathisers deprecated both Normanby's despatch of August 1839 to Hobson and the Treaty of Waitangi. They pointed to the incompatibility of the comprehensive recognition of the Maori title with 'general principle'. In December 1842 Somes protested to Stanley\footnote{Somes to Stanley, 21 December 1842 CO 209/18:376-87. Similarly "Memorandum left at Colonial Office by the New Zealand Company", \textit{circia} 11 November 1842, \textit{id}, 325-34.}:

... if the aborigines are to be regarded as being, with the exception of such small portions as they may have legally sold, proprietors of the whole surface of New Zealand, ninety-nine hundredths of which are probably covered with the primeval forest, then, doubtless, the claims of the natives would be co-extensive with those of the Company, an inquiry into them would put their title to their whole property again at issue, and the agreement and award would be mere nullities. But the only interest in land which our law has ever recognized as possessed by savages is that of "actual occupation or enjoyment"; and this would obviously be a peculiarly fitting measure for the rights of an agricultural population like that of New Zealand, requiring no extent of territory for hunting or pasture, but confining itself to the small area which it could cultivate... If the claims of the natives be limited to such lands in their actual occupation, as they may now assert that they did not alienate to the Company, the question can, at the utmost, be one only of a few patches of potato-ground and the rude dwelling-places, and can involve no matter of greater moment than some few hundreds of acres.

Hope replied for Stanley that some lands claimed by the Company not actually occupied by the Maori might indeed by "waste", that is not subject to a native title, but that would require a local investigation of the native title over the land in question.\footnote{Hope to Somes, 10 January 1843, \textit{id}, 388-400.} This was exactly what the Company was seeking to avoid. Stanley was, in short, not prepared to concede the principle restricting the Maori's aboriginal title to lands in their actual occupation.

The New Zealand Company continued to villify Normanby's despatch and the Treaty of Waitangi "as reconcilable neither with sound reason nor with the acknowledged principles of our law".\footnote{Somes to Stanley, 24 January 1843 CO 209/26:35-92.} Stanley's reply grew firmer. He was "not prepared, as Her Majesty's Secretary of State, to join with the Company in setting aside the Treaty of Waitangi, after obtaining the advantages guaranteed by it, even though it might be made 'with naked savages', or though it might 'be treated by lawyers as a praiseworthy device for amusing and pacifying..."
savages for the moment". The Crown's position was that it took a "different view of the respect due to obligations contracted by the Crown of England". The Maori title over all their land, cultivated and otherwise, would be respected.

The controversy continued through 1843 and into 1844 when the Select Committee on New Zealand (1844) castigated the Treaty of Waitangi as "injudicious" and insisted upon "the exclusive title of the Crown to all land not actually occupied and enjoyed by Natives". The Committee pointed to the charter of the colony (1840) and the Treaty of Waitangi itself as justifying this restriction of the tribal title.

In this charter and instructions, 'actual occupation and enjoyment' are clearly pointed out as alone establishing a right of property in land in the natives; and the rule is laid down that all other lands must be considered as vested in the Crown, in virtue of the sovereignty that had been assumed, and that they must be dealt with accordingly. The Treaty of Waitangi (which had previously reached England and been approved), it may therefore fairly be assumed, must, when this charter and the instructions which accompanied it were forwarded to the colony, have been understood as bearing a meaning not inconsistent with the terms in which they are couched. The lands held 'collectively', of which the possession was guaranteed to the aboriginal inhabitants of New Zealand, must, therefore, have been regarded as the lands actually occupied by them, and cultivated in common by a tribe, in the manner frequently practised, and the forests as those actually used for cutting timber.

This interpretation was consistent, the Committee reported, "with the ancient and acknowledged principles of colonial law". The New Zealand Company had not been without substantial influence among the members of the Committee whose advice Stanley was unwilling to swallow. He instructed Fitzroy to continue in the recognition of Maori title over their uncultivated lands insisting that the restriction of the Maori title to lands in their actual occupation "appeared... wholly irreconcilable with the large words of the Treaty of Waitangi". The restriction, Stanley insisted, was also inconsistent with Normanby's instructions to Hobson which contained directions that "had not only been promulgated, but acted upon in the colony or an early period after the sovereignty had been assumed". Stanley soon afterwards defended his position in the Lords declaring that "the limits and rights of tribes" to their land were known and decided by native law since by "them we

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169 Hope to Somes, 1 February 1843, id, 117-20. Also Stephen to Hope, minute, 28 January 1843, reply stating "that no person, and that no Govt., can possibly contract a legal, honorary, or moral obligation to commit injustice, or to depopulate others of their lawful and equitable rights", id, 95.
170 Id.
171 Notably: Somes to Stanley, 15 February 1843 CO 209/26: 280-304 insisting the Company recognized the native title "to be, as it has always been held by our law, paramount to every other" but limited to lands in their actual occupation; Hope to Somes, 1 March 1843, id, 305-7; Somes to Stanley, 4 March 1843, id, 398-403.
172 "Report from the Select Committee on New Zealand", PP (1844),#556,xii,xiii (Resolutions 2,3 and 6).
173 Id. vi.
174 Id.
175 Stanley to Fitzroy, 13 August, PP (1845),#1,3-9.
176 Id.
have agreed to be bound, and by them we must abide". He instructed Governor Grey to "honourably and scrupulously" fulfill the terms of the Treaty of Waitangi.

Stanley’s view of the extent of the tribal title was not shared by his immediate successors at the Colonial Office. Earl Grey instructed Governor Grey to take the restrictive view of the Maori’s aboriginal title. His instructions noted that the Maori at the commencement of European settlement "were not a people of hunters" but lived "in a great measure at least, upon the produce of the soil... and practiced to a certain extent a rude sort of agriculture". According to the "most trustworthy accounts" these cultivations formed "far less than one-hundredth part" of the "naturally fertile" land:

To contend that under such circumstances civilized men had not a right to step in and take possession of the vacant territory, but were bound to respect the supposed proprietary title of the savage tribes who dwelt in but were utterly incapable to occupy the land, is to mistake the grounds upon which the right of property in land is founded. To that portion of the soil, whatever it might be, which they really occupied, the aboriginal inhabitants, barbarous as they were, had a clear and undoubted claim; to have attempted to deprive them of their patches of potato-ground, even so to have occupied the territory as not to leave them ample space for shifting, as was their habit, their cultivation from one spot to another, would have been in the highest degree unjust; but so long as this injustice was avoided, I must regard it a vain and unfounded scruple which would have acknowledged their right of property in land which remained unsubdued to the used of man.

The Instructions under the sign manual accompanying the second charter of the colony, both sent with the above despatch, affirmed Earl Grey's position. The Instructions stipulated that the native title was to be recognised where the tribe "have actually had the occupation of the lands... and have been accustomed to use and enjoy the same, either as places of abode, or for tillage, or for the growth of crops, or for the depasturing to cattle, or otherwise for the convenience and sustenation of life, by means of labour expended thereon". Fortunately Governor Grey gave these Instructions an expansive interpretation identical to that which had previously obtained realising that otherwise conflict with the tribes would become inevitable. Instead he offered a policy of more aggressive purchase of Maori land by the Government and commenced an orgiastic land-purchasing programme which certainly

177 BPD (1845), 3rd ser vol 82, 318-9; Adams, Fatal Necessity, 186.
178 Stanley to Grey, 13 June 1845, PP (1847), #337,68-72. Stephen's draft of these instructions, May 1845 CO 209/38:251-92, had said the Treaty of Waitangi was to be followed "as a question of honour and justice no less than of policy".
179 Adams Fatal Necessity, 187 on Gladstone's and Earl Grey's positions.
181 Id.
182 New Zealand charter, 23 December 1846, para Xiv, id, 72-5; Instructions under sign manual accompanying charter, id, 76, cap xiii, paras 9 and 11.
183 The enforcement and enforceability of these Instructions radically reducing the thitherto recognized extent of the Maoris' aboriginal title sparked controversy within the colony. Space inhibits discussion, but see Wards The Shadow of the Land, 385-9. The missionaries' and legal officers (Martin and Swainson) sided with the fullest recognition of the extent of the aboriginal title.
took advantage if not exploited the tribes. In 1848 Labouchere, President of the Board of Trade, informed the Commons that the Crown recognised the rights of the Maori to their uncultivated lands as guaranteed by the Treaty of Waitangi.\(^{185}\) The right of the Maori to the title of their land as determined by their customary law had been restored if, indeed, it had ever been suspended. Thus Stout CJ was able to observe in *Tamihana Korokai v Solicitor-General* (1912) that "[a]ll the old authorities have agreed that for every part of the colony there was a native owner... [t]he Governor and Legislature of New Zealand accepted this position".\(^{186}\)

The authorities to which those who would have limited the aboriginal title to land in the actual tribal occupation appealed were those who had taken the 'labour' theory of property rights. Earl Grey's despatch to Governor Grey of December 1846, already quoted above, contained a passage from Dr Arnold:\(^{187}\)

> Men were to subdue the earth: that is, to make it by their labour what it would not have been by itself; and with the labour so bestowed upon it came the right of property in it. Thus every land which is inhabited at all belongs to somebody: that is, there is either some one person, or family, or tribe, or nation, who have a greater right to it than any one else has; it does not and cannot belong to everybody. But so much does the right of property go along with labour, that civilized nations have never scrupled to take possession of countries inhabited only by tribes of savages - countries which have been hunted over, but never subdued or cultivated. It is true, they have often gone further and settled themselves in countries which were cultivated, and then it becomes a robbery; but when our fathers went to America and took possession of the mere hunting-grounds of the Indians - of lands on which man had hitherto bestowed no labour they only exercised a right which God had inseparably united with industry and knowledge.

This passage was a typical blend of the injunction in Genesis to subdue and replenish the earth with its secularization in the 'labour' theory of property rights popularised by Locke and, more especially, Vattel, the writer usually invoked to justify the limitation of the aboriginal title to the lands in their actual occupation.

William Fox, Inner Temple and a New Zealand Company functionary in the colony for nearly nine years, wrote *The Six Colonies of New Zealand* (1851) almost immediately upon his return to England. There were, he said, "two theories... propounded" on the native title to the waste (uncultivated) lands:\(^{188}\)

> According to one, the savage inhabitants of an unreclaimed country have an absolute right of proprietorship in its soil, based upon the mere fact of their residing on some portion of it. Thus, because they live in New Zealand, New Zealand belongs to them.

\(^{185}\) *BPD* (1848), 3rd ser, vol 96, 349.

\(^{186}\) (1912), 32 NZLR 321 (CA), 340-1.

\(^{187}\) "The Labourers of England" in *The Englishman's Register*, No 6, 11 June 1831. Reprinted in *Miscellaneous Works* (1845), VII,155 at 156-7. Arnold equated law with establishment of a civil society and saw property rights as an emanation from law. This was the same position as Mill and Austin.

\(^{188}\) *Six Colonies of New Zealand*, 89-90.
According to the other theory (which I give in the words of Vattel), it is contended that, in an unreclaimed country, "in which there are none but erratic natives, incapable of occupying the whole, they cannot be allowed exclusively to appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate. It is urged that their unsettled habitation in those immense regions cannot be accounted a true and legal possession, and that the people of Europe, too closely pent up at home, are lawfully entitled to take possession of the waste and settle it with colonies".

Fox found the latter theory was correct in point of law. He had never "seen anything worthy of the name of an argument in favour of native right" to their uncultivated lands. His own position was confirmed, he said, by the Crown's charters for the New World wherein no express saving of the aboriginal title appeared and Kent's account of the position adopted by the New England Puritans on the extent of the Indian title. Fox conceded, unwittingly contradicting himself, that the American courts had "laid down a different rule for their own guidance" but this could not "affect the common law right of the British Crown" to the wild lands of its colonies. Elsewhere in the book, in a portion apparently ghosted if not written by Henry Sewell later Attorney-General of the colony, the admission was made:

The right of the natives to the waste lands though so contrary to principle, and attended with so many bad consequences to themselves and to colonization, is now in practice, and ex necessitate, admitted, while the right of the Crown is reduced to a mere right of pre-emption; that is to say, it retains the privilege of being the only purchaser from the natives, and prohibits its subjects from doing so. Hence, it is through the instrumentality of the Crown alone (or, in other words, of the Colonial-office and the local government) that every acre which is to be reclaimed from the waste and subjected to colonizing operations, must be obtained. And it follows that every private title must (to be valid) be traced back to a grant from the Crown.

The Crown's pre-emptive right, it was added, did not emanate solely from "mere feudal or prerogative" rules vesting the Crown with ultimate ownership of the land but was founded "on a wise and constitutional principle, by virtue of which it assumes the office of

189 Id, 90.
190 Id.
191 A pencilled note, p 98, on the Hocken Library reprint states the section was "written by Henry Sewell".
192 Id, 98.
regulating the future settlement and occupation of the country".\footnote{193}

The likes of Fox, Earl Grey and those who would have limited the aboriginal title to the land in the actual occupation of the Maori tribes had been refuted at length by Chamerovzow and Phillimore and Woolmer in opinions appended to \textit{The New Zealand Question} (1848). Chamerovzow's book contained important \textit{legal} assessments of Maori rights, all contributors confirming both the aboriginal title and its inclusion of all tribal lands, those uncultivated as well as actually occupied.

Phillimore, after affirming the Treaty of Waitangi as the basis of the Crown's sovereignty,\footnote{194} indicated the Crown's absolute ownership of land in the colony derived not from feudal theory but a general principle of the law of Nations.\footnote{195} Although extremely wary of the principle of the modification of the tribal title represented by the Crown's pre-emptive right, he had little time for those limiting the tribal title to the land in their actual occupation. The Treaty's reservation of tribal land, forests, fisheries and other properties was "to be construed with every latitude of explanation which the ordinary acceptance and use of the words"\footnote{196} would admit. He hardly thought Dr Arnold an "overwhelming authority on a question of this nature".\footnote{197} He observed:\footnote{198}

\begin{quote}
It is obvious that if his doctrine were pushed to the full extent in the present instance, it might lead to usurpation and injustice, as it might be made use of to dispossess independent chiefs and native tribes from property occupied by them and their ancestors for successive generations, although they have hitherto neither bestowed labor nor cultivation on their lands... [T]he right of property is the same in all men. That such right can neither be modified nor altered by difference of religion, nor by difference of customs and manners - and finally, that the law of Nature - the just and only true source of the Law of Nations never conferred a right on Christian Countries to wrest, forcibly, from their actual possessors, and to appropriate to themselves, lands and districts effectually and permanently occupied by savage Nations.
\end{quote}

Woolmer's opinion emphasised the coincidence of the Law of Nations with the law of England but concentrated on the latter. Unlike Phillimore he indicated the Crown's ultimate ownership of all land in New Zealand derived from its feudal title. This, he found, footnoting Chapman and Martin's judgments in \textit{Symonds} was the basis of the Crown's pre-emptive right as against its own subjects.\footnote{199} He noted, however:\footnote{200}

The law of England also follows the law of Nature in recognizing a just title to the

\begin{footnotes}
\footnotetext[193]{Id.}
\footnotetext[194]{\textit{The New Zealand Question} (1848), app 1,7.}
\footnotetext[195]{Id., 8-9.}
\footnotetext[196]{Id., 8.}
\footnotetext[197]{Id., 13.}
\footnotetext[198]{Id., 14.}
\footnotetext[199]{Id., 38.}
\footnotetext[200]{Id. The quote he gives is from Chitty, \textit{Prerogatives of the Crown} (1820), 25.}
\end{footnotes}
possession of their lands, in the natives of any such countries, so far as they really occupy and enjoy them, and will not exercise any of its powers to deprive them of their possessions, without their free consent and concurrence; but as to all unoccupied and waste lands, these are the demesnes of the Crown, and may be granted out - this right is a part of the prerogative royal, and the prerogative is an attribute of sovereignty; 'and the attributes of the sovereign which are inherent in and constitute his political capacity, prevail in every part of the territories subject to the British Crown...'

Elsewhere Woolmer intimated the continuity of the native title was modified by its uncivilised nature, there being "no species of tenures analogous to those introduced by refined civilisation into European States". But as to those lands which the Crown "by virtue of its prerogative, may acquire and grant out, such lands will be held in the nature of tenancies in common socage or freeholds". He thus recognised two systems of tenure, one uncivilised and limited to the aboriginal population, the other Crown-derived and based on feudal principles. The extent of the Crown's prerogative title, if any, to uncultivated Maori lands was ascertained by reference to its own conduct. Referring to the Treaty of Waitangi, the Crown's early instructions to Hobson, Earl Grey's invocation of Dr Arnold but subsequent withdrawal from the limited view of the extent of Maori title, Woolmer found the tribal title extended over all lands claimed by the customary law. He expressly located this position in the "Common Law of England and the High prerogative of the Crown".

Chamerovzow's investigation of the extent of aboriginal title - like Phillimore and Woolmer he took the legal recognition of some title for granted, was much lengthier and a little less legalistic. He noted Earl Grey's use of Dr Arnold referring also with disapproval to Bulkley and Cotton Mather whom, it was seen in the previous chapter, had unsuccessfully argued a similar limitation of the North American Indian's aboriginal title. Chamerovzow scorned the "Arnoldian theory" and the "evil results of applying this false theory". If the theory were to be applied consistently, he mused, should not the vast hunting estates and wild moorlands of England be incapable of ownership other than by the Crown as part of its prerogative? "Give up your estates, then, you who hold them not by right of labor, and who eat the bread of idleness", he demanded colourfully. More fatally, however, he insisted the labour theory of property rights did not acknowledge its own vital predicate: "It surely has never occurred to our opponents that industry cannot constitute the first title to land, because there must exist a right precedent, namely; a right to enter upon it, for the purpose of expending labour". He thus concluded:

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201 Id., 47-8.
202 Id., 41-5.
203 Id., 45.
204 Id., 196.
205 Id., 197.
206 Id., 199.
207 Id.
It is not a question with us whether tribes called savage ought or ought not to be left in the undisturbed possession of their uncultivated lands, when for the requirements of civilization those lands may be necessary. On this point we cannot entertain a doubt; but it being proved that the right to the soil of their country, is not derived from the expenditure of industry thereupon, but rests upon an antecedent right of occupancy, under whatever conditions or circumstances acquired, we must maintain that civilized nations possess no abstract right of extinguishing native title, save by purchase, or by other adequate compensation; and that the fulfilling of this condition of acquiring new territory is imperative upon them, as long as they continue to violate, in their own case, the law by which they assert that their acquisitions are regulated.

The remainder of Chamberovzow's discussion continued in the same vein. He reviewed colonial practice in British North America, noting most especially for our purposes how *Campbell v Hall* had upheld the validity of the Royal Proclamation of 1763 recognising aboriginal title to its fullest extent and the recognition of Indian title in the Marshall Court. His subsequent chapters observed how the constituent instruments for the colony, instructions to the Governors, imperial as well as colonial legislation had all recognised the property rights of the Maori tribes. In all, Chamberovzow's study was exhaustive and one which New Zealand judges in later times would have done well to consult.

Finally reference might be made to a tract written in 1870 solely (it appears) for the use of the Colonial Office. This work written by one E Fairfield took the same title as Chamberovzow *The New Zealand Question*. The writer acknowledged Maori consent as the basis of the Crown's sovereignty over New Zealand, observing how the recognition of native title and the Crown's pre-emptive right provided for in the Treaty of Waitangi had been incorporated into colonial practice. This tribal title was defined by the native customary law. Thus:

> In one block of land the Government might find it necessary to extinguish six classes of title. There were first, the title by occupation - that of the sub-tribe living on the land; second, the seignorial title of the head chief of the whole tribe; third, the title by conquest - that of a distinct tribe which had formerly conquered the occupying tribe, and only left them the land as an act of grace; fourth, title by attempt at conquest - that of a tribe which had tried to conquer the occupying tribe, and fought great battles, and endured great sufferings in the attempt; fifth, title by burial - that of a tribe whose ancestors were buried in the block; sixth, title by exercising the privilege of hunting and fishing over the land.

Thus was the aboriginal title of the Maori according to their customary law recognised irrespective of the traditional exploitation of the land.

The 'general principles' to which the advocates of a limited aboriginal title appealed were the 'labour' theorists of property rights. The difficulty with this appeal was that such theory had not been incorporated into colonial law. The title of the American Indian to their

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208 *Id.*, 203-4.
209 Text in CO 881/2:#8,6.
lands both cultivated and wild was recognised. This was also the case with the Maori notwithstanding the advocacy otherwise. The aboriginal title was defined by reference to the native law, as Stanley had informed the Lords (1845), and so extended to all the regions claimed under that code even if unclaimed and used simply for fishing, hunting and foraging.

10. Crown-recognised into Crown-derived title

Throughout the first two decades of the colony’s history, even after the grant of a representative assembly in 1852, the Colonial Office maintained its control over native policy in New Zealand. The New Zealand Constitution Act (UK) 1852 had practically sanctified the recognition of the Maori’s aboriginal title and the Crown’s pre-emptive right.210 This committed the colonial authorities to a rigorous land purchasing programme as British settlement and emigration grew dramatically through the 1850s. During this period the Maori had begun to resist the pressure on their land through mobilisation of the paramount chief’s recognised power to veto the sale of land. The Maori tribes of the central North Island had appointed a ‘King’ and established what the settlers deprecated as a ‘Land League’ by which the paramount chiefs of the various tribes agreed to veto sales agreed by lesser chiefs and hapu vested with the primary right of occupancy. The Waitara dispute which escalated into the Maori Wars was sparked by an attempt by the colonial government to evade the customary veto which, as they saw it, could be used to inhibit severely the growth of the colony. The denial of the paramount chief’s veto was not only a challenge to the traditional rules of Maori tenure to which the Crown had pledged its respect but, more crucially, an affront to the mana and authority of the chiefs. Paradoxically, therefore, the Imperial Parliament’s eventual grant to the colonial assembly of full legislative jurisdiction over Maori affairs,211 including their aboriginal title, was prompted by civil conflict arising from the colonial authorities’ efforts to sidestep the earlier limitations on their jurisdiction. The attempt to control native policy from London had failed.

In retrospect the Maori Wars and consequential grant of a legislative jurisdiction over native affairs, particularly land, were crucial moments for the recognition of the Maori aboriginal title as together they meant the primary identification and application of the relevant constitutional principles had shifted from London to Wellington. The important result of this was the Native Lands Act 1865. This colonial statute established a Native (today Maori) Land Court with the function of transforming the "native", that is aboriginal, title into a Crown-derived tenure. The Court was required to investigate the ownership of a block of land according to customary law and to issue a certificate to no more than ten

210 15 & 16 Vict c 72, sections 72 and 73.
211 25 & 26 Vict c 48, section 8.
owners. This certificate was to be freely alienable and could be exchanged, either by the owners specified in the order or by a purchaser, for a Crown grant. This system devastated the traditional rules of tenure ousting, most notably, the superior chiefs' right of veto. Its avowed purpose was to make Maori land more readily marketable, a goal in which it was remarkably successful. The effects of the transformation by the Native Land Court of the native title into a Crown-derived tenure will be assessed at a later stage. It will be suggested that the attempt to incorporate the common law aboriginal title into a Crown-derived system of title has been only partially accomplished and that subsisting aboriginal titles remain throughout the country.

212 Native Lands Act 1865, No 71, section 23.
213 Id, sections 47,74 (sales to be completed before a JP), 75.
214 Comments of H Sewell, Minister of Justice, in the Legislative Council, (1870) NZPD,9,361.
CHAPTER 8
ABORIGINAL TITLE IN NEW ZEALAND COURTS

A. THE EARLIEST CASES

During the first two decades of the colony's history, it was universally recognised that the tribal title to the ancestral lands survived the Crown's assumption of the territorial sovereignty of New Zealand and that the principles of 'modified continuity' (comprising what has been termed the doctrine of aboriginal title) defined this right. The aboriginal title was regarded as a property right taking the form of a burden upon the Crown's ultimate ownership of land within the country. This ultimate ownership came not with the Crown's sovereignty, which would simply have given it the dominium eminens, but in consequence of the introduction of feudal principles of title to the land in the colony. The aboriginal title of the tribes was recognised by the Crown, its immediate advisors in London and colonial representatives as well as the settlers and the colonial judiciary in *R v Symonds* (1847).1 If there was any argument over the aboriginal title it did not concern its existence, which was never in doubt, but the extent to which it included the uncultivated lands of the tribes. This shortlived dispute was resolved in the tribes' favour. It was submitted that in embodying the doctrine of aboriginal title the Treaty of Waitangi did no more than declare what would have obtained as a matter of law in any event.

*R v Symonds* gave judicial expression to the prevailing understanding regarding the character of the tribal title to their land. This case articulated a position which was not upset until the important judgment of Prendergast CJ in *Wi Parata v The Bishop of Wellington* (1877).2 In the period between *Symonds* and *Wi Parata* a cluster of cases appeared in the earliest colonial law reports touching upon the question of aboriginal title. These cases, in judgments delivered by Martin's successor, Arney CJ, described the aboriginal title as almost a matter of course.

*R v Fitzherbert and others* (1872) arose from the 1839 purchases of land by the New Zealand Company by deed from the Maori owners. Eventually the title to these lands in Port Nicholson (today Wellington) was clarified as between the Company and the Crown so that in 1851 a Crown grant was made of the land upon which a hospital had been built some years earlier. The Maori inhabitants of Port Nicholson brought a writ of *scire facias* to repeal the grant alleging aboriginal ownership of the land. Arney CJ commented:3

The allegation that the lands have never been ceded to the Crown, and that the

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1 (1847) [1840-1932] NZPCC 387 (SC).
2 (1878) 3 NZ Jur 72 (SC).
3 (1872) 2 NZ (CA) 133, 172-3.
Native title thereto has never been extinguished, may be shortly disposed of. No formal act of cession to the Crown was necessary. From and after the purchase of these lands by the Company from the Natives, they became, by virtue of the alienation itself, part of the demesne lands of the Crown; insomuch that even if the purchase by the Company had been investigated by Commissioners under the Lands Claims Ordinance No. 1, and the same had been approved, and the Commissioners had recommended grants or a grant to the Company accordingly, it would have remained at the discretion of the Crown to make or refuse such grant.

In other words, the aboriginal title over the land had been relinquished by sale to the New Zealand Company. Although the original tribal owners apparently argued otherwise, the court was satisfied that this extinguishment had been agreed on fair and equitable grounds. Given this, the land vested in the Crown free of the aboriginal title and hence could not affect any Crown grant.

The same year the Court of Appeal assessed the colonial Native Lands Act 1865. Under this Act the Native Land Court ascertained the owners of native land and issued certificates of ownership which, if granted pursuant to section 23 of the Act, were freely alienable by the specified tribal owners. Usually there was a time lag between the Court’s order for the certificate to issue and its actual issue in which time it was common practice for the prospective grantees to make an alienation of their land. In *Re ‘The Lundon and Whitaker Claims Act, 1871’* (1872) the Maori owners had agreed to lease their land to De Hirsch and Graham prior to the issue of the certificate but upon its receipt alienated the land to Lundon and Whitaker. Because the Native Lands Act 1869 permitted the backdating of the certificate to the date of the Court’s order, the lease to De Hirsch and Graham took priority. A special Act was passed to allow the Court to assess Lundon and Whitaker’s claim. In the course of this assessment Arney CJ made on behalf of the Court some important comments on the character of the aboriginal title. Under the Native Lands Act 1865 two forms of certificate could issue in respect of the tribal land. A certificate under section 23, the form which the Maori owners had obtained in this case, made the land freely alienable even before exchange for a Crown grant. The Court of Appeal found that as a result section 23 modified section 73 of the Constitution (UK) Act 1852 which had (further) codified the Crown’s pre-emptive right to purchase the aboriginal title. The Court found, however, that it was the certificate itself and not the order for its issue which ‘commuted’ the native title. This meant the tribal land remained inalienable until the actual date of issue of the certificate. The second form of certificate, one issued under section 43 of the Act, gave the traditional owners a Crown-derived title but it maintained the inalienable character of the aboriginal title. Arney indicated that section 43 disclosed "no indication of a purpose to legalize alienation which could be supposed to override the prohibitions of the common law and of the Constitution Act".

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4 (1872) 2 NZ (CA) 41,47 (emphasis added).
title was addressed more explicitly:

The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right. Whatever the extent of that right by established Native custom appears to be, the Crown is bound to respect it. But the fullest measure of respect is consistent with the assertion of the technical doctrine, that all title to land by English tenure must be derived from the Crown; this of necessity importing that the fee-simple of the whole territory of New Zealand is vested and resides in the Crown, until it be parted with by grant from the Crown.

Amey repeated his view that the Crown held the fee-simple of the country subject to any unextinguished aboriginal title in *Johns v Rivers* (1873). He stated that "by the common law the whole territory of the colony originally vested in the Crown as its demesne, subject only to the rightful and necessary use thereof by the aboriginal inhabitants". He noted, though, that the Crown had by statute temporarily divested itself of part of its demesne in favour of the New Zealand Company. There was no suggestion that during this period the New Zealand Company had taken the title to the land on any fuller basis than that by which the Crown had held it, that is subject to the unextinguished aboriginal title.

The above cases show Amey to have been of the clear view that the Crown held the fee to all the ungranted lands of the colony in virtue of the introduction of feudal rules of land title. This position was underlined by his judgment in *Veale v Brown* (1868) where he affirmed the applicability to the colony of feudal rules of land title and, hence, the rule of escheat:

The feudal system, long extinct in England itself as a social and political system, is yet the source of all the doctrines of the English law of real property. It is a fundamental principle of that law that all lands are held of some superior lord - according to the old French maxim, *Nulle terre sans seigneur*. In other words, the doctrine of tenure is a fundamental principle of the English law of real property; and to say that the doctrine of tenure is not to prevail in this Colony, is as much to say that the English law of real property is not in force here. This we may safely treat as an absurdity.

Although the writer might not accept the soundness of the general proposition implicit in this passage - that feudal principle came to a colony with the general introduction of English law, there can be no doubting the correctness of Amey's proposition that the feudal doctrine had come to New Zealand.

Amey had no occasion to develop his position upon aboriginal title into a sophisticated account such as that provided by Chapman in *Symonds* but implicit in his judgments was a similar harmonisation of feudal doctrine with the recognition of aboriginal title. He was

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5 *Id*, 49.
6 (1873) 2 NZ (CA) 344,359-60.
7 (1868) 1 NZ (CA) 152,157.
emphatic that the fee to the ungranted land in the colony was vested in the Crown but was as unequivocal in his indication that this title was burdened by the aboriginal title which by common law and the Constitution (UK) Act 1852 was a property right inalienable other than to the Crown.

B. ABORIGINAL TITLE IN NEW ZEALAND COURTS UNDER CHIEF JUSTICE PRENDERGAST (1875-99)


In this case the Supreme Court comprising Prendergast CJ and Richmond J considered the effect of a Crown grant to the Bishop of Wellington. The grant had been made without the knowledge or consent of the aboriginal owners. Previously the tribe had reached an understanding with the Bishop that they would grant the land as an endowment for the establishment of a school for their community. No school was ever established. Learning of the Crown grant the aboriginal owners sought a declaration "that the grant was issued by the then Governor without the knowledge or consent of the chiefs and members of the Ngatitoa tribe, and was a violation of the agreement and understanding between the native donors of the land and the Bishop, and a fraud upon the donors".8

Prendergast CJ's ruling for the Supreme Court was simple: He held that the court had "no jurisdiction to avoid a Crown grant, or anything therein contained, on the pretence that the Crown [had] not conformed in its grant to the terms on which the aboriginal owners... ceded their rights in the land, or that the native title [had] not been extinguished".9 Prendergast intimates that the court might be able to avoid such grants upon a writ *scire facias* brought by the Crown but on the general rule his position was clear: The courts had no jurisdiction to entertain any claims based upon a supposed aboriginal title.

Prendergast indicated that the Maori lacked an aboriginal title both at common law and as a matter of statutory interpretation. He rested his findings against a common law source of aboriginal title on two grounds.

His explanation of the first ground opened by denying that the Treaty of Waitangi had ever been a valid instrument of cession. It was, he said, a "simple nullity".10 This position, the difficulties with which have been considered in an earlier chapter, gave him the basis for the conclusion that the tribes lacked any enforceable property rights because their laws of tenure were uncivilized in character. He observed:11

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8 (1878) 3 NZ Jur 72, 76.
9 *Id.*, 77.
10 *Id.*, 78.
11 *Id.*
On the cession of territory by one civilised power to another, the rights of private property are invariably respected, and the law of the old country is administered, to such extent as may be necessary, by the courts of the new sovereign. In this way the British tribunals administer the old French law in Lower Canada, the Code Civil in the island of Mauritius, and Roman-Dutch law in Ceylon, in Guinea, and at the Cape.

This could not be the case, however, with the land rights of the Maori tribes. But in the case of primitive barbarians, the supreme executive Government must acquit itself, as best it may, of its obligation to respect native proprietary rights, and of necessity must be the sole arbiter of its own justice. Its acts in this particular cannot be examined or called in question by any tribunal, because there exist no known principles whereon a regular adjudication can be based. Here, then, is one sufficient reason why this Court must disclaim jurisdiction which the plaintiff is seeking to assume.

As authority for this conclusion Prendergast cited Gipps' speech during the second reading of the New Zealand Land Claims (New South Wales) Bill 1840, "the American jurists, Kent and Story, who, together with Chief Justice Marshall, in the well-known case of Johnson v M'Intosh, have given the most complete exposition of this subject" and R v Symonds (1847). In using these sources, however, Prendergast had taken the comments about the modification of the continuity of the tribal title, that is the justification for its general inalienability, as going to the question of the existence of the property right. These authorities had used the uncivilised character of the aboriginal tenure to explain the modification of the presumption of the continuity of tribal property rights whereas Prendergast used it to deny any legal continuity whatsoever. It was a crucial shift of emphasis for the tribal (hence to Prendergast 'barbaric') character of the Maori title and tenure now prevented rather than modified the legal continuity of their property rights subsequent to the Crown's assumption of the sovereignty.

Prendergast's second reason for judgment against any common law right was that upon "such a settlement as has been made by our nation upon these islands, the sovereign of the settling nation acquiring on the one hand the exclusive right of extinguishing the native title, assumes on the other hand, the correlative duty, as supreme protector of aborigines, of securing them against any infringement of their right of occupancy". This meant that "[t]ransactions with the natives for the cession of their title to the Crown are thus to be regarded as acts of State, and therefore are not examinable by any Court". There were several major flaws in this conclusion. Earlier Prendergast had ruled that the Treaty of Waitangi was a "simple nullity" yet here he seemed contradictorily to restore if not tribal

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12 Id.
13 3 NZ Jur 72 at 77.
14 Id, 78.
15 Id, 79.
sovereignty then certainly some juridical capacity to the tribes to enter into formal relations with the Crown. More fatally, he termed transactions between the tribes and Crown 'acts of state'. This violated the fundamental rule of common law that as against its own subjects the Crown could make no act of state.16 By 1877 the status of the Maori as British subjects had long been fixed, Prendergast, whilst Attorney-General, having given an opinion some years earlier on that basis.17 As a matter of common law this status had arisen with the Crown's formal annexation of the islands in 1840. The Maori may even have become British subjects earlier if Prendergast was to be taken at his word18 that the Crown's sovereign title over New Zealand arose from the time of the foundation of the colony of New South Wales (1788), an interpretation which chapter three has shown to be without support. But even if New Zealand had become British at that early stage and had the Maori not acquired British subjecthood in 1788, this legal position could only have been achieved through the application of a Marshall-like doctrine of discovery with its notions of partial and divided sovereignty. British constitutional theory of the time was unable to accommodate any such theory. Certainly the Maori were British subjects by 1877 if only as a result of the declaration to that effect in the Native Rights (NZ) Act 1865.19 Moreover, in Rira Peti v Ngairahi Te Paku (1888), some years later, Prendergast insisted the Maori were British subjects and governed by the laws of the land.20 This insistence hardly sat easily beside the Wi Parata ruling that there was a class of British subject, aboriginal owners, against whose property rights the Crown could act arbitrarily if it chose and without fear of being required to show lawful reason. Prendergast's "second reason" would appear difficult if not impossible to sustain.

Having denied the existence of a common law aboriginal title Prendergast considered whether some such title had come into being by statute. He quoted section 3 of the Native Rights Act (NZ) 1865 parenthesizing an important comment:21

"9. 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 property, whether real or personal, of the Maori people; and touching the title to land held under Maori custom and usage, as they have, or may have, under any law for the time being in force" - [this, we presume, is meant to include the common law] "- in all cases touching the persons and property of natural born subjects of her Majesty".

16 Enick v Carrington (1765) 19 St Tr 1030; Campbell v Hall (1774) 1 Cowp 204, 208-10; Walker v Baird [1892] AC 491 (PC), 496-7; Johnstone v Pedlar [1921] 2 AC 262 (HL), 272 per Viscount Finlay; Attorney-General v Nissan [1970] AC 179 (HL), 207 and 213 per Lord Reid, also comments of Lords Morris (p 221), Pearce (pp 226-7), Wilberforce (p 235) and Pearson (p 240).
18 Wi Parata v Bishop of Wellington, supra, 78.
19 The Native Rights Act 1865, No 11, section 2 declaring and deeming every "person of the Maori race... whether born before or since New Zealand became a dependency of Great Britain" to be "a natural-born subject of Her Majesty to all intents and purposes whatsoever".
20 (1888) 7 NZLR 235 (SC),229.
21 Wi Parata v Bishop of Wellington, supra, 79.
He then emasculated this section with the observation that 23

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

Finally Prendergast reiterated his general conclusion: The issue of a Crown grant was conclusive in all courts "against any native person asserting that the land therein comprised was never duly ceded ". 23 He admitted that Chapman had intimated otherwise in R v Symonds but this had not been a "legitimate inference" 24 from the American authorities. The true American position, Prendergast claimed, was that although a Crown grantee took his title subject to any unextinguished Indian title, the Indians were unable to bring an action in the American courts under this title either generally or to impeach the grant. This was a severe distortion of the American position which simply held that in suits between citizens of a state the court would not question the validity of the patent on the grounds of an unextinguished aboriginal title. Even in suits between grantee and Indian occupants the patent would not be invalidated but it would be legally qualified (perhaps to the extent of being virtually valueless to the grantee) by the unextinguished aboriginal title. 25 The American courts certainly recognised the standing of the tribe to sue on their aboriginal title. The inferences Chapman had made from the American authorities were certainly more "legitimate" than those of Prendergast.

Despite the manifest flaws in Prendergast's judgment Wi Parata v The Bishop of Wellington became an influential case. The Supreme Court's newfound refusal to accept any doctrine of aboriginal title whether derived from the common law or even statute, flew in the face of clear evidence to the contrary. There were no portions of the judgment in which important errors of detail or interpretation did not occur. Perhaps the most damning indictment of the case was the washing of the judicial hands of questions of Maori claims to their traditional lands. Law only came to the protection of Maori land owners where the machinations of the Native Land Court had transformed the 'barbarous' communal title into a Crown-derived title.

2. later cases

22 Id.
23 Id., 80.
24 Id.
25 Fletcher v Peck (1810) 6 Cranch 87 (USSC) (grantee under Government patent cannot eject Indians); Johnson and Graham's Lessee v M'Intosh (1823) 8 Wheat 543 (USSC) 574 (grantee takes subject to unextinguished Indian title); Clark v Smith (1839) 13 Pet 195 (grantee takes full title only upon Indian relinquishment of title); Beecher v Wetherby (1877) 95 US 517; Cramer v United States (1926) 261 US 219 (approved Hall J. in Attorney-General (British Columbia) v Calder (1973) 34 DLR (3d) 145 (SCC) 200-1).
The position taken by Prendergast CJ in *Wi Parata* was developed in his courts through the remainder of the nineteenth century. During this period the New Zealand courts did not move from their Chief Justice’s view that the Maori had no aboriginal title either by right of common law or statutory recognition because the tribal law defining that title was 'uncivilised' and hence beyond the cognisance of the courts.

In *Mangakahia v The New Zealand Timber Company* (1881 - 82) Gillies J held the Native Rights Act 1865 was "merely a declaratory Act", which recited "the pre-existing right of natives to appeal to this Court for the protection or vindication of their personal rights and of their rights to their lands". He then commented upon the character of the aboriginal title:

What title does legally recognised ownership according to native custom confer? I answer that no title known to English law is thereby conferred. A pre-existing right according to native custom is thereby recognised and declared - an exclusive right to occupation - a right to inherit not according to the rules of English law but according to native custom - all these are recognised and declared, but though in many respects they are analogous to, they are not equivalent to a fee simple. If a recognised and declared native owner sell to a European the purchaser does not derive his title from the vendor, he merely extinguishes the vendor's right of occupation, but derives his title from the Crown, subject nevertheless to the "full, exclusive and undisturbed possession of their lands", guaranteed to the natives by the treaty of Waitangi which is no 'simple nullity', as it is termed in *Wi Parata v The Bishop of Wellington*.

One might have thought these comments would have led to an enforcement of the aboriginal title. Perversely, however, Gillies held that the aboriginal owners who had been put out of occupation by non-natives could not bring an action for recovery of that right. The basis of any such action was that "the owner being out of possession [might] by entry obtain such a constructive possession as to entitle him by virtue of his freehold title to sue a trespasser". This right, however, was one "of the attributes or incidents of the ownership of land in fee simple under English law". The aboriginal owners bringing the action had a memorial of ownership under the Native Lands Act 1873, which was not a Crown-derived title but one held by native custom (and hence not "an estate recognized by law"). Thus, continued Gillies, the "right of entry by which constructive possession can be obtained", was "an incident of title held under the Crown, not of title according to native custom". This meant that tribal owners put out of possession could bring no action for recovery of that right in colonial courts (unless their title had been transformed into the Crown-derived variety). He added, however, that "bare possession" was "sufficient to entitle the possessor to bring

26 (1881-2) 2 NZLR (SC) 345,351.
27 Id.
28 Id., 350.
29 Id.
30 Id., 351.
trespass". The basis of this right, he implied, was the superiority of the tribal occupation to that of the trespasser. Where that possession was lost, so was the basis for proof of a right superior to the alleged trespasser. In all, Gillies' conclusions did not square with his earlier comments about the "legally recognised" character of the aboriginal title.

Gillies' judgment in Mangakahia seemed to infer that aboriginal owners put out of possession should resort to their customary law to regain that right. The previous year, however, when aboriginal owners had tried precisely that the Court of Appeal had found that an indictment for forcible entry could proceed against them despite the fact that their aboriginal title was unextinguished. In R v Niramoana (1880) the Maori defendants had broken into a wooden building, an inn, with sticks, staves and other weapons and, asserting their aboriginal title, had put the occupant out of possession. The court affirmed the conviction at trial insisting that the supposed aboriginal title was no lawful justification and that the Queen's peace must be maintained. If the implication intended was that the native owners should have resorted to the courts, the decision a year later in Mangakahia put paid to that means of redress. So much for the right of 'undisturbed' tribal ownership recognised in the Treaty of Waitangi.

The status of the memorials of ownership issued by the Native Land Court under the various Native Lands Acts and which had not been exchanged for a Crown grant came up for judicial assessment on several occasions during the late nineteenth century. It has been seen that Gillies J took the position in the Mangakahia case that such certificates did no more than identify the owners according to native custom and did not give the aboriginal title any of the incidents of title under English law. The problem with this approach was that in those cases where the certificate holders had sold their native title, as permitted by statute, a non-Maori purchaser who had yet to exchange the certificate for a Crown grant could hardly be said to hold under native customary law. This problem was adverted to indirectly in Ani Waata v Grice (1884). The Court of Appeal indicated that such licences gave "a right of possession, as against all the world, save the Crown" who, it was left unstated but implied, enjoyed unfettered power over all land which had not been brought into the Crown-derived system of title. In Hobson v Sheehan (1884 - 85) Richmond J commented upon the nature of the estate taken by native owners holding under the memorials of ownership without a Crown grant:

That title is a native title, and in the absence of express provision there is no alienable quality in such a title. It is not capable of transfer to Europeans. In order to give such a title an alienable quality an express enactment was requisite.

31 Id, 349.
32 (1880) O B & F (CA) 76.
33 (1884) 2 NZLR 95 (CA).
34 (1884-5) 3 NZLR,SC 230,232 (approved Hira Tamati v District and Registrar [1957] NZLR 231 (SC) 236).
Richmond proceeded to state that the bare certificate of the Native Land Court was

... a recognition by the Court that the holders are owners according to native custom. But ownership according to native custom, whatever be its exact nature, is certainly not the same thing as ownership in fee simple. The power of absolute alienation which is an incident of an estate in fee is the creation of a highly artificial state of society. Probably the native notion of property in land never included more than an usufructuary right.

He had admitted the inalienable character of the aboriginal title was the necessary result of its uncivilised character, a finding which would suggest the source of this inalienability was the common law, without, however, identifying the source of the rule. Some years later in judgment for the Court of Appeal in *Nireaha Tamaki v Baker* (1894) he intimated the location of the rule in the statutory regime (as opposed to common law rules) affecting tribal ownership of traditional lands.

The general position taken was that the certificates or memorials of ownership issued by the Native Land Court did not make the land the subject of tenure until exchanged for a Crown grant. Any person holding under such a certificate did so subject to the plenary right of the Crown over land not alienated from it. This was a straight application of the principles expressed by Prendergast CJ in the *Wi Parata* case.

Related to the question of the legal character of certificates from the Native Land Court was that of the status of agreements between the Crown and tribal owners for the cession of their aboriginal title. It was seen *Wi Parata* held that such transactions were ‘acts of state’ and that a Crown grant could not be read as qualified by any unextinguished aboriginal title or agreement between the Crown and aboriginal owners. Prendergast reaffirmed this position in *Moore v Meredith* (1889). The aboriginal title conferred "no estate in the land known to the law beyond, possible, a tenancy at will". The aboriginal owners could not compel the Crown to grant them any estate even where it had made such a promise in return for the cession of their title. This maintained the ‘act of state’ characterisation of these transactions, a position taken by other judges during the remaining years of Prendergast’s tenure.

In a very short judgment in *Ani Kanara v Mair* (1885) Prendergast held that where a Crown grant had been issued to certain Maori individuals they took the title absolutely and not on trust for the tribe (claiming right by way of aboriginal title). This holding was a continuation of the *Wi Parata* approach in that it treated a Crown grant as absolute on the face of it and unqualifiable by any aboriginal (or other pre-existing private) rights over that

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35 *Id*, 234.
36 (1894) 12 NZLR 483 (CA) 488.
37 (1889) 8 NZLR 160 (CA).
38 *Aitken v Swindley* (1897) 15 NZLR 517 (SC); *Chalmers v Busby* (1897) 16 NZLR 287 (SC), *Teira Te Paea and others v Roera Tareha and another* (1896) 15 NZLR 91 (CA) 114 per Edwards J (Crown has prerogative power to extinguish unilaterally the aboriginal title).
39 (1885) 4 NZLR (SC) 216.
land. By the time of this decision it appears Crown grants had frequently been issued with
the intention (not apparent from the terms of the grant) the grantees hold as trustees for the
tribe. Such was the outcry against this decision the Native Equitable Owners Act 1886 was
passed.40 This Act empowered the Native Land Court to investigate whether on the creation
of the title it had been intended the grantees take on a representative basis. If the court
answered an inquiry favourably it was unable simply to declare the trust but was required to
amend the record by including all those omitted on the rectified title.41 The Native Land
Court Certificate Confirmation Act 1894 made it clear that thereafter the Court could not
award a freehold title to tribal representatives,42 a provision surviving in Part XV Maori
Affairs Act 1953.43 Prendergast’s ruling presupposed that the Maori had no pre-existing right
to their land other than the mere goodwill of the Crown. The Crown grant was thus the
exclusive legal source of any tribal right to their traditional lands. This obsession with
Crown-derived tenure might be contrasted with the series of West African appeals heard by
the Privy Council during the 1920s and '30s considered in the opening chapter of this Part.
The Board consistently held that the grants of land in Lagos subject to an unextinguished
tribal title to one or more members of the tribe were taken on a representative basis. The
means used to transmute the native tenure in Lagos into a system based on Crown grants
were virtually identical to those employed in New Zealand. The Privy Council proceeded on
the basis that a Crown grant transformed rather than created or negated the pre-existing
private title to the land. The Board presumed such grants to bring the least possible
interuption of the original tribal title. The contrary position of the New Zealand courts under
Prendergast CJ culminated with the eventual appeal to the Privy Council in Nireaha Tamaki
v Baker.

The plaintiff in Nireaha Tamaki v Baker had commenced an action to prevent the
disposal of lands by the Commissioner of Crown Lands over which he alleged his tribe
enjoyed a subsisting aboriginal title. Richmond J held for the Court of Appeal that Wi
Parata was a "direct authority":44

... the mere assertion of the claim of the Crown is in itself sufficient to oust the
jurisdiction of this or any other court in the colony. There can be no known rule of
law by which the validity of the dealings in the name and under the authority of the
Sovereign with the Native tribes of this country for the extinction of their territorial
rights can be tested. Such transactions began with the settlement of these Islands; so
that Native custom [ie the pre-European customary law] is inapplicable to them. The
Crown is under a solemn engagement to observe strict justice in the matter, but of
necessity it must be left to the conscience of the Crown to determine what is justice.

40 NZPD (1886),54,141 (2nd Reading) and 303 (Committee stage).
41 Native Equitable Owners Act 1886, No 16, sections 3 and 4. The Act did not apply to land previously alienated
by the titular owners (section 5).
42 Native Land Court Certificate Confirmation Act 1894, No 44, section 6.
43 Maori Affairs Act 1953, No 94, sections 169-172; also the Maori Land Act 1931, No 31, sections 130-5 and the
Native Land Act 1909, No 15, sections 103-108.
44 (1894) 12 NZLR 483 (CA) 488.
The security of all titles in the country depends on maintenance of this principle. Accordingly the Court ruled that it had no jurisdiction to interfere with the Commissioner's disposal of lands on behalf of the Crown, there being no legal basis upon which a court could intervene to protect the unextinguished aboriginal title.

Commencing with the *Wi Parata* judgment, the New Zealand courts developed a consistent theme with regard to the aboriginal title of the Maori. They held that the native inhabitants had no title to their land recognisable in the courts. The Crown could dispose of such land as it willed and municipal courts would not question or challenge any such acts on grounds of an unextinguished aboriginal title. Although it was intimated that a tribe could sue in trespass this right was not based on any title to the land so much as a superior right (a tenancy at sufferance) to that of the trespasser. The courts refused to find that the common law or even statute had ever provided otherwise.

3. **the conceptual basis of the Prendergast position**

The technical flaws in the *Wi Parata* judgment have been noticed but underlying it, and the position which it encouraged Prendergast's judges to take, was a fundamental misconception as to the basis of land titles in the colony. The colonial bench was clearly of the view that the sole form of title to land in New Zealand was Crown-derived and that the only rights in land which could be recognised by the courts were those incidental to a Crown grant. In *Wi Parata* Prendergast had conceded that some forms of Crown-recognised title could be given effect in the colonial courts of the Crown but these were only those of 'civilised' societies. A society met this requirement of civilisation if prior to the Crown's sovereignty it could be said to have been 'sovereign'. Being 'uncivilised' Maori society lacked this original sovereignty and hence a land tenure system and rights to land cognisable in the colonial courts. The Treaty of Waitangi did not affect this since so far as it purported to cede the sovereignty of the islands it was a 'simple nullity'. Having taken this position Prendergast handed his judges feudal blinkers which saw the sole title to land in the colony as nothing other than Crown-derived, there never having been any previous sovereign from whom another legally recognisable system of title could have derived.

Prendergast's position reduced to its simplest form was this: All property rights derived from a grant by a sovereign. If a society lacked an original sovereignty so too did it lack any property rights upon the acquisition of its territory by the Crown. In reaching this equation Prendergast, unwittingly to be sure, had synthesised a number of legal traditions into one: feudal rules of land title mixed with Austinian theory and emergent notions of international law. Unfortunately Prendergast's grasp of these principles was not that of a Marshall or H.S. Chapman.
The equation of a right to property with the grant or permission of a sovereign was feudal in its concern for the relationship of lord and tenant, ie some superior from whom the right to use the land was derived. The feudal notion sat easily beside and was, indeed, enhanced by the influential utilitarian ideas of property developed through the nineteenth century. According to the traditional utilitarian view, civil society existed to maximize the means of happiness for the maximum number of individuals. Since the acquisition of property and security in its enjoyment was necessary to the achievement of happiness civil society required a system of property rights. Property rights were thus an emanation from the law of a civil society. Onto this utilitarian premise we might add Austin's definition of 'law' as the command of a sovereign who was a "determinate and common superior" to whom the bulk of the population owed habitual obedience. The American Indian tribes were sovereign-less, Austin decided, because they lacked any such determinate superior being composed of loose and independent societies who behaved, so far as he could tell, in whatever manner suited the savage temperament. Austin insisted that a society without a sovereign was without law. He rejected a vice versa argument that the presence of law implied the existence of a sovereign, again by reference to the North American Indians. The customs of the tribes he characterised as nothing more than the "general opinion" of the savage community unsupported by "legal or political sanctions". This was not law nor could it imply any sovereignty in such societies. The Austin view, then, was that a society without a sovereign was without law and, it followed, without property rights. This was simply a way of intellectualising the feudal view of property as a sovereign-derived right.

Prendergast's formulation also incorporated aspects of the standard of civilisation then becoming recognised by international law. According to the position taken towards the end of the nineteenth century by a very limited group of English writers the standard of civilisation was an absolute threshold for international personality. This Austinian-influenced position, it has been seen, missed the subtleties of international practice and, in any event, was not an intertemporal rule of international law in 1840 when the Crown acquired the sovereignty of New Zealand. The Crown had always recognized the juridical capacity of tribal societies to make a valid grant of an imperium. The civilisation of the Maori, or lack thereof, did not nullify this recognition. The failings of the Wi Parata judgment on this point have been noted elsewhere.

Finally, and by way of general comment on the Prendergast approach to aboriginal title, it should be observed that there is nothing intrinsically compelling in the preoccupation with the sovereign-derived character of property rights. Certainly some of the early writers on the common law did not find this characteristic intellectually explicable other than as an

45 For a general account of the utilitarian's position see Becker Property rights - philosophic foundations (1977), 57-74.
46 The Province of Jurisprudence Determined (1832), lect VI, 208-10. For Austin's influence in Australasia see Morison John Austin (1982), 151-60.
accident of the reception in England of the feudal system. If one were to seek an intellectual or theoretical justification for a right of property any number of formulations other than the sovereign-derived variety come to mind. The common law doctrine of aboriginal title sidestepped any such theorising in so far as it located the title in the fact of the tribal occupation of their land under a customary if 'barbaric' system of tenure. Theorists of property rights might have shunned any such justification of the title, indeed we have seen the abortive attempts to inject 'labour' theories of property rights into the rules affecting aboriginal title, but from the start the aboriginal title was based on the simple, provable fact of tribal occupation.

C. THE PRIVY COUNCIL INTERVENES (1901-03)

1. Nireaha Tamaki v Baker (1901)

Prendergast's position on aboriginal title first came before the Privy Council twelve months almost to the day after the expiry of his term as Chief Justice. In delivering their advice in Nireaha Tamaki v Baker (1901), the facts of which have been related earlier, the Board expressed firm disagreement with Prendergast. The Board criticised his approach for its failure to accept that the various statutes had recognised an aboriginal title to which the courts were bound to give effect. The advice avoided explicit comment on Prendergast's approach to the common law origins of the Maori's aboriginal title however strong disagreement was also apparent if not so emphatically delivered.

Davey noted that the issues had been presented to the Board as two, the first being "the interest of the Crown in the subject-matter of this suit [could] be attacked by this proceeding". He confessed that their Lordships had been "somewhat embarrassed by the form" in which that issue had been framed:

If it refers to the prerogative title of the Crown, the answer seems to be that title is not attacked, the Native title of possession and occupancy not being inconsistent with the seisin in fee of the Crown. Indeed, by asserting his Native title, the appellant impliedly asserts and relies on the radical title of the Crown as the basis of his own title of occupancy or possession.

This meant that the major issue was that given as the second question for determination, namely the jurisdiction of the Court to inquire into the character of the Crown's title and the

47 For example: Digges "Arguments proving... Kings of England are by the lawes of the Corone just and lawfull owners..." (1568-9), reprinted in Moore History of the Foreshore, 185; Cowell, The Interpreter... (1607), tit "propertie" and Institutes of the Lawes of England (1651), 57 c 12; callis Reading... Upon the Statute... of Sewers (1647), 2; Rastell Les termes de la ley (1624), tit "propertie". See generally Aylmer "Meaning and Definition of 'Property' in Seventeenth-Century England" (1980) 86 Past and Present, 87.

48 (1900-01) [1840-1932] NZPCC 371,379.

49 Id.
extent to which it might be encumbered in point of law by a subsisting aboriginal title. In
describing the native title as "not being inconsistent with the seisin in fee of the Crown" the
Board had already intimated the position which it was about to adopt.

Davey attempted to distinguish the present case from Wi Parata which the Court of
Appeal had treated as a "direct authority". He indicated Wi Parata had been a case in
which the actions of the Crown in making a grant of the land subject to the aboriginal claim
had been called into question whereas the case before it involved a Government functionary
acting under authority "derived solely from the statute" establishing his office.

In the end, however, nothing turned on this distinction for in both situations the issue concerned the
courts' jurisdiction "to decide whether the Native title has or has not been extinguished by
cession to the Crown".

Addressing the issue of cession to the Crown, Davey considered the Wi Parata view that
there was no customary law of the Maori "of which the courts of law [could] take
cognizance". Prendergast had based this conclusion on the uncivilized character of tribal
law and hence the impossibility of its recognition by the colonial courts when confronted
with questions of aboriginal title. Davey firmly disagreed with this conclusion pointing to
the express recognition of Maori property rights in the Native Rights Act 1865:

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 ss. 3 and 4 of the Native Rights Act,
1865, by saying (as the Chief Justice said in the case referred to) that "a phrase in a
statute cannot call what is non-existent into being". It is the duty of the Courts to
interpret the statute which plainly assumes the existence of a tenure of land under
custom and usage which is either known to lawyers or discoverable by them by
evidence.

The Privy Council took the view, then, that the recognition of the aboriginal title of the
Maori was required by statute. Davey added that this conclusion was required not only by
the terms of the Native Rights Act but the whole of the various enactments touching upon
questions of aboriginal title:

The legislation both of the Imperial Parliament and of the Colonial Legislature is
consistent with this view of the construction and effect of the Native Rights Act, and
one is rather at a loss to know what is meant by such expressions "Native title",
"native lands", "owners", and "proprietors", or the careful provision against sale of
Crown lands until the Native title has been extinguished if there be no such title
cognizable by the law and no title therefore to be extinguished. Their Lordships think

50 Id, 380.
51 Refer Te Raihi v Grice (1886) 4 NZLR (CA) 219, 238-40 per Williams J (not cited by Lord Davey).
52 NZPCC, 381.
53 Id, 382.
54 Id.
55 Id, 382-3.
that the Supreme Court are bound to recognize 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.

Thus the Board advised that "if the appellant [could] succeed in proving that he and the members of his tribe [were] in possession and occupation of the lands in dispute under a Native title which [had] not been lawfully extinguished", he was able to maintain an action "to restrain an unauthorized invasion of his title".56

The Board proceeded to cast doubt upon the Wi Parata position that the issue of a Crown grant implied a declaration by the Crown that the native title had been extinguished. This was dicta which Davey said went "beyond what was necessary for the decision".57 Although the Board expressly left open the question whether the Crown could extinguish the Native title by exercise of the prerogative apart from the statutory procedures laid down, that is by issue of a Crown grant to other than the aboriginal owners, the criticism of the dicta in Wi Parata strongly suggested a negative answer. The direct implication was that the Crown's paramount title to land in the colony was subject to the unextinguished aboriginal title. The source of any such rule could only have been the common law. This was, however, a point into which the Board felt no need to inquire further as no such disposal had been made in the case before it; indeed the litigation had been prompted by an attempt to prevent it occurring. The Board did comment, and this too was thinly veiled criticism of the Wi Parata approach, that if the Crown held such power to effect a unilateral extinguishment by exercise of the prerogative, it was "all the more important that Natives should be able to protect their rights (whatever they are) before the land is sold and granted to a purchaser".58 To underline this position the Privy Council endorsed Chapman's judgment in Symonds, especially his comment that the courts were to respect an aboriginal title which could not be extinguished "otherwise than by the free consent of the Native occupiers", or, the Privy Council added, "otherwise than in strict compliance with the provisions of the statutes".59 Curiously, the Board took the position that the American cases were unhelpful being based upon a doctrine of discovery inapplicable to New Zealand.60 This hinted that they considered the substantive basis of the Crown's sovereignty over New Zealand to be the Treaty of Waitangi which they had quoted in full at the opening of their advice. This also challenged a vital ingredient of the Wi Parata position, although the association of the doctrine of discovery with the tribal right to their land had misinterpreted Marshall's position.

56 Id, 383.
57 Id, 384.
58 Id.
59 Id.
60 Id, Davey referred to New Zealand as a "conquest" inferring that the country had been a conquered or ceded colony at common law.
In summarizing the advice of the Privy Council in *Nireaha Tamaki v Baker* it may be said at least to have commanded the New Zealand courts to take a 'statute-based' approach to the aboriginal title of the Maori. That is, the statutes applicable in the colony had given overwhelming recognition to the aboriginal title which, even if only on that basis, was to be respected. Although the reference to a common law source of the aboriginal title was not so explicit there were several important indications of the Privy Council's belief that the aboriginal title had a basis in the principles of common law. This position was confirmed by its judgment soon after in *Wallis v Solicitor-General* (1902-03).

The reaction to *Nireaha Tamaki v Baker* in New Zealand showed the local awareness of the implications of the Board's holding that the traditional Maori title was legal in character. It meant local titles were in jeopardy to the extent that where it could be shown the aboriginal title had not been properly extinguished, the title to the land might be invalidated in virtue of the unsuccessful extinguishments.

In July 1902 the Minister of Native Affairs was asked in the House of Representatives whether he was aware of the possible invalidation of Crown grants as a result of the ineffective extinguishments of the native title. The Minister replied that the Government would not intervene as the matter was *sub judice*.61 Some months later the Court of Appeal delivered its judgments in *Hohepa Wi Neera v The Bishop of Wellington* (1902),62 Stout resorting (it will be seen) to a dubious interpretation of the Native Rights Act 1865 to justify a result avoiding the potential upsetting of the colony's land titles. The Government must have realised the fragility of the Court of Appeal's assessment and the likelihood of reversal on appeal to the Privy Council. Fortunately for the settlers' titles, an appeal did not eventuate, the Maori litigants' funds being exhausted. Sensing the vulnerability of the *Wi Parata* position and doubtless worried that future litigation by the Maori might eventually succeed, the Land Titles Protection Act 1902 was passed.

The Preamble of this Act recited how after a lapse of over thirty years certain Maori persons had been calling into question Crown grants issued in consequence of orders of the Native Land Court under the 1865 statute. It also alluded to the *Hohepa Wi Neera* case, suggesting the futility of such litigation:63

And whereas the said actions have been dismissed by the Court of Appeal, and the Native plaintiffs have been cast in costs and expenses amounting in the aggregate to at least two thousand pounds: And whereas, through the death or retirement of Judges of the Native Land Court and other responsible officers of the public service who could give official evidence, the defence of such actions may be a matter of great difficulty if not an impossibility; And whereas considerable alarm has been caused amongst the European landholders of the colony at such attacks upon their titles, and it is expedient that reasonable protection should be afforded to the holders

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61 *NZPD* (1902),120,450 (per Fraser, MP) and 451 (Carroll’s reply).
62 (1902) 21 *NZLR* 655 (CA).
63 The Land Titles Protection Act 1902, No 37, Preamble.
of such titles...

Section 2(1) provided that the validity of any order of the Native Land Court or Crown grant "purporting to have been issued under the authority of a law which has subsisted for not less than ten years prior to the passing of this Act shall not be called in question in any Court" without the consent of the Governor in Council first obtained. The ten year period ostensibly excepted from the Act was window-dressed surplusage for the Native Land Court Certificate Confirmation Act 1894 deemed all Crown grants issued thereafter to have vested title absolutely in the tribal grantees.

The Native Minister, James Carroll, had explained the measure to the House in the Committee stages of the Bill:64

The whole start of the thing arose from the Tamaki - Baker case... The Privy Council decided that the question of Maori title was yet open to review by the Courts here. That was taken to be a victory, and it was enlarged upon and magnified to such an extent as a Maori land victory that the whole race arose up in arms to do and dare in the field of litigation. The fever spread in its most malignant form among the Natives, and it became quite an easy work for lawyers to say to the Natives, 'If you will only instruct us to bring cases against the European holders we can get you back all the lands you have parted with, or make them pay. Your victory is assured, because we have the Tamaki versus Baker case to go by'.

Other members agreed with Carroll, noting that Europeans had purchased titles under the statutory procedure established in 1865 and believing the title they had acquired was absolute and good. How then, they demanded, could those titles be invalidated on the grounds of an improperly extinguished native title? The Member for Northern Maori disagreed: "The effort of the Bill now before us", he complained, was "to bar a section of His Majesty's subjects in New Zealand from exercising their right as British subjects in bringing cases which they may believe, or which they may be counselled to believe, they have a perfect right to bring".65 This was a direct violation of the Treaty of Waitangi in that legislation was taking from the Maori legal rights held as British subjects. Here, he protested, was "an alteration of the law by legislation which will prevent any Maori from taking action in the Supreme Court where he considers he has a justifiable right to bring a case in respect to the title to land".66 Nonetheless the Bill was passed and the proposition established by statute that an improperly extinguished aboriginal title (that is, one not extinguished with the consent of all the traditional owners) could not invalidate a Crown grant or order of the Native Land Court. This legislation still left the possibility of a Crown grant being affected by a subsisting aboriginal title in some way not amounting to invalidation. Moreover the statute had not addressed the relation between the Crown and

64 NZPD (1902),120,375.
65 Id, 375.
66 Id.
aboriginal owners, a question which the Privy Council was soon to consider in Wallis v Solicitor-General (1902-03).

2. Wallis v Solicitor-General (1902-03)

This case was another installment in the saga of litigation spawned by the 1848 grant of land to the Bishop of Wellington by the tribal owners in order that a school might be established on their land. The former tribal owners were not a party to the litigation although the character of their title at the time of the grant and hence validity of the trust was at issue. The appellants were the trustees who had begun the suit. They sought a direction for the administration of the trust cy-pres as no school had been erected according to the terms of the 1848 agreement. The Court of Appeal had accepted the Solicitor-General's argument, ruling the endowment "null and void from its very commencement" and declared the property to have become vested in the Crown absolutely. The trustees appealed to the Privy Council who upheld their claim in the strongest possible terms.

The advice given for the Board by Lord Macnaghten turned on the character of the purported cession of 1848. His Lordship indicated that the cession in August 1848 from the natives to the Bishop conveyed him the beneficial interest in the land subject to the terms of the cession. The Lieutenant-Governor of the Province had sanctioned the cession in October 1848 and in December 1850 a Crown grant issued to the Bishop conveying him legal title to the land. The Board found the Bishop's title to the land was, therefore, governed by two sources: His legal title derived from the Crown grant, the equitable title the terms of the grant from the native owners in October 1848. The Court of Appeal had taken the position that the Crown had the full original title to the land in law and equity and that the Bishop's title rested solely on the grant of the Crown. Where the condition specified by the grant had not been met (the establishment of the school) the property was not to be administered cy-pres but revested in the Crown for the failure of the grant. The Privy Council could not share this approach. They did not dispute that the Crown had legal title to the land but treated it as originally burdened by an aboriginal title comprising the equitable ownership of the land. By the rule of pre-emption any cession of that title by the tribal owners would also have vested the equitable title in the Crown, however in this case the Crown had agreed to 'waive' its right of pre-emption. This meant that in issuing the Crown grant "the Crown had no beneficial interest to pass". It had disavowed its claim on this title so that the basis of the trust was the direct relation between native benefactors and the Bishop. The Crown grant was not, therefore, the sole basis of the title of the Bishop's trustees to the land.67

It should be explained that the Board's position was no departure from the rule prohibiting direct alienation of land from aboriginal owners to European. The rule of pre-

67 [1903] AC 173.
emption prevented a direct purchaser of aboriginal land laying claim to a legal title to the land as against the Crown and subsequent Crown grantees or, in other words, prevented the creation of a legal estate by conveyance of the aboriginal title to a European without the medium of a Crown grant. That rule, in 1848 embedded in colonial and imperial legislation, was not violated by the 'waiver' made in this case for a Crown grant was issued and the Bishop's legal title founded upon it. In agreeing to the endowment the Crown had not surrendered or disavowed its original legal title over the land but had permitted the passage of the beneficial estate from Maori to Bishop on their agreed terms. In that sense the Government had not waived the Crown's statutorily-declared right of pre-emption by an executive act beyond its lawful authority, as, for example, was the case with Fitzroy's Proclamations of 1844 purporting to allow a European to acquire a legal title by direct purchase from the aboriginal owners. The legal title of the trustees thus emanated from Crown grant but the basis of their duty as trustees although recognised by the grant derived from the approved endowment of the native owners. The Privy Council did not make itself as clear on this point as it might have, a failing which coupled with other aspects of the report would prompt an extremely hostile reaction in New Zealand.

The Privy Council could not have reached their finding that the doctrine of cy-pres was applicable without supposing that the original aboriginal title was a property right capable of being the subject-matter of a trust. Their location of the equitable duty of the trustees in the cession of 1848 and their willingness to give it effect were consistent with no other position. This was affirmed by Macnaghten when, after quoting the Court of Appeal's recitation of what to them was the received Wi Parata-inspired approach, he commented upon their Lordship's inability "to follow this observation".68 Another more provocative rejection of the Wi Parata doctrine occurred towards the end of the report. The basis of the Crown's argument had been that the equitable as well as legal title to the land (before and after the tribe's cession) was in the Crown. This was a way of stating that the aboriginal owners had never had an interest in their lands capable of being recognised in the courts as the subject-matter of a trust. The Crown's administration of the native title was thus put solely at its own discretion and beyond the jurisdiction of the courts albeit subject to the ultimate authority of statutory enactment. The Privy Council repudiated this argument in the strongest language. The proposition, which the Court of Appeal had accepted, was:69

... certainly not flattering to the dignity or the independence of the highest Court in New Zealand, or even to the intelligence of the Parliament. What has the Court to do with the executive? Where there is a suit properly constituted and ripe for decision, why should justice be denied or delayed at the bidding of the executive? Why should the executive Government take upon itself to instruct the Court in the discharge of its proper functions? Surely it is for the Court, not for the executive, to determine what

68 Id, 187.
69 Id, 188.
is a breach of trust.

We might summarise the Privy Council’s position as this: The Board treated the aboriginal title as a beneficial title to Crown land. This title could not be conveyed to give a direct purchaser from the tribal owners a legal title to the land, the grant of the Crown being necessary. But where some such grant of legal title was made and the Crown had approved the aboriginal owners’ cession to a European of their ‘equitable estate’, the equitable title was passed subject to the terms of the approved cession. The enforcement of the cession laid not in the executive hands as a matter of high policy, as Wi Parata held, but was fully justiciable in the ordinary judicial tribunals of the country. Quite simply: the aboriginal title was a property right cognisable in the courts.  

D. ABORIGINAL TITLE IN NEW ZEALAND COURTS UNDER CHIEF JUSTICE STOUT (1899 - 1926) 

1. early cases

Whilst the above two appeals to the Privy Council were outstanding local courts, now under recently appointed Chief Justice Robert Stout, twice considered the question of aboriginal title.

In Mueller v Taupiri Coal Mines (1900) Edwards J expressed the Court’s agreement with Gillies’ comments in Mangakahia v New Zealand Timber Company that the fee of all lands in the colony had been held by the Crown subject to the Maori right and that the Treaty of Waitangi was no ‘simple nullity’. The Treaty, he said, "declared the existence of the proprietary rights of the Natives". This position, much like that of Gillies, was hard to reconcile with his subsequent adoption of the Wi Parata approach that all dealings between the Crown and aboriginal owners were beyond the jurisdiction of the courts.

In re an application by Beare and Perry for mining area in the Arahura River (1900) Stout considered the status of the Maori right to the Arahura River bed. The Crown had agreed with the aboriginal owners of the region that the whole course of the river bed belonged to them. It had accepted the cession of their aboriginal title subject to their continued ownership of the whole river and the setting aside of certain land ("the reserve"). The Crown then gave the tribal owners a Crown grant for the reserve. Stout considered an application for mining rights over the portion of the river outside the reserve. Although the Mining Act prohibited the issue of mining licences for "Native land", Stout found that the riverbed outside the reserve did not so qualify. According to the rule of English law "the

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70 For a similar analysis see Hookey "Millirrump and the Maoris", [1972] OLR 63. cf Cooke, ed Portrait of a Profession (1969) 22 dismissing this holding as per incuriam.

71 (1900) 20 NZLR 89 (CA) 123.
bed of an unnavigable stream" belonged "to the proprietors on each side". Since the native title to the land beside the stream outside the reserve had been extinguished and the native right over the bed had been reserved by an instrument for the cession of an aboriginal title beyond the cognisance of the court, Stout ruled that mining licences could issue irrespective of the aboriginal owner's objections and formal agreement with the Crown. The refusal to give effect to the cession of the aboriginal title was a direct application of the doctrine in *Wi Parata*. Stout's judgment showed, however, an incipient movement towards a 'statute-based' approach to the recognition of aboriginal title. He was apparently ready to accept that there was such a thing as 'native title' of which he was required by statute to take cognisance but left the question of its extinguishment (and the enforceability of agreements made thereupon between Crown and tribal owners) to the rules in *Wi Parata*.

The advice of the Privy Council in *Nireaha Tamaki v Baker* in 1901 required the New Zealand courts to take stock of their position on aboriginal title. The slightly revised approach adopted in *Hohepa Wi Neera v The Bishop of Wellington* (1902) took the lead Stout had given two years earlier.

*Hohepa Wi Neera v The Bishop of Wellington* arose from the cession in 1848 of the native chiefs of Porirua to the Bishop of Wellington. In *Wallis v Solicitor-General*, it may be recalled, the Court of Appeal had found that the Crown grant of 1850 had been void from its commencement. Whilst the appeal to the Privy Council from this judgment was outstanding, the Maori of the Porirua region brought an action alleging that the land should be revested in them, their aboriginal title never having been extinguished. In refusing this application Stout CJ referred to the Native Lands Act 1862 which had provided that "nothing herein contained shall be construed as rendering the rights of Natives in respect of such lands, or the usages or customs on which such rights depend, cognisable or determinable by any Court of law or equity judicature, until the same shall have been defined and a certificate of title... issued according to the provisions of this Act". Stout observed that it had "always been assumed - at all events up to the decision in *Tamaki v Baker* - that the declaration in the Act of 1862 which I have quoted was a true declaration of the law". This interpretation was founded on the *Wi Parata* doctrine that there was no such thing as a 'native title' cognisable in the courts. More fatally, the rule established by the 1862 Act was simply a means of requiring litigants to have their aboriginal title proven by the special panel established under the 1862 Act before bringing suit upon it. The rule was shortlived, probably being the cause of some inconvenience if not hardship, for it was reversed by sections 3 and 4 of the Native Rights Act 1865 by which, as Lord Davey had stressed in *Nireaha Tamaki*, all courts were to have jurisdiction in all cases "touching the

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72 (1900) 2 GLR 242 (SC) 243.
73 The Native Lands Act 1862, No 42, section 3.
74 (1902) 21 NZLR 655 (CA) 665.
75 NZPCC, 382.
persons, and property, whether real or personal, of the Maori people and touching the titles to land held under Maori custom and usage" as they had in cases concerning the natural-born subjects of the Crown. Stout commented that this Act did not bind the Crown, a point which he noted the Privy Council as missing in *Nireaha Tamaki v Baker.* In so commenting, however, Stout neglected the Privy Council's more general conclusion that the Native Rights Act was but one of a series of statutes (including Imperial legislation which had most certainly bound the Crown) recognizing the 'Native title', 'Native lands', 'owners' or howsoever else the aboriginal title had been styled. Perhaps Stout did not attach much weight to this observation because he said that in any event in the view of the Privy Council *Wi Parata* had been "rightly decided" despite the disapproval "of certain dicta in the judgment". This interpretation of *Nireaha Tamaki* was at best an inference from the report and an incorrect one at that. Nonetheless it encouraged Stout to maintain the *Wi Parata* position that the issue of a Crown grant implied the extinguishment of any native title over the land included in the grant. Strictly speaking this aspect of his judgment was *dicta* for Stout found that there had in fact been an extinguishment of the aboriginal title since the grant to the Bishop in 1848 had been described by the chiefs as a "full and final giving up". Stout ruled that in their dealing with the Crown for the extinguishment of the aboriginal title the customary law required the tribe members to abide by the decision of their chiefs and acknowledged leaders. These leaders had made the complete cession of the aboriginal title so that it could not now be asserted that it remained unextinguished.

Williams concurred with Stout's position observing that *Wi Parata* had not been overruled by the Privy Council and that its *ratio* remained. The present case was indistinguishable from *Wi Parata* and on its authority the fact that a Crown grant had issued was conclusive proof of the extinguishment of any aboriginal title over the land.

The judgments of the Court of Appeal in *Hohepa Wi Neera* were a deliberate attempt to contain the damage to the authority of *Wi Parata* inflicted by the Privy Council. The local courts were now prepared to concede the existence of some native title recognisable in the courts - Stout even took judicial notice of the customary right of the chiefs in the sale of tribal lands, but fought to maintain the *Wi Parata* doctrine giving the Crown wide, unreviewable powers to effect the extinguishment of that title as an 'act of state'.

2. the Protest of Bench and Bar (1903)

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76 *Supra, 667.*
77 *Id.*
78 *Id.* The *dicta* had important ramifications, however, for land titles in the colony where the native title had not been properly extinguished (as by an alienation by ten owners named as owners on the certificates issued under the Native Lands Act 1865).
79 *Id, 671.*
The terms in which the Privy Council had delivered its advice in *Wallis v Solicitor-General* were incendiary so it was little surprise that when news of it reached New Zealand the reaction was explosive. At an adjourned sitting of the Court of Appeal on Saturday, 25 April 1903, the Chief Justice and two of his fellow judges gathered members of the local Bar and publicly censured the Privy Council.

Stout opened the proceedings with a formal ‘Protest’ in which he challenged the Privy Council’s “direct attack... upon the probity of the Appeal Court in New Zealand”. Although there were other aspects, for present purposes the important parts of his Protest lay in his dogged insistence that the Board had been wrong to think there was any such thing as a Native title cognisable in the courts. "The root of title being in the Crown", he said, "the Court could not recognise Native title". As authority he cited *Symonds, Wi Parata* and *Nireaha Tamaki* where the Privy Council did not "entirely overrule this view".

Stout had not only misrepresented the position taken in *Symonds* and, indeed, *Nireaha Tamaki* but maintained the *Wi Parata* fixation with Crown-derived title as the sole source of right to land. He also neglected the settled rule that feudal principle where introduced to a colony was only applicable to the extent it was suitable to local circumstances. The Crown’s formal and constant recognition of the native title indicated the feudal principle was not to be applied without regard to Maori ownership.

Turning to the Privy Council’s position that the trust for the land arose from the native donation rather than Crown grant, Stout insisted this could not be:

The fee-simple was in the Crown, and the Crown gave that to the Bishop. The legal title came from the Crown, and in that sense the Crown was the donor.

The Privy Council had not disputed the position that the Crown held the fee of the country although Stout’s description of the Crown’s title as the fee-simple was a misleading rendering of the character of the Crown’s title to land subject to an unextinguished aboriginal title. The term he had used implied a *dominium plenum*. The Privy Council accepted the Crown had the *dominium* but refused to infer from this, as Stout and those subscribing to the *Wi Parata* approach, that this was a title which the courts would recognise as full and unencumbered by the aboriginal title. The Privy Council had treated the aboriginal owners’ right as one of property which although subject to the legal title of the Crown was capable, with the permission of the Crown, of forming the subject-matter of a valid and enforceable trust. Stout was mistaken if he thought the Board had called into question the technical doctrine by which the legal title to the ungranted lands of the colony was in the Crown.

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81 Id, 732.
82 Id, 734.
Developing his Protest, Stout insisted that cessions of the native title were acts of state beyond judicial cognisance.\(^{83}\) This was the basis upon which the Court of Appeal was unable to consider the terms of the natives' cession in 1848. The Privy Council had used the courts' inability to look at such 'acts of state' to make "baseless imputations" that "this Court had declined jurisdiction, had denied justice, and had lost its dignity and independence through dread of the Executive Government". It was "hardly... becoming in the highest tribunal in the Empire to make such charges against any Court"\(^{84}\) without conclusive proof which here was complete lacking.

In closing, Stout pointed the Privy Council to other errors they had made in recent judgments on appeal from New Zealand, including *Nireaha Tamaki v Baker*. These showed how out of touch with the circumstances of the colony the Privy Council had become. Stout closed in a tone of self-righteous indignation which questioned the continued value of appeals to the Privy Council.\(^{85}\)

The matter is really a serious one. A great Imperial judicial tribunal sitting in the capital of the Empire, dispensing justice even to the meanest of British subjects in the uttermost parts of the earth, is a great and noble ideal. But if that tribunal is not acquainted with the laws it is called upon to interpret or administer, it may unconsciously become the worker of injustice. And if such should unfortunately happen, that Imperial spirit that is the true bond of union amongst His Majesty's subjects must be weakened. At present we in New Zealand are, so far as the Privy Council is concerned, in an unfortunate position. It has shown that it knows not our statutes, or our conveyancing terms, or our history. What the remedy may be, or can be, for such a state of things, it is not at present within my province to suggest.

To give Stout some due there was justification for his unhappiness in that the Privy Council’s tone had been needlessly provocative and the report contained some minor errors of detail. Nonetheless his grounds for disputing the Board’s recognition of the native title were unfounded. He had adopted and argued the *Wi Parata* position but this, it has been stressed, was one which it was difficult to maintain with technical much less historical accuracy. It is hard, therefore, to read the above passage without a sense of irony. The Privy Council had not bothered to refute the *Wi Parata* position in the detailed and precise fashion which the New Zealand judiciary’s subscription to it doubtless required. The Privy Council could have made its own premises more apparent, in particular the location of the aboriginal title in the common law recognition of tribal property rights subsequent to British annexation. This, however, did not alter the fundamental differences between it and the colonial judiciary. The Board was prepared to accept Crown-recognised as well as a Crown-derived title to land whereas the New Zealand bench, blinkered in its adherence to feudal doctrine, could not do likewise. It hardly occurred to the New Zealand judges that a tribunal

\(^{83}\) *Id*, 742.
\(^{84}\) *Id*, 744.
\(^{85}\) *Id*, 746.
sitting at the heart of the British Empire would be in a better position to assess the legal principles upon which the Crown’s relations throughout its colonies had been based. The Privy Council had shown its instinctive willingness to protect the various tribes’ title to their land throughout the Crown’s colonial possessions and *Wallis v Solicitor-General* was part of that tendency. This was hardly a "worker of injustice" to the Crown’s subjects, who, Stout seemed to overlook, included the Maori as well as those who in the "Imperial spirit" had ventured forth from England to establish the colony of New Zealand.

The sequel to this spectacle was the intervention of the New Zealand legislature to codify the *Wi Parata* rule that the Crown was not bound by the aboriginal title. Section 84 of the Native Land Act 1909 provided that "save so far as otherwise expressly provided in any other Act the Native customary title to land shall not be available or enforceable as against His Majesty the King by any proceedings in any Court or in any other matter". This legislation passed its Second Reading without any debate despite its constitutional importance. In moving the Bill be read a second time the Attorney-General Dr Findlay acknowledged that this provision was designed to clarify once and for all the position of the native right to their traditional lands in the colony.86 The position chosen, not surprisingly, coincided with the feelings of local lawyers. It may be added that the "customary title" the Act rendered unenforceable against the Crown did not cover all the forms of aboriginal title which being untouched by section 84 and its successors retained their full standing under the common law rules.87 Section 86 of this Act also re-codified the rule in the Land Titles Protection Act 1902, stipulating that a Crown grant was not to be impeached or adversely affected by any subsisting "customary title". The 1909 Act thus amounted to a statutory reversal of the common law principles so far as they might previously have protected the Maori "customary title".

3. later cases

The codification of the *Wi Parata* decision was doubtless seen by Stout as a vindication of his position on aboriginal title. If so, it put him in a conciliatory mood towards the question of Maori rights to their traditional lands, forests and fisheries. Prior to *Wallis* he had been moving towards a statute-based approach but his Protest did not touch the possibility of some such foundation to aboriginal title. His later judgments showed his position had mellowed with the years.

In *Baldick v Jackson* (1911) Stout considered the statute 17 Edw II, c 11 which made whales found within the territorial waters royal fish. He held that the rule in the statute was

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86 *NZPD* (1909), 148 at 1273.

87 See the writer’s "The legal status of Maori fishing rights in tidal water" (1984) 14 *VUWL* 247.
I am of opinion that this statute has no applicability to New Zealand, and that though the right to whales is expressly claimed in the statute... as part of the Royal prerogative, it is one not only that has never been claimed, but one that would have been impossible to claim without claiming it against the Maoris, for they were accustomed to engage in whaling and the Treaty of Waitangi assumed that their fishing was not to be interfered with; they were to be left in undisturbed possession of their lands, estates, forests, fisheries etc".

Stout agreed that whales were royal fish as part of the royal prerogative but found the assertion of this prerogative unsuitable to the circumstances of the colony because, amongst other reasons, of the Treaty of Waitangi. In so ruling he appeared to hold that the prerogative rights of the Crown could be qualified by an aboriginal right to their lands, forests and fisheries. It was but a step from the prerogative right to royal fish to the prerogative title to the ungranted lands in the colony but Stout seemed unaware of this implication which, if taken, would have amounted to a dramatic reversal of his previous attitude to aboriginal title.

Tamihana Korokai v Solicitor-General (1912) showed Stout in his true if softer colour. This case dealt with the jurisdiction of the Native Land Court to entertain a claim by the Maori to the customary title to the bed of Lake Rotorua in the face of a claim by the Attorney-General that the land was Crown land. Stout opened by noting that the Crown was under a duty to respect the aboriginal title of the Maori by reason of the Treaty of Waitangi. He maintained, however, that any native right relied on the mere goodwill of the Crown not being a Crown-derived title. However, the Crown had kept faith with the Maori, he insisted, and recognised their title over the whole of the country.

The Governor and Legislature of New Zealand accepted this position and numerous Ordinances and Acts of Parliament have been passed to enable the Maoris to transmute their customary title into freehold. The position assumed all along has been that the lands are vested in the Crown, and until the Crown issues a freehold title the customary titles cannot be recognized, but that the Crown will give to all who prove that the land was theirs a freehold title. The Crown has not assumed that land could be taken or kept by the Crown from the Natives unless the Natives ceded their rights to the Crown. Thousands of purchases in both islands have been made by the Crown, and thousands of deeds are in existence.

Stout cited the "classic judgment" of H.S. Chapman J agreed in by his brother Martin CJ in Symonds as authority for the rule that the courts recognised no native title until transmuted into Crown-derived form. The Wi Parata judgment, he found inaccurately, had emphasized the Symonds ruling that "the Native customary title was a kind of tenure that the Court

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88 (1911) 13 GLR 398 (SC).
89 (1912) 32 NZLR 321 (CA) 340.
90 Id, 341.
could not deal with". Nonetheless, Stout continued, statutes could recognise the natives' traditional rights over their land and where this was done the statute-recognised right became incapable of executive abridgement without statutory authority. Ignoring the possibility that earlier statutes affecting Maori traditional lands could have provided a basis for this 'statutorily recognised' title, the response the Privy Council had demanded in *Nireaha Tamaki v Baker* (1901), Stout held it to have been created by the 1909 legislation. This ruling enabled Stout to adopt the statute-based approach without upsetting the position he had taken in his Protest some years earlier.

Stout's brethren took the same approach that whatever its original status the Maori aboriginal title had become recognised by the 1909 legislation. It was thus a statutorily-recognised right of property incapable of defeat by the mere claim of the Crown. Any claim by the Crown that certain land was not subject to a subsisting aboriginal title had to follow the formalities specified in sections 85 and 86 of the Native Land Act. Section 85, which had taken earliest form as section 105 of the Native Rights Act 1865, stipulated that a proclamation by the Governor that land vested in the Crown was free of the native customary title was to be taken as conclusive proof by a court. Section 86 stated that no alienation of Crown land by grant, lease or otherwise was to be affected by reason of the fact that the native customary title had not been duly extinguished. As the Crown had never made a formal act evidencing the extinguishment of the native title to the bed of Lake Rotorua, the Court held that the Maori Land Court had jurisdiction to determine the customary owners. It should be noted that the statute in which the Court located its new-found acceptance of the aboriginal title as a recognisable and enforceable property right, the Native Land Act 1909, was in content not significantly different to the many earlier statutes affecting the Maori title. Still the Court used this Act as the excuse for its tardy adoption of a statute-based approach. Thereafter this became the standard approach of the New Zealand courts to the question to aboriginal title.

By *Waipapakura v Hempton* (1914) Stout was not only admitting the statute-based approach but indicating the Privy Council's advice in *Nireaha Tamaki v Baker* to be its source. Still this concession, a response which he had not initially made to the Privy Council's advice, did not alter so much as underline his unwillingness to find that the common law had ever given any recognition to the aboriginal title. He stated, incorrectly, that *Nireaha Tamaki* supported such a position and had not overruled *Wi Parata*. It was "clear" from the Board's advice that "until there was some legislative provision as to the carrying-out of the treaty, the Court was helpless to give effect" to its recognition of the

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91 Id.
92 Id, 345.
93 Id, 346-8 per Williams J; 349-51 per Edwards J; 354-55 per Chapman J (but refers to legislation preceding the 1909 Act).
property rights of the Maori in their lands, forests and fisheries. In *Waipapakura v Hempton* Stout was facing a Maori claim to a common law right of fishery unscathed by a Fisheries Act drafted with the proviso that nothing in the Part of it dealing with sea fisheries was to "affect any existing Maori fishing rights". The provision was held to apply only to those fishing rights conferred by legislation and in the absence of such *Wi Parata* and *Nireaha Tamaki* were "authorities for saying that until given by statute no such right" could be enforced. One wonders where Stout's recognition of Maori fishing rights in *Baldick v Jackson* (where nothing had turned on the point) had gone.

In summary it may be said that goaded by the Privy Council, the New Zealand courts under Stout CJ finally treated aboriginal title as a property right rather than a form of licence dependent on the goodwill of the Crown. They based this position upon the Native Lands Act 1909, a facesaving step which did not undermine the 'Protest of Bench and Bar' in 1903. This was a belated step which had certainly been available to the local courts, as the Privy Council pointed out in *Nireaha Tamaki*, since at least 1865, twelve years before the *Wi Parata* judgment. In strong contrast to the Privy Council, however, the local courts refused to see the common law as a source of a cognisable aboriginal title binding upon the Crown's legal title to its ungranted lands or the title of its grantees. Section 84 of the Native Lands Act 1909 codified this position. The colonial courts maintained that except where statute had provided otherwise the only form of property right in land was Crown-derived. In this respect *Wi Parata* was still treated as good law, any dubious aspect of it simply being the refusal to take the statute-based approach now practiced in the local courts. Despite the Privy Council's advice delivered clumsily and heavy-handedly it must be admitted, the courts remained blinded by feudal doctrine and insensitive to the major flaws in the *Wi Parata* judgment.

E. SUBSEQUENT DEVELOPMENTS IN NEW ZEALAND COURTS

The question of the aboriginal title of the Maori resurfaced in *Hoani Te Heu Heu Tukino v Aotea District Maori Land Board* (1939 - 41). The owners of Maori freehold land argued that a charge imposed on their land by section 14 Native Purposes Act 1935 was invalid being in violation of the Treaty of Waitangi. This statutory charge had been imposed by Parliament as a compromise to an ongoing dispute between the Maori owners and a timber company over the timber felling rights granted it many years previously. In the Court of Appeal Myers CJ gave judgment without considering the common law status of the land guarantee in the Treaty of Waitangi. He stressed the court's duty to give effect to legislation

94 (1914) 33 NZLR 1065 (SC) 1070.
95 The Fisheries Act 1908, No 65, section 77 (2). See now the Fisheries Act 1983, No 14, section 88 (2) which omits the word 'existing'.
96 Supra, 1070.
and its inability to go behind the clear terms of an Act of Parliament. He discounted the argument that the Treaty of Waitangi had been constitutionally entrenched by Westminster through sections 72 and 73 New Zealand Constitution Act 1852 (UK), pointing to the power given the local assembly in 1862 to amend or repeal these sections. This power had been used to repeal section 73 in 1873 and to the extent that section 72 entrenched any land guarantee it would have to be read as modified by "necessary implication" from subsequent legislation. Myers brethren agreed but the disgruntled Maori owners appealed.

In argument before the Privy Council Denning KC, who elevated to the Lords would later deliver the Board's advice in Oyekan v Adele (1957), had conceded the common law aboriginal title for the respondent Board. He emphasised the nub of the appellant's case was the contention that the Treaty of Waitangi was a limitation on the legislative capacity of the New Zealand assembly, a proposition with which the Board expressed impatience. Their Lordships dismissed the appellant's argument rather peremptorily, citing Vajesingji Joravasingji and Cook v Sprigg. As a result their advice has been taken as supporting the proposition that the land guarantee in the Treaty of Waitangi lacked any legal basis absent recognition by statute. If one looks carefully at the case, however, it is no more than an authority for the simple, unremarkable proposition that promises in a treaty of cession cannot act as a restraint upon the legislative supremacy of Parliament.

Maori claims to the aboriginal ownership of the foreshore and navigable riverbeds of the country were made before the New Zealand courts during the late 1950s.

The Maori claim to ownership of the Wanganui River formally commenced in 1938 when an application was filed in the Maori Land Court to have the customary title to the riverbed investigated and a freehold order issued by the Court. The question of aboriginal title did not reach any conclusive determination until the Court of Appeal had delivered its second opinion in 1962. Taken together the judgments held that the Maori enjoyed no aboriginal right to the riverbed based either upon general principles of constitutional law or the Treaty of Waitangi. In this respect the opinions continued the 'statute-based' approach of

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97 [1939] NZLR 117. The argument was not made in the Supreme Court hearing before Smith J (id, 112-4).
98 Id, 121.
99 Id, 122 per Callan and Northcroft JJ.
100 (1957) 2 All ER 785 (PC).
101 [1941] AC 308 (PC) 315.
102 Id, 324 per Viscount Simon LC. A recent case where the Board has reacted with similar impatience is Winfat Enterprise (HK) Ltd v Attorney-General [1985] 2 WLR 786 (PC). See Wesley-Smith "Acts of State: Lord Diplock's curious inconsistency" (1986) 6 Legal Studies 325.
104 O'Connell State Succession, i, 255; Roberts-Wray Commonwealth and Colonial Law, 634; Hookey "Milirrpum and the Maoris", 72; Slattery "Land Rights of Indigenous Canadian Peoples", 49,53.
earlier cases. The Court of Appeal held in its first judgment that at the time of British annexation the Maori claimants 'owned' the riverbed as part of their tribal territory which rights of ownership had been recognised by statute.\textsuperscript{106} However, its second hearing ruled that when the Maori Land Court issued freehold orders for the customary land adjoining the riverbed the \textit{ad medium filum} presumption of English law applied so that traditional rights attaching to the river were transformed into riparian rights such as those enjoyed by any freeholder with land fronting onto a river.\textsuperscript{107} Effectively this ruling applied the \textit{ad medium filum} rule to deny the riverbed as a separate strip of land (such as Maori custom strongly suggested it to be) the title to which was ascertained independently to that of the adjoining land.

A similar line of reasoning was applied against the claim by the Te Aupori and Te Rawara tribes to the foreshore of the Ninety Mile Beach. In the Supreme Court Turner J held simply that section 150 Harbours Act 1950 excluded the Maori Land Court's jurisdiction to issue a freehold order for this section required any grant by special Act.\textsuperscript{108} The Court of Appeal, however, took the approach it had taken in \textit{Re Bed of the Wanganui River (No. 2)}. All judges agreed that the Maori enjoyed no right to enforce their aboriginal claims against the Crown other than by reliance on a statute which recognised their rights. Both North J\textsuperscript{109} and Gresson J (Gresson P concurring)\textsuperscript{110} applied feudal principles to justify this decision, despite the former's homage to Chapman's "classic judgment" in \textit{Symonds} and his quotation from the passage in \textit{Nireaha Tamaki v Baker} stating "the prerogative title of the Crown and the Native title of possession and occupation [were] not inconsistent with seisin in fee of the Crown". Along with his fellow judges North found statutes had recognised the Maori right to lands held according to their ancient customs and usage. This meant that statute law had placed a burden upon the Crown's paramount title to land in the colony of New Zealand. Hence the Maori Land Court was able to make a freehold order fixing the boundary of land fronting the sea at the low-water mark. Where, however, the Court had not fixed the boundary as other than the sea the presumption was that the grant took effect to the high-water mark freed from "the obligation which the Crown had undertaken when legislation was enacted giving effect to the promise contained in the Treaty of Waitangi".\textsuperscript{111} This was rather a backhanded way of avoiding the inconvenience of finding the presence of a surviving Maori right for most freehold orders simply named the sea as the boundary without addressing the suitability of making the grant to the high or low-water

\begin{thebibliography}{11}
\bibitem{106} \textit{Re the Bed of the Wanganui River} [1955] NZLR 419 (CA), 427 per Hutchison J, 433 per Cooke J agreeing with North J at 462.
\bibitem{107} \textit{Re the Bed of the Wanganui River} [1962] NZLR 600 (CA), 609-10 per Gresson P, 618 per Cleary J, 623 per Turner J.
\bibitem{108} [1960] NZLR 673 (SC), 676-7.
\bibitem{109} [1963] NZLR 461 (CA) 468.
\bibitem{110} \textit{Id}, 475-6.
\bibitem{111} \textit{Id}, 473.
\end{thebibliography}
mark. In all, the judgments in *Re the Ninety Mile Beach* had much the same effect as *Re the Bed of the Wanganui River* in denying the foreshore to be a separate strip of land (as Maori custom suggested) the title to which was ascertained independently to that of the adjoining land.

New Zealand courts considered a claim based on an aboriginal title on two other occasions during the late 1950s. The defendants in *Inspector of Fisheries v Ihaia Weepu* (1956) had been charged with an offence under the Fisheries Act 1908 and sought to invoke section 77 (2) excepting "existing Maori fishing rights" from the statutory regime. FB Adams J applied *Waipapakura v Hempton*, holding that since the fishing rights claimed by the Maori defendants were not derived from any other statute the prosecution would have to be upheld.112 The judge thus rejected any common law source of fishing right. The same ruling was given a few years later in *Keepa v Inspector of Fisheries* (1965).113 In the other case of this period, *Hira Tamati v District Land Registrar* (1957) North J considered the meaning of the term "land... alienated... from the Crown" in section 70 Land Transfer Act 1885. He found the phrase excluded land held by the Crown subject to an unextinguished tribal title but gave the legal basis of the traditional title as "the early Native Land Acts" of 1862 and 1865.114 He cited *Symonds and Nireaha Tamaki v Baker* as the authorities for this approach but neglected these cases' recognition of a common law source as well as statutory basis for Maori property rights.

By the 1970s the Maori had largely abandoned any attempt to obtain judicial recognition of their traditional property rights. The argument was put in *Hitia v Chisholm* (1977) that traditional Maori fishing rights protected by the Treaty had become referentially incorporated into municipal law through the New Zealand Day Act 1973 and Treaty of Waitangi Act 1975.115 This argument was quickly, and correctly, dismissed by Henry J.

It has been seen that the New Zealand courts of superior jurisdiction have consistently failed to adopt any common law doctrine of aboriginal title. The technical deficiencies in this position, emanating as it did from Prendergast's judgment in *Wi Parata v Bishop of Wellington* and corrected only by the belated adoption of a statute-based approach, have been noted. It must be added, however, that to some extent this failing may be explained as a consequence of the emphasis placed by Maori litigants upon the terms of the Treaty of Waitangi. The location of Maori claims to traditional property rights exclusively in the guarantees of the Treaty contributed a measure of inevitability to the approach taken by the New Zealand courts inviting the invocation of the wide *dicta* in *Cook v Sprigg* and

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115 Unreported judgment of Henry J, Supreme Court, Auckland Registry, 8 February 1977. Counsel for the Maori appellant had clearly relied on Molloy's suggestion in [1971] NZLR 194 that the Treaty of Waitangi might be referentially incorporated into New Zealand law.
Vajesingji Joravasingji. Had the Maori claims been framed in terms of a common law presumption of continuity affirmed by treaty (as was the case in the West African appeals to the Privy Council) the chances of Maori success might have been greater. This, of course, cannot justify so much as partially explain the fundamental difference in approach between the Privy Council and New Zealand courts on the question of the traditional tribal title to land. The emphasis upon the Treaty in legal argument was but a reflection of its status in Maori society as their take or cause of action against the Crown. In the end, the aboriginal title of the Maori might have been better protected by the courts without the complication of the Treaty or by a less explicit land guarantee (as for example with the Cession of Lagos (1861)).

F. ABORIGINAL TITLE IN THE NATIVE LAND COURTS

The Native Land Court was established by statute to transmute the tribal title under customary law into one based upon a grant from the Crown. The function of the Court was strongly associated with policies of assimilation and exposure of Maori land to market forces encouraging its alienation. Nonetheless, in dealing with the tribal title the Native Land Court took a position which in a general sense resembled the common law doctrine of aboriginal title.

The Native Land Court had traditionally functioned under what has become known as its 'quasi-parental jurisdiction'. The Court took the position that its function under the statutory regime was to shield Maori land from the harsher aspects of a Pakeha system of tenure.\(^\text{116}\) Within the constraints and limited protection of this regime, Maori land tenure, with the Maori Land Court as its focal point, has shown a large degree of resilience.\(^\text{117}\) The protective duty given the Court may be seen as a statutory delegation of the duty of guardianship held by the Crown under the doctrine of aboriginal title (and the terms of the Treaty of Waitangi). The rule of pre-emption, it may be recalled, was intended as much to protect the tribal owners from landjobbing so much as to ensure the orderly colonisation of the country.\(^\text{118}\) In this general sense there is a continuity between the position of the Crown under the doctrine of aboriginal title\(^\text{119}\) and the statutory functions of the Maori Land Court in relation to Maori freehold land.

Two celebrated judgments of the Native Land Court have considered the question of aboriginal title. These cases are Chief Judge Fenton's *Kauwaeranga Judgment* (1870),


\(^{117}\) *Kawharu Maori Land Tenure* (1977), passim.

\(^{118}\) *R v Symonds* (1847), [1840-1932] NZPCC 387 (SC) 391 per Chapman J.

\(^{119}\) See also *Guerin v The Queen* (1984) 13 DLR (4th) 591 (SCC) where the Crown's guardian duties under the doctrine of aboriginal title were described as fiduciary in character, and *Hurley "The Crown's Fiduciary Duty: Guerin v The Queen"* (1985) 30 McGill LJ 559.

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referred to by FB Adams J as “impressive” in *Re Bed of the Wanganui River* (1955), and Judge Acheson’s *Omapere Lake* judgment (1929), presented to the Privy Council in argument in *Hoani Te Heu Tukino v Aotea District Maori Land Board* (1941).

The *Kauwaeranga Judgment* dealt with a claim to the aboriginal ownership of tidal mudflats. An application had been lodged in the Native Land Court for a freehold order so that legal title could vest in the Maori applicants. They had based their claim on their exclusive traditional use of the fisheries on the flats. Fenton ruled that the applicants were not entitled to a freehold order which would enable a Crown grant to issue for the land. Aboriginal exploitation by way simply of fishery fell short, he indicated, of the exclusive titular ownership but was sufficient to justify an order of the Court recognising the right of fishery. In terminology which will be explained at a later stage, he found the evidence did not establish a ‘territorial’ aboriginal title but was proof of a ‘non-territorial’ title.

Fenton’s judgment, given some years before the *Wi Parata* decision, was clearly predicated upon a common law doctrine of aboriginal title. After a detailed review of the process by which the Crown acquired the sovereignty of New Zealand he concluded:

I am of opinion, especially remembering the very clear and almost stringent nature of the instructions given to Captain Hobson, that it was the intention of both parties to the compact to guarantee to the aborigines the continued exercise of whatever territorial rights they then exercised in a full and perfect manner, until they thought fit to dispose of them to the Crown. The natives kept to themselves what Vattel calls the ‘useful domain’ while they yielded to the Crown the ‘high domain’.

Convinced that the aboriginal claims to the mudflats amounted at least to a "privilege or easement,... included in the word ‘fishery’ used in the treaty", Fenton proceeded to consider the applicability of feudal doctrine.

The fundamental principle of the feudal doctrines is that all land is holden of some superior lord, originally with the view of keeping up a certain organisation for supplying fighting men, for the service of the lord or the king. And although the original cause of the foundation of feudalism has long since disappeared, yet the doctrine of tenure remains as the law of real property. But real property means land actually or by presumption held of or at some time or other granted by the Crown. Land owned by natives according to their customs or usages can in no sense be deemed subject to the same rules as real property in its technical sense.
Fenton then referred to the example of Ireland\textsuperscript{126} where private rights of fishery having a basis in ancient custom and usage had been recognised notwithstanding the Crown's acquisition of title to all land in Ireland by conquest. The direct inference of this, evident also in his reference to Vattel, was that whilst the Crown might be able to claim a prerogative sovereign title to the foreshore this title was qualified by any Maori customary rights. This was an adoption and application of a presumption of continuity identical to that underlying the common law doctrine of aboriginal title.

In 1929 the Native Land Court considered an application on behalf of the Ngapuhi tribe for the investigation of title and grant of a freehold order for Omapere Lake, a non-tidal inland lake in Northland covering over 3000 acres. Judge Acheson considered the tribal claim to a customary title over the lake by posing a series of questions. The substance of his judgment took the following form: He found first that the annexation of New Zealand had not disrupted the continuity of Maori property rights. He located this continuity both in the common law and local legislation but not the Treaty of Waitangi.\textsuperscript{127} Instead he turned to the Treaty to amplify the character of this continuity, using it as proof the Crown had intended \textit{all} Maori property rights to survive its assumption of sovereignty. The Treaty of Waitangi was thus not a source so much as clarification of the principle of continuity. He indicated the character of these property rights was to be determined according to Maori customary law. On the application before him he found the character of the aboriginal claim was territorial rather than non-territorial: The Ngapuhi had used the lake for fishing, had dug for kauri gum on its shores and had "not only asserted their rights continuously, but... [had] secured the stopping of acts by Crown officers that might possibly have been construed into acts of ownership if permitted".\textsuperscript{128} This title had never been ceded to the Crown or extinguished by legislation.\textsuperscript{129} Accordingly, he found the lake was "customary land" for the purposes of the Native Land Act 1909 so that a freehold order could issue.\textsuperscript{130}

G. \textit{TE WEEHI v REGIONAL FISHERIES OFFICER} (1986)

This case concerned a prosecution under the Fisheries Act 1983. The defendants successfully invoked section 88(2) of the Act exempting those exercising "any Maori fishing right". The defendants had been convicted by Judge Paterson in the District Court who found that on the balance of probabilities no customary right was proven.\textsuperscript{131} On appeal to the

\textsuperscript{126} He could have assisted his argument by citing \textit{The Case of Tanistry} (1608) Davies 28.
\textsuperscript{127} \textit{Applications by Ripi W Hongi and other Natives for Investigation of Title to Omapere Lake}, Judgment of Judge FOY Acheson, 1 August 1929, Bay of Islands MB 11, folio 253,263-5. (The writer is grateful to Mr P Temm QC for supplying a copy of this judgment).
\textsuperscript{128} Id, 277.
\textsuperscript{129} Id, 265-6.
\textsuperscript{130} Id, 277-8.
\textsuperscript{131} \textit{Regional Fisheries Officer v Te Weehi and Hauraki}, District Court, Christchurch, undated transcript, 5-6.
High Court Williamson J quashed the convictions, holding that the defendants had been exercising a non-territorial aboriginal title over the Motunau beach of the South Island.\textsuperscript{132}

This case is the first important occasion since Symonds (1847) upon which the common law doctrine of aboriginal title has been recognised by a New Zealand court of superior jurisdiction. In reaching judgment Williamson expressly adopted the common law approach of the pre-\textit{Wi Parata} period citing the relevant Privy Council and Canadian cases in support. He noted the gap that had opened between the Privy Council and New Zealand bench on the question but did not dwell upon the technical deficiencies in the \textit{Wi Parata} position. Instead he emphasised the common law presumption of the continuity of local property rights which he indicated to have applied irrespective of the original constitutional status of the colony.\textsuperscript{133} This last finding was particularly significant because local courts had previously associated New Zealand’s original designation as a ‘settled’ colony with the failure of the Treaty of Waitangi as an instrument of cession by reason of the Maori tribes’ lack of international personality.\textsuperscript{134} Since New Zealand was legally as desert and uncultivated land, the reasoning implicitly ran, the tribes lacked any legal right to the recognition of their tribal land rights upon British annexation. This approach was identical to that expressly taken by Blackburn J in \textit{Milirrpum v Nabalco Property Ltd} (1971).\textsuperscript{135} It has also been taken by academic commentators,\textsuperscript{136} most notably D V Williams who has argued that categorisation of New Zealand as a ‘settled’ colony was a device to supplant any recognition of tribal law and property rights.\textsuperscript{137} The historical record cannot sustain this cynical and superficial interpretation. Indeed, it will be recalled, a whole chapter has been devoted to clarification of the function of designation of the common law status of a colony. The association of the county’s original constitutional status with the question of the continuity of local property rights confused the process by which a colony populated by tribal communities received its common law status with late-nineteenth century ideas of sovereignty, property rights and the standard of civilisation in international law. The two were separated intellectually as well as historically. Williamson’s judgment therefore represents the judicial dismissal of any link between the continuity of tribal property rights upon annexation and the original constitutional status of the colony of New Zealand. A similar rejection can be found in the judgment of Hall J in the \textit{Calder} case (1973)\textsuperscript{138} and the

\textsuperscript{132} \textit{Te Weehi v Regional Fisheries Officer}, High Court Christchurch, 19 August 1986, unreported.

\textsuperscript{133} \textit{Id}, 11 citing \textit{Campbell v Hall} (1774) 1 Cowp 204.

\textsuperscript{134} \textit{Wi Parata v Bishop of Wellington} (1877) 3 NZ Jur (NS) SC 72,78; \textit{Tamihana Korokai v Solicitor-General} (1912) 32 NZLR 321 (CA) 354 per Chapman J; \textit{Waipapakura v Hempton} (1914) 33 NZLR 1065 (SC) 1070 per Stout CJ; \textit{In re the Ninety Mile Beach} [1963] NZLR 461 (CA) 475 per TA Gresson J.

\textsuperscript{135} (1971) 17 FLR 141 (FC).

\textsuperscript{136} Foden \textit{The Constitutional Development of New Zealand}, 179-190, esp.184 and 188; Molloy "The Non-Treaty of Waitangi", 194; Haughey "Notes on The Maori Land Question", 7.

\textsuperscript{137} "The Use of Law in the Process of Colonization", ch 2.

\textsuperscript{138} (1973) 34 DLR (3d) 145 (SCC),199.
recent Report of the Australian Law Reform Commission on Aboriginal Customary Law.\textsuperscript{139}

The \textit{Te Weehi} judgment recognised two forms of aboriginal title: The first type was a territorial aboriginal title, this being a claim to full, exclusive titular ownership of the land. In the words of Viscount Haldane in \textit{Amodu Tijani} (1921) this is a title "so complete as to reduce any radical right in the sovereign to one which only extends to comparatively limited rights of administrative interference".\textsuperscript{140} A non-territorial aboriginal title, such as that recognised in the \textit{Kauwaeranga Judgment} and the Canadian cases dealing with those Indian hunting and fishing rights severed from a claim to the titular ownership of the land,\textsuperscript{141} is a charge analogous to a profit à prendre or easement over land other than Maori "customary" land. Although a territorial aboriginal title will be equivalent to a customary title and hence its common law status diminished by Part XIV Maori Affairs Act 1953 a non-territorial title is not so affected. Since many 'aboriginal servitudes' continue to be exercised over land the length and breadth of New Zealand irrespective of the ownership of the land under Pakeha laws of tenure, the \textit{Te Weehi} judgment opens the possibility of their enjoyment of some legal status.\textsuperscript{142} The extent of these implications have yet to be felt.

Finally it can be noted that Williamson J indicated the character of an aboriginal title was to be defined by reference to Maori customary law. To enlist the protection of section 88 (2) Fisheries Act 1983 a Maori must show compliance with tribal law and cannot be fishing for commercial gain. If, for example, the particular fishery is subject to a rahui (tribal banning order)\textsuperscript{143} the fisheries officials are able to enforce the Act against those tribe members defying the customary code. Williamson J treated proof of customary law as an issue of fact. He assessed the evidence of both academic specialists and the Ngaitahu kaumatua (elders).\textsuperscript{144}

The judgment in \textit{Te Weehi} has brought this Part full circle. We started with the early recognition of Maori aboriginal title in the practice prior to, during and subsequent to British annexation and the early judgment of the colonial Supreme Court in \textit{R v Symonds} (1847). This recognition of the legal basis of the Maori right to their traditional lands, forests and fisheries (qualified only by the pre-emptive right of the Crown) was eclipsed by the severely flawed judgment of Prendergast CJ in \textit{Wi Parata v The Bishop of Wellington} (1877). The approach of New Zealand courts stood in contrast to that of the Privy Council in relation not only to tribal title in New Zealand but throughout the British Empire. Belatedly the New Zealand courts accepted that statutes had recognised the traditional property rights of the Maori, the statute-based approach as it was termed, but until the \textit{Te Weehi} case never

\begin{itemize}
  \item \textsuperscript{139} The Recognition of Aboriginal Customary Laws (1986), I, paras 60-68.
  \item \textsuperscript{140} [1921] 2 AC 399 (PC).
  \item \textsuperscript{141} Discussed in the writer's "Maori Fishing Rights and the North American Indian" (1985) 6 OLR 62.
  \item \textsuperscript{142} See the writer's "Aboriginal servitudes and the Land Transfer Act 1952" (1986) 16 VUWLR 313.
  \item \textsuperscript{143} Smith \textit{Native Custom affecting Land}, 46.
  \item \textsuperscript{144} \textit{Te Weehi v Regional Fisheries Officer}, App 2, 2-4.
\end{itemize}
returned to the common law rules used in *Symonds* and by the Privy Council. With *Te Weehi* it has become re-accepted that British annexation did not disrupt the continuity of Maori property rights. This continuity derived from the common law rules affecting the acquisition of territory by the Crown rather than article two of the Treaty of Waitangi. If the Treaty had any relation to the legal status of traditional property rights upon annexation it was simply as a declaration by the Crown that during the assumption of the sovereignty there would be no act of state disrupting the continuity of those property rights.
CONCLUSIONS
CHAPTER NINE

CONCLUSION

When the Maori chiefs agreed to British sovereignty by signing the Treaty of Waitangi (1840) they did so in the belief that their *rangatiratanga* (internal tribal government) and property rights were not to be disrupted. Indeed, the Treaty was represented to them as an express protection of these rights. Since British sovereignty brought with it civilised society’s ‘rule of law’ one would have thought these rights recognized by the Treaty were somehow incorporated into the legal fabric of the new colony. *De facto*, of course, British sovereignty of itself - mere legal ceremony, could hardly have upset the enjoyment of such rights. Instinctively one would have expected the legal position to have had some correspondence to this continuity. By the end of the nineteenth century, however, Prendergast CJ had held that the Maori enjoyed no legal right to their customary law (*Rira Peti v Ngāraihi Te Paku* (1888))\(^1\) and that their rights to the traditional lands, forests and fisheries subsisted at the mere sufferance of the Crown (*Wi Parata v The Bishop of Wellington* (1877)).\(^2\) These cases established the New Zealand orthodoxy according to which legislative recognition became the sole source of Maori rights under their customary law. The writer has attempted to confront and assess the basis for the exclusion of a common law recognition of Maori rights manifest in the orthodox approach of New Zealand courts.

The most general conclusion of the present inquiry must be the lack of support and sophistication in the received position. The belief that the common law failed altogether to recognise the tribal rights embodied in the Treaty of Waitangi simply cannot be sustained. New Zealand was not acquired in a legal vacuum carried over post-annexation to the relations of the Crown and tribes.

The distinction between *imperium* (the right of government) and *dominium* (rights of ownership) has been fundamental to the format adopted in this dissertation. The first Part considered the rules governing the Crown’s acquisition of an *imperium* over the Maori tribes. It was found that the Crown acknowledged the sovereignty of the Maori tribes and conducted itself on the basis that any *imperium* it might establish over the islands required formal Maori consent. This position culminated in the Treaty of Waitangi. The second Part looked at the reception of English law in New Zealand, assessing the extent of the importation of English law into the Crown’s new colony. The consequences which this had for the customary law of the Maori was assessed. It was concluded that the common law recognised the continuity of Maori customary law but this was substantially affected by the general introduction of English law by charter of the Crown (1840). It was this rather than

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\(^1\) (1888) 7 NZLR 235 (SC).
\(^2\) (1877) 3 NZ Jur (OS) 72 (SC).
the Crown’s sovereignty which from a legal point of view impaired the *rangatiratanga* of the chiefs. Nonetheless Maori customary law still retained some viability at common law in the ‘civil’ relations of the Maori *inter se* and to that extent, albeit limited, the chiefs retained some *rangatiratanga*. More importantly, however, at least so far as contemporary Maori claims are concerned, Part III found the *dominium* or property rights of the tribes were unaffected by British sovereignty. The aboriginal title of the Maori was recognised by the common law principles of ‘modified continuity’ and thus reflected the land guarantee in the Treaty of Waitangi. The thrust of the conclusions in each Part tends heavily against the orthodox position of the New Zealand courts.

The first chapter of Part I considered the rules governing the Crown’s acquisition and erection of an *imperium* over and amongst non-Christian societies. Although this practice was organic and necessarily varied in practice two related principles underpinned it throughout the sixteenth to early twentieth century. In the first place the Crown acted on the basis that such societies, tribal or otherwise, held the capacity to enter into formal relations with the Crown so long as they had obtained a perceptible degree of social organisation with recognised leaders with whom the Crown’s representatives could treat. Secondly, the Crown rarely erected an *imperium* over these societies without their consent or, exceptionally, forcible submission. Their juridical capacity extended at least to the ability to grant such rights to the Crown even once the standard of civilisation became incorporated into international law during the second half of the nineteenth century. So far as English courts were concerned the subscription to these principles was a matter solely within the Crown’s election relating as they did to its exercise of the nation’s foreign relations. Nonetheless where the Crown had followed such principles these necessarily became a matter of judicial cognisance. It hardly lay within the judicial province to tell the Crown its recognition of the sovereignty of a particular society had been mere fiction. The primary determinant of international personality was the Crown’s conduct. Thus the Privy Council regularly recognised the sovereignty of the princely states of the East Indies, tribal rulers of Africa as well as Maori chiefs in the treaties by which these indigenous authorities granted the Crown powers of government within their territory.

Chapter three dealt with the particular application of these principles to New Zealand during the late 1830s and 1840 as the Crown’s sovereignty was established. It was seen that Maori consent was treated as a legal prerequisite to British annexation of New Zealand. Britain had solemnly recognised the sovereignty of the Maori chiefs and saw their consent to the assumption of sovereignty as an unavoidable concomitant. Maori agreement was undoubtedly the substantive basis of British sovereignty. Once, however, that sovereignty was formally established it became absolute and indivisible in point of English law. Unlike the Indian tribes of the United States, the Maori chiefs could not claim a residual legal sovereignty from which a legal right of *rangatiratanga* might have been derived.
Some commentators, judicial and otherwise, have seen the conclusions reached in Part I as refuted by the constitutional status of New Zealand as a 'settled' colony. According to this view, status as a 'settled' colony meant, first, the original Maori sovereignty was a 'simple nullity' and, secondly, that the introduction of English law into such a colony was comprehensive and unqualifiable by the indigenous tribal laws. Thus the common law status, if any, of Maori customary law was implicitly tied to the original constitutional status of the colony. The first chapter of Part II addressed this association. After reviewing the origin and basis of the distinction between the two forms of colony it was concluded that the distinction was never formulated to affect the rights of the indigenous population to their customary law. It was simply a device to explain the relation of the Crown to the English settlers and an expression of the settlers' 'birthright' to English law in the absence of a pre-existing Christian legal system to which their conformity could reasonably be expected. Chapter five looked at the common law rules governing the continuity of non-Christian lex loci in British territory. Although Maori customary law theoretically survived annexation this continuity was affected by the general introduction of English law in the first charter of the colony (1840). This did not mean, however, the complete suspension of Maori customary law. Since the property rights of the tribes had not been suspended by an 'act of state' during the process of annexation so much of the customary law as defined these rights survived (as Te Weehi v Regional Fisheries Officer (1986) would indicate). Similarly certain portions of the customary law covering the 'civil' relations of the Maori (marriage, adoption and succession) probably survived in point of law. In any event Imperial legislation (1846) and constituent instruments under its authority restored Maori customary law to a fuller legal basis in that colonial courts were allowed to have recourse to tribal law in dispensing justice to the Crown's Maori subjects. Still this measure did not give the chiefs any of the powers to enforce the tribal code such as they had held previous to the general introduction of English law. A series of local judgments towards the end of the nineteenth century denied any continuity to Maori customary law as a matter both of common law and interpretation of the 1846 statute and instruments under its authority. The correctness of these judgments was treated as doubtful.

The final Part of the thesis turned to the question of greatest controversy, being the extent to which the common law recognised the right of the Maori tribes to their traditional land, forests and fisheries upon British annexation. Chapter six looked at the common law principles comprising what has become known as the doctrine of aboriginal title. It was found that in principle the common law recognised tribal property rights survived British sovereignty. These principles of 'modified continuity' were seen to have been declared but not derived from the Treaty of Waitangi as well as other royal proclamations prior to annexation, the early constituent instruments for the colony and colonial and Imperial
legislation. The rules received an important and early recognition in local courts with the judgments in *R v Symonds* (1847). The recognition of the aboriginal title of the Maori was thus everywhere confirmed in the formalities attending the process of annexation and its immediate aftermath. On what basis, then, did local courts commencing with Prendergast's influential judgment in *Wi Parata v The Bishop of Wellington* (1877) deny the aboriginal title? None could be found by the writer nor, it must be added, the Privy Council whose position contributed to strained relations between the Board and local judiciary during the early years of this century. Legislation eventually codified the *Wi Parata* approach but was not comprehensive. As the recent judgment in *Te Weehi v Regional Fisheries Officer* (1986) rejecting the *Wi Parata* position shows, this legislation did not affect the 'non-territorial' aboriginal title of the Maori. Part III closed with the suggestion that the doctrine of aboriginal title may be far from spent in New Zealand notwithstanding the commutation of the 'territorial' aboriginal title into 'Maori freehold land' through the agency of the Maori Land Court.

The common law was far from silent on the question of Maori rights upon British annexation. There was no legal vacuum wherein the Crown was left as the supreme arbiter of its own justice. Indeed, the common law had so much to say of Maori rights that this thesis has been unable to go beyond an assessment of the general principles. Aspects which have not been explored in detail include the legal status of treaties of cession - the position taken has characterised the Treaty of Waitangi as declaratory rather than a separate source of right, and the actual practice of the colonial courts in relation to Maori customary law as well as the residual status of this law so far as it affects the contemporary internal relations of Maori society. It is clear, for example, that customary adoptions and dying declarations (ohaki) are still practiced within Maoridom. Nor did the thesis explore in any depth the residual status of the doctrine of aboriginal title either in terms of its continued enforceability or the more general sense of the constitutional basis it can bring to Maori land claims. The writer hopes, however, that this thesis has established a platform for future research and that it will contribute towards the rehabilitation of the common law as a source of Maori rights. The judgment of Williamson J in *Te Weehi v Regional Fisheries Officer* (1986) is an encouraging sign as also the response of the Government, Waitangi Tribunal

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4 (1847) [1840-1931] NZPCC 387 (PC).
5 The matter is discussed by the writer in "Maori Fishing Rights and the North American Indian" (1985) 6 OLR 62 at 82-7.
6 The statutory regime is discussed in Smith *Native custom affecting land* (1942) and *Maori Land Law* (1960).
7 For example, the writer's "The legal status of Maori fishing rights in tidal water" (1984) 14 VUWLR 247; "Aboriginal servitudes and the Land Transfer Act (1986) 16 VUWLR 313.
8 See the writer's argument in "The Constitutional Role of the Waitangi Tribunal" [1985] NZLJ 224.
and recent academic commentators\textsuperscript{11} to the common law argument. There was no wide divergence between the principles obtaining \textit{de jure} and the promises contained in the Treaty of Waitangi.

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